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Dispute Settlement Pursuant to the Agreement on Technical Barriers to Trade: The United States-Japan Metal Bat Dispute

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Dispute Settlement Pursuant to the Agreement on Technical Barriers to Trade: The United States-Japan Metal Bat Dispute

Fred J. Coccodrilli

Abstract

In this Note, the dispute settlement case involving the marketing of United States-made metal baseball bats in Japan will be examined. The effectiveness of the Standards Code's dispute settlement procedures will be analyzed through an examination of the metal bat case and its effect on Japan's standards laws and certification systems.

DISPUTE SETTLEMENT PURSUANT TO THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE: THE UNITED STATES-JAPAN METAL BAT DISPUTE

INTRODUCTION

The Agreement on Technical Barriers to Trade (Standards Code or Code)¹ was adopted pursuant to the Tokyo Round negotia-

1. Agreement on Technical Barriers to Trade, Apr. 12, 1979, 31 U.S.T. 405, T.I.A.S. No. 9616 [hereinafter cited as Standards Code].

In the 1960's, the formation of an electrical certification system in Europe, which was closed to non-European electrical products, created pressure for the development of an agreement that would regulate the use of standards and certification systems in international trade. 4 U.S. DEP'T OF COM., TECHNICAL BARRIERS TO TRADE 1 (The Tokyo Round Trade Agreements, Sept. 1981). According to the Standards Code, a standard is a "technical specification approved by a recognized standardizing body for repeated or continuous application with which compliance is not mandatory." Standards Code, *supra*, annex 1 (a technical specification is a "specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions."). However, under the Trade Agreements Act of 1979, 19 U.S.C. § 2571 (Supp. V 1981), Congress did not distinguish between mandatory and nonmandatory specifications when defining the term standard. *Id.* For purposes of this Note, the term standard will refer to both mandatory and nonmandatory technical specifications, unless otherwise stated. Certification systems, which are used to determine whether a product conforms to applicable standards, "include documents, marks or other evidence of conformity with standards." Note, *Technical Analysis of the Technical Barriers to Trade Agreement*, 12 LAW & POL'Y INT'L BUS. 179, 182 n.27 (1980) [hereinafter cited as Note, *Technical Analysis*]. According to the Trade Agreements Act of 1979, the term certification system means a system "(A) for determining whether a product conforms with product standards applicable to that product; and (B) if a product so conforms, for attesting, by means of a document, mark, or other appropriate evidence of conformity, to that conformity." 19 U.S.C. § 2571 (Supp. V 1981).

An international working group of GATT began to draft such a standards and certification system agreement in 1967. U.S. DEP'T OF COM., *supra*, at 1. In 1975, these discussions were removed to the Tokyo Round of Multinational Trade Negotiations. *Id.* Four years of negotiations resulted in the Standards Code, the first international agreement to recognize the importance of the effect of standards and certification systems on international trade. *Id.*

Several commentators have explained and analyzed the provisions of the Standards Code. See generally Middleton, *The GATT Standards Code*, 14 J. WORLD TRADE L. 201 (1980); Note, *Technical Analysis*, *supra*, at 179; Note, *Prospects for Implementation of the GATT Standards Agreement in the United States*, 20 VA. J. INT'L L. 699 (1980) [hereinafter cited as Note, *GATT Standards*].

The legislation which implements the provisions of the Standards Code in the United States is contained in Title IV of the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (Supp. V 1981). For a discussion of this legislation, see International Trade Administration, U.S. Dep't of Com., Agreement on Technical Barriers to Trade (June 1980). For the legislative history of Title IV of the Trade Agreements Act of 1979, see S. REP. No. 249, 96th Cong., 1st. Sess. 148 (1979), *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 534-38.

tions of the General Agreement on Tariffs and Trade (GATT)² in

2. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A5, T.I.A.S. No. 1700, 55 U.N.T.S. 194, (current version *reprinted in* 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969) [hereinafter cited as GATT], is a multilateral agreement containing a body of rules designed to regulate international trade. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* § 1.3, at 9-11 (1969); Graham, *Results of the Tokyo Round*, 9 GA. J. INT'L & COMP. L. 153, 156 (1979) [hereinafter cited as Graham, *Results of the Tokyo Round*]. GATT is the principal forum through which the over 80 signatories work to "reduce tariffs, eliminate nontariff measures, and remove other trade obstacles." U.S. DEP'T OF COM., *supra* note 1, at iii.

Seven rounds of multilateral trade negotiations have been conducted pursuant to GATT. *Id.* The most recent round of negotiations occurred in Geneva from 1973 through 1979. It is commonly referred to as the "Tokyo Round" or the "MTN." *Id.* Negotiation rounds prior to the Tokyo Round, especially the Kennedy Round, reduced tariff barriers. As tariff barriers were reduced, the problem of nontariff barriers became more pronounced. *Id.* See NAT'L ASS'N OF MFRS., *A CLOSER LOOK AT NON-TARIFF BARRIERS* 1, 9 (1975) [hereinafter cited as NAM REPORT]; Graham, *Results of the Toyko Round*, *supra*, at 159. Nontariff barriers to trade (NTBs) include a wide variety of measures which serve to distort normal trade patterns. See NAM REPORT, *supra*, at 10. NTBs are defined as any public or private measure, other than conventional tariffs, that restrict imports or artificially stimulate exports. Cao, *Nontariff Barriers to U.S. Manufactured Exports*, 15 COLUM. J. WORLD BUS. 93, 93 (1980). The major NTBs affecting international trade are: (1) specific limitations on trade, including quotas, import licensing practices, restrictions on the proportion of foreign to domestic goods used, minimum import price limits and embargoes; (2) customs and administrative entry procedures, including valuation systems for incoming goods, anti-dumping practices, tariff classifications, documentation requirements and fees; (3) standards which impede trade, including disparities in existing and potential legislation and regulations on product standards, intergovernmental acceptance of testing methods and standards, and unreasonable applications of standards, packaging, labeling and marking requirements; (4) government participation in trade, including government procurement policies, export subsidies, countervailing duties, and domestic assistance and investment programs; (5) charges on imports other than regular tariff rates; and (6) rules of origin and domestic content requirements. NAM REPORT, *supra*, at 10-13; Cao, *supra*, at 93-95.

The Tokyo Round, the "most comprehensive and far-reaching [yet] . . . resulted not only in a significant reduction of world tariffs but also resulted in six major agreements concerned with nontariff measures." U.S. DEP'T OF COM., *supra* note 1, at iii. Often referred to as "Codes," *id.*, these agreements lay out new international rules for: (1) subsidies and countervailing measures, Agreement on Interpretation and Application of Articles VI, XVI and XXIII, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619; (2) antidumping, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650; (3) government procurement, Agreement on Government Procurement, Apr. 12, 1979, _____ U.S.T. _____, T.I.A.S. No. 10,403; (4) technical barriers to trade, Agreement on Technical Barriers to Trade, Apr. 12, 1979, 31 U.S.T. 405, T.I.A.S. No. 9616; (5) customs valuation, Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, _____ U.S.T. _____, T.I.A.S. No. 10,402; and (6) import licensing, Agreement on Import Licensing Procedures, Apr. 12, 1979, _____ U.S.T. _____, T.I.A.S. No. 9788.

an effort to eliminate the use of standards³ and certification systems⁴ as a barrier to trade.⁵ United States-Japan consultations⁶ under the Standards Code resulted in the first settlement of a case initiated under the dispute settlement provisions of the Code.⁷ In this Note, the dispute settlement case involving the marketing of United States-made metal baseball bats in Japan will be examined. The effectiveness of the Standards Code's dispute settlement procedures⁸ will be analyzed through an examination of the metal bat

3. See *infra* note 5 and accompanying text. For a definition of the term standard, see *supra* note 1 and accompanying text.

4. See *infra* note 5 and accompanying text. For a definition of the term certification system, see *supra* note 1 and accompanying text.

5. U.S. DEP'T OF COM., *supra* note 1, at 2. These barriers, called technical barriers to trade, result when the application of technical regulations, standards, or certification systems distorts international competition. Note, *Technical Analysis*, *supra* note 1, at 182. For example,

[d]ifferences between nations' standards, testing and approval procedures, and certification systems often have hindered the free flow of international commerce. . . . Furthermore, required testing and approval procedures, developed primarily for domestic/regional use, can be conducted arbitrarily or in such a way as to increase unnecessarily the expense of importers. Certification systems, which provide assurance that products conform to standards, may, because of their internal orientation, either limit access for imports or deny the right of a certification mark to imported products.

U.S. DEP'T OF COM., *supra* note 1, at 1.

6. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, REPORT TO THE UNITED STATES CONGRESS ON THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE—"STANDARDS CODE" 15, 24-32 (1983) [hereinafter cited as GREEN REPORT]. Title IV of the Trade Agreements Act of 1979, 19 U.S.C. § 2573 (Supp. V 1981), requires that a report on the domestic and international operation of the Standards Code be supplied to Congress once every three years. *Id.* The *Green Report* was prepared by the four United States agencies responsible for the Standards Code: the Office of the United States Trade Representative (USTR), the Department of Agriculture, the Department of Commerce, and the Department of State. *Id.* See also *infra* notes 32-41 and accompanying text (describing United States-Japan bilateral consultations pursuant to the Standards Code).

Because of the sensitive nature of these international consultations and the fact that issues initiated during these discussions have not yet been resolved, many government documents pertaining to the discussions between the United States and Japan concerning standards and certification systems have not been declassified. As a result, this Note does not summarize all the issues that have been raised by the United States and Japan in these consultations.

7. Standards Code, *supra* note 1, art. 14. For purposes of this Note, the term dispute settlement procedures includes both bilateral consultation procedures and third party adjudication and mediation (*i.e.* panel and committee proceedings) under article 14 of the Standards Code. See *infra* notes 23-31 and accompanying text.

8. Several commentators consider only third party adjudication and mediation provisions when analyzing dispute settlement procedures. See generally Graham, *Reforming the*

case and its effect on Japan's standards laws and certification systems.

I. AGREEMENT ON TECHNICAL BARRIERS TO TRADE

A. *Obligations of the Standards Code*

Several of the obligations imposed on Standards Code signatories⁹ were involved in the metal bat case.¹⁰ One of these obligations concerns the national treatment of imported goods.¹¹ The Standards Code requires countries to provide the same treatment to

International Trading System: The Tokyo Round Trade Negotiations in the Final Stage, 12 CORNELL INT'L L.J. 1, 28-30 (1979) [hereinafter cited as Graham, *Reforming the International Trading System*]; Graham, *Results of the Tokyo Round*, *supra* note 2, at 171; Address by Robert E. Hudec (Apr. 17, 1980), *reprinted in* 1980 AM. SOC'Y INT'L L.: PROCEEDINGS 129, 129 (remarks by Robert E. Hudec, Professor of Law, University of Minnesota Law School, during panel discussion of dispute settlement under the Multilateral Trade Negotiations).

9. Standards Code, *supra* note 1, arts. 2.1 (national treatment of imported products), 2.2 (use of international standards), 2.4 (design versus performance standards), 2.5 (open procedures (transparency)), 5.1, 5.2 (product testing), 7.2 (access to certification systems), 10.1 (information and assistance). Regarding these substantive obligations,

[t]he Code addresses itself to governmental and nongovernmental standards, both voluntary and mandatory, and certification systems which are developed by central governments, state and local governments and private sector organizations. However, only central governments are directly bound by the obligations in the Code, since the Code states that signatories "shall ensure that" central government bodies comply fully with the provisions of the agreement.

With respect to regional, state, local and private organizations, the Code states that the signatories "shall take such reasonable measures as may be available to them" to ensure compliance. The nature of such reasonable measures is left to the discretion of each individual signatory to determine within the context of its domestic political and legal system. Regional, state, local and private organizations are therefore subject to a "second" level of obligation, as compared to central governments who are bound by the "first" level of obligation. However, it should be pointed out that a signatory can be brought to a dispute settlement or enforcement case by another signatory if, for example, the standards-related activity of a non-central governmental or private body within its territory is creating an unnecessary barrier to international trade.

U.S. DEP'T OF COM., *supra* note 1, at 3.

10. *See infra* note 58 and accompanying text.

11. Standards Code, *supra* note 1, art. 2.1. According to the Standards Code: Parties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade. Furthermore, products imported from the territory of any Party shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country in relation to such technical regula-

imported products as is given to domestic products "with regard to standards, technical regulations, certification and testing."¹² This national treatment obligation is an extension of the national treatment clause in GATT,¹³ "which prohibits a country from discriminating against imported products."¹⁴ The Standards Code makes this obligation more specific "by stating that a country should not, in its application of standards, testing procedures, certification rules, etc., discriminate against imported products."¹⁵

Another Standards Code obligation related to the metal bat dispute concerns access to certification systems.¹⁶ According to the Standards Code, each signatory must ensure that certification systems are "formulated and applied" so as to grant access to foreign suppliers under conditions no less favorable than those accorded to domestic suppliers or other foreign suppliers.¹⁷ This obligation, which applies to both national and regional certification systems, opens such systems to participation on an equal basis by all Code signatories.¹⁸ Signatories may no longer refuse to give national certification marks to imported products that meet the technical requirements of the certification system.¹⁹ In addition, regional certification bodies must be open to suppliers from all signatories.²⁰

B. Dispute Settlement Provisions

Article 14.1 of the Standards Code provides that every signatory which believes that another signatory has violated the Code

tions or standards. They shall likewise ensure that neither technical regulations nor standards themselves nor their application have the affect of creating unnecessary obstacles to international trade.

Id.

12. GREEN REPORT, *supra* note 6, at 5; U.S. DEP'T OF COM., *supra* note 1, at 4.

13. GATT, *supra* note 2, art. 3.

14. GREEN REPORT, *supra* note 6, at 5; U.S. DEP'T OF COM., *supra* note 1, at 4.

15. GREEN REPORT, *supra* note 6, at 5; U.S. DEP'T OF COM., *supra* note 1, at 4.

16. Standards Code, *supra* note 1, art. 7.2. The Code states:

Parties shall ensure that certification systems are formulated and applied so as to grant access for suppliers of like products originating in the territories of other Parties under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, including the determination that such suppliers are able and willing to fulfill the requirements of the system.

Id.

17. *Id.*

18. GREEN REPORT, *supra* note 6, at 6; U.S. DEP'T OF COM., *supra* note 1, at 4.

19. GREEN REPORT, *supra* note 6, at 6; U.S. DEP'T OF COM., *supra* note 1, at 4.

20. GREEN REPORT, *supra* note 6, at 6; U.S. DEP'T OF COM., *supra* note 1, at 4.

may request bilateral consultations.²¹ If these consultations do not result in a solution acceptable to both parties, the complaining signatory must provide a written copy of the allegations to the other party.²² If additional consultations based on the written allegations do not produce an acceptable solution,²³ either party to the dispute may request an investigation by the Committee on Technical Barriers to Trade.²⁴ The Committee must meet to investigate the matter within thirty days of receipt of such request.²⁵ If the Committee cannot reach a satisfactory solution to the dispute within three months, either party may petition the Committee to establish a technical expert group,²⁶ a panel of trade policy experts,²⁷ or

21. Standards Code, *supra* note 1, art. 14.1. "Each Party shall afford sympathetic consideration to and adequate opportunity for prompt consultation regarding representations made by other Parties with respect to any matter affecting the operation of this Agreement." *Id.* The United States has participated in many bilateral consultations under this provision. See GREEN REPORT, *supra* note 6, at 15-32 (these bilateral consultations have involved countries such as Japan, France, the Federal Republic of Germany, and the United Kingdom).

22. Standards Code, *supra* note 1, art. 14.2. To invoke article 14.2, a signatory must assert that some benefit due the signatory under the Agreement is being "nullified or impaired, or that the attainment of any objective of this Agreement is being impeded, by another Party or Parties, and that its trade interests are significantly affected." *Id.* One commentator claims that this nullified or impaired benefit standard is too subjective. *The Sixth Annual Judicial Conference of the United States Court of Customs and Patent Appeals*, 84 F.R.D. 429, 595 (1979) (session discussing reform of the international trading system, mainly dispute settlement) (remarks by Daniel Tarullo, Antitrust Foreign Commerce Division, Department of Justice) [hereinafter cited as *Judicial Conference of Customs and Patent Appeals*]. Tarullo contends that the dispute settlement procedures of the Code should be triggered by any violation of the substantive provisions of the Code. *Id.*

23. Standards Code, *supra* note 1, art. 14.4.

24. *Id.* The Committee on Technical Barriers to Trade, composed of all the signatory countries, meets at least once a year to consult "on any matters relating to the operation of [the Code] or the furtherance of its objectives." *Id.* art. 13.1; see U.S. DEP'T OF COM., *supra* note 1, at 7. If a signatory requests an investigation of a dispute by the Committee, the investigation must proceed "with a view to facilitating a mutually satisfactory solution." Standards Code, *supra* note 1, art. 14.4.

25. Standards Code, *supra* note 1, art. 14.4.

26. *Id.* art. 14.9. Participation in technical expert groups is restricted to persons, preferably government officials, of professional standing in the field in question. *Id.* annex 2. If no mutually satisfactory solution is reached after the use of a technical expert group, either party to the dispute may request that the Committee establish a panel. *Id.* art. 14.13.

27. *Id.* art. 14.14. The use of a panel of trade policy experts is appropriate where either the dispute does not involve a technical issue or where a technical expert group has failed to reach a mutually satisfactory solution. U.S. DEP'T OF COM., *supra* note 1, at 8. The Code recommends that the panel deliver its findings to the Committee within four months after it

both.²⁸ After the report of the technical expert group or panel is presented, the Committee should take action within a thirty-day period.²⁹ If the Committee determines that a party's actions were in violation of the Code, and its recommendations are not followed within a reasonable period of time, the Committee may authorize appropriate retaliatory counter-measures against the offending party.³⁰ These counter-measures include suspension of the nonoffending parties' obligations under the Standards Code.³¹

C. *United States-Japan Bilateral Consultations*

Following numerous conflicts concerning standards-related issues,³² the United States and Japan negotiated and agreed upon a "Joint

is established. Standards Code, *supra* note 1, art. 14.18. A description of the panel's report and at least an outline of its conclusions are submitted to the parties to the dispute before being circulated to the Committee so that the parties might reach a mutually satisfactory solution. *Id.* annex 3; see U.S. DEP'T OF COM., *supra* note 1, at 8-9. If no resolution is reached, the panel's report is circulated to the Committee. *Id.* at 9.

28. Standards Code, *supra* note 1, art. 14.19.

29. *Id.* Such action includes "a statement concerning the facts of the matter; or recommendations to one or more Parties; or any other ruling which it deems appropriate." *Id.*

30. Standards Code, *supra* note 1, art. 14.21. See U.S. DEP'T OF COM., *supra* note 1, at 9.

31. *Id.* The Code states,

If the Committee considers that the circumstances are serious enough to justify such action, it may authorize one or more Parties to suspend, in respect of any other Party, the application of such obligations under this Agreement as it determines to be appropriate in the circumstances. In this respect, the Committee may, *inter alia*, authorize the suspension of the application of obligations, including those in Articles 5 to 9, in order to restore mutual economic advantage and balance of rights and obligations.

Id. See U.S. DEP'T OF COM., *supra* note 1, at 9.

32. GREEN REPORT, *supra* note 6, at 21. These problems involved access to certification systems, procedures for obtaining official approval, input during the development of standards, acceptance of test data generated in the United States, and ability to appeal standards determinations by the Japanese government. *Id.* A number of theories attempt to explain Japan's restrictive trade practices, including the standards-related activities which violate the Code. One theory is that Japan's restrictive trade practices are a consequence of its historic development. See Weil & Glick, *Japan—Is the Market Open? A View of the Japanese Market Drawn From U.S. Corporate Experience*, 11 LAW & POL'Y INT'L BUS. 845, 849 (1979). Four important factors in Japan's historic development have contributed to the creation of restrictive trade practices. *Id.* One factor is Japan's early desire to limit trade with the outside world. From the 17th through the 19th centuries, the leaders of Japan's feudal society isolated Japan from the rest of the world and permitted only very limited trade with other countries. *Id.* at 850. Another factor is the cautious and suspicious reaction by the Japanese to foreign control, evident in the strict limitations on foreign ownership in Japan. *Id.* at 849, 851. The

Statement on Standards, Testing and Certification Activities.”³³ The Joint Statement led to a series of bilateral consultations between the United States and Japan aimed at reducing the technical barriers to trade created by Japan’s standards and certification practices.³⁴ As a result of these consultations, Japan announced

third factor is “the severe centralization of economic power in large business combinations and trading companies” in Japan. *Id.* at 849, 852-54. This concentration of economic power may limit a foreign company’s ability to sell products in Japan, “because business ethics prevent a trading company from marketing competing products.” *Id.* at 854. The fourth factor is “a strong link between the interests and structures of Japanese business and government.” *Id.* at 849.

To protect the public from dangerous or defective products, the Government of Japan has devised extremely strict standards and testing requirements. U.S.-JAPAN TRADE STUDY GROUP, A SPECIAL PROGRESS REPORT 5 (Apr. 1980) [hereinafter cited as TSG REPORT]. The Japanese claim that these restrictive practices are necessary because of Japan’s concern for product liability of imported products. See GREEN REPORT, *supra* note 6, at 19. For an explanation of product liability in Japan and the effect of government safety regulations on product liability, see J. LAMBERT, MOTOR VEHICLE SAFETY STANDARDS AND PRODUCT LIABILITY IN JAPAN 13-16 (The Economist Intelligence Unit Special Report No. 129, Aug. 1982) [hereinafter cited as EIU REPORT]; K. Arita, Product Liability in Japanese Law: Principles and Cases 4, 89 (unpublished manuscript) (available at the offices of the *Fordham International Law Journal*).

Another theory is that these restrictive practices result because foreign producers lack the knowledge and experience necessary to function in Japan’s standards system. TSG REPORT, *supra*, at 5. While Japanese standards and technical regulations are strict, the government officials who administer these regulations have broad discretion to relax these regulations in certain cases. *Id.* Foreign producers, who do not understand this system and do not have the connections with government officials necessary to operate in this system, are at a disadvantage as compared to Japanese producers. *Id.* In addition, the tremendous discretion given to Japanese government officials in administering the standards system has resulted in cases where an official’s restrictive interpretation of a regulation has created a barrier to trade. Weil & Glick, *supra*, at 862-65.

A final explanation for Japan’s restrictive trade practices is that the Japanese language itself creates standards which act as barriers to trade. See EIU REPORT, *supra*, at 2. The difficulty of translating written laws from Japanese to English often results in the misinterpretation of these laws by the United States. Klein, *Firms Seek Aid in Deciphering Japan’s Culture*, Wall St. J., Sept. 1, 1983, at 27, col. 3.

33. Government of Japan & Government of the United States Joint Statement on Standards, Testing and Certification Activities (Dec. 7, 1979) [hereinafter cited as 1979 Joint Statement], reprinted in GREEN REPORT, *supra* note 6, at 53-57 app. (1983). The basic principles of the 1979 Joint Statement include an agreement on mutual acceptance of test data, the use of open procedures when developing new standards, nondiscriminatory treatment of applications for product approval, availability of an appeals procedure, and specification of standards in terms of performance rather than design criteria. *Id.* The 1979 Joint Statement also required consultations between the United States and Japan concerning the the issues listed above. *Id.*

34. GREEN REPORT, *supra* note 6, at 20. For the first round of discussions, the United States presented to Japan a list of twelve issues for bilateral consultations. However, discus-

three packages of trade liberalization measures.³⁵ Despite this pro-

sions were held on only four of these issues. *Id.* The four issues were motor vehicles, telecommunications interconnect equipment, electrical appliances and small boats. *Id.*

At the next round of discussions, held in Toyko on July 29 and 30, 1980, the United States initiated bilateral discussions with Japan on three additional specific product issues: cosmetics, processed foods and agricultural chemicals. See GREEN REPORT, *supra* note 6, at 20; Dep't of State Telegram No. 190,084 from the United States Secretary of State, Washington, D.C. to the United States Embassy, Toyko (July 19, 1980) (all telegrams cited in this Note are available at the Office of the United States Trade Representative, Washington, D.C.).

35. The first package is contained in a report entitled MINISTERIAL CONF. FOR ECON. MEASURES, ON THE IMPROVEMENT OF IMPORT TESTING PROCEDURES, ETC. (Jan. 30, 1982) (prov. trans.) (available at the Office of the United States Trade Representative, Washington, D.C.) [hereinafter cited as January Package]. The January Package addresses 99 nontariff trade barriers which the United States and other signatories had complained of to Japan. *Id.* at 3-1. The package covers general areas, such as examination procedures, documentation requirements, and specific product issues, such as athletic equipment, agricultural chemicals, electrical appliances, medical devices, motor vehicles, pharmaceuticals, pressure vessels, processed foods, sake, and cosmetics. *Id.* Bilateral discussions concerning the January Package were held in Tokyo during the week of February 15, 1982. Dep't of State Telegram No. 033,818 from the United States Secretary of State, Washington, D.C., to the United States Embassy, Tokyo (Feb. 9, 1982).

The January Package was considered a compilation of measures already undertaken by various Japanese Government agencies, and narrowly focused on standards and import procedures. Statement of Ambassador W. Brock, United States Trade Representative, before the Subcomm. on International Economic Policy and Trade and on Asian and Pacific Affairs of the House Comm. on Foreign Affairs, 97th Cong., 2d Sess. 6 (June 15, 1982) (available from Office of the United States Trade Representative, Washington, D.C.) [hereinafter cited as Brock June 15 Statement]. However, the May 28, 1982 package was considered a major step toward the reduction of tariff and nontariff barriers which prevented access to Japanese markets. Dep't of State Telegram No. 146,783 from the Secretary of State, Washington, D.C., to the United States Embassy, Tokyo (May 28, 1982). The May package addresses the issue of transparency (open procedures) in standards development. See GREEN REPORT, *supra* note 6, at 21. Under the May package, qualified foreigners will be allowed to participate with the Japanese in the formation of new standards for products. Agress, *Japan Issues New Trade Package*, BUS. AM., June 14, 1982, at 10-12. United States-Japan bilateral discussions were held in August, November and December, 1982 concerning the May package's trade liberalization measures. Memorandum from Donald S. Abelson, Office of the United States Trade Representative 1-9 (Aug. 16, 1982) (discussing the May 1982 Japan trade package) (available at the Office of the United States Trade Representative, Washington, D.C.).

The May package also discusses other standards-related issues involving medical devices, GREEN REPORT, *supra* note 6, at 21, and two new issues concerning processed foods and Japanese certification practices regarding certain products. *Latest Talks Fail to Resolve Disputes But Concrete Reply Promised By Jan. 1*, 18 U.S. EXP. WEEKLY (BNA) 392, 393 (Dec. 7, 1982) (electrical appliances); Dep't of State Telegram No. 070,039 from the United States Information Service, Tokyo, to the United States Secretary of State, Washington, D.C. 1 (Dec. 7, 1982) (metal baseball bats); Dep't of State Telegram No. 070,019 from the United States Information Service, Tokyo, to the United States Secretary of State, Washington, D.C. 1 (Dec. 6, 1982) (motor vehicles).

gress, the bilateral consultations left several problems unresolved.³⁶ The problem areas relevant to the metal bat dispute include access to Japanese certification systems,³⁷ procedures for obtaining Japanese government approval to market products,³⁸ foreign input in

Another package of trade liberalization measures was issued by Japan in January, 1983. See Letter from Donald S. Abelson, Office of the United States Trade Representative, to Jaxon White, Senior Vice President, Health Industry Manufacturers Association (Jan. 14, 1983) (available at the Office of the United States Trade Representative, Washington, D.C.) [hereinafter cited as Jan. 14 Letter]. One part of this package established a committee to review 30 Japanese laws dealing with standards, import testing and certification practices, Jan. 14 Letter, *supra*, at encl. 8-9. (statement of Prime Minister Nakasone, Japan, on the Promotion of External Economic Measures), for the purpose of providing foreign firms the same treatment as domestic Japanese firms, thereby improving access to Japan's markets. Dep't of State Telegram No. 012,741 from the United States Secretary of State, Washington, D.C., to the United States Embassy, Tokyo 1 (Jan. 15, 1983) (statement by Ambassador Brock regarding Japanese trade announcement of January 13, 1983). This review led to the May 18, 1983 revisions of 17 Japanese laws dealing with standards and certification systems. See *infra* notes 97-104 and accompanying text.

36. See GREEN REPORT, *supra* note 6, at 21.

37. *Id.* Under certain Japanese laws, including the Consumer Product Safety Law, No. 31 of 1973 (Japan), the Electrical Appliance and Material Control Law, No. 234 of 1961 (Japan), the Pharmaceutical Affairs Law, No. 145 of 1960 (Japan), the Road Vehicles Act, No. 105 of 1960 (Japan), and the High Pressure Gas Control Law, No. 204 of 1951 (Japan) (copies of Japanese laws cited in this Note available through Japan Trade Center, New York, New York), the United States suppliers of such products as metal bats, pressure vessels, pharmaceuticals, cosmetics, medical devices, electrical appliances, automobiles, and air conditioners are not provided access to Japanese Government and private certification systems under conditions as favorable as those provided to Japanese suppliers. Such restrictions on access to certification systems violate the Standards Code obligation to provide equal access to certification systems. Standards Code, *supra* note 1, art. 7.2. See GREEN REPORT, *supra* note 6, at 21. For example, as a result of Japan's concern for product liability, and misuse of certification marks, Japanese certification systems prevent foreign suppliers, including Americans, from having their plants inspected and from receiving product type approval (government approval to market the product). See *id.* at 19, 22. This prevents foreign manufacturers from complying with Japanese specifications for products through the self-certification method. See *id.* at 22. Self-certification occurs when foreign manufacturers, whose factories are registered by the importing nation and who have legal ownership of certification marks (marks indicating that the product satisfies given mandatory or voluntary standards), are permitted to affix the certification marks to the products at their factories. See *id.* Factory registration usually requires on-site factory inspection by government officials, government type approval of products and agreement on product liability insurance. *Id.* In contrast, foreigners are subject to costly dockside inspections, referred to as "lot inspection systems," which may be carried out in an arbitrary and discriminatory manner. *Id.*

38. GREEN REPORT, *supra* note 6, at 21. Once United States producers have access to certification systems, obtaining product type approval is more difficult for foreign manufacturers than for Japanese producers of automobiles and electrical appliances. *Id.* at 22-23. Another related problem is that once product type approval is given, a foreign producer must

the development of Japanese standards,³⁹ acceptance by Japan of foreign test data,⁴⁰ and appeals of Japanese government standards-related determinations.⁴¹

II. DISPUTE SETTLEMENT PROCEEDINGS

The United States has initiated two dispute settlement proceedings under the Standards Code during the three years that it has been in effect.⁴² The first proceeding involving a process for the chilling of poultry, will not be discussed in this Note.⁴³ The second case involved an attempt by United States manufacturers to market metal baseball bats in Japan.

work through a Japanese agent in order to market a product in Japan. *Id.* at 23. The agent then legally gains proprietary rights to important information concerning the product's manufacturing. *Id.*

39. *Id.* at 21. This problem was dealt with by Japan's May 28, 1982 package of trade liberalization measures. See *supra* note 35 and accompanying text. However, the extent to which these measures solve the problems concerning the development of Japanese standards depends on how the May package is implemented. See Brock June 15 Statement, *supra* note 35, at 6.

40. GREEN REPORT, *supra* note 6, at 21. United States producers are frequently forced to repeat product tests in Japan that have already been completed in the United States. This occurs because the Japanese will not accept test data generated in the United States. *Id.* at 23. Product areas involved include pharmaceuticals, cosmetics, automobiles and medical devices. *Id.*

41. *Id.* at 21. United States producers have experienced problems with arbitrary decisions made during dock side inspections of products such as processed food, automobiles, cosmetics and pleasure craft. *Id.* at 24. Unfortunately, the judgment of low level Japanese bureaucrats during these lot inspections appears to be final. *Id.* However, the Japanese Office of Trade Ombudsman, established by the January 30, 1982 trade liberalization package, *supra* note 35 and accompanying text, may lead to an effective appeals process for these dock side inspection decisions. GREEN REPORT, *supra* note 6, at 24.

42. GREEN REPORT, *supra* note 6, at 14.

43. See Memorandum from Tom O'Connell, United States Dep't of Agriculture, to Don Abelson, Office of the United States Trade Representative 2 (May 11, 1982) (discussing the process and production method dispute) [hereinafter cited as O'Connell Memorandum] (all memoranda cited in this Note are available at the Office of the United States Trade Representative, Washington, D.C.). The United States issued a complaint under the Standards Code against the Commission of European Countries and the United Kingdom concerning a process and production method requirement for the immersion chilling of poultry. *Id.* Process and production methods (PPMs) are "any product related requirement which establishes design criteria for manufacturing, processing or production practices to ensure the acceptability of a final product." Letter from Andrew L. Stoler, Office of the United States Trade Representative, Geneva, to F. Roessler, GATT Secretariat, Geneva 1 encl. (Feb. 26, 1982). The United States claimed that a European Community directive, which required the use of

A. *The Metal Baseball Bat Dispute*

United States manufacturers have attempted to sell metal bats in Japan since the early 1970's.⁴⁴ In order to market metal baseball bats in Japan, every manufacturer must affix to the bats the mandatory government "S" certification mark,⁴⁵ the "SG" insurance

counterflow immersion of poultry, created an unnecessary barrier to trade in violation of the Standards Code. See O'Connell Memorandum, *supra*, at 2. The United States also claimed that the United Kingdom discriminated against United States poultry producers in applying this directive. *Id.* Although this problem was the subject of bilateral consultations, GREEN REPORT, *supra* note 6, at 14, the discussions did not resolve the issue, but instead generated a controversy in the interpretation of article 14.25 of the Code. Standards Code, *supra* note 1, art. 14.25. See GREEN REPORT, *supra* note 6, at 11-12; Letter from Nancy E. Morgan, Acting Director, GATT Affairs Division, United States Dep't of Com. to Jerry Steinpres, Executive Vice President, Shenandoah Valley Poultry Co. (July 1, 1982) (available at the Office of the United States Trade Representative, Washington, D.C.); See O'Connell Memorandum, *supra*, at 2. The United States, along with a minority of the signatories, contend that under article 14.25 of the Standards Code, PPM requirements can be the subject of dispute settlement procedures where these methods violate provisions of the Code. GREEN REPORT, *supra* note 6, at 12. A majority of the signatories, including the Commission of the European Communities, contend that PPM requirements are not subject to the Code's dispute settlement provisions "unless intentionally used to bypass Code obligations." *Id.*

44. See N.Y. Times, Oct. 25, 1981, § 3, at 17, col. 1. The first metal bats sold in Japan were made by United States manufacturers. They were introduced in Japan in the early 1970's and were sold through Japanese distributors. See *id.* By the mid-1970's, however, Japanese manufacturers were producing and selling metal bats. *Id.* Japan adopted standards and certification procedures for metal bats after a person was seriously injured in an accident involving a metal bat. Dep't of State Telegram No. 00615 from American Consulate, Osaka-Kobe, to the United States Secretary of State, Washington, D.C. 2 (May 10, 1983) [hereinafter cited as Telegram No. 00615]. The application of these standards and certification procedures forced United States manufacturers out of Japan's metal bat market. *Id.* Japan's metal bat market has continually expanded since the mid-1970's. Sales in that market are now estimated at U.S.\$30,000,000 per year. Letter from Herbert A. Cochran, Commercial Officer, Consulate General of the United States, Osaka-Kobe, to Maryanne Mascoline-Esser, Sporting Goods Manufacturers' Association (SCMA) 3 (Aug. 17 1981) (discussing JSBB approval for metal bats) [hereinafter cited as Aug. 17 Letter] (all letters cited in this Note are available at the Office of the United States Trade Representative, Washington, D.C.).

45. Consumer Product Safety Law, No. 31 of 1973 (Japan). Under the Consumer Product Safety Law, metal bats are required to have "S" (safety) marks to show that they have met safety standards. Letter from Herbert A. Cochran, Commercial Officer, Consulate General of the United States, Osaka-Kobe, to Maryanne Mascoline-Esser, SCMA 1 encl. (May 14, 1982) [hereinafter cited as May 14 Letter]. The two ways of receiving "S" mark approval are through the factory inspection system and the lot inspection system. See Dep't of State Telegram No. 260,133 from American Consulate, Osaka-Kobe, to United States Mission, Geneva 4 (May 26, 1982) (discussing Standards Code consultations with Japan on athletic equipment) [hereinafter cited as Telegram No. 260,133]; *infra* note 63 and accompanying text.

mark,⁴⁶ and the Japanese Rubberized Baseball League (JSBB)⁴⁷ approval mark.⁴⁸ On May 30, 1980, pursuant to the Standards Code and the United States-Japan Joint Statement on Standards, a United States government official asked the JSBB to provide information on standards and procedures for official approval of metal baseball bats.⁴⁹ In response, the JSBB stated that "no foreign bats were allowed to receive official approval."⁵⁰ This denial of access to Japan's certification systems, which appeared to violate article 7.2 of the Code,⁵¹ prompted the United States to raise the JSBB certification issue with Japan under the Standards Code.⁵² In an effort to

46. May 14 Letter, *supra* note 45, at 1 encl. "Also under the *Consumer Product Safety Law*, provision is made for manufacturers to put 'SG' marks (SG: safety goods) on bats to show there is a compensation system (product liability compensation system) for damages or injury due to any defects of products bearing the 'SG' mark." *Id.* "The SG mark on metal bats shows consumers that the manufacturer belongs to the Product Safety Association liability insurance system. If the bat is defective and injures someone while in use, liability insurance payments, up to a certain limit, will be made by the Product Safety Association." Telegram No. 260,133, *supra* note 45, at 2. The safety standards and testing methods for receiving the "SG" mark are the same as those for receiving the "S" mark. May 14 Letter, *supra* note 45, at 1, encl.

47. The JSBB governs 1.6 million players or 85% of organized amateur baseball players in Japan. The JSBB requires that the JSBB stamp of approval must be affixed to the bat before it can be used in a league game. *N.Y. Times*, *supra* note 44, at 17.

48. Telegram No. 00615, *supra* note 44, at 2, 4.

49. Telegram No. 260,133, *supra* note 45, at 4.

50. *Id.* Between April and June, 1981, several United States bat manufacturers requested information from the JSBB concerning standards and certification procedures. *Id.* at 5. The JSBB told the manufacturers that it would not approve foreign made bats. Letter from Shinzo Fukuda, Secretary-General, JSBB League Headquarters, Tokyo, to Joe Johnston, Executive Vice President, Easton Aluminum (July 8, 1981) (available at the Office of the United States Trade Representative, Washington, D.C.). The JSBB only granted its approval mark to six Japanese manufactures, claiming that the bat market was saturated. Dep't of State Telegram No. 011,541 from United States Dep't of Com. to United States Consulate, Osaka-Kobe 1 (July 1, 1981) [hereinafter cited as Telegram No. 011,541]. An executive of one of the six Japanese manufacturers admitted that the purpose of the approval mark is to limit competition. *N.Y. Times*, *supra* note 44, at 17, col. 1.

51. Standards Code, *supra* note 1, art. 7.2.

52. See Dep't of State Telegram No. 129,477 from the United States Secretary of State, Washington, D.C., to the United States Mission, Geneva 1 (May 13, 1982) [hereinafter cited as Telegram No. 129,477]. In July, 1981, United States representatives in Geneva and Tokyo informally raised the issue of access to certification systems for athletic equipment, especially metal bats. *Id.* On July 31, 1981, a United States Government representative to GATT made written representations under article 14.2 to a Japanese official. Aug. 17 Letter, *supra* note 44, at 1. The United States Government asserted that the JSBB refusal to grant foreign manufacturers approval marks was a denial of access to certification systems under conditions no less favorable than those accorded to domestic suppliers, in violation of article 7.2 of the

settle the Standards Code claim, the Government of Japan and the JSBB devised new standards for metal bats.⁵³ The new JSBB standards contained two design criteria⁵⁴ which violated the Standards Code.⁵⁵ The Code requires that product standards be based on performance criteria.⁵⁶ The JSBB design standards, in addition to problems of access to Japan's certification systems for other athletic products,⁵⁷ prompted the United States to request bilateral consultations with Japan under the Standards Code.⁵⁸

Prior to the consultations, the JSBB announced its intention to revoke all standards pertaining to metal bats.⁵⁹ In addition, the May 28, 1982 trade package⁶⁰ required the JSBB to take measures

Standards Code. Telegram No. 011,541, *supra* note 50, at 1. The United States assumed that the JSBB was a nongovernmental body, and accordingly, the application of Article 8.1 of the Code was appropriate. *Id.*

53. Dep't of State Telegram No. 18,839 from the American Embassy, Tokyo, to the United States Secretary of State, Washington, D.C. 1 (Oct. 15, 1981). The JSBB amended its procedures and extended its approval mark to foreign manufacturers. *Id.* The Japanese Government abolished its then existing technical regulation for metal bats and replaced it with a new regulation. *Id.* To be used in Japan, a bat must meet this new regulation, and must bear the "S" mark to show that this mandatory standard is met. *Id.* The JSBB adopted technical regulations for metal bats similar to the new mandatory government standards required for the "S" mark. *Id.*

54. Memorandum from Don Abelson, Office of the United States Trade Representative, to Jim Murphy, Office of the United States Trade Representative 1 (Apr. 26, 1982) (available at the Office of the United States Trade Representative, Washington, D.C.). The new JSBB standard requires manufacturers to use an aluminum alloy not made in the United States. *Id.* The substitute alloy is weaker than the material used by United States manufacturers. *See* Wash. Post, May 8, 1982, at C1, col. 1. The new design criteria also require rubber plugs in the end of the bats. *Id.* United States producers do not use rubber plugs because they can fly off under certain circumstances and injure bystanders. *Id.*

55. Standards Code, *supra* note 1, art. 2.4.

56. *Id.*

57. Telegram No. 129,477, *supra* note 52, at 1. These products included tennis balls, inflatable balls, and gymnastic equipment. *Id.*

58. *Id.* The United States claimed that the Japanese sporting associations were preparing, adopting and applying standards for the purpose of creating obstacles to trade, basing their specifications on design criteria rather than performance criteria in inappropriate situations and formulating and applying their certification systems so as to create obstacles to trade in violation of articles 2.1, 2.4, and 7.1 of the Code. *Id.* *See* Standards Code, *supra* note 1, arts. 2.1, 2.4, 7.1; *infra* notes 159-61, 176-77, 169-70 and accompanying text.

59. *See* Letter from Kensaku Hogen, Counselor, Embassy of Japan, to Maria Dennison, SGMA (May 21, 1982) (available at the Office of the United States Trade Representative, Washington, D.C) [hereinafter cited as May 21 Letter].

60. *See supra* note 35 and accompanying text.

that would "facilitate official approval procedures for foreign products."⁶¹ As a result, the JSBB stated that it would give its recommendation mark to bats that received the mandatory "S" mark.⁶² However, the "S" mark was not given to foreign producers on the same basis as it was given to Japanese producers.⁶³ Thus, United States manufacturers were still denied equal access to Japan's certification systems for metal bats⁶⁴ in violation of article 7.2 of the

61. Letter from Andrew L. Stoler, Trade Attache, Office of the United States Trade Representative, to Toshiaki Tanabe, Permanent Mission of Japan, Geneva (Aug. 4, 1982) (available at the Office of the United States Trade Representative, Washington, D.C.) [hereinafter cited as Aug. 4 Letter].

62. May 21 Letter, *supra* note 59, at 1.

63. Aug. 4 Letter, *supra* note 61, at 1. Under the Consumer Product Safety Law, No. 31 of 1973 (Japan), the two methods of receiving the "S" approval mark are the factory inspection system and the lot inspection system. *See supra* note 45 and accompanying text. Under the factory inspection system, a manufacturer must have its factory inspected before receiving the "S" mark and annually thereafter. *See* Telegram No. 260,133, *supra* note 45, at 2. The manufacturer must also participate in a model approval test of three bats. Following completion of these procedures, a manufacturer may self-test and self-certify its products for compliance with standards regulations and apply the "S" marks to them. *Id.* Under the factory inspection system, the manufacturer has legal ownership of the certification ("S") mark and is liable for the misuse of such mark. GREEN REPORT, *supra* note 6, at 22. Under the lot inspection system, a certain number of bats from each shipment are inspected as they arrive at the dock in Japan. *See* Telegram No. 260,133, *supra* note 45, at 2. If they pass the inspection, all the bats are unpacked, the "S" mark is affixed to every bat, and the bats then may be sold in Japan. If the sample bats do not pass the inspection, all the bats in the lot are returned to the manufacturer. *Id.*

64. Dep't of Com. Telegram No. 031,387 from United States Consulate, Osaka-Kobe, to the United States Secretary of State, Washington D.C. 1 (June 8, 1982). On June 4, 1982, the Easton Aluminum Company's application to register under the factory inspection system was denied by Japan's Ministry of International Trade and Industry (MITI). *Id.* MITI stated that "non-Japanese firms could not receive the same treatment as Japanese firms under the then existing Consumer Product Safety Law." *Id.* For each "S" mark issued, "the company pays a fee, which is pooled with other such payments to underwrite product liability insurance for metal bats." N.Y. Times, June 20, 1982, § 3, at 17, col. 1. Manufacturers that use the factory inspection system pay the insurance fees themselves, and assume the liability for defective bats. *Id.* For foreign producers forced to use the lot inspection system, the Japanese importing company pays the insurance fee and assumes the liability. *Id.* MITI told Easton that foreign producers are not allowed to participate in the product liability system, and thus use the factory inspection system, "because Japan's Consumer Product Safety Law does not provide for punishment of foreign companies for violations of the law. Because the law cannot be enforced on an American company, factory inspection of its bats would give it an unfair advantage over its Japanese competitors." *Id.* Instead, MITI told Easton to use the lot inspection system to obtain the "S" mark. *See* Aug. 4 Letter, *supra* note 61, at 2. The United States claimed that requiring lot inspection for foreign goods places them at a competitive disadvantage as compared to Japanese products. *Id.*

Standards Code.⁶⁵ To resolve the problem, the Government of Japan made an informal proposal to the United States which provided that United States manufacturers would be given certification mark stickers to affix to their metal bats before shipping.⁶⁶ The bats would be subject to spot-check lot inspections once they arrived in Japan.⁶⁷ The United States rejected this "modified lot inspection system" because United States manufacturers would still be denied equal access to Japan's factory inspection (certification) system.⁶⁸ After rejecting the proposal, the United States requested bilateral consultations with Japan in accordance with article 14.1⁶⁹ of the Standards Code.⁷⁰

The consultations were held in Tokyo in August of 1982.⁷¹ Not satisfied with the results,⁷² the United States gave Japan a written

65. Standards Code, *supra* note 1, art. 7.2. Under the lot inspection system, dock inspections can be arbitrary, time consuming, burdensome and costly. See GREEN REPORT, *supra* note 6, at 22; Telegram No. 260,133, *supra* note 45, at 1. In addition, United States manufacturers cannot deal directly with Japanese Government approval bodies, nor do they acquire ownership of the certification marks which is necessary to self-certify compliance with Japanese standards. See GREEN REPORT, *supra* note 6, at 22.

66. Dep't of State Telegram No. 216,101 from the United States Secretary of State to the United States Mission, Geneva 1 (Aug. 3, 1982).

67. *Id.*

68. See *id.* at 1-2. The United States manufacturers would prefer a factory inspection system where MITI chose as an inspector a United States testing concern, such as Underwriters' Laboratory. *Id.* at 2.

69. Standards Code, *supra* note 1, art. 14.1. See *supra* note 21 and accompanying text.

70. See Aug. 4 Letter, *supra* note 61, at 2. The United States claimed that Japan had violated article 7.2 of the Standards Code, *supra* note 1, art. 7.2, which requires Japan to provide United States manufacturers with the same access to certification systems as is provided to Japanese producers. *Id.*

71. Dep't of State Telegram No. 13,634 from the United States Embassy, Tokyo, to the United States Secretary of State, Washington, D.C. 1 (Aug. 10, 1982). Japan argued that the discussions were informal and not official consultations as provided for under article 14.1. The United States stated that the consultations occurred "under the Standards Code," without referring to a specific provision of the Code. *Id.* The United States claimed that the Japanese government's practice of denying United States manufacturers access to the factory registration system "led to nullification and impairment" of benefits accruing to the United States under the Code. *Id.* See Standards Code, *supra* note 1, art. 14.2. The United States was denied the Code benefit of equal access to certification systems guaranteed by article 7.2. See Standards Code, *supra* note 1, art. 7.2.

72. Letter from Andrew L. Stoler, Trade Attache, Office of the United States Trade Representative, Geneva to Katsuro Shinzeki, Permanent Mission of Japan, Geneva (Sept. 7, 1982) (available at the Office of the United States Trade Representative, Washington, D.C.) [hereinafter cited as Sept. 7 Letter].

copy of its allegations⁷³ as required by article 14.2 of the Code.⁷⁴ Pursuant to article 14.4 of the Standards Code,⁷⁵ the United States formally requested the Committee on Technical Barriers to Trade⁷⁶ on September 17, 1982 to investigate Japanese certification practices "based on the example of Japanese treatment of U.S. aluminum softball bats."⁷⁷ Shortly thereafter, the Sporting Goods Manufacturers Association (SGMA), a United States trade association, threatened to file a formal complaint against Japan under Section 301 of the Trade Act of 1974.⁷⁸ Cognizant of the possible investigation⁷⁹ and the threatened SGMA complaint,⁸⁰ the Japanese Govern-

73. *Id.* The United States claimed that MITI's actions, *see supra* notes 64-70 and accompanying text, nullified or impaired a benefit accruing to the United States "in that U.S. producers [were] accorded significantly less favorable treatment than Japanese producers in at least three areas." Sept. 7 Letter, *supra* note 72, at encl. 1. The three areas involved the arbitrary and time consuming nature of the lot inspection system, the additional costs to foreign producers of unboxing, attaching the "S" marks, and reboxing bats under the lot inspection system, and the fact that Japanese importing companies would be reluctant to deal with a foreign producer because, under the lot inspection system, the importing company is liable for misuse of the "S" mark (under the factory inspection system, the importer is not liable for misuse of the "S" mark). *Id.* at 2.

74. Standards Code, *supra* note 1, art. 14.2. Under the provisions of article 14.2, [i]f any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded, by another Party or Parties, and that its trade interests are significantly affected, the Party may make written representations or proposals to the other Party or Parties which it considers to be concerned.

Id. See Sept. 7 Letter, *supra* note 72, at 1; *supra* note 22 and accompanying text.

75. Standards Code, *supra* note 1, art. 14.4. The article states:

If no solution has been reached after consultations under Article 14, paragraphs 1 and 2, the Committee shall meet at the request of any Party to the dispute within thirty days of receipt of such a request, to investigate the matter with a view to facilitating a mutually satisfactory solution.

Id. See *supra* notes 23-24 and accompanying text.

76. Standards Code, *supra* note 1, art. 13; *see supra* notes 23-31 and accompanying text.

77. Dep't of State Telegram No. 275,923 from the United States Secretary of State, Washington, D.C., to the United States Embassy, Tokyo 1 (Sept. 30, 1982) [hereinafter cited as Telegram No. 275,923]. Since article 14.4 requires the Committee to meet within 30 days of such request for an investigation, Standards Code, *supra* note 1, art. 14.4, the United States expected that the metal bat dispute would be considered at the Committee's October, 1982 meeting. Telegram No. 275,923, *supra* at 1.

78. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2041 (1975) (codified as amended at 19 U.S.C. § 2411 (Supp. V 1981)). *See* J. Com., Nov. 8, 1982, at 23B, col. 5. Under Section 301 of the Trade Act of 1974, the President is authorized to retaliate against unfair trade practices. 19 U.S.C. § 2411 (1981).

79. *See supra* note 77 and accompanying text.

80. *See supra* note 78 and accompanying text.

ment offered a new solution.⁸¹ This proposal essentially changed the lot inspection system, which requires individual inspection of products,⁸² to a factory certification system, which allows a manufacturer to self-certify its compliance with standards.⁸³

At the December Trade Subcommittee meeting,⁸⁴ the United States was prepared to exchange letters with Japan to signify acceptance of the Japanese proposal.⁸⁵ Japan, however, offered a different proposal.⁸⁶ Although this proposal offered United States manufacturers treatment similar to that provided to Japanese manufacturers, the United States deemed the proposal inadequate because it did not help realize the larger objective of opening all Japanese certification systems to foreign suppliers⁸⁷ through factory certification.⁸⁸ Nevertheless, to expedite the sale of metal bats in Japan, United States trade officials recommended acceptance of the new proposal.⁸⁹

81. See Dep't of State Telegram No. 21,603 from the United States Embassy, Tokyo, to the United States Secretary of State, Washington, D.C. 1 (Dec. 10, 1982) [hereinafter cited as Telegram No. 21,603]. The United States revised the proposal and submitted the changes to Japan. See Memorandum from Don Abelson, Office of the United States Trade Representative to Jim Murphy, Office of the United States Trade Representative 1 (Nov. 12, 1982) (concerning the Japanese response to United States revisions of the metal bat proposal) (available at the Office of the United States Trade Representative, Washington, D.C.).

82. Under the lot inspection system, a certain number of bats from each shipment are inspected as they arrive at the dock in Japan. See Telegram No. 260,133, *supra* note 45, at 2.

83. Dep't of State Telegram No. 070,122 from the United States Information Service, Tokyo, to the United States Secretary of State, Washington, D.C. 1 (Dec. 7, 1982). Under a factory inspection (certification) system, a manufacturer must have its factory inspected before receiving the "S" mark. See Telegram No. 260,133, *supra* note 45, at 2. The manufacturer must also participate in a model approval test of three bats. Following completion of these procedures, a manufacturer may self-certify its products for compliance with applicable standards. *Id.*

84. United States officials held separate meetings with Japanese officials from December 1 through December 7, 1982, in search of a solution to the bat dispute. Telegram No. 21,603, *supra* note 81, at 1.

85. See *id.*

86. *Id.*

87. See Dep't of State Telegram No. 01506 from the United States Consulate, Osaka-Kobe, to the United States Secretary of State, Washington, D.C. 1 (Dec. 22, 1982) [hereinafter cited as Telegram No. 01506].

88. *Id.*

89. See Telegram No. 01506, *supra* note 87, at 1 (which lists several problems existing in the December 6 proposal, including loss of secret production knowledge and excessive paperwork).

Three weeks later, the Government of Japan abruptly removed metal bats from the list of specified products which must have "S" marks under the Consumer Product Safety Law.⁹⁰ This created problems for United States manufacturers because they were unaware of the procedures for obtaining the "SG" insurance mark required for JSBB approval.⁹¹ These problems were solved when Japan's Product Safety Association gave the United States a copy of the procedures for obtaining the "SG" insurance mark.⁹² In March, 1983, after Japan announced its intention to revise its standards and certification systems laws, the United States and Japan exchanged letters indicating acceptance of the earlier proposal on "S" and "SG" marks,⁹³ and the United States withdrew its request for a Committee investigation under the Standards Code.⁹⁴

90. Dep't of State Telegram No. 01541 from the United States Consulate, Osaka-Kobe, to the United States Secretary of State, Washington, D.C. 1 (Dec. 29, 1982). As a result, metal bats produced in the United States could be sold in Japan without the "S" certification mark. *Id.* at 2. Japan pledged to continue working toward a solution to the problem of access to the "S" certification mark encountered by manufacturers of metal bats and the other eight products designated under the Consumer Product Safety Law, Law No. 31 of 1973 (Japan) (pressure cookers, motorcycle helmets, baseball batting helmets, infant beds, roller skates, mountainclimbing ropes, bottled carbonated beverages, and glass bottles). See Mainichi Daily News, Dec. 28, 1982, at 5, col. 2; Telegram No. 00615, *supra* note 44, at 9.

91. See Dep't of State Telegram No. 00850 from the United States Embassy, Tokyo, to the United States Secretary of State, Washington, D.C. 1 (Jan. 14, 1983). The JSBB now required the "SG" mark instead of the "S" mark. *Id.* However, the Product Safety Association had not yet developed procedures for allowing foreign manufacturers to obtain the "SC" mark. *Id.*

92. Dep't of State Telegram No. 00186 from the United States Consulate, Osaka-Kobe, to the United States Secretary of State, Washington, D.C. 1 (Feb. 10, 1983) [hereinafter cited as Telegram No. 00186]. To receive the "SG" marks, United States manufacturers must obtain factory inspections, model approvals, and a standard insurance contract with the Product Safety Association (PSA). Dep't of State Telegram No. 00035 from the United States Consulate, Osaka-Kobe, to the United States Secretary of State, Washington, D.C. 1 (Jan. 23, 1983). PSA officials agreed to a timetable which allowed for factory registration in May, 1983, PSA model approval by July 1, 1983, application for JSBB authorization by August 1, 1983 and negotiations for the sale of United States bats in Japan during the fall, 1983. Telegram No. 00186, *supra*, at 2.

93. Letter from Shinji Fukukawa, Director-General, International Trade Administration Bureau, MITI, to David R. Macdonald, Deputy United States Trade Representative (Mar. 9, 1983). On March 14, 1983, the United States presented a letter to Japan which recognized Japan's December 6 proposal and pledged the United States' cooperation in implementing the proposal. Dep't of State Telegram No. 072,755 from the United States Secretary of State, Washington, D.C., to the United States Mission, Geneva 1 (Mar. 17, 1983) [hereinafter cited as Telegram No. 072,755].

94. Telegram No. 072,755, *supra* note 93, at 1.

B. *The Importance of the Metal Bat Case*

The metal bat case demonstrated to Japanese officials the problems foreigners have with access to Japan's markets.⁹⁵ As a result, Japan addressed the underlying problem of access to its certification systems.⁹⁶ The revision of the certification systems began with the formation of a committee to review Japan's standards and certification laws.⁹⁷ After a two-month review, the Committee issued a report⁹⁸ which announced the formulation of measures⁹⁹

95. See Telegram No. 00615, *supra* note 44, at 1. Under the Consumer Product Safety Law, No. 31 of 1973 (Japan), and 30 other laws establishing certification systems, Telegram No. 00615, *supra* note 44, at 3-5, domestic suppliers may receive certification through the factory registration method, but foreign suppliers are forced to use the lot inspection method. *Id.* at 4, 5. Japan recognized the United States' claim that the lot inspection system, which is time consuming and costly, acts as an "impenetrable non-tariff barrier" that denies foreign producers equal access to Japan's certification systems. *Id.* at 5.

96. *Id.* at 9.

97. Letter from David Macdonald, Deputy United States Trade Representative to Howard Bruns, President, SGMA (Feb. 9, 1983). United States officials claimed that a major reason for the establishment of the Japanese review committee was the United States' request for the Committee on Technical Barriers to Trade to investigate Japan's certification procedures for United States-produced metal bats. N.Y. Times, Feb. 22, 1983, at D5, col. 5. Other factors leading to the formation of the Japanese review committee included political pressure on the Nakasone Government caused by increasing economic tensions between the United States and Japan. Wash. Post, Mar. 26, 1983, at D10, col. 1. This pressure was evident at the December 3-4, 1982 Trade Subcommittee Meeting where the United States requested that Japan "implement a national certification policy that provides foreign suppliers treatment equal to that provided Japanese suppliers under government and non-government certification systems." Dep't of State Telegram No. 03014 from the United States Secretary of State, Washington, D.C., to the United States Embassy, Tokyo 1 (Jan. 6, 1983).

98. Letter from Donald S. Abelson, Director, Technical Trade Barriers, to Sherwin Gardner, Vice President, Science and Technology, Grocery Manufacturers of America (Mar. 28, 1983) (report entitled "Improvement of Japan's Standards and Certification Systems") (available at the Office of the United States Trade Representative, Washington, D.C.).

99. The measures were published in a report entitled Review of Standards and Certification Systems. See Embassy of Japan, Press Release (Mar. 25, 1983) [hereinafter cited as Tokyo Press Release]; Dep't of State Telegram No. 114,009 from the United States Secretary of State, Washington, D.C., to the United States Embassy, Tokyo (Apr. 26, 1983) [hereinafter cited as Telegram No. 114,009]. The United States claimed that the review addressed all of the standards-related issues raised in consultations with Japan, including direct access to Japan's certification systems for foreign suppliers, increased transparency during the development of standards, greater use of international standards, increased acceptance of foreign test data and continued simplification of import procedures. Office of the United States Trade Representative, Press Release No. 83/11 (Mar. 25, 1983) (entitled "USTR Brock Hopeful Following Japanese Standards Review") [hereinafter cited as Washington Press Release] (available at the Office of the United States Trade Representative, Washington, D.C.). For a discussion of the issues considered at previous United States-Japan consultations, see *supra* notes 34, 37-41 and accompanying text.

intended to open Japan's markets.¹⁰⁰ These measures included proposed amendments to seventeen Japanese laws dealing with standards and certification systems.¹⁰¹ Sixteen of these amendments¹⁰² were contained in omnibus legislation¹⁰³ passed by Japan's Diet.¹⁰⁴

The changes in Japanese law are "the most significant development in the [United States-Japan] bilateral relationship since the conclusion of the Tokyo Round of Multilateral Trade Negotiations."¹⁰⁵ The majority of United States exports to Japan, possibly

100. See Tokyo Press Release, *supra* note 99, at 1. The Japanese Government stated that its most important goal was to eliminate discrimination between foreign and Japanese producers in Japan's certification procedures. *Id.* This objective would be achieved by amending nearly 20 laws (including the Pharmaceuticals Affairs Law, No. 145 of 1960 (Japan) and the Consumer Product Safety Law, No. 31 of 1973 (Japan)) to allow foreign suppliers to obtain certification directly from the Japanese government on the same basis as Japanese producers. *Id.*; see Telegram No. 114,009, *supra* note 99, at 1.

101. See Washington Press Release, *supra* note 99, at 1.

102. One of the proposed 17 law changes was approved by the Japanese Diet in a special bill on May 13, 1983. See Wall St. J., May 19, 1983, at 38, col. 3.

103. Dep't of Com. Telegram No. 07313 from the United States Embassy, Tokyo, to the Secretary of State, Washington, D.C. 1 (Apr. 19, 1983).

104. The lower half of Japan's Diet approved the legislation on May 10, 1983. Dep't of State Telegram No. 00640 from United States Consulate, Osaka-Kobe, to the United States Secretary of State, Washington, D.C. 1 (May 13, 1983). The upper house of Japan's Diet approved the bill on May 18, 1983. Dep't of State Telegram No. 00681 from the United States Consulate, Osaka-Kobe to the United States Secretary of State, Washington, D.C. 1 (May 19, 1983). The 16 laws amended are: the Consumer Product Safety Law, No. 31 of 1973 (Japan); the High Pressure Gas Control Law, No. 204 of 1951 (Japan); the Law Concerning the Securing of Safety and the Optimization of Transaction of Liquefied Petroleum Gas, No. 149 of 1967 (Japan); the Law Concerning the Examination and Regulation of Manufacture, etc. of Chemical Substances, No. 117 of 1973 (Japan); the Measurement Law, No. 207 of 1951 (Japan); the Electrical Appliances and Materials Control Law, No. 234 of 1961 (Japan); the Gas Utility Law, No. 51 of 1954 (Japan); the Fertilizer Control Law, No. 127 of 1950 (Japan); the Agricultural Mechanization Promotion Law, No. 252 of 1953 (Japan); the Agricultural Chemical Regulation Law; No. 82 of 1948 (Japan); the Law Concerning Safety Assurance and Quality Improvement of Feed, No. 35 of 1953 (Japan); the Law Concerning Standardization and Proper Labeling of Agricultural and Forestry Products (JAS Law), No. 175 of 1950 (Japan); the Nutrition Improvement Law, No. 248 of 1952 (Japan); the Pharmaceutical Affairs Law, No. 145 of 1960 (Japan); the Road Vehicles Act, No. 105 of 1960 (Japan); and the Industrial Safety and Health Law, No. 57 of 1972 (Japan). Comm. on Technical Barriers to Trade, Information on Implementation and Administration of the Agreement, GATT Doc. No. TBT/1/Add.32 (1983) (communication from Japan to the Committee on Technical Barriers to Trade) [hereinafter cited as GATT Notification].

105. Office of the United States Trade Representative, Press Release No. 83/16, at 1 (May 18, 1983) (entitled "Major Japanese Shift") [hereinafter cited as May 18 Press Release] (available at the Office of the United States Trade Representative, Washington, D.C.).

up to five billion dollars worth of trade, could be affected by the changes to seventeen Japanese standard and certification laws.¹⁰⁶ Nevertheless, the extent to which the changes will improve United States manufacturers' access to Japan's markets depends on the regulations drafted to implement these revisions, including the procedures which must be formulated to provide United States producers with direct access to Japan's certification systems.¹⁰⁷

III. *CRITIQUE OF THE DISPUTE SETTLEMENT PROVISIONS*

The objectives of the Tokyo Round negotiations were to improve the effectiveness of the dispute settlement provisions of GATT and the Multilateral Trade Negotiations (MTN) Codes¹⁰⁸ and reduce technical barriers to trade.¹⁰⁹ To determine the effectiveness of the Standards Code's dispute settlement provisions, the dispute settlement proceedings held between the United States and Japan may be analyzed in light of the Tokyo Round objectives.

106. *Id.* at 2. Approximately 60% of United States-manufactured exports to Japan will be affected. 129 CONG. REC. S7038 (daily ed. May 18, 1983) (statement of Sen. Chafee discussing the May 18, 1983 amendments to Japan's standards and certification laws) [hereinafter cited as Statement of Sen. Chafee]. See May 18 Press Release, *supra* note 105, at 2. See also Japanese Diet Passes Legislation Easing Standards Laws For Manufactured Imports, 19 U.S. EXP. WEEKLY (BNA) 281, 281 (May 24, 1983). The changes are intended to allow manufacturers to self-certify imports through factory registration instead of costly lot inspection. See Statement of Sen. Chafee, *supra*, at S7038. Products which manufacturers may self-certify through factory registration include: (1) products covered by the Consumer Product Safety Law, No. 31 of 1973 (Japan), including pressure cookers, infant beds, and glass bottles containing carbonated beverages, see Telegram No. 00615, *supra* note 44, at 3; (2) liquified petroleum gas equipment; (3) electrical appliances; (4) gas appliances; (5) fertilizers; and (6) agricultural chemicals. See GATT Notification, *supra* note 104, at 2-7.

107. May 18 Press Release, *supra* note 105, at 3. Bilateral discussions of the May 18, 1983 changes in Japanese standards and certification laws were held in Tokyo on July 27 and 28, 1983. Dep't of State Telegram No. 14,664 from the United States Embassy, Tokyo, to the United States Secretary of State, Washington, D.C. 1, 2 (Aug. 1, 1983). However, just five months after Japan amended these laws, a group of United States testing experts claimed that the Japanese government was not enforcing these revisions. See Wall St. J., Oct. 20, 1983, at 34, col. 2.

108. See *infra* note 111 and accompanying text.

109. See *infra* note 156 and accompanying text.

A. Effectiveness of the Standards Code's Dispute Settlement Provisions

At the Tokyo Round, an important goal of the participants was legal reform¹¹⁰ of the dispute settlement provisions of GATT.¹¹¹

110. The Tokyo Declaration required the negotiators to consider "improvements in the international framework for the conduct of world trade." Graham, *Results of the Tokyo Round*, *supra* note 2, at 169; *see also* GATT, GATT ACTIVITIES IN 1979 AND CONCLUSION OF THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS 15 (1980). This led to the formation of a negotiating group on "framework" reform. *Id.* One agreement produced by the Framework Group, the Draft Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Multilateral Trade Negotiations, Group "Framework," GATT Doc. No. MTN/FR/W/20/Rev.2 (1979), reprinted in STAFF OF HOUSE COMM. ON WAYS AND MEANS, SENATE COMM. ON FINANCE, 96TH CONG., 1ST SESS., MULTILATERAL TRADE NEGOTIATIONS 375 (Joint Comm. Print 1979), clarified the dispute settlement procedures under GATT. Graham, *Results of the Tokyo Round*, *supra* note 2, at 171.

111. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 94TH CONG., 1ST SESS., BACKGROUND AND STATUS OF THE MULTILATERAL TRADE NEGOTIATIONS 73 (Comm. Print 1975) [hereinafter cited as BACKGROUND AND STATUS OF MULTILATERAL TRADE NEGOTIATIONS]. *See* R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 267 (1975) [hereinafter cited as R. HUDEC, THE GATT LEGAL SYSTEM]; Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 148, 156-57 (1980) [hereinafter cited as Hudec, *GATT Dispute Settlement*].

During the 1950's, GATT's dispute settlement procedures were actively utilized. *Id.* at 151. However, in the 1960's, the number of cases invoking these disputes settlement procedures decreased sharply. R. HUDEC, THE GATT LEGAL SYSTEM, *supra*, at 228. The procedures had become ineffective. Hudec, *GATT Dispute Settlement*, *supra*, at 147; Graham, *Reforming the International Trading System*, *supra* note 8, at 29; Graham, *Results of the Tokyo Round*, *supra* note 2, at 171.

One reason for this ineffectiveness was the growing practice of signatories to avoid enforcing their rights under GATT. During the 1950's, GATT's regulatory policy involved strict enforcement of GATT obligations. *See* Hudec, *GATT Dispute Settlement*, *supra*, at 151. When violations of GATT rules occurred, the signatories were quick to adjudicate their legal complaints through GATT's dispute settlement provisions. *Id.* In the 1960's, the signatories became reluctant to use GATT's enforcement procedures. *Id.* This reluctance was due to two developments. First, several of the original GATT rules became obsolete. R. HUDEC, THE GATT LEGAL SYSTEM, *supra*, at 193-94; *see* Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L. 747, 748 (1978). The signatories began to ignore these rules and concentrated on reaching practical solutions. Hudec, *GATT Dispute Settlement*, *supra*, at 151. This breakdown of the original GATT rules led signatory governments to question the utility of a rule-oriented approach in general. *Id.* The second development causing this reluctance to use GATT's enforcement procedures was the change in political power within GATT. *Id.* The growth of a strong block of developing countries increased the superpowers preference for a less rule-oriented approach. *Id.* The developing countries pressed for strict compliance with GATT rules by the developed countries. *Id.* Finding these demands excessive, the developed countries' antilegalistic attitude grew as their compliance with the GATT rules decreased. *Id.*

Another reason for the ineffectiveness of GATT's dispute settlement provisions was the lack of detailed procedures and time limits in these provisions. R. HUDEC, THE GATT LEGAL

Under GATT, defendant countries could delay and obstruct committee consideration of a dispute.¹¹² In response to this problem, the signatories revised GATT's dispute settlement provisions.¹¹³ The Tokyo Round negotiators formulated specific procedures "for the establishment of panels of experts to hear complaints and for the ultimate disposal of cases,"¹¹⁴ and suggested time limits for the different phases of dispute settlement under GATT.¹¹⁵ The negotiators formulated the Tokyo Round nontariff barriers (NTB) codes' dispute settlement provisions based on the revised GATT provisions.¹¹⁶ Thus, dispute settlement under the Standards Code should be more effective than dispute settlement under GATT as implemented before the Tokyo Round.

Some commentators have found improvement in the dispute settlement provisions of the NTB Codes,¹¹⁷ including the new time limits for the different phases of the dispute settlement process.¹¹⁸ However, several writers have criticized the dispute settlement provisions of the new Codes. Two of these criticisms are that the Codes

SYSTEM, *supra*, at 269; Graham, *Results of the Tokyo Round*, *supra* note 2, at 171; see Hudec, *GATT Dispute Settlement*, *supra*, at 171.

112. Hudec, *GATT Dispute Settlement*, *supra* note 111, at 171-72. According to one commentator, "[t]he most frequent complaint about the panel procedure in the 1970's was that the defendant governments were able to obstruct or delay the panel procedure . . . thereby increasing the time, effort and unpleasantness involved in the adjudication of a legal complaint." *Id.* at 171.

113. General Agreement on Tariffs and Trade, *supra* note 2, arts. XXII, XXIII. See also Hudec, *GATT Dispute Settlement*, *supra*, note 111, at 170-72; Graham, *Results of the Tokyo Round*, *supra* note 2, at 129. For a description of GATT's dispute settlement provisions contained in articles XXII and XXIII, see Jackson, *GATT as an Instrument for the Settlement of Trade Disputes*, AM. SOC. INT'L L.: PROCEEDINGS 144 (1967) [hereinafter cited as Jackson, *Settlement of Trade Dispute*].

114. Graham, *Results of the Tokyo Round*, *supra* note 2, at 171. These improved procedures included a standing list of potential GATT panelists. *Id.* For a description of the revised panel procedures contained in article XXIII of GATT, see Hudec, *GATT Dispute Settlement*, *supra* note 111, at 174-77.

115. Hudec, *GATT Dispute Settlement*, *supra* note 111, at 174-77.

116. See *Judicial Conference of Customs and Patent Appeals*, *supra* note 22, at 2-93; Graham, *Results of the Tokyo Round*, *supra* note 2, at 171.

117. See *Judicial Conference of Customs and Patent Appeals*, *supra* note 22, at 595; Hudec, *GATT Dispute Settlement*, *supra* note 111, at 187; Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 LAW & POL'Y INT'L BUS. 21, 46 (1980); Comment, *GATT and the Tokyo Round; Legal Implications of the New Trade Agreement*, 11 CALIF. W. INT'L L.J. 302, 310 (1981).

118. *Judicial Conference of Customs and Patent Appeals*, *supra* note 22, at 595.

should require even more stringent time limits for the different dispute settlement phases¹¹⁹ and that the Codes overly emphasize consultations rather than third party adjudication (*i.e.* committee or panel proceedings), thereby undermining the dispute settlement process.¹²⁰

1. Result-Oriented Criteria

The slow progress of the United States-Japan metal bat dispute seemingly supports the recommendation for more detailed dispute settlement procedures involving third party adjudication and less emphasis on consultations.¹²¹ However, the criteria for determining the effectiveness of the Standards Code's dispute settlement provisions should not be the number of disputes settled or the speed of the settlement process.¹²² The effectiveness of the dispute settlement procedures is more accurately determined by criteria which measure results.¹²³

Five such result-oriented criteria were utilized to determine the effectiveness of GATT's dispute settlement provisions.¹²⁴ These criteria may be applied to the Standards Code's dispute settlement

119. *See id.*

120. *See id.* at 598. The commentator argues that this stress on consultations as a means of settling disputes under the MTN Codes will result in cases being bargained out based on political factors, not rules of law, and this will prevent a body of precedent committee rulings from developing under the Codes. *Id.* This indicates that dispute settlement will remain a political and time consuming process. *Id.* at 596-97.

121. The fact that the Committee on Technical Barriers to Trade did not act within 30 days on the United States' request for an investigation of the bat case, *see supra* note 77 and accompanying text, thus violating article 14.4 of the Standards Code, supports the claim that more formal procedures are necessary to implement the Standards Code's dispute settlement provisions. Standards Code, *supra* note 1, art. 14.4; *see supra* note 119 and accompanying text. In addition, metal bats will not be sold in Japan until three years after the United States first raised the bat issue with Japan. *See supra* note 52 and accompanying text. This confirms the view that the emphasis on consultations allowed Japan to delay the metal bat dispute settlement procedures.

122. Jackson, *Settlement of Trade Dispute*, *supra* note 113, at 152-53.

123. *See id.*

124. *Id.* at 153. These criteria were proposed by Professor John H. Jackson, an authority on the dispute resolution procedures of GATT, at the 61st annual meeting of the American Society of International Law, held on April 27, 1967. *Id.* For other articles by Jackson discussing GATT and its dispute settlement provisions, see Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L. 747 (1978); Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93 (1978).

provisions because of the similar objectives and content of such provisions in GATT and the Standards Code.¹²⁵

The first criterion is that "the procedure helps effectuate other goals of the particular institution."¹²⁶ This criterion, as applied to GATT, means that the dispute settlement procedures should help enforce the particular obligations of GATT.¹²⁷ Under the Standards Code, the settlement of the metal bat dispute prompted changes in Japanese standards and certification laws.¹²⁸ The effect of these changes is to reduce nontariff barriers to trade.¹²⁹ Thus, the United States' implementation of the Code's dispute settlement provisions fulfilled this criterion by enforcing Japan's obligations under the Standards Code.¹³⁰

The second criterion is that the procedures "[tend] to assist friendly relations between parties, and not exacerbate them."¹³¹ Under GATT, the parties are encouraged to achieve a mutually satisfactory solution through consultation and conciliation.¹³² This is important because parties to GATT will continue to have com-

125. Article XXII of GATT states: "Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement." General Agreement on Tariffs and Trade, *supra* note 2, art. XXII. This is nearly the same language as is contained in article 14.1 of the Standards Code. See Standards Code, *supra* note 1, art. 14.1. In addition, article XXIII of GATT, concerning nullification or impairment of GATT objectives, provides for written representation to the offending party in the same manner as provided under article 14.2 of the Standards Code. See Standards Code, *supra* note 1, art. 14.2; General Agreement on Tariffs and Trade, *supra* note 2, art. XXIII.

126. Jackson, *Settlement of Trade Dispute*, *supra* note 113, at 153. The other goals of the Standards Code signatories are the major principles of the Code. See *supra* notes 9-20 and accompanying text; *infra* notes 158-79 and accompanying text.

127. Jackson, *Settlement of Trade Dispute*, *supra* note 113, at 153. Jackson concludes that GATT, before the Tokyo Round reforms, least fulfilled this first criterion because of the weaknesses and self-defeating effects of GATT sanction. *Id.* These weaknesses include GATT's stress on informality and conciliation (*i.e.* consultations) throughout the dispute settlement procedures and its lack of effective sanctions for GATT violations. *Id.* at 151-52.

128. See *supra* notes 95-107 and accompanying text.

129. See *infra* notes 159-79 and accompanying text.

130. *Id.* As previously discussed, the metal bat case was not the only factor leading to Japan's revision of its standards and certification systems laws. Nevertheless, the bat case must be considered one of the most important factors. See *supra* note 97 and accompanying text.

131. Jackson, *Settlement of Trade Dispute*, *supra* note 113, at 153.

132. *Id.* at 154.

mercial relationships after a dispute has been settled.¹³³ The parties to the metal bat dispute used the Standards Code to reach an acceptable solution through bilateral consultations without a Committee investigation.¹³⁴ Instead of aggravating relations between the United States and Japan, the consultations led to improved access¹³⁵ to Japan's markets for a variety of products.¹³⁶

The third objective of effective dispute settlement is that the procedures "reasonably [protect] the interests of nonparties and parties to the immediate controversy."¹³⁷ GATT provides for notification to all signatories of any formal proceedings¹³⁸ so that all interested parties may participate in the dispute resolution proceedings.¹³⁹ In the metal bat controversy, all signatories to the Standards Code were notified of the dispute concerning access to Japan's certification systems after the United States requested a Committee investigation.¹⁴⁰ Each signatory would have been represented if the Committee had investigated the bat dispute.¹⁴¹ In addition, the interests of all the signatories were promoted by the changes in Japanese law because access to Japan's certification systems will be improved for all foreign manufacturers.¹⁴²

The fourth goal of dispute settlement procedures is to promote "justice."¹⁴³ Justice for GATT purposes has been defined as reasonably accurate fact-finding and "a reference to higher and relatively objective standards, such as a collective international morality, which does not depend solely upon power or might."¹⁴⁴

Since there was no investigation in the metal bat dispute, the accuracy of the fact-finding was not in issue.¹⁴⁵ However, because

133. *Id.*

134. *See supra* note 94 and accompanying text.

135. *See supra* notes 101-04.

136. *See supra* notes 95-107.

137. Jackson, *Settlement of Trade Dispute*, *supra* note 113, at 153.

138. *Id.* at 154.

139. *Id.*

140. All signatories are notified of matters brought before the Committee on Technical Barriers to Trade because every signatory is a participating member of the Committee. *See Standards Code*, *supra* note 1, art. 13.1.

141. *See supra* note 24 and accompanying text.

142. *See supra* note 100 and accompanying text.

143. Jackson, *Settlement of Trade Dispute*, *supra* note 113, at 153.

144. *Id.*

145. Fact-finding by the Committee on Technical Barriers to Trade did not occur because the dispute settlement process did not proceed beyond the consultations phase. *See supra* note 94 and accompanying text.

the Standards Code provides for distribution of an investigative report to all contracting parties,¹⁴⁶ international moral pressure is likely to promote voluntary settlement. Thus, the threat of international attention can be focused on the 'wrongdoer' and the fact of its wrongdoing can enter into all other relations and negotiations of the party.¹⁴⁷ In the metal bat controversy, Japan desired to avoid the publicity associated with third party adjudication of international disputes.¹⁴⁸ When the United States requested a Committee investigation, Japan sought a rapid solution to the dispute.¹⁴⁹

The final criterion is that the costs of dispute settlement do not unduly exceed the benefits.¹⁵⁰ The costs of panel operations and Contracting Parties' debates¹⁵¹ under GATT are believed to be as low as that of other international dispute settlement processes.¹⁵² The benefits of these procedures are considered to be higher than most.¹⁵³ While precise statistics concerning the costs of the Standards Code's dispute settlement procedures are not available, these costs are comparable to those under GATT.¹⁵⁴ This criterion is satisfied because as a result of the changes in Japanese standards and certification laws, "as much as five billion dollars worth of trade may be affected."¹⁵⁵

146. Jackson, *Settlement of Trade Dispute*, *supra* note 113, at 154. See Standards Code, *supra* note 1, at annex 3.

147. Jackson, *Settlement of Trade Dispute*, *supra* note 113, at 154.

148. See generally Telegram No. 00615, *supra* note 44, at 8.

149. See *id.* at 7-8. The threat of third party adjudication (*i.e.* committee or panel proceedings) influences the parties toward more moderate behavior, thus creating a higher probability of settling a dispute through negotiations. R. BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENTS* 58 (1981). This is especially true for Japan, in that the Japanese did not want to consider improved dispute settlement provisions during the Tokyo Round because Japan would prefer to settle disputes without publicizing them. See *Judicial Conference on Customs and Patent Appeals*, *supra* note 22, at 592.

150. Jackson, *Settlement of Trade Dispute*, *supra* note 113, at 153.

151. *Id.* at 155.

152. *Id.*

153. *Id.*

154. The costs of dispute settlement under the Standards Code are probably similar to those costs under GATT because of the parallel construction of the dispute settlement provisions of the Standards Code and GATT. See *supra* note 125 and accompanying text. Based on these similarities, the costs of dispute settlement under the Standards Code should be as low as the costs under GATT. See *supra* note 152 and accompanying text.

155. May 18 Press Release, *supra* note 105, at 2. See *supra* note 106 and accompanying text.

2. Reducing Nontariff Barriers to Trade

A major objective of the Tokyo Round of Multilateral Trade Negotiations was the reduction of nontariff barriers to trade.¹⁵⁶ Therefore, another approach to analyzing the effectiveness of the Code's dispute settlement provisions as applied in the metal bat case is to assess the reduction of nontariff barriers to trade.¹⁵⁷ To determine whether the dispute settlement process reduced technical barriers, the effect of the metal bat case on Japan's compliance with the five basic obligations of the Standards Code must be evaluated.¹⁵⁸

The first of these obligations, and the most important,¹⁵⁹ is that standards, technical regulations, and rules of certification systems should not create unnecessary obstacles to trade.¹⁶⁰ As previously noted, the United States contended that Japan prevented access to certification systems, limited foreign input into the development of Japanese standards, and refused to accept United States-produced test data in Japan.¹⁶¹ The Japanese standards and certification laws¹⁶² were reviewed in order to provide direct access to certification systems, to increase the use of open procedures during the development of standards, and to facilitate acceptance of foreign test data.¹⁶³ The resulting changes in Japanese law should remove unnecessary barriers to trade.¹⁶⁴

Signatories must also establish the same standards, technical regulations, certification and testing treatment for imported as well as for domestic products.¹⁶⁵ The metal bat case forced Japan to acknowledge that numerous Japanese laws discriminated between imported products and Japanese products.¹⁶⁶ Revision of Japanese

156. BACKGROUND AND STATUS OF MULTILATERAL TRADE NEGOTIATIONS, *supra* note 111, at 3.

157. *See supra* note 5 and accompanying text.

158. *See generally* GREEN REPORT, *supra* note 6, at 5-6.

159. *Id.* at 5.

160. Standards Code, *supra* note 1, arts. 2.1, 7.1. The Code prohibits both intentional and unintentional actions which violate the above provisions. GREEN REPORT, *supra* note 6, at 5; U.S. DEP'T OF COM., *supra* note 1, at 4.

161. *See supra* notes 37, 39, 40 and accompanying text.

162. *See supra* note 97 and accompanying text.

163. *See supra* notes 99, 100 and accompanying text.

164. *See supra* notes 105-07 and accompanying text.

165. *See supra* notes 11-15 and accompanying text.

166. *See supra* note 95 and accompanying text.

law¹⁶⁷ provided equal access to certification systems and equal acceptance of test data.¹⁶⁸

The Code further obligates signatories to ensure that access to regional certification systems is granted without discrimination.¹⁶⁹ The metal bat controversy arose from a violation of this obligation by the Government of Japan and the JSBB.¹⁷⁰ The settlement of the metal bat dispute not only provided for equal access to Japan's certification systems for foreign metal bat manufacturers,¹⁷¹ but also led to equal access for suppliers of other products, including electrical appliances, agricultural chemicals, and petroleum gas equipment.¹⁷²

Signatories, when developing new standards, must use requirements¹⁷³ promulgated by an international standards organization.¹⁷⁴ After a review of its standards and certification systems, Japan announced that it would make greater use of international guidelines when developing new standards.¹⁷⁵

Finally, the Code obligates signatories to specify technical regulations and standards in terms of performance rather than design or descriptive characteristics.¹⁷⁶ Japan violated this obligation by imposing technical regulations which required the use of an

167. See *supra* notes 97-104 and accompanying text.

168. See *supra* notes 99-100 and accompanying text.

169. See *supra* notes 16-20 and accompanying text.

170. See *supra* notes 51-65 and accompanying text.

171. See *supra* note 100 and accompanying text.

172. See *supra* note 106 and accompanying text.

173. Standards Code, *supra* note 1, art. 2.2. Article 2.2 states: "Where technical regulations or standards are required and relevant international standards exist . . . , Parties shall use [the international standards] . . . as a basis for the technical regulations or standards." *Id.* However, if national security requirements, the prevention of deceptive practices, health or safety factors, fundamental climate or other geographical factors, and fundamental technological problems, make the use of international standards inappropriate, the obligation to use the standards will be suspended. See *id.*

174. 19 U.S.C. § 2571(5) (Supp. V 1981).

175. See *supra* note 99 and accompanying text.

176. Standards Code, *supra* note 1, art. 2.4. "Wherever appropriate, Parties shall specify technical regulations and standards in terms of performance rather than design or descriptive characteristics." *Id.* "For example, instead of specifying the dimensions of the parts of a motor in centimeters or inches, signatories should use minimum or maximum power performance levels." GREEN REPORT, *supra* note 6, at 6; U.S. DEP'T OF COM., *supra* note 1, at 5. This provision "is intended to ensure that standards and regulations are defined only in terms of those product characteristics that are essential to the objective of the standard." Note, *Technical Analysis*, *supra* note 1, at 195.

inferior metal alloy and a rubber plug in the production of metal bats.¹⁷⁷ Following bilateral consultations, Japan revoked the design criteria,¹⁷⁸ thereby bringing their technical regulations into compliance with the Code.¹⁷⁹

CONCLUSION

During the three years that the Standards Code has been in effect, the dispute settlement provisions have not been invoked in a consistent pattern. In the only case that has been resolved, these procedures have helped to achieve two objectives of the Tokyo Round. The metal bat case demonstrated the improved effectiveness of the dispute settlement provisions and led to the reduction of nontariff barriers to trade. While three years of operation and one dispute settlement under these procedures do not warrant a conclusive determination, effective application of the Standards Code's dispute settlement provisions in the metal bat dispute indicates that there is presently no justification for new procedures that would reduce emphasis on consultations and provide more specific time limits for each phase of the dispute settlement process.

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177. See *supra* note 54 and accompanying text.

178. See *supra* note 59 and accompanying text.

179. Standards Code, *supra* note 1, art. 2.4.

