ANNUAL REPORT ON DISCRIMINATION IN FOREIGN GOVERNMENT PROCUREMENT

April 30, 2001

I. Introduction

A longstanding objective of U.S. trade policy has been to open opportunities for U.S. suppliers to compete on a level playing field for foreign government contracts. The first major breakthrough in this area was the 1979 conclusion of the Government Procurement Agreement (GPA), followed by the ten-fold expansion of that Agreement during the Uruguay Round negotiations that led to the creation of the World Trade Organization (WTO). The WTO estimates that, under the GPA, the United States and the 26 other GPA Parties provide their suppliers with non-discriminatory access to government tendering procedures worth more that $300 billion annually. In 1995, Mexico agreed to provide comparable access to its government procurement markets under the North American Free Trade Agreement (NAFTA).

The Administration continues to push for the reciprocal removal of discriminatory government procurement practices in a wide range of multilateral, regional and bilateral fora. As a result of our efforts, the 34 countries of North, South and Central America that are participating in negotiations to create a Free Trade Area of the Americas (FTAA) have agreed that the FTAA will provide for openness and transparency of government procurement processes and non-discrimination in tendering procedures within a scope to be negotiated. The Administration is also urging the early conclusion of an Agreement on Transparency in Government Procurement that would apply to all 140 Members of the WTO. Within the Asia-Pacific Economic Cooperation (APEC) forum, the United States and other economies in the region are pushing for concrete steps that will build on the progress APEC has made in developing non-binding principles on government procurement.

The "Title VII" process, initially established under Title VII of the Omnibus Trade and Competitiveness Act of 1988 ("Title VII"), as amended, provides a vehicle for identifying priorities for international negotiations that may address discriminatory foreign government procurement practices and for monitoring and enforcing existing international agreements. After the Title VII legislation expired in 1996, the process was re-instituted by Executive Order 13116 on March 31, 1999.

II. Summary

The Executive Order mandates that the United States Trade Representative ("USTR") submit a report to the Congressional committees of jurisdiction within 30 days of the submission of the National Trade Estimate Report for the years 1999, 2000, and 2001, and publish these reports in the *Federal Register*. This is the third of the three annual reports required by the Executive Order.

USTR's 1992 identification of the European Union ("EU") for discriminatory procurement practices applied by government-owned telecommunications entities in certain member states, as well as the resulting sanctions, remains outstanding. There are no other outstanding Title VII identifications.

As in previous years, however, this report describes a number of foreign procurement practices that are of significant concern to U.S. exporters and that the United States is monitoring closely. Those practices, discussed in detail below, are:

< ***Japan***: Various discriminatory practices relating to procurement for public works.
< ***Taiwan***: Certain discriminatory practices and procedural barriers.
< ***Canada***: Provincial governments' discriminatory procurement practices.
< ***Germany***: Exclusion of certain suppliers affected by discriminatory "sect filters."

The United States is working actively in a range of bilateral and multilateral fora to resolve these issues. As a result of recent bilateral consultations with Germany, this report announces that our concerns relating to the use of "sect filters" appear to have been resolved.

III. Provisions of the Executive Order

Under Executive Order 13116, USTR is required to submit to the Congress each year a report identifying foreign countries that:

1) have failed to comply with their obligations under the WTO Agreement on Government Procurement ("GPA"), Chapter 10 of the North American Free Trade Agreement, or other agreements relating to government procurement to which that country and the United States are parties; or

2) maintain, in government procurement, a significant pattern or practice of discrimination against U.S. products or services which results in identifiable harm to U.S. businesses, when those countries' products or services are acquired in significant amounts by the U.S. Government.

If any country is identified under one or both of these criteria, the Executive Order requires USTR to initiate an investigation under section 302 of the Trade Act of 1974. If the matter is not resolved within 90 days of the submission of the report and USTR determines that the rights of the United States under an international procurement agreement are being violated or that a significant pattern or practice of discrimination exists, the Executive Order permits USTR, *inter alia*, to initiate formal dispute settlement proceedings under relevant international agreements or withdraw any waivers of U.S. purchasing requirements that have been granted to the discriminating foreign country.

International dispute settlement procedures are available to address discriminatory government procurement practices covered by the WTO Government Procurement Agreement (GPA) and the

North American Free Trade Agreement (NAFTA). Under authority provided in the Trade Agreements Act of 1979, as amended, the United States waives domestic purchasing requirements for countries that are Parties to the GPA and the NAFTA, for certain Caribbean Basin Initiative countries; and for countries included on the United Nations' list of "least developed countries."

IV. Identification of Specific Discriminatory Foreign Procurement Practices

EU -- Telecommunications: In 1992, USTR identified EU telecommunications entities that have "special and exclusive rights" in certain member state markets as engaging in discriminatory procurement practices. Those entities were required to apply discriminatory practices under the 1990 EU "Utilities Directive." After bilateral negotiations did not resolve this issue, the United States imposed sanctions in May 1993. Those sanctions remain in place today.

In 1999, the European Commission informed the United States that it considered telecommunications operators in most EU member states to be no longer bound by the procurement requirements in the Utilities Directive, and requested that the United States remove the sanctions imposed in 1993. The Administration has asked the Commission for clarification of the legal requirements currently in effect in the EU and what further steps the Commission is taking to revise Utilities Directive requirements. Once agencies have evaluated the information received from the Commission, the Administration will review the overall market access conditions in the EU telecommunications market, with a view toward deciding whether the 1993 sanctions are still warranted.

In developing this report, USTR has given careful consideration to a wide range of views and information, including the recommendations of other executive agencies and U.S. embassies and consulates overseas, private sector responses to USTR's request for comments for this year's Title VII report (published in the Federal Register on February 28, 2001), and information on foreign government procurement practices reported in the 2001 National Trade Estimates Report.

On the basis of this information, and after consultation with other agencies, USTR has determined that no practices meet the criteria for Title VII identification this year. As in previous years, however, there remain a number of foreign government procurement practices of concern which the Administration is pursuing in bilateral and multilateral fora, or that require continued monitoring and study.

V. Other Foreign Government Procurement Practices of Concern to the United States

Japan -- Public Works:

U.S. companies are well-known around the world for their excellence in design/consulting and construction. Yet the U.S. share of Japan's $300 billion public works market was only $50 million in 1999 (the most recent year for which data are available).

The United States has repeatedly expressed concern to Japan that Japanese procuring entities continue to engage in discriminatory procurement practices that impede American design/consulting and construction companies from participating in Japan's public works sector. These practices include: failure to address rampant bid-rigging; unreasonable restrictions on the formation of joint ventures, including the three-company joint venture rule; the use of discriminatory qualification and evaluation criteria; and the structuring of individual procurements so they fall below thresholds established in international agreements.

The United States is seriously disappointed by the lack of progress in addressing these practices, and also is concerned that Japan has repeatedly refused the U.S.'s request to continue regular bilateral consultations since the consultative mechanism set forth in the 1994 U.S.-Japan Public Works Agreement expired last year. The United States will continue to monitor Japan's public works sector and urges Japan to take immediate, concrete steps to address these concerns, strengthen the integrity of its system for procurement of public works, and eliminate discriminatory practices which prevent U.S. suppliers and workers from participating in this market.

Taiwan – Discriminatory Practices and Procedural Barriers: Taiwan is in the process of acceding to the World Trade Organization (WTO), and has committed to join the WTO Government Procurement Agreement (GPA) as soon as it enters the WTO. Taiwan's accession to the GPA will allow U.S. exporters to compete on a level playing field for major projects worth billions of dollars, including in the power generation, transport, environmental, and other infrastructure sectors.

The 2000 Title VII report noted a number of U.S. concerns with existing discriminatory practices and other barriers to Taiwan's government procurement market. As a result of ongoing bilateral consultations intended to clarify the terms of Taiwan's GPA accession and address other bilateral concerns, significant progress has been made on these issues. However, the United States continues to have serious concerns relating to the following:

- restrictions on the ability of suppliers to joint tender, based on market considerations;

- the need for appropriate and predictable contract provisions relating to contingent liabilities, consistent with international norms.

The Administration continues to urge the Taiwan authorities to take concrete steps to bring these practices into conformity with GPA requirements and ensure that they do not constitute an unnecessary barrier to fair and open competition in Taiwan's government procurement market.

Canada – Provincial Government Restrictions: A number of Canadian provinces apply price preferences and other significant restrictions that discriminate against U.S. suppliers interested in bidding on provincial government procurement contracts. To date, the Administration has identified particular concerns with respect to procurement restrictions applied by the provinces of Ontario, Quebec and

British Colombia. The Administration is concerned that the application of such restrictions may result in a significant imbalance of bilateral market access opportunities in government procurement. Canada is the only GPA Party that has yet to open its sub-Federal procurement markets. Working closely with interested U.S. states, the Administration continues to urge Canada to bring provincial governments and other government-owned entities within the scope of NAFTA and GPA procurement rules.

Germany – "Sect Filters": In September 1998, the German Ministry of Economics promulgated a "protection clause" (commonly referred to as a "sect filter") meant to be incorporated into government contracts for certain training and consultation services. Among other elements, the clause would have prohibited firms from bidding on German government contracts if they have employees that attend or participate in Scientology seminars. Following the promulgation of this "protection clause," the United States expressed concern in bilateral consultations and in the 2000 Title VII report about the clause's potentially discriminatory effects on government procurement. In subsequent consultations with German government and industry representatives, the Administration urged Germany to rescind the sect filter requirements.

In response, the German government has revised its "protection clause" in a manner that no longer prohibits firms from competing for government contracts on the basis of the affiliation of its management or employees with the Church of Scientology. This decision represents significant progress in addressing U.S. concerns relating to the use of "sect filters." The Administration will continue to monitor the implementation of the revised policy to ensure that U.S. firms and workers are not discriminated against in procurement by German Federal and sub-Federal governments.