Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to discuss H.R. 1750, the "Buy American Act of 1987," which is intended to strengthen U.S. government efforts to combat foreign government use of discriminatory procurement practices that serve as nontariff barriers to U.S. exports.

BACKGROUND

The General Agreement on Tariffs and Trade (GATT)[1] permits member governments to use procurement practices which discriminate against foreign goods and services. Article III of the Agreement specifically states that GATT rules restricting the use of internal regulations as barriers to trade do not apply to "procurements by governmental agencies of products purchased for governmental purposes." As a consequence, many countries discriminate against foreign suppliers and/or products in conducting government procurements. Since governments are the largest purchasers of goods and services in every major country, such practices can serve as substantial barriers to trade.

Limiting the use of discriminatory government procurement was first discussed informally during the early 1960s. These exchanges led to a series of formal discussions under the auspices of the

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[1]GATT is a multilateral trade agreement which sets out rules of conduct for international trade relations and provides a forum for multilateral negotiations regarding the solution of trade problems and the gradual elimination of tariffs and other barriers to trade.

Organization for Economic Cooperation and Development (OECD). In the mid-1970s, Congress authorized U.S. negotiators to seek international agreements limiting the use of nontariff barriers to trade, including discriminatory government procurement. In 1977, the OECD discussions, which by this time focused on a proposed international government procurement code, were transferred to the broader forum of the Tokyo Round of multilateral trade negotiations, where the world's major trading countries were conducting wide ranging negotiations under the auspices of GATT.

After nearly 20 years of deliberations, an international Agreement on Government Procurement was concluded in 1979 and became effective January 1, 1981. This Agreement seeks to limit the use of discriminatory procurement practices as barriers to trade by requiring signatory governments to conduct covered procurements in the open in accordance with a set of agreed upon procurement procedures. The Agreement generally covers purchases of supplies and equipment valued at 150,000 Special Drawing Rights ($171,000 in 1987 dollars) or more made by designated central government agencies, excluding purchases of supplies and equipment essential to the maintenance of national security and safety.

The Agreement was expected to open substantial export opportunities for U.S. businesses. However, these expectations have not been fully realized. The foremost limitations on the effectiveness of the Government Procurement Agreement are its limited coverage of

procurements, small membership, and less than full compliance with the Agreement's obligations by signatories. Improvements in these three areas are needed if the Agreement is to open meaningful export opportunities for U.S. businesses. The administration is attempting to address the first limitation. Amendments to the Agreement adopted in November 1986 and scheduled for implementation in January 1988, among other things, reduce the threshold to 130,000 Special Drawing Rights ($148,000 in 1987 dollars) and extend the Agreement to leasing. The United States also hopes to successfully conclude ongoing negotiations aimed at extending the Agreement to procurements of services and to certain agencies--still excluding national security purchases--not now covered, particularly those that purchase telecommunications equipment, heavy electrical machinery, and transportation equipment.

SMALL MEMBERSHIP LIMITS THE EFFECTIVENESS OF THE AGREEMENT

The United States has had little success in encouraging other countries to join the Agreement. Only 20 countries,[2] including the United States, are signatories to the Agreement. The only country to join after the Agreement entered into force was Israel in June 1983. As a consequence, discriminatory government procurement practices continue to serve as barriers to export opportunities for

[2]The signatories to the Agreement are the United States and Austria, Belgium, Canada, Denmark, Finland, France, Hong Kong, Ireland, Israel, Italy, Japan, Luxembourg, the Netherlands, Norway, Singapore, Sweden, Switzerland, the United Kingdom, and West Germany.

U.S. firms. The 1985 Annual Report on National Trade Estimates, compiled by the Office of the U.S. Trade Representative, points to the use of such practices by several countries as important nontariff barriers to trade. Countries identified in this report as pursuing strong buy national policies include Argentina, Brazil, and Mexico. The report further states that, while it is not possible to estimate the dollar impact of these restrictions, U.S. exporters in some cases would have significant market opportunities if they were allowed to compete freely.

It is also generally held that the less-visible administrative procedures often used by other countries effectively exclude participation by U.S. and other foreign firms. Foreign government procedures include (1) making only domestic firms aware of procurements, (2) using specifications that give a competitive advantage to domestic suppliers, and (3) applying criteria in awarding contracts that favor domestic suppliers, such as taking into consideration the use of domestic labor and materials. Using these and similar procedures, foreign governments have been able to generally restrict foreign participation to purchases of products not available domestically.

The Buy American Act price preferences[3] used by the U.S. government are generally considered as much less of a barrier to foreign firms attempting to sell to the U.S. government. These price preferences do not prohibit foreign firms from bidding on procurements. Instead, they only make it somewhat more difficult for them to win contracts. The 6- and 12-percent price preferences used by civilian agencies are relatively small and, as such, may not always pose major hurdles for foreign firms bidding on U.S. government procurements. The 50 percent price differential used by the Defense Department since 1962 is relatively high and, as such, may pose a major hurdle for foreign firms. However, the U.S. government waives these price differentials for procurements covered by the Government Procurement Agreement when considering bids from companies in countries that adhere to the Agreement.[4] In addition, the Defense Department, for national security reasons, has entered into Memorandums of Understanding with many of our allies who are also major trading partners. Through these Memorandums, Defense, on a reciprocal basis, waives the price

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[3]The U.S. government also discriminates against foreign-source goods through various product-specific restrictions which require executive agencies, primarily the Defense Department, to purchase U.S.-made textiles, clothing, specialty metals, stainless steel flatware, etc.

[4]The President also grants waivers to developing countries that do not assume the obligations of the Government Procurement Agreement but will provide procurement opportunities to U.S. products and suppliers and unilaterally to lesser developed countries.

differential for suppliers offering goods produced within the customs territories of the other Memorandum signatories.

We believe that the provisions of section 2 of H.R. 1750, which would restrict U.S. government agencies' purchase of goods produced in countries that have not been granted waivers by the President, could help to encourage other governments to assume the obligations of the Agreement on Government Procurement and, thus, limit their use of discriminatory procurement practices. We anticipate that the President would grant waivers only to (1) countries that have adhered to the Government Procurement Agreement or have entered into bilateral agreements with the United States which contain requirements similar to the Agreement, (2) certain developing countries, or (3) allies that have entered into Memorandums of Understanding with the Defense Department. If foreign businesses lose sales to the U.S. government because their own governments have not received the necessary waivers, this legislation could create support within the business communities of those countries for a lessening of discriminatory government procurement practices. Such action could serve as a strong impetus for nonsignatory countries to join the Government Procurement Agreement, thus subjecting their government procurements to the requirements of the Agreement.

GAO REPORTED THAT GOVERNMENT EFFORTS TO ENSURE COMPLIANCE NEED STRENGTHENING

In addition to encouraging nonsignatories to adhere to the Agreement, the United States also needs to better ensure compliance by those countries that are signatories. U.S. businesses are not receiving the export opportunities anticipated under the Agreement. Consequently, we do not believe that signatories that are not meeting their obligations under the Agreement should receive the full benefits of the waiver provided for in the bill. We believe that the provisions of section 3 of H.R. 175Ø would strengthen U.S. government efforts to enforce foreign government compliance with the obligations of the Agreement.

During its deliberations on the Tokyo Round trade package, Congress emphasized the need for the executive branch to vigorously monitor and enforce foreign government compliance with the Government Procurement Agreement. For the United States, the success of the Government Procurement Agreement depends upon the new sales it creates for U.S. firms. Monitoring and enforcement was necessary to enable U.S. firms to derive whatever commercial benefit resulted from the Agreement. Although it was generally held that the Agreement's transparency provisions helped to ensure that covered procurements are conducted in the open, the legislative history indicates that Congress did not see these procedures, in and of themselves, as ensuring compliance; vigorous monitoring and enforcement still would be needed.

In our July 1984 report, The International Agreement on Government Procurement: An Assessment Of Its Commercial Value And U.S. Government Implementation (GAO/NSIAD-84-117),[5] we said that noncompliance with the Agreement was decreasing its commercial value for U.S. firms. U.S. business representatives in signatory countries told us of several foreign government procurement practices which violated the Agreement and, thus, reduced its commercial value. Some of the more commonly mentioned practices include:

1. Using single-tendering (i.e., non-competitive) procedures for procurements that could have been conducted using open or selective procedures.
2. Conducting what normally would have been one procurement as two or more procurements to bring the anticipated contract value below the Agreement's threshold for covered purchases.
3. Diverting covered procurements to central government agencies that are not subject to the Agreement or, possibly, to local or regional governments, which are excluded from the Agreement.
4. Using specifications in such a way as to limit foreign participation in the procurement.

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[5]See also our October 1983 reports, Data Collection Under The International Agreement on Government Procurement Could Be More Accurate And Efficient (GAO/NSIAD-84-1) and Assessment Of Bilateral Telecommunications Agreements With Japan (GAO/NSIAD-84-2).

5. Awarding contracts to domestic bidders even though foreign firms should have won the competitions.

We concluded that the U.S. government needs to strengthen its efforts to monitor and enforce foreign government compliance with the Agreement and suggested ways this could be accomplished. Both Washington headquarters agencies and U.S. embassies in signatory countries have important roles in the government's monitoring and enforcement effort. In our 1984 report, we found that headquarters staffs from the Office of the U.S. Trade Representative and the Departments of Commerce and State were adequately addressing compliance problems that could be identified from reviewing publicly available information. We also found, however, that the embassy staffs generally needed to strengthen their efforts. Headquarters relies on the posts in signatory countries to actively elicit from the incountry American business communities (1) information on problems not made apparent through the Agreement's transparency procedures and (2) evidence that certain potential problems identified through the review of publicly available information do indeed represent instances of noncompliance. Most of the 9 posts[6] we visited devoted little time to this effort and some embassies were unsure about what they could and should do when pursuing instances of noncompliance that come to their attention. Further, we reported that the incountry American business

[6]Austria, Belgium, France, Hong Kong, Italy, Japan, the Netherlands, the United Kingdom, and West Germany.

communities were very reluctant to seek the assistance of the U.S. government for fear of jeopardizing their firms' standings in the host countries. To complain to the U.S. government was viewed as potentially jeopardizing future sales to the host government. As a result, the U.S. government often lacked the hard evidence needed to conclusively demonstrate foreign government noncompliance with Agreement requirements. We recommended that Washington agencies instruct the posts to more vigorously obtain from the incountry American business communities information on instances of foreign government noncompliance and provide them with guidance on what they should do to correct problems.

The executive branch has acted on our recommendation and, as part of a renegotiation of the Agreement begun in 1984, has also attempted to improve its transparency provisions. In an October 1985 cable, Washington requested posts in signatory countries to "pursue measures to solicit more feedback from U.S. business" on foreign government compliance and suggested some possible activities.

The Agreement signatories recently concluded the first phase of negotiations aimed at improving the operation of the Agreement and expanding its coverage. As part of this phase, which is scheduled for implementation in January 1988, the signatories, among other things, agreed to extend the Agreement to leasing, reduce the

threshold, and adopt a series of amendments[7] to improve the functioning of the Agreement. These amendments, most of which were suggested by the United States, aim to improve the functioning of the Agreement by strengthening its transparency requirements, closing loopholes, and extending discipline to areas where currently the Agreement's provisions have proven to be ineffective. These changes, when implemented, could facilitate U.S. government monitoring and enforcement efforts.

Although these improvements to the Agreement's transparency procedures may eventually enhance U.S. government monitoring efforts, executive branch officials have told us that they continue to experience substantial problems obtaining the hard evidence needed to fully ensure foreign government compliance. Despite headquarters agencies' efforts to increase post activities to solicit such evidence, information available in Washington indicates that many overseas posts have not substantially increased their efforts to monitor compliance. A relatively small number of

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[7]Among other things, the amendments will (1) require signatories to publish within 60 days after the award of a covered contract certain information on contracts awarded, (2) require signatories to publish all contracts awarded noncompetitively (i.e., using single-tendering), (3) explicitly prohibit agencies from seeking or accepting (in a manner which would have the effect of precluding competition) advice in preparing a procurement from a firm that may have a commercial interest in the procurement, (4) increase discipline over the use of supplier qualification procedures, (5) increase discipline over the use of options clauses, a commonly used method of purchasing a limited number of items while reserving the right to procure additional quantities sometime in the future, and (6) clarify the Agreement's requirement that agencies allow "reasonable" delivery times for covered procurements.

overseas posts--London, Paris, Madrid, Bern, Stockholm, and Tel Aviv--have taken or plan specific actions to inform incountry American business communities about the Agreement and their rights under it. Only the U.S. embassy in Paris conducted a specific activity to obtain feedback on host-government compliance. Further, as we found in our 1984 report, the incountry American business communities reportedly continue to be reluctant to provide assistance.

As a consequence of limited efforts by overseas posts and the reluctance of firms to provide information on specific problems, strong evidence of noncompliance is often not available. For instance, annual statistical information indicates that some countries have an inordinate proportion of procurements below the Agreement threshold or an inordinate level of single-tendered procurements. Yet, the U.S. government has no hard evidence that these governments are splitting contracts or using single-tendering procedures to circumvent the Agreement.

Even in cases where the needed evidence was available, the U.S. government has also experienced difficulty using the Agreement's dispute settlement procedures to enforce compliance. In our 1984 report, we expressed concern that the Agreement's dispute settlement mechanism can be cumbersome and take inordinately long to conclude. We found, for instance, that a government could delay the process by continually refusing individuals nominated to sit on

the panel or delay in collecting information requested by the panel. Since that time, the U.S. government's experience with the formal dispute settlement mechanism has borne out our concern. In January 1983, the U.S. government formally challenged the European Communities' practice of excluding the value-added tax in determining whether a procurement is above the Agreement's value threshold. The United States contended that the Agreement does not permit the exclusion of any form of taxation in making this determination and that this practice may decrease the number of European Communities' procurements covered by the Agreement and thereby open to U.S. competition. The United States obtained a favorable resolution to this proceeding, but not until February 1987--over 4 years after it sought to have this problem corrected.

We believe that the provisions of section 3 of H.R. 1750, which would require the President to issue an annual report certifying foreign government compliance and take meaningful measures to correct problems, could help to strengthen compliance with the Agreement and enhance export opportunities for U.S. firms. Requiring an annual report would increase the priority given by the administration to monitoring compliance. We anticipate that, in compiling this report, the Trade Policy Staff Subcommittee on Government Procurement--the interagency committee responsible for U.S. implementation of the Agreement--would place a notice in the Federal Register requesting information from U.S. businesses on foreign government compliance with the Agreement. The Subcommittee

would also instruct the commercial staffs at U.S. embassies in signatory countries to seek similar information from incountry U.S. firms. We believe that such instruction based on a legislative requirement will enhance the priority that overseas posts place on this responsibility.

Addressing compliance problems on a country by country basis rather than an individual company basis could help to facilitate the active participation of the American business community. Rather than addressing individual problems separately, leaving the U.S. firm(s) involved subject to possible retaliation, the government would address all problems with signatories' compliance at once. It is less likely that foreign governments would retaliate against a large number of U.S. firms. The U.S. government has successfully undertaken such efforts in the past. Most notably, under the Generalized System of Preferences program,[8] it reviewed beneficiary countries' compliance with certain criteria contained in the legislation governing operation of the program and reduced the benefits of those countries unwilling to meet these requirements.

We also believe that requiring the executive branch to initiate dispute settlement procedures to remedy compliance problems and limiting the time in which the United States can participate in

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[8]Through this program, the U.S. government allows developing countries to export designated products to the United States duty free to further their economic development.

such procedures before initiating unilateral reciprocal action would strengthen government efforts to enforce compliance. The U.S. government has in some cases been reluctant to use the Agreement's dispute settlement provisions. For instance, it has not initiated a procedure regarding Italy's compliance problems even though its compliance appears to have been seriously deficient since the Agreement's inception in 1981. Further, such a proposal, with appropriate Presidential discretion, would give impetus to U.S. government efforts to ensure that these procedures are concluded in a timely manner and ensure that the United States need not experience an inequitable reduction in potential benefits under the Agreement for longer than one year without taking reciprocal action.

Mr. Chairman, this concludes my statement. I would be happy to respond to any questions you may have at this time.