

GAO

Report to the Chairman, Committee on  
Government Operations, House of  
Representatives

April 1980

INTERNATIONAL  
PROCUREMENT

Problems in  
Identifying Foreign  
Discrimination Against  
U.S. Companies



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April 5, 1990

The Honorable John Conyers, Jr.  
Chairman, Committee on Government Operations  
House of Representatives

Dear Mr. Chairman:

Your letter of May 1, 1989, expressed concern about implementation of Title VII of the Omnibus Trade and Competitiveness Act of 1988. Title VII requires the President to identify, in an annual report, countries that discriminate against U.S. companies in their government procurement practices. Countries identified in the report are subject to sanctions that would limit their access to U.S. procurement, if negotiations to correct these inequitable practices are unsuccessful.

You requested that we (1) assess the availability and adequacy of information about foreign discriminatory procurement, and (2) review executive branch efforts to gather this information. The first Title VII report is due April 30, 1990, so we reviewed the executive branch's plan to gather the information based on similar past efforts and an assessment of existing knowledge.

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## Background

Most government procurement markets are closed to foreign suppliers. However, 20 countries wanting to eliminate discriminatory practices have worked together toward this goal by agreeing to the Code on Government Procurement, under the auspices of the General Agreement on Tariffs and Trade (GATT). The code requires signatories to adopt transparent (open and predictable) procedures to guarantee nondiscrimination.

Congressional frustration with the limited coverage of the code and its failure to create more foreign sales for U.S. suppliers led to the passage of Title VII. In identifying countries, Title VII includes not only procurement covered by the code, but also discrimination that occurs outside the code; however, the criteria for identifying discrimination and the associated information gathering processes differ between the two.

The United States Trade Representative (USTR) has responsibility for implementing Title VII. The work program has been led by the Trade Policy Staff Committee's Subcommittee on Government Procurement;

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this interagency group is also responsible for working on code negotiations. As with other trade investigations, much of the information gathering to identify foreign discrimination is the responsibility of USTR country desk officials with the support of the Department of Commerce and the overseas posts.

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## Results in Brief

Implementation of Title VII was slow getting started, and the first report is due April 30, 1990. USTR has decided to take a broad look at virtually every country around the world to identify potential discrimination. USTR has not concentrated on the most significant countries; for example, countries where the United States has the most leverage to effect change.

The availability of information on foreign procurement practices varies in quality and quantity, affecting determinations. The private sector has not come forward with many complaints. It is generally acknowledged that the government's ability to obtain information about foreign government procurement has been limited in the past by a lack of expertise and by resource constraints. Nevertheless, USTR is still relying on these same methods and sources for the Title VII investigation.

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## Information Gathering Started Late

The April 30, 1990, deadline in the act gave the executive branch 20 months to prepare the President's first report. Following interagency study and discussion, the work program was adopted 1 year after the act's passage, in August 1989. The first steps in the 9-month work program were taken December 1, 1989, 4 months later than planned. As a result, three-quarters of the time allotted will not be used to conduct the investigation. Lawmakers in conference extended the deadline in the original House bill from December 31, 1988, "to ensure...evidence of sufficient quantity and quality...."

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## Investigation Not Focused

USTR's information gathering is broad in scope. The act has several criteria that countries must meet to be identified as discriminatory in noncode procurement. One criterion was intended to focus USTR's efforts on those countries over which the United States has leverage through sanctions. Nevertheless, U.S. officials decided to gather information on virtually all countries and later make country-by-country determinations of where there is leverage. Thus, the current investigation seeks detailed information on the procurement procedures and practices of

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many countries which sell little to the U.S. government, in some cases less than \$100,000.

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## Code Monitoring Unchanged

Little new information gathering has been undertaken in the investigation of code-covered procurement. Officials believe their existing monitoring of signatories' compliance through the GATT Committee on Government Procurement works well. The United States is currently pursuing a formal complaint against another code signatory. Officials said that if this case is not resolved in time, Title VII requires the country to be identified in the April report.

While fairly comprehensive information is made available by the code's transparency requirements, it takes a long time to gather and analyze in order to reach any conclusions. Thus, this year's annual Title VII investigation will be based on some information that is over 2 years old.

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## Noncode Information Difficult to Gather

There is much less information on non-code-covered procurement. There are indications of discrimination, but knowledge varies considerably from country to country and sector to sector. Officials are generally relying on the private sector to identify problems because there is little transparency outside the code. Also, the private sector must provide evidence of harm before a country will be identified as conducting discriminatory practices.

The overseas business communities are to be surveyed by the U.S. posts. The posts have discretion in conducting their surveys and they have limited resources. The principal means of soliciting help from the domestic business community is a Federal Register notice. However, private sector response has been limited. Retaliation by foreign governments remains a prevalent concern for U.S. businesses; also, some firms question the benefit of U.S. government involvement. Aside from a few, aggressive companies, many firms appear reluctant to come forward. In addition, U.S. industry representatives in some sectors have given up trying to sell to certain "closed" markets and have found other means to enter these markets. Some U.S. industry and government representatives suggested that if the U.S. government made more direct contact, private sector response may improve.

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## Procurement Expertise Limited

Country and industry desk officers and overseas post officials are the principal government sources for information, but they have limited experience in working on noncode procurement issues. Some overlapping investigations have occurred, and this information can be used for Title VII, but only for narrow sectors of specific countries. The general lack of expertise has produced information that is often not of sufficient quality for Title VII. For example, USTR's National Trade Estimate Report on Foreign Trade Barriers (NTE report), due out only 1 month before the April report, describes discriminatory procurement practices. Although the NTE report depends on the same methods to gather information as Title VII, responsible officials do not consider it a reliable source for identifying countries under Title VII.

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## Recommendation

Although the initial USTR investigation under Title VII has been very broad, covering virtually all countries worldwide, we believe future efforts should be better focused to make better use of available resources and expertise. Therefore, we recommend that the United States Trade Representative narrow the scope of future Title VII investigations to only those countries over which the United States has leverage, as defined in the act, before information gathering begins.

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## Views of Agency Officials and Our Evaluation

In accordance with your wishes, we did not obtain written comments on a draft of this report. However, we discussed our findings with officials at USTR, the Department of Commerce, and the Department of Defense and have included their views where appropriate. In response to our concerns about slow implementation, USTR officials told us that they have created a task force to intensify their efforts to complete the report. Also, officials acknowledged that the scope of the initial investigation could have been narrowed earlier, but they thought it was important to develop information on many countries about which they know little.

We believe that a more effective investigation would result if USTR focused on fewer countries in future Title VII information gathering. As a result, more in-depth analyses and more active contact with the private sector could occur. Furthermore, the U.S. government purchases little from many of the countries under investigation for the first Title VII report, and they represent smaller potential markets for U.S. suppliers.

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Appendix I provides general background information on the code, Title VII, and how we conducted our work. The availability of evidence about foreign discrimination in procurement is assessed in appendix II, and the government's information gathering methods are reviewed further in appendix III.

Unless you publicly announce its contents earlier, no further distribution of this report will be made until 30 days from its issue date. At that time we will send copies of this report to the United States Trade Representative, the Secretaries of Commerce, Defense, and State, and to other interested parties.

This review was performed under the direction of Allan I. Mendelowitz, Director, International Trade and Finance Issues, who may be reached on (202) 275-4812 if you or your staff have any questions. Other contributors are listed in appendix IV.

Sincerely yours,



Frank C. Conahan  
Assistant Comptroller General

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## Abbreviations

EC	European Community
DOC	Department of Commerce
DOD	Department of Defense
FCS	Foreign Commercial Service
GATT	General Agreement on Tariffs and Trade
MOU	Memoranda of Understanding
NTE	National Trade Estimate
TOP	Trade Opportunities Program
TPSC	Trade Policy Staff Committee
USTR	United States Trade Representative



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# Background

Governments are the largest single purchasers of goods and services in every major country, creating an annual world market potentially worth hundreds of billions of dollars. However, most of this vast market has been closed to foreign suppliers because of formal and informal mechanisms that favor domestic firms. In the United States, the Buy American Act of 1933 requires that, where applicable, only U.S.-origin articles, materials, or supplies be acquired for public use. Regulations implementing this law apply a price differential in favor of domestic sources.

## What Is the GATT Government Procurement Code?

Countries wanting to eliminate discriminatory practices in government procurement, however, have worked together toward this goal by developing the Agreement, or Code, on Government Procurement.<sup>1</sup> The code was negotiated during the 1973-79 Tokyo Round of Multilateral Trade Negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT). GATT itself does not provide for “national treatment” in government procurement.<sup>2</sup> Also, the code guarantees procurement opportunities rather than actual sales.

## The Code Creates Obligations

Code signatories are committed to nondiscrimination against other signatories’ products in specified procurement areas. Signatories must maintain transparent (open and predictable) procedures and provide full information to other signatories on every stage of their procurement process. The commitment to nondiscrimination obligates the United States to lift its Buy American price preferences in purchasing decisions.<sup>3</sup> The code calls for the signatories to provide contract information on request and to publish an annual statistical report on their purchases. The statistics disclose purchasing entities, product categories, and suppliers’ nationalities. The reports also indicate the estimated value of contracts above and below the threshold for code coverage and of contracts awarded using “single-tendering” procedures, identifying

<sup>1</sup>The 12 signatories to the code include 20 countries: the United States, Austria, Canada, Finland, Hong Kong, Israel, Japan, Norway, Singapore, Sweden, Switzerland, and, under the European Community (EC), Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, the United Kingdom, and West Germany.

<sup>2</sup>National treatment is the act of treating a foreign product or supplier as though it were domestic.

<sup>3</sup>The United States also waives Buy American preferences for some nonsignatory countries, including “least-developed” and Caribbean Basin countries. Also, the price differentials do not apply to defense procurement from allies covered by reciprocal Memoranda of Understanding on procurement.

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the legal basis on which they were awarded.<sup>4</sup> U.S. government officials use these statistics to monitor code compliance. They review the statistics and raise questions about them at formal, semiannual meetings of the GATT Committee on Government Procurement.

The code establishes formal procedures to enforce signatories' obligations. However, these procedures are not often used. The first step to resolve an allegation of noncompliance is bilateral consultations. Then, if the parties cannot resolve their differences, a dispute resolution process begins that includes investigation and arbitration by a panel of other signatories.

The code does not cover certain significant government agencies, or "entities," including those that purchase large amounts of telecommunications equipment, heavy electrical machinery, and transportation equipment.<sup>5</sup> Services are covered only when they are incidental to the procurement of supplies and equipment. Also, the code does not cover purchases costing less than a minimum "threshold" value, military weapons, or purchases made by state and local governments.

Exclusion of certain countries, entities, product sectors, and small procurements limited the scope of the code's coverage and, consequently, of government procurement opportunities for U.S. suppliers. We reported in 1984<sup>6</sup> that the value of code coverage had not met expectations of generating over \$20 billion in anticipated foreign sales opportunities. Instead, foreign opportunities in 1981 totaled just \$4 billion, compared to \$18 billion in U.S. opportunities for foreign suppliers.

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## Limited Coverage Led to Other Negotiations

Bilateral agreements with a few signatory countries extend code-like coverage to certain areas not specified in the code and thereby increase sales opportunities for U.S. suppliers. For example, the 1980 U.S.-Japan Agreement on Procurement by Nippon Telegraph and Telephone Public

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<sup>4</sup>Using single-tendering, entities need not publicize procurements but can award contracts noncompetitively to a particular firm. The code allows the use of single-tendering only under certain circumstances, such as when only one supplier can meet the entity's needs or when an urgent need arises.

<sup>5</sup>The agencies were not included because the EC lacked jurisdiction over its member states' procurement in these "excluded" sectors.

<sup>6</sup>The International Agreement on Government Procurement: An Assessment of Its Commercial Value and U.S. Government Implementation (GAO/NSIAD-84-117, July 16, 1984).

Corporation grew out of the original negotiations on the code. It provides code-like transparency in Japanese procurement of telecommunications products not covered by the code. It also establishes a set of procedures and requires that solicitations be published and that adequate time to respond to such solicitations be fixed. In addition, a 1987 agreement with Japan sets up more transparent procurement procedures for supercomputers and requires a periodic review of these procedures' implementation. Free Trade Agreements with Israel and Canada lower the threshold for coverage and thereby extend code-like transparency to smaller contracts. In addition, the U.S.-Canada Free Trade Agreement includes a bid protest system, which provides local resolution of contract disputes and helps to ensure nondiscriminatory treatment of suppliers.

The United States was disappointed with the code's original coverage but hoped that renegotiations provided for in the agreement would remedy the imbalance in opportunities between U.S. and foreign government procurement. Indeed, the first phase of renegotiations concluded in 1986 and resulted in amendments that improved code procedures. The second phase, begun in 1987, has focused on expanding coverage to services and to procurement by entities in major excluded sectors. These negotiations, expected to conclude in 1990, are being conducted at the same time as the first Title VII investigation. Procurement opportunities will also expand if more countries join the code. However, many countries are not able to meet the code's obligations, and attracting new members has been a concern.

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## What Is Title VII?

In 1987, Members of Congress, frustrated by continued foreign government discrimination against U.S. suppliers, drafted legislation designed to offer a more forceful measure to get U.S. suppliers fairer treatment from other countries. This legislation led to the inclusion of the Buy American Act of 1988 as Title VII of the Omnibus Trade and Competitiveness Act of 1988. Title VII amended both the Buy American Act of 1933 and the Trade Agreements Act of 1979. The U.S. government is also able to use more general "section 301"<sup>7</sup> authority to deal with discrimination in government procurement overseas.

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<sup>7</sup>Chapter 1 of Title III of the Trade Act of 1974, commonly referred to as section 301, provides the President with the authority and procedures to enforce U.S. rights under international trade agreements and to respond to certain unfair foreign practices.

Title VII requires an annual report from the President identifying countries, other than least-developed countries, that discriminate against the United States in their government procurement. The President has delegated the responsibility for preparing the report (sec. 7003 of Title VII) to the United States Trade Representative (USTR). The first annual report is due April 30, 1990. The date for this report was changed from December 31, 1988, in the House version of the bill, "to ensure that the executive branch has adequate time to obtain evidence of sufficient quantity and quality to identify...countries...and to coordinate with reporting requirements associated with the annual National Trade Estimate Report on Foreign Trade Barriers...due on March 31st of each year."<sup>8</sup> Countries identified as not complying with the code or as acting in a discriminatory manner are subject to sanctions that would limit their access to U.S. procurements, if negotiations to correct these inequitable practices are unsuccessful.

Sanctions may be modified or restricted to further the public interest, to avoid the creation of a monopoly, or to ensure acceptable quality at competitive prices. Further, for national security reasons, in the case of procurements awarded under authority of Department of Defense Memoranda of Understanding (MOUS) with foreign governments, Title VII allows the President to delegate to the Secretaries of Defense, Army, Navy, or Air Force the authority to waive sanctions. The President has chosen to delegate this authority to the Secretary of Defense. However, the conferees believed it possible to take actions for national security reasons consistent with U.S. trade policy goals. They therefore intended that "the Secretary of Defense and the United States Trade Representative consult with one another to determine methods for achieving greater cooperation between them for the purpose of promoting increased reciprocity for U.S. suppliers seeking access to the government procurement markets of foreign countries participating in Department of Defense Memorandum of Understanding programs."<sup>9</sup>

Title VII requires the annual report to identify the following types of countries: (1) signatories who are not in compliance with the code; (2) signatories whose governments discriminate against U.S. firms in their procurement of products or services not covered by the code; and (3) nonsignatories whose governments discriminate against U.S. products or

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<sup>8</sup>Conference Report accompanying H.R. 3, Omnibus Trade and Competitiveness Act of 1988 (H. Rept. 100-576, Apr. 20, 1988).

<sup>9</sup>H. Conf. Rept. 100-576, p. 1060.

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services. For a country to be identified as being in the latter two categories, the discrimination must represent a “significant and persistent pattern or practice” and result in “identifiable harm” to U.S. businesses, and its products or services must be acquired in “significant” amounts by the U.S. government. The test for “significant” amounts of U.S. procurement was intended “to permit the executive branch to focus its efforts on those countries over which the United States can exercise some leverage.”<sup>10</sup>

To identify discrimination, the law specifies a number of factors for consideration: the code’s requirements and the offending country’s specific practices, such as its use of sole-sourcing, whether it splits contracts, whether it provides adequate bidding times, whether it uses specifications that limit U.S. participation, and whether it violates any other additional criteria deemed appropriate.

In developing the annual report, Title VII requires the President to take into account information and advice from government agencies, through the “interagency trade organization,” the Trade Policy Committee,<sup>11</sup> and from U.S. businesses in the United States, from countries that have signed the code, and from other countries whose products or services are acquired in significant amounts. To obtain information from businesses, the conferees suggested that executive branch officials (1) seek information from committees in the private sector such as the Industry Sector Advisory Committees and the Labor Advisory Committee; (2) place a notice in the Federal Register requesting information from U.S. businesses; and (3) instruct the commercial staffs at U.S. embassies to seek information from American businesses in their particular country.

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## Objectives, Scope, and Methodology

The Chairman of the House Committee on Government Operations requested that we determine whether the executive branch is assembling data that will allow it to arrive at informed conclusions about foreign government procurement practices in the Title VII report.

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<sup>10</sup>House Conference Report 100-576, p. 1062.

<sup>11</sup>The Trade Policy Committee has a working-level interagency group called the Trade Policy Staff Committee (TPSC). The TPSC has various “bilateral” country subcommittees as well as a subcommittee on government procurement, which USTR chairs; Commerce, State, Labor, Justice, Treasury, and the Office of Management and Budget have representatives on this subcommittee.

Our review focused on two objectives:

1. To assess the availability and adequacy of information needed to identify noncompliance with the GATT Government Procurement Code and other discriminatory practices by foreign countries;
2. To evaluate the methods for gathering and compiling information, including the coordination of efforts within the U.S. government.

To document the legal requirements of Title VII, we reviewed the law, the conference report, and the hearings on the original legislation in 1987. To determine alternative means for identifying discriminatory practices, we assessed other provisions of the Omnibus Trade and Competitiveness Act of 1988 with similar reporting requirements, and we spoke with those responsible for their implementation.

We interviewed trade officials at USTR and the Department of Commerce (DOC) with expertise in international government procurement issues. They are responsible both for implementing Title VII and for representing the United States in the code. We reviewed their work plan for implementing Title VII and monitored their progress in meeting goals that the plan established. To document the officials' ongoing efforts to monitor signatories' compliance with the code, we reviewed cables, correspondence, and annual statistics provided by signatories under the code's requirements as well as other GATT material provided by DOC. We also spoke with foreign members of the GATT Government Procurement Committee.

We met with officials at USTR responsible for preparing drafts of the Title VII report and with DOC industry specialists familiar with sector issues to establish the breadth of materials on government procurement issues in the U.S. government. We reviewed cables, reports, and other documents dealing with foreign government procurement and other overlapping trade issues. We also met with DOD officials who are familiar with military procurement issues. We did not meet with DOC Foreign Commercial Service (FCS) officers in U.S. embassies overseas, but reviewed their reporting on code compliance and other related trade issues and broadly discussed FCS officers' knowledge of procurement issues with USTR and Commerce officials.

To assess the information available from the private sector and to obtain industry views on the adequacy of consultations with the private sector, we spoke with a range of industry representatives, including

Industry Sector Advisory Committee chairpersons and members, trade and industry associations, and Washington, D.C., representatives of individual firms. We did not speak to industry representatives overseas. Our private sector interviews focused on areas where government procurement historically has been a problem and where or when it constitutes a large share of foreign purchases.

Our work was performed from July 1989 through December 1989 in accordance with generally accepted government auditing standards. We did not obtain written agency comments on a draft of this report, but have discussed the draft with officials at USTR, Commerce, and Defense and have incorporated their comments where appropriate.



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# What Types and Sources of Information Are Available?

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Title VII requires action based on adequate evidence of discrimination in foreign procurement practices. The quality and quantity of information about each foreign government's procurement practices vary widely. Information falls into two broad groups: procurement covered by the GATT Government Procurement Code, and procurement not covered by the code.

Information on code-covered procurement is fairly comprehensive but it takes time and expertise to analyze. It consists of (1) data on procurement systems and practices, and statistics on bidding opportunities provided by governments that have signed the code; (2) input from overseas posts and the private sector; and (3) extensive U.S. government analysis of these data.

Information on non-code-covered procurement is incomplete and uneven in quality. Much of the information available is anecdotal or general, based on industry complaints or information-gathering activities for cases on specific trade sectors.

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## What Does the Code Provide?

DOC analysis of compliance with the code provides a major source of information on code-covered procurement practices for the Title VII investigation. The U.S. government already monitors signatories' compliance with the provisions of the code by studying code-reported information, asking overseas posts for information on compliance, and receiving private sector input on problems with code-covered procurement. U.S. officials consider issues of noncompliance raised through the code's dispute settlement procedures to be equivalent to discrimination under Title VII.

The obligations of the code generate a large amount of information reported by signatory governments; this information can be reviewed to establish compliance. For example, code signatories publish their procurement laws and regulations and provide full information about and explanation of every stage of the procurement process to ensure nondiscriminatory treatment. Also, entities covered by the code publish tender notices for covered procurement. The publication of these notices and the provision of adequate bid response times and reasonable delivery deadlines in the notices are important measures of signatories' compliance.

Statistics reported by signatories on code-covered opportunities provide some information on potential compliance problems. To identify possible

discrimination, DOC analyzes patterns of the use of single-tendering and the value of tenders that fall below the code's threshold. These are reported in the statistics on a country- and entity-specific basis. Procuring entities may attempt to circumvent code requirements by using single-tendering when it is not justifiable or by dividing contracts to keep them below the threshold for coverage. Based on its analysis, DOC develops questions to ask other signatories during semiannual reviews by the GATT Committee on Government Procurement.

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### Are the Statistics Useful?

The statistics have shortcomings that raise some doubts about their usefulness in identifying potential noncompliance with the code for the Title VII investigation. First, the statistics reported have had significant time lags. In recent years, the United States took about 11 months to report its statistics to the GATT Committee; more than half of the remaining signatories took longer (as much as 14 months) to report their statistics.

Some foreign representatives believe that the data review is not very useful because the statistics are outdated. Others, including the United States, still consider the review of procurement statistics to be important. U.S. officials note that statistics can be used as an indicator of noncompliance with the code. However, they stress that statistics alone do not establish noncompliance with the code or discrimination. Evidence from specific contracts is also necessary. Thus, U.S. officials must review the data thoroughly for signs of possible noncompliance and then follow up with officers at overseas posts and with U.S. industry representatives.

The process for reviewing data in the Committee is lengthy, taking 12-18 months to complete. Therefore, compliance determinations may not be finished until over 2 years after procurements have been made. Because it takes so many months for the statistics to be reported and reviewed, there is also considerable delay before the statistics are made public. As of late 1989, the latest statistics that GATT labeled "unrestricted" were from 1985. However, U.S. government sources continued to give these and later statistics a national security classification.

Further, U.S. officials have stated that signatories' data reporting systems, though improved from the past, still have problems. In addition, the varied means of determining the nationality, or "country of origin," of a product have posed a problem. Inconsistencies in defining country of origin have rendered some of the statistics on actual purchases

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unusable for judging results. Changes making country of origin reporting consistent for code signatories as of February 1988, together with efforts to unify the EC market by 1992, are expected to improve statistics based on country of origin. These statistics will be available for future Title VII investigations.

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### What Do Overseas Posts and Industry Provide?

DOC's Trade Opportunities Program (TOP) provides information on code-covered procurement that can be used to indicate compliance with the code. TOP disseminates trade leads, including all code-covered tenders, provided by the posts overseas. DOC reviews TOP-reported information, including bid response times and delivery deadlines, to determine possible noncompliance. However, there have been some problems with selective reporting of TOP notices. Code tender reporting was limited, sometimes due to resource constraints, by overseas officers' judging what they considered to be U.S. commercial interests. Officials told us that they have taken steps to resolve these selective reporting problems.

In addition to reporting tender notices, officers at overseas posts provide other information on signatories' compliance. DOC conducts code compliance reviews on each country every 2 years and asks the posts to review both contract-specific and general procurement issues in their host country. Responses that we examined were brief and generally indicated that there were no compliance problems. Overseas posts also have continuing responsibility to report compliance problems.

Even with this experience, FCS officers may not be able to provide detailed information on foreign procurement practices. Some officials believe that FCS officers need more education on procurement, because the officers' knowledge of government procurement is limited, and their reporting on procurement practices is often deficient. Moreover, one Washington-based official who had been responsible for monitoring compliance during an overseas posting told us that he did not have a detailed knowledge of the code's procedures; most of his procurement-related discussions with foreign representatives dealt with broad policy issues.

The transparency in code-covered procurement should allow private industry to identify and complain about problems more easily. However, officials at DOC and USTR do not receive many specific complaints from U.S. businesses on code-covered procurements. They believe that this is because companies fear retaliation from foreign governments if they complain. Also, many companies may still not be knowledgeable about

the obligations or rights that the code established or may prefer to handle problems without involving the U.S. government.

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## Why Is Less Known About Procurement Outside of the Code?

Information on government procurement practices not covered by the code is limited, because these practices do not benefit from the code's procedures and statistical reporting requirements. For some countries, no information exists, because these countries lack formal procurement systems. Extensive information is available in a few narrow areas where U.S. bilateral procurement agreements, such as Free Trade Agreements, provide code-like requirements and transparency. However, the lack of transparency in almost all non-code-covered procurement makes it difficult to identify discrimination. Further, prior to the passage of Title VII, the U.S. government did not conduct systematic reviews of all noncovered procurement.

The availability of information on discrimination varies according to sector and country, because the U.S. government collects information about non-code-covered procurement only when specific problems arise. Moreover, there is greater reliance on input from the private sector for non-code-covered procurement issues, although firms' willingness to come forward varies. Some government officials told us that because their time is limited, they take a reactive approach to trade issues. They rely on the private sector to bring discrimination to their attention and to identify priorities.

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## Why Are Some in the Private Sector Reluctant to Complain?

The major private sector sources are individual firms, industry and trade associations, and advisory groups, mainly Industry Sector Advisory Committees. According to government sources, individual firms provide the best specific, detailed descriptions of foreign government practices that are discriminatory. Both firms and trade associations supply good information on broader procurement questions. The advisory committees are not a good source of factual information, but instead are more policy oriented and have a broader, industrywide focus. The government often uses the Industry Sector Advisory Committees to alert the private sector about important trade issues.

U.S. industry provides information that is mixed and incomplete, depending on which industry is under review. Firms in some sectors have not had many difficulties with foreign government procurement. One reason for this is that most of these firms' overseas business is in the private sector. Others have not raised procurement difficulties with

the U.S. government because they are not a high priority; for example, some consider the problem of foreign industrial policies and other trade barriers to be more important to their sector. Further, industry representatives told us that some firms might be unable to identify discrimination in procurement because they are unaware of government procurement issues or lack extensive overseas experience.

Several other factors explain why industry representatives do not raise procurement problems with the U.S. government. In the transportation sector, and railways in particular, industry representatives told us that they have stopped pushing for the removal of discrimination in the markets of industrialized countries because practices are too ingrained, and the railway systems are fully developed already. Instead, firms have entered foreign markets by establishing joint ventures and manufacturing arrangements. Similarly, a representative in the construction services industry reported that when firms encounter procurement problems in a foreign market they tend to work around them, often using joint ventures and consortium arrangements.

In other sectors, U.S. industry has been more willing to seek government assistance and provide information about unfair foreign practices. For example, in the area of heavy electrical equipment, U.S. industry provided government officials with data showing that a number of foreign governments purchased equipment exclusively from favored domestic firms, despite competitive U.S. products. Responses to questionnaires sent to posts, and recent overseas fact-finding missions, have also generated information on foreign discrimination. As a result, industry specialists in the U.S. government have an updated, detailed market history, but only for this sector. Because the U.S. government so far has not initiated any trade cases about this issue, firms may be very willing to provide information for the Title VII investigation.

In addition, representatives in the telecommunications sector told us that they have regularly cooperated with the U.S. government, providing material on discriminatory foreign procurement practices, and they remain willing to do so. However, the quality of information provided by individual companies may vary—although one major firm has detailed data on transactions and practices, another has been unable to identify specific problems and their causes. Still, several firms noted that aside from a few, aggressive companies, most would be reluctant to discuss problems publicly.

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**Is Retaliation Still a  
Problem?**

Retaliation by foreign governments is a prevalent concern for the private sector; this fact may limit input for the Title VII investigation. For example, large, diversified firms fear the loss of existing business with foreign governments if they complain about specific cases. However, although private sector sources frequently mentioned this concern, few of those we talked to cited any actual case of retaliation. Many think that provisions for confidentiality are necessary to encourage firms to come forward, but some noted that even these might not be sufficient. In addition, industry may not come forward with a case of discrimination because it does not believe that doing so will be worthwhile. The cost, in terms of potential foreign retaliation as well as in time, effort, and expense, is perceived to outweigh the benefits of changes to foreign practices resulting from the U.S. government's efforts.

Some government and private sector representatives thought that the most effective way to solicit industry input for the Title VII investigation was to contact individual companies directly, because firms are less likely to respond to indirect requests for information. Certain firms told us that they sometimes go directly to U.S. government representatives when they have trade problems. Also, for proprietary reasons, some firms do not want to provide information to an advisory committee or industry association

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**What Do Other  
Government Activities  
Provide?**

Overlapping government activities also generate information on discrimination in non-code-covered procurement. For example, a U.S. government database of nontariff measures that affect specific products and sectors has been compiled for use by U.S. negotiators in the GATT Uruguay Round of multilateral trade negotiations. The database summarizes the current knowledge of country and industry desk officers, foreign posts, and the private sector. It includes entries describing government procurement barriers in over 30 countries. The descriptions vary in detail and age. Further, more than one-third of these entries indicate additional information needs to be gathered.

Some information on non-code-covered foreign government tender notices is available through the TOP system. However, information from TOP notices is not comprehensive because foreign governments as well as overseas posts have no obligation to report tenders outside of the code. Also, the announcements are summaries of the actual bidding requirements.

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**Appendix II**  
**What Types and Sources of Information**  
**Are Available?**

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As a result of the renegotiations to expand the code's coverage, information has been developed on noncovered sectors and on countries considered to be the most probable candidates for signing the code. In code renegotiations, information on excluded sectors, such as telecommunications and heavy electrical equipment, as well as services, is exchanged by signatory governments. Directives prepared for European Community (EC) 1992 market unification efforts provide further information on excluded sectors. EC 1992 efforts have also generated other directives' dealing with government procurement, including some that apply to public supply contracts and public works contracts.

In addition, investigations of discrimination required by overlapping trade legislation produce information on non-code-covered procurement. The level of detail of this information depends on the requirements of the law.

The NTE report, a key source of input determining "super 301"<sup>12</sup> cases under the Omnibus Trade and Competitiveness Act of 1988, broadly identifies a wide range of trade barriers in specific countries. Each year's report reflects changes from the previous year and adds information on newly identified discrimination. Of the 36 entries in the 1989 report, 15 mentioned government procurement barriers.<sup>13</sup> Country and industry specialists named this report as one good source of information on foreign government procurement practices, although several noted that the information in the report was very general. A U.S. government official has cautioned that the NTE report is not a reliable source of information on government procurement issues, because (1) those who prepare the report (country specialists, with the assistance of economic officers overseas) lack expertise on government procurement issues; (2) the report misidentifies certain practices, such as predatory pricing, as government procurement barriers; and, (3) the report uses different selection criteria.

Other overlapping investigations focus on industry sectors as well as on countries. The Telecommunications Trade Act of 1988 called for an investigation of countries that discriminate in the telecommunications sector. Because governments in many countries continue to own or to run telecommunications companies, government procurement issues are

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<sup>12</sup>"Super 301" provisions require identification and investigation of "priority" foreign countries and trade practices that pose significant barriers to and restrictions on U.S. exports or investment abroad.

<sup>13</sup>Entries identified not only individual countries but also the European Community and Gulf Cooperation Council.

very important in this sector. The information generated by the investigation focused only on certain countries and was rather general; specific examples of discrimination were not gathered. In addition, the Brooks-Murkowski Amendment to the Continuing Resolution for the 1988 fiscal year budget (P.L. 100-202) required information gathering on access to public works projects overseas. The overseas posts, which did not have a great deal of background in the area, provided substantive input on the procurement of construction goods and services in a very short period (about 1 week). Also, industry representatives provided input that, according to one source, lacked detailed information.

As a result of these U.S. government trade activities and the information they generate about foreign government procurement practices, country and industry specialists in Washington, and economic and commercial officers overseas, are aware of certain procurement issues. However, their knowledge varies greatly, according to both country and sector. For example, FCS officers most often deal with procurement issues in specific sectors, according to requests from Washington agencies, although a few seem to become more involved in non-code-covered procurement matters on their own initiative.

In some sectors, obtaining information about discrimination will be very difficult. Little information exists on the procurement of services beyond what is available as a result of efforts to broaden the code. The lack of international definitions, rules, procedures, and statistics for the service sector makes it difficult to determine what problems exist. Further, one service industry representative believes that discrimination in government procurement tends to be more indirect for services than for goods.

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## Why Does Military Procurement Pose Special Problems?

Gathering information about discrimination in the defense sector will face additional problems because of the focus on national security concerns. Where there are indications of discrimination in foreign military procurement, there is little available evidence for the Title VII investigation because (1) the U.S. government generally does not monitor foreign procurement practices nor promote trade in defense products, and (2) the private sector rarely complains to the government.

National security concerns are often a reason to exclude foreign competition in making decisions about procurement. For this reason, defense products have generally been excluded from trade agreements and are usually excluded from code coverage. A report from the private sector



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**Appendix II**  
**What Types and Sources of Information**  
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Defense Policy Advisory Committee on Trade stated that the United States still has to address how fair rules of trade in defense goods are established.

Much international defense purchasing is subject to bilateral MOUs that include provisions for reciprocal access to defense procurement.<sup>14</sup> MOUs vary in scope and in the degree of reciprocity required, but all have a general provision waiving policies that give preference to national products. However, the MOUs do not require procedures like those used in the code to add transparency and to ensure equal treatment for all potential suppliers.

Although MOUs have commercial consequences, they are not treated as trade agreements. Instead, MOUs are considered national security agreements and are almost solely the responsibility of DOD. The principal objective of the MOUs is to enhance military readiness and armaments cooperation. DOD officials believe that the MOUs have been successful in maintaining U.S. access to foreign defense markets by increasing foreign access to the U.S. market. Because defense objectives could be jeopardized, DOD opposes linking these agreements to nondefense goals in achieving market access.

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**Little Is Known About**  
**Foreign Military**  
**Procurement Practices**

As a result of the focus on national security in defense procurement, there is no monitoring of foreign practices similar to that under trade agreements. For example, there are no procurement data exchanged under the MOUs, unless the purchases also happen to be covered by the code. DOD does not generally review the military procurement laws and procedures of the countries that have signed agreements. Although DOD has constructed data to assess the balance of foreign military sales and purchases covered, these have serious deficiencies.

There is little existing information available for the first Title VII investigation. Until recently, the U.S. government did not support the commercial export of defense products, therefore there was little need to gather knowledge about foreign defense procurement practices. However, DOD, together with the FCS, has just assembled some information on the practices of foreign military agencies. This material will form part of a planned guide for U.S. firms on how to sell to foreign defense ministries. The information collected is very general in nature, but it includes a basis for identifying discrimination.

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<sup>14</sup>The United States has reciprocal MOUs with 19 countries.

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**Appendix II**  
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In the future, more information on MOU-covered procurement and discriminatory practices may be available. In September 1987, the Deputy Secretary of Defense initiated a comprehensive evaluation of the MOUs. Although a final report was never issued, some of the task force's recommendations were announced on September 27, 1989, in testimony before the House Committee on Government Operations, Subcommittee on Legislation and National Security. They included adding code-like procedures to the MOUs that would create more transparency in foreign military procurement practices.

Such improvements would allow monitoring of MOU-covered trade and create sources of information on foreign practices for future Title VII investigations. Other new joint efforts of DOD and the FCS to publish foreign opportunities and to educate both defense and commercial officials overseas about promoting defense sales could also create greater government awareness about discrimination in the purchase of defense goods.

Additional developments are increasing concern about the commercial aspects of international trade in defense items. Some believe the proposed creation of a united European armaments market and reactions to anticipated reductions in international defense spending may add to foreign discrimination. European unification efforts have produced some information on barriers in these countries' defense procurement.

With no active monitoring, DOD relies on private sector complaints to learn about problems with MOUs. When a U.S. company complains, DOD officials provide assistance. However, officials do not generally receive complaints about foreign military procurement. Before annual bilateral MOU meetings, DOD asks selected defense industry associations to submit suggested agenda items; these could include problems with discriminatory practices. However, industry representatives have felt they had little opportunity to contribute to MOU meetings, and they have given little response.

Thus, with little industry input, DOD is in a difficult position to question discriminatory practices in foreign defense procurement. Furthermore, U.S. restrictions and a favorable trade balance in defense goods discourage any DOD efforts to raise such issues. In contrast, foreign countries frequently raise questions in MOU meetings about U.S. practices such as small business set-asides.

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**Appendix II**  
**What Types and Sources of Information**  
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U.S. defense industry representatives confirmed that they do not formally pursue resolutions to their problems. When they face discrimination, they are not likely to go to the U.S. government for help. Although they consider foreign defense procurement practices nontransparent, and defense trade generally to be restricted, especially concerning requirements to offset defense sales with purchases of foreign goods and services, they accept these problems as part of the normal business environment. Some representatives noted that large companies can work around discrimination by creating joint ventures with their foreign competition. Furthermore, they consider U.S. restrictions, such as export controls, a more important issue.

U.S. defense companies fear foreign retaliation and question the ability of the U.S. government to remedy their problems. Various factors inhibit industry from looking to DOD to solve problems. The MOUs are principally the responsibility of DOD acquisition officials; because the objective of the MOUs is to foster defense cooperation, some industry representatives doubt that adversarial issues would be pursued. The defense industry has frequent interaction with DOD, but the relationship centers around regulatory functions that industry considers adversarial, such as export controls. Government officials believe it is their responsibility to keep the industry "at arm's length" in most of their contact.

Industry generally does not bring complaints to other agencies such as USTR or DOC. They believe these agencies do not understand defense trade issues. Although USTR is advised by the Defense Policy Advisory Committee on Trade, there is no one at USTR whose principal responsibility is defense trade issues, and none of the country desk officials we talked to had regular contact with DOD officials. DOC and State do have some contact with defense issues. At DOC, most defense matters are handled by the Bureau of Export Administration, which deals with export control and defense industrial base issues, rather than by the International Trade Administration, which monitors trade legislation. Similarly, State regulates the commercial export of defense products. While State also reviews defense coproduction and technical assistance agreements, it does not promote commercial sales.

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# How Is the Investigation Being Conducted?

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Compiling the President's Title VII report will take place in two phases. The first is information gathering, during which overseas posts, various government agencies, and the private sector will be called upon to detect the use of foreign discriminatory practices. In the second, the decision-making phase, the information will be analyzed by officials who will apply the act's criteria to identify those countries that are not in compliance with the code or that otherwise discriminate in their procurement of goods and services. The resulting list of discriminatory countries will then be sent through the interagency clearance process before going to the President for final approval.

USTR is responsible for the Title VII report, working through the existing interagency trade policy-making apparatus. Specifically, the TPSC Subcommittee on Government Procurement has adopted a work program that outlines particular tasks to collect the needed information and indicates who will perform these tasks. A subsequent TPSC paper has further detailed the responsibilities and the decision-making process.

Most of the time that the act allots to compile the President's report was not used by the administration in developing the first report. The requirement for a thorough investigation of unfair foreign procurement practices became law August 23, 1988. The reporting deadline of April 30, 1990, gave the executive branch 20 months to conduct its work. Following interagency study and discussion, the work program was adopted 1 year after the act's passage, in August 1989. The first steps in the 9-month work program were taken December 1, 1989, 4 months later than planned. As a result, the many tasks in the work program will have to be carried out in the remaining 5 months.

The law creates significant new government responsibilities. The work program gives USTR and DOC primary responsibility for gathering and reviewing the needed information. However, no new resources have been added by either agency to implement Title VII; instead, these duties have been added to those that the responsible offices already have.

The scope of the investigation is broad until the decision-making process begins. Therefore, USTR will collect information on the procurement systems and practices of all but the least-developed countries, over 100 in total. Based on the act's requirements, there are differences in the plan to gather information on code and non-code-covered procurement.

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## Has Code Compliance Been Reviewed Further?

Officials interpret Title VII as reinforcing their present commitment to monitor code compliance. USTR and the DOC's Office of Multilateral Affairs monitor other signatories' compliance, with assistance from the overseas posts. For the Title VII report, little new information gathering has been undertaken to identify signatories not in compliance with the code. Nor does the work program change the timing or methods of the review process, because officials believe they work well.

USTR has relied upon the existing methods of gathering information about signatories' code-covered procurement. Thus, annual determinations will be based on such things as the biannual compliance reviews conducted by the overseas posts (the last was conducted in January 1989), the ad hoc investigation of private sector complaints, and the information gathered through the semiannual GATT Government Procurement Committee meetings.

Much valuable information is available for conducting the Title VII investigation because of the transparency in code-covered procurement. But, because it takes a long time to gather and review the information, this year's annual Title VII determinations will be based on some measures of compliance that are over 2 years old. For example, the GATT Government Procurement Committee will be ending its 1987 statistical review as the President's 1990 report is being prepared.

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## Will Actual Sales Be Considered?

Citing disappointing results of the code in increasing U.S. sales to foreign governments, some private sector officials thought that, for Title VII, finding the presence of discrimination should be based on actual sales to each signatory. They suggested an approach similar to that used in U.S. civil rights cases: If, based on other experience, U.S. suppliers should be selling certain goods or services to a foreign government but are always unsuccessful, then there must be discrimination.

Government officials told us that a review based on such findings would not be conclusive because the code does not guarantee sales for signatories' suppliers. Instead, the code's procedural rights and obligations create only opportunities. Sales are determined by each company's competitiveness. Furthermore, such an analysis would only be possible in the future, after planned improvements in signatories' statistical reporting are made, but there are no plans to use results to determine signatories' compliance under Title VII. Other legislation calls for results-based reviews of foreign compliance with different trade agreements.

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Based on their past review of signatories' practices, U.S. officials believe that compliance with the code has generally been good. Foreign government representatives to the GATT Committee on Government Procurement, however, have mixed views of code compliance. While some have few or no complaints, others believe that noncompliance (and, therefore, discrimination) continues to be a problem.

The United States is currently pursuing a formal complaint against another code signatory. Officials said that if this case is not resolved in time, Title VII requires that the country be identified in the April report.

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## How Is Information Being Obtained Outside of the Code?

The work program calls for information gathering by three methods: (1) cables to overseas posts, (2) contributions by the interagency bilateral TPSC subcommittees, and (3) requests for comments from the private sector in the United States and abroad. Title VII information gathering focuses on non-code-covered procurement by signatory countries and procurement by nonsignatory countries. Although there are many more nonsignatory countries than signatory countries, they represent much smaller procurement markets.

The overseas posts were given a month to provide much of the information being used to identify discriminatory foreign procurement practices, to notify foreign governments, and to survey the local business community. The cables to posts include a detailed questionnaire about the foreign procurement environment, procurement procedures, and procurement practices.

Officials generally consider the overseas posts' knowledge of procurement issues limited, and their reporting widely varied from country to country. To help educate posts on the issues and requirements, the cables give some general background information; other briefing materials are to be sent later. Because of the posts' limited resources, a fill-in-the-blank reporting format was adopted.

Although the cables ask the posts to provide factual information on unfair practices, they also ask the posts to assess the openness of the foreign countries' procurement methods. To do this, the posts must apply the act's code-like criteria and review all the countries' procurement laws and practices. To assist in this assessment, the cables ask a series of very specific and technical procurement questions.

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The interagency TPSC bilateral subcommittees, chaired by USTR, will review and augment the posts' responses, using information they already have on hand. The USTR country desk officials play a central role in gathering this information from their counterparts in DOC. They have been given a briefing and provided background materials to improve their knowledge of procurement issues.

The availability of information on the different countries' procurement practices varies considerably in quality and quantity. According to officials, much of the existing information is incomplete and does not meet the detailed requirements in Title VII for identifying discrimination. For example, the annual NTE report represents a summary of known procurement problems and will be issued again 1 month before the Title VII report. Although it depends on the same sources as will be used for Title VII, officials told us these sources do not have expertise in procurement issues. Because previously gathered information is not detailed enough to make any determinations, additional requests will be made to update and expand upon known problem areas.

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### Private Sector Contact Differs

Although the first two methods for obtaining information rely on government channels, the third method focuses on the private sector. However, there are differences in how information will be gathered from the domestic and from the overseas business communities.

The principal method for gathering information from the domestic business community is a request for public comment published in the Federal Register. The private sector advisory committees are encouraged to respond to this request. The notice asks for specific information requiring a knowledge of procurement issues that may take time to develop. Specifically, respondents are asked to identify "requirements of the Agreement which are not being complied with...or describe how the country has maintained a significant and persistent pattern or practice of discrimination." The notice asks for a separate submission on each country and for each submission to include both an estimate of the cost of the discriminatory practices and information about similar U.S. government procurement. Respondents may file confidential business information (with a public summary) under established procedures.

Individual domestic firms and industry associations have not been contacted directly. However, direct contact was used to gather information for the Telecommunications Trade Act of 1988, where affected companies were more easily identifiable. Officials said limited resources and

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the need for equal treatment prevent the use of more vigorous approaches, such as a survey, to gather information.

Contacting the overseas business community is another responsibility of the posts. Although resources are also scarce in the posts, the overseas business communities are to have been contacted directly. In addition to requesting comments on the procurement environment, procedures and practices, the posts were told to ask the business community to quantify both U.S. sales to the foreign government and the potential business that was lost because of discrimination. The posts have discretion in conducting their surveys because no guidance is given on the number, type, or size of companies that should be contacted.

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## How Will Countries Be Identified?

After the necessary information has been collected, the decision-making process then begins. The various criteria in the act to assess non-code-covered procurement will be used to identify countries. There are no standard legal definitions for the criteria to be used, according to a USTR lawyer. The TPSC Subcommittee on Government Procurement will then review the initial draft reports from the bilateral subcommittees and the responses to the Federal Register notice. Follow-up investigations to complete the necessary information will take place as needed.

First, discrimination against the United States must be determined. Officials have offered the following guidance to the posts and to the country desks responsible for finding discrimination.

Discrimination may be thought of as:

- a) treatment different from and less favorable than that accorded to national suppliers of the country in question, and/or
- b) failure by the government to use competitive procedures in procurement, and/or
- c) failure by the government to provide predictable (i.e., guaranteed) treatment.

Second, the discrimination must be significant and persistent. In this way systematic discrimination can be distinguished from isolated enforcement problems. This determination will be based on information the posts supply.



Third, this discrimination must result in identifiable harm to U.S. businesses. Lost sales opportunities could be construed as the complete inability to bid or the failure to win a bid. The private sector was asked to provide this information to the TPSC Subcommittee on Government Procurement, but firms must show that opportunities actually have been lost. If U.S. industry has stopped trying to sell in markets long since closed, it may be difficult for the industry to document the harm.

The next criterion that will be applied requires the U.S. government to have procured goods or services from the foreign country in significant amounts. The purpose of this significance test is to focus the investigation where the United States can use the potential sanctions to end the discrimination. This test could eliminate many of the countries still under investigation, as many countries' suppliers sell very little to the U.S. government; a \$10 million limit would eliminate all but about 30 countries. However, many of these countries are included in the first Title VII investigation, even some that have sold less than \$100,000 to the U.S. government in fiscal year 1988.

Officials have decided to gather information on all countries in order to (1) ensure equal treatment of all countries; (2) develop an information base on countries where little is known; and (3) educate government officials about procurement. Officials' interpretation of "significant amounts" necessary for leverage will vary according to an individual country's productive capacity in a given industry or because of other factors. These more detailed, country-by-country determinations using various classifications may be difficult because the U.S. government data have limitations and inaccuracies that could affect any such analysis.

A final review will take into account the effects of the identified discrimination on U.S. commerce and the comparability of opportunities available to foreign suppliers in the United States. Also, determinations would consider any requests for consultations by countries wishing to avoid identification. Guidance on how these requests will be handled was being developed at the time of our review. Final country reports will be written recommending a list of discriminatory countries to the United States Trade Representative. After the various TPSC agencies have approved the choices and the President has made a final decision, the report is to be sent to Congress by April 30, 1990.

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