Ten Years of Mediation at the United States Court of International Trade: Perspectives of a Private Practitioner

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> MR. SIMON: I've just spoken with counsel for the Government, and we'd like to just jointly move for if we could have a 60-day stay in any decision by the Court so that we can talk about the potential of settling this thing.
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> THE COURT: Okay, that's fine with me. Mr. Vanderweide?
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> MR. VANDERWEIDE: Yes. I mean obviously there'd be talks and nothing can be promised at this point. But because there's different aspects to this case, not just involving [28 U.S.C. § 1581(a)] jurisdiction but [(i)] jurisdiction, part of our conversation may be completely academic. Again, I'm not sure. And so, I'd like to have a chance to have Customs evaluate more of the nuances of his claim and see if we can't come to a resolution. *So I don't think talks could hurt anything. I think if anything it will enrich our understanding of where to go from here.*[1]

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1. Transcript of Oral Argument on Motion to Amend Summons at 34:6-20, Family Delight Foods, Inc. v. United States, No. 10-00136 (Ct. Int'l Trade Sept. 21, 2010), Doc. No. 29 (emphasis added); Report of Mediation, *Family Delight Foods, Inc.*, No. 10-00136 (July 26, 2012), Doc. No. 51 (indicating that mediation resulted in a settlement of all issues).

I. INTRODUCTION

In the ten years since the United States Court of International Trade (CIT) adopted Rule 16.1, "Court-Annexed Mediation," and the Guidelines for Court-Annexed Mediation (Mediation Guidelines),[2] the court closed 8,329 cases,[3] formally considered mediation in 46 cases,[4] actually mediated 42 cases,[5] and resolved 16 cases through mediation.[6] Stated another way, mediation was considered in less than 1% of the cases. Of those cases, mediation was successful 36% of the time.[7] If only the 42 cases that were mediated are counted, the success rate slightly

2. For purposes of this Article, the period reviewed is January 1, 2004, to September 1, 2014.

3. *See infra* Appendices A.1-.2. The total number of cases reported as closed in the CIT's Case Management/Electronic Case Filing (CM/ECF) system cannot be precisely reconciled due to the fact that the "Jurisdiction" and "Category" fields are populated by CM/ECF staff from the CIT Form 5, Information Statement, in which the plaintiff often lists multiple bases for jurisdiction, e.g., CM/ECF reports 3,013 cases were closed under 28 U.S.C. § 1581(a); however, the CM/ECF system also reports a sum of 4,022 cases closed when each of the statutory bases on which protests can be filed (and denied) is considered, i.e., 19 U.S.C. §§ 1514 (a)(1) through (a)(7). Unless otherwise indicated, the statistics cited herein are adjusted to avoid double counting.

4. *Infra* Appendices B.1-.7. The court does not traditionally issue a written opinion addressing mediation, so appendices B.1-.7 and C were created for purposes of this Article. Those appendices, which address the 46 cases the court considered for mediation, are presented in the context of the court's jurisdiction, procedural history, parties to the proceeding, issues, the point at which mediation was introduced into the proceeding, and the amount in controversy, to the extent it is known. The list of specific cases "considered" for mediation was provided by the CIT's Office of Case Management. For purposes of this Article, "considered" for mediation includes all cases in which either a party or the parties filed a motion for mediation, regardless of whether it was granted, or the court ordered mediation *sua sponte*.

5. *Infra* Appendices B.1-.7.

6. *Infra* Appendices B.1-.7.

7. *Infra* Appendices B.1-.7 (16 cases resolved / (46 cases considered - 1 case pending)).

increases to 39%.[8] Notwithstanding that precise statistics are unavailable from public sources, it is clear that mediation comprises an extremely small part of the court's overall caseload.

This Article will attempt to answer why mediation does not have a more prominent role at the CIT and to determine whether mediation could be more frequently used at the CIT. In making that attempt, this Article will address the following issues: (1) whether there are certain types of cases over which the court has exclusive jurisdiction that are not amenable to mediation, (2) whether the fact the United States is a party somehow acts to constrain mediation, (3) whether the point at which mediation is introduced in a case acts to constrain mediation, (4) whether the amount in controversy acts to constrain mediation, and (5) whether mediation at the court should only be considered successful if it results in the settlement of all of the issues in the context of mediation.

Notwithstanding the small universe of cases from which to identify patterns and draw conclusions, the short answer is that all areas over which the court has exclusive jurisdiction are amenable to mediation, regardless of whether the United States is a party, regardless of the point at which mediation is introduced into the case, and regardless of the amount in controversy. Moreover, mediation at the court is more successful than the statistics appear to indicate. As set forth below, there are opportunities for the court to apply mediation to cases other than the most intractable. For example, the court can use early mediation to narrow the issues and streamline discovery. Before discussing the support for the foregoing conclusions, however, it is important to first have a common understanding of the process and procedures by which the CIT conducts mediation.

II. CIT COURT-ANNEXED MEDIATION GUIDELINES, AS AMENDED

Pursuant to 28 U.S.C. § 2071(a), the CIT adopted its first set of Mediation Guidelines, effective January 1, 2004.[9] Unlike district courts,

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8. *Infra* Appendices B.1-.7. (16 cases resolved / (42 cases mediated - 1 case pending)). That success rate would change if the data were adjusted to account for the fact that each denied protest under 19 U.S.C. § 1514(a) is considered a separate cause of action, despite identical underlying products and issues. Global Sourcing Grp., Inc. v. United States, 33 Ct. Int'l Trade 389, 393 (2009) ("[T]he summons must establish the court's jurisdiction, and because each protest forms the basis for a separate cause of action, the summons must establish the [CIT's] jurisdiction as to each protest." (quoting H&H Wholesale Serv., Inc. v. United States, 30 Ct. Int'l Trade 689, 691 (2006))). Furthermore, the success rate would change if protests suspended by CBP at the administrative level pending the court's resolution of the case considered for mediation were also included in the statistics.

9. *Guidelines for Court-Annexed Mediation*, U.S. CT. INT'L TRADE (Jan. 1, 2012), http://www.cit.uscourts.gov/Rules/Rules_Forms%20Page/Rules_Forms_Guide_AO%20Page/Rul

the CIT was not required to adopt a program of alternative dispute resolution (ADR);[10] however, Congress made the CIT's adoption of an ADR program seemingly inevitable.[11]

The Mediation Guidelines were subsequently amended twice, in 2004 and in 2012.[12] The Mediation Guidelines describe mediation at the CIT as "a flexible, non-binding dispute resolution procedure in which a neutral third party, the mediator, facilitates negotiations between the

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es_Forms_Guide_AO%20PDF%27s/Guidelines_Mediation.pdf (added Sept. 30, 2003, effective Jan. 1, 2004; and amended May 25, 2004, effective Sept. 1, 2004; amended Dec. 6, 2011, effective Jan. 1, 2012) [hereinafter *Mediation Guidelines*]. 28 U.S.C. § 2071(a) (2012) states, "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."

10. See 28 U.S.C. § 651(b) wherein Congress mandates, "Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, . . . in accordance with this chapter . . . ."; see also 28 U.S.C. § 651(a), which defines "an alternative dispute resolution process" as including "any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration."

11. Congress stated in its "Findings and Declaration of Policy" in section 2 the Alternative Dispute Resolution Act of 1998,

> Congress finds that—
> (1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;
> (2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and
> (3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.

Alternative Dispute Resolution Act of 1998 § 2, Pub. L. No. 105-315, § 2, 112 Stat. 2993, 2993 (codified as amended 28 U.S.C. § 651-658 (2012)).

12. The May 25, 2004, amendments corrected typographical errors, replaced "upon" with "on" in certain instances, deleted "forth" when preceded by "set," and provided that the initial confidential memoranda filed with the judge mediator identify a "person" rather than a "party" with "actual authority to negotiate a settlement of the case." *Mediation Guidelines*, *supra* note 9. The 2012 amendments corrected typographical errors, replaced "upon" with "on" in certain instances, replaced "make"—as in "[a]ny judge may make an Order"—with "issue," replaced "allowed"—as in "extensions may be allowed"—with "permitted," replaced "action"—as in settlement of the action—with "case," and shortened the period in which parties have to file their initial confidential memoranda with the judge mediator from 15 days to 14 days. *Mediation Guidelines*, *supra* note 9 (amendments made on Dec. 6, 2011, effective Jan. 1, 2012).

parties to assist them with settlement."[13] "Mediation sessions are confidential and structured to help parties communicate, to clarify their understanding of underlying interests and concerns, probe the strengths and weaknesses of legal positions, explore the consequences of not settling and generate settlement options."[14] The Mediation Guidelines "govern the procedures for Court-Annexed Mediation unless otherwise ordered by the assigned judge or Judge Mediator."[15]

A. Initiating Mediation

Mediation at the CIT is initiated in one of three ways. First, the presiding judge may issue an order of referral to court-annexed mediation *sua sponte* in any case to which he or she is assigned.[16] Second, the order of referral may be issued in response to a consent motion for court-annexed mediation.[17] Third, the order of referral may be issued in response to a motion for court-annexed mediation filed by one of the parties to the litigation.[18] The order of referral will set forth the deadline by which mediation is to be concluded.[19]

B. Mediators

The Mediation Guidelines make available as mediators the judges of the CIT to serve "throughout the pretrial phase of all litigation."[20] A CIT judge mediator may not serve as mediator in a case in which he or she is the presiding judge and in which he or she is disqualified pursuant to 28 U.S.C. § 455, "Disqualification of Justice, Judge, or Magistrate Judge," or the Canons of Judicial Ethics.[21]

C. Mediation Schedule

Below is a timeline of a CIT mediation schedule:

Day [?]: The presiding judge or a three-judge panel may, at any time, refer a case to mediation.[22] Not less than thirty days prior to the

13. *Id.* pmbl.
14. *Id.*
15. *Id.*
16. *Id.* § I.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* pmbl.
21. CT. INT'L TRADE R. 16.1 ("Court-Annexed Mediation").
22. *Id.* Note that CIT Rule 16.1 refers to an "action," whereas the Mediation Guidelines refer to a "case." *See Mediation Guidelines*, *supra* note 9, pmbl.

scheduled date for the filing of a motion for summary judgment, a motion for judgment on the agency record,[23] "or trial (whichever first occurs), any party may move for the referral to mediation of a case pending before the court."[24]

Day 0: Order of Referral to Court-Annexed Mediation issued; beginning of stay of all proceedings.[25]

Day 14: Deadline for each party to file with the judge mediator a confidential memorandum of no more than ten pages, which sets forth the following information:

(i) the name of the person with authority to settle the case;
(ii) the relevant facts;
(iii) the key legal issues;
(iv) the discovery, which would improve the prospects for settlement;
(v) the pertinent factors relating to settlement;
(vi) the party's initial settlement position; and
(vii) the names of all persons expected to attend any scheduled settlement negotiations.[26]

Day 30: The judge mediator will notify the parties of the time, date, and place of the mediation session. That notification will state whether the session will be conducted in person, telephonically, or by videoconference. Unless excused, the session must be attended by one person on each side with the authority to recommend settlement. The sessions may be conducted *inter partes* or *ex parte*. There is no limitation on the number of mediation sessions.[27]

Day 90: End of Stay.[28]

D. Confidentiality

Unless a party to the mediation agrees to the contrary, all statements made during the course of mediation and documents used for the

23. CT. INT'L TRADE R. 56.1-.2.
24. *Id.* R. 16.1.
25. *Mediation Guidelines*, *supra* note 9, § I.
26. *Id.* § II(A). Copies of the confidential memoranda are only to be submitted to the judge mediator, i.e., not to co-counsel, opposing counsel, or the clerk's office for placement on the official record.
27. *Id.* § II(B).
28. The judge mediator has the discretion to grant extensions for deadlines falling within the mediation schedule. If the proposed deadline extension does fall outside the ninety-day period, the extension can only be granted by the presiding judge or the judge mediator with the presiding judge's concurrence. *Id.* § II(F).

purpose of mediation are not shared with the opposing party (or parties). The judge mediator is prohibited from disclosing such statements and documents to anyone, including the presiding judge. The parties are prohibited from using any information obtained during the course of mediation in any document filed with or argument made to the court. However, the mere fact that mediation is a success or failure is not confidential. Mediation sessions at the CIT are considered negotiations conducted pursuant to Federal Rule of Evidence 408.[29]

E. Discovery

Outside mediation, unless there is an agreement to the contrary, parties to the mediation may obtain any nonprivileged "matter" that a party could lawfully obtain, such as discovery, "regardless of whether the party . . . learned about the existence of such information from the mediation proceedings."[30]

F. Ending Mediation

Binding settlement can only be demonstrated by a signed document. If the settlement includes a dismissal, in whole or in part, the parties are to file a voluntary dismissal pursuant to CIT Rule 41 or a stipulated judgment pursuant to CIT Rule 58.1.[31] The parties have thirty days from the date of the signed agreement or settlement to file the dismissal. Failure to meet that thirty-day deadline will act to return the case to the court's active calendar.[32]

Regardless of the outcome of mediation, at its conclusion, the judge mediator is required to file a CIT Form M-2-1, "Report of Mediation," with the office of the clerk and to serve copies on the parties and the presiding judge.[33] The form only lists the following three possible results: the mediation resulted in the settlement of all issues, the mediation resulted in a partial settlement, or the mediation did not result in a settlement.[34]

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29. *Id.* § II(C).
30. *Id.*
31. *Id.* § II(D).
32. *Id.*
33. *Id.* § II(E).
34. *Id.*; *see also Form M-2-1*, CT. INT'L TRADE (Jan. 1, 2012), http://www.cit.uscourts.gov/Rules/Rules_Forms%20Page/Rules_Forms_Guide_AO%20Page/Rules_Forms_Guide_AO%20PDF%27s/Form%20M-2.pdf.

III. ISSUES AND ANALYSIS

This Part of the Article addresses the following five issues pertaining to the CIT's mediation program: (1) whether there are certain types of cases over which the court has exclusive jurisdiction that are not amenable to mediation, (2) whether the fact that the United States is a party somehow acts to constrain mediation, (3) whether the point at which mediation is introduced in a case acts to constrain mediation, (4) whether the amount in controversy acts to constrain mediation, and (5) whether mediation at the court should only be considered successful if it results in the settlement of all of the issues in the context of mediation. These issues were identified through discussions with members of the Customs and International Trade Bar Association (CITBA) of the CIT.

A. Jurisdictional or Subject Matter Constraints to Successful Mediation

Given the ten-year history of mediation at the CIT and the relatively small percentage of cases the court considered for mediation during that time, an issue arises as to whether there are certain types of cases over which the court has exclusive jurisdiction that are not amenable to mediation.

The CIT's exclusive jurisdiction covers most issues related to international trade and customs, including, but not limited to, judicial review of United States Customs and Border Protection's (CBP) denial of administrative protests and antidumping and countervailing duty determinations issued by the United States Department of Commerce (Commerce) and the United States International Trade Commission (ITC).[35] In addition, the court's exclusive jurisdiction extends to certain international trade and customs issues that the court's other specific grants of exclusive jurisdiction do not address.[36]

The following analysis will discuss the cases the court considered for mediation in a jurisdictional context to determine whether issues underlying the court's jurisdiction made or makes those cases more or less amenable to mediation. This analysis will also include 28 U.S.C. § 1581(c) due to the relative number of cases closed during the period reviewed, notwithstanding that the court has never considered any such cases for mediation during that time.

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35. 28 U.S.C. §§ 1581(a), (c) (2012).
36. *Id.* § 1581(i).

1. 28 U.S.C. § 1581(a)—Denied Protests

28 U.S.C. § 1581(a) grants the CIT exclusive jurisdiction over "any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [(19 U.S.C. § 1515)]." 19 U.S.C. § 1515 sets forth the procedure by which CBP will allow or deny a protest in whole or in part filed in accordance with 19 U.S.C. § 1514.[37] 19 U.S.C. §§ 1514(a)(1)-(7) provides importers and other interested parties the statutory bases to administratively challenge certain decisions of CBP. Those parties or their duly appointed representative(s) have 180 days from the date of liquidation to file a protest that sets forth the facts and arguments associated with the challenged administrative decision.[38] Those same parties then have 180 days to file a summons with the CIT that challenges CBP's denial of the protest.[39]

In the past ten years, the CIT closed 4,022 cases brought under 28 U.S.C. § 1581(a) and considered 36 such cases for mediation.[40] Of those cases, the subject matter of the denied protests, which served as jurisdictional prerequisites, were valuation, classification, charges/ extractions, and liquidation/reliquidation.[41] Of those cases, 12 were resolved through mediation.[42]

a. 19 U.S.C. § 1514(a)(1)—Appraised Value

Valuation cases brought to the court under 28 U.S.C. § 1581(a) and 19 U.S.C. § 1514(a)(1), "the appraised value of [the] merchandise," are amenable to mediation.[43] Moreover, increased use of, and/or earlier referral to, mediation in valuation cases may further the court's goal of the "just, speedy, and inexpensive determination of every action and proceeding."[44]

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37. 19 U.S.C. § 1515(a) (2012).
38. *Id.* § 1514(c)(3).
39. 28 U.S.C. § 2636(a).
40. *Infra* Appendices A.2, B.1-.4.
41. 19 U.S.C. §§ 1514(a) sets forth the following statutory bases on which a protest can be filed (and denied): (1) appraised value; (2) classification/rate of duty; (3) charges/extractions; (4) exclusion; (5) liquidation/reliquidation; (6) drawback; and (7) refusal to reliquidate.
42. *Infra* Appendices B.1-.4. Because *Kahrs International Inc. v. United States* was listed under 19 U.S.C. §§ 1514(a)(2) and (a)(5), it was counted twice. No. 07-00343 (Ct. Int'l Trade filed Sept. 12, 2007).
43. It is CBP's responsibility to affix the value of, i.e., appraise, merchandise upon entry into the United States. 19 U.S.C. § 1500(a). 19 U.S.C. § 1401a establishes the different methods by which merchandise may be valued for purposes of appraisement.
44. *See* CT. INT'L TRADE R. 1.

In the period reviewed, the court closed 314 valuation cases.[45] Of the 11 valuation cases that the court considered for mediation, all issues, which were fact issues, were settled through mediation.[46] It may be notable that 3 of the 11 cases resulting in settlement were initiated well before the 2004 effective date of CIT Rule 16.1.[47] The court ordered mediation *sua sponte* in 2 of the cases and on plaintiff's motion in the other 9 cases. Of the 9 cases in which plaintiff moved the court for mediation, defendant took no position in 1 and consented to mediation in 8.[48]

One of the reasons why more valuation cases are not referred to mediation may be that 40% of all valuation cases that closed during the period reviewed were settled—without having been mediated—through either a CIT Rule 58.1 "Stipulated Judgment on Agreed Statement of Facts," or a CIT Rule 41(a)(1)(A)(ii) "Voluntary Dismissal."[49] Given that those two disposition methods are the only methods through which cases settled through mediation are disposed,[50] there does not appear to be a current need for mediation of valuation cases at the court, particularly when the universe of such cases otherwise eligible for mediation was less than 13% of all of the valuation cases closed during the period reviewed.[51]

b. 19 U.S.C. § 1514(a)(2)—Classification/Rate of Duty

At first glance, classification and rate of duty cases (hereinafter, collectively referred to as "classification" cases) brought to the court under 28 U.S.C. § 1581(a) and 19 U.S.C. § 1514(a)(2)[52] do not appear to be amenable to mediation.[53] However, if one considers the postmediation

45. *Infra* Appendix A.1.
46. *Infra* Appendices B.1, C.
47. *See infra* Appendix B.1.
48. *Infra* Appendix B.1.
49. *Infra* Appendices A.2, B.1. Row (a)(1), Valuation ((112 (SJOASF) + 25 (41(a)(1)(A)(ii) Vol. Dism.) - 11 (Settled)) / 314 (Total)).
50. No successfully mediated cases were voluntarily dismissed via CIT Rule 41(1)(A)(i). *See infra* Appendices B.1-.7 (demonstrating that no successfully mediated cases were voluntarily dismissed via CIT Rule 41(1)(A)(i)).
51. *Infra* Appendix A.2. Row (a)(1), Valuation ((11 (Slip Op.) + 19 (Jdgmt. Order) + 11 (Order of the Court)) / 314 (Total)).
52. 19 U.S.C. § 1514(a)(2) (2012) ("the classification and rate and amount of duties chargeable").
53. It is CBP's responsibility to affix the final classification and rate of duty applicable to merchandise entering the United States. 19 U.S.C. § 1500(b). The General Rules of Interpretation (GRIs), Harmonized Tariff Schedule of the United States (HTSUS), establish the rules by which merchandise is classified upon entry into the United States. *See* 19 U.S.C. § 1202; *Harmonized Tariff Schedule of the United States (2014): General Rules of Interpretation*, U.S.

disposition of the classification cases and the disposition methods of all nonmediated classification cases closed during the period reviewed, one will realize that these types of cases are amenable to mediation.

Of the 17 classification/rate of duty cases in which the court considered mediation, the court ordered mediation *sua sponte* in 16 cases and denied the plaintiff's motion for an order of referral to mediation in the other case.[54] The issues pending when mediation was initiated were all questions of fact.[55] None of the 16 *sua sponte* cases were settled through mediation.[56]

The parties settled 14 of the *sua sponte* cases postmediation, pursuant to a stipulated judgment on an agreed statement of facts.[57] Of the 2 other *sua sponte* classification cases, the United States Court of Appeals for the Federal Circuit affirmed the court's opinion in 1,[58] and the other is still pending before the court.[59] The case in which the court denied the plaintiff's motion for an order of referral to mediation was nonetheless settled pursuant to a stipulated judgment on an agreed statement of facts.[60]

The court closed 2,305 classification cases during the period reviewed and disposed of 976 and 129 cases pursuant to CIT Rule 58.1, "Stipulated Judgments on Agreed Statement of Facts," and CIT Rule 41(a)(1)(A)(ii), "Dismissal of Actions, Voluntary Dismissal," respectively.[61] Stated another way, the court disposed of 48% of classification cases via stipulated judgments on agreed statements of fact and voluntary dismissals in the period reviewed, which is more than any other method of disposition.[62] Pursuant to the court's Mediation

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INT'L TRADE COMMISSION 1-6, http://www.usitc.gov/publications/docs/tata/hts/bychapter/1401gn.pdf (last visited Mar. 2, 2015).

54. *Infra* Appendix B.2.

55. *Infra* Appendix C.

56. *Infra* Appendix B.2.

57. *Infra* Appendices B.2, C.A.2.a. *Park B. Smith v. United States* involved 14 denied protests based on identical merchandise and the same set of issues, including Court Nos. 94-00546, 95-00043, 95-00184, 95-00701, 95-01180, 96-01810, 96-02594, 97-00936, 98-00019, 99-00419, 99-00749, 00-00411, 01-00084, 01-00952. This case involved 14 denied protests based on identical merchandise and the same set of issues.

58. *Infra* Appendices B.2, C.A.2.d.

59. *Infra* Appendices B.2, C.A.2.c.

60. *Infra* Appendices B.2, C.A.2.b.

61. *Infra* Appendix A.2.

62. *Infra* Appendix A.2. Rows (a)(2) Classification and (a)(2) Rate of Duty ((756 (Classification SJOASF) + 102 (41(a)(1)(A)(ii) Vol. Dism.) + 220 (Rate of Duty SJOASF) + 27 (41(a)(1)(A)(ii) Vol. Dism.)) / (1819 (Classification Total) + 486 (Rate of Duty Total))).

Guidelines, those methods of disposition also happen to be the only methods of disposition, i.e., settlement, in mediation.[63]

Given that, without having ever been subject to mediation, the parties settle classification cases postmediation, and also settled 48% of the classification cases in the same manner as mediated cases, it appears that there is no jurisdictional or subject matter impediment to the mediated settlement of classification cases.[64] With no such impediment, questions arise as to whether the other 10% of the classification cases eligible for mediation, or even the additional 48% of the classification cases settled by means other than mediation, could have benefitted from mediation.[65]

c. 19 U.S.C. § 1514(a)(3)—Charges or Extractions

Given the parties' lack of success in mediating cases, regarding protests denied under 19 U.S.C. § 1514(a)(3), "Charges or Extractions," such cases facially do not appear to be amenable to mediation. None of the 5 cases the court considered for mediation and for which plaintiffs used a 19 U.S.C. § 1514(a)(3) "Charges or Extractions" denied protest as the jurisdictional basis resulted in a settlement.[66] The court also considered charges and extractions in another case considered for mediation, but the plaintiff was able to obtain judicial review based on a denial of a 19 U.S.C. § 1514(a)(5) "Liquidation or Reliquidation" protest.[67] Mediation did not result in a settlement of that case either.[68] However, parties have settled 19 U.S.C. § 1514(a)(3) litigation prior to final judgment, which supports the amenability of such cases to mediation.[69]

Of the 6 charges and extractions cases the court considered for mediation, 5 were referred to mediation and 1 was not, due to the court

63. *Mediation Guidelines*, *supra* note 9, § II(D).

64. *Infra* Appendix A.2. Rows (a)(2) Classification and (a)(2) Rate of Duty ((756 ((Classification SJOASF) + 102 (41(a)(1)(A)(ii) Vol. Dism.) + 220 (Rate of Duty SJOASF) + 27 ((41(a)(1)(A)(ii) Vol. Dism.)) / (1819 (Classification Total) + 486 (Rate of Duty Total))). Interestingly, parties are able to reach mediated settlements in 28 U.S.C. § 1582 cases in which classification was the underlying issue. Those cases involved the settlement of both the lost revenue as a result of the misclassification and the associated penalties. *See infra* Part III.A.5.

65. *Infra* Appendix A.2. Row (a)(2) Classification and(a)(2) Rate of Duty ((146 (Classification Slip Op.) + 28 (Classification Jdgmt. Order) + 25 (Classification Order of the Court) + 37 (Rate of Duty Slip Op.) + 1 (Rate of Duty Jdgmt. Order) + 2 (Rate of Duty Order of the Court))) / (1819 (Classification Total) + 486 (Rate of Duty Total))).

66. *Infra* Appendices B.3, C.

67. *Infra* Appendix C.A.4.a (discussing Allstates Trading & Clothing Co. v. United States, 30 Ct. Int'l Trade 1914 (2006)).

68. *Infra* Appendix C.A.4.a.

69. *Infra* Appendix A.2.

denying the plaintiff's motion.[70] 4 of the mediated cases involved the same issues of law,[71] and the issue in the other mediated case was also an issue of law.[72] The issue in the plaintiff's motion for referral to mediation, which the defendant opposed and the court ultimately denied, was whether mediation was even necessary for settlement.[73] The parties ultimately settled the underlying issue of the proper amount of interest due on duties on vessel repair without mediation.[74] The parties also ultimately settled the charges and extractions issue in the case brought under the denial of a 19 U.S.C. § 1514(a)(5) protest after mediation.[75]

The court disposed of 67% of the charge and extraction cases through dispositive slip opinions, judgment orders, and orders of the court.[76] However, the parties also settled 11% of the charge or extraction cases during the period reviewed through either a CIT Rule 58.1 "Stipulated Judgment on Agreed Statement of Facts" or a CIT Rule 41(a)(1)(A)(ii) "Voluntary Dismissal."[77] Given that parties were able to settle 11% of the cases without the assistance of a neutral third party, it is reasonable to conclude that, with assistance, at least some of the 67% of the cases that did not settle could have benefitted from mediation.

d. 19 U.S.C. § 1514(a)(5)—Liquidation/Reliquidation

Liquidation/reliquidation cases that have 19 U.S.C. § 1514(a)(5) as their underlying jurisdictional base are amenable to mediation. The court considered mediation in 3 such cases. However, the issues that led to mediation for 2 of those cases are more properly characterized as a classification issue and charge or extraction issue, respectively.[78]

The remaining liquidation/reliquidation case was settled through mediation.[79] The issues in that case consisted of both issues of law and fact. The issues were whether CBP's denial of a protest prevents a different interested party from filing a protest on the same entry if the

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70. *Infra* Appendices B.3-.4, C.A.3.a-.b, C.A.4.a.
71. *Infra* Appendix C.A.3.a.
72. *Infra* Appendix C.A.4.a.
73. *Infra* Appendix C.A.3.b.
74. *Infra* Appendix C.A.3.b.
75. *Infra* Appendix C.A.4.a.
76. *Infra* Appendix A.2. Row (a)(3) Charges or Extractions ((21 (Slip Op.) + 12 (Jdgmt. Order) + 348 (Order of the Court)) / 567 (Total)).
77. *Infra* Appendices A.2. Row (a)(3) Charges or Extractions ((37 (SJOASF) + 28 (41(a)(1)(A)(ii) Vol. Dism.)) / 567 (Total)).
78. *Infra* Appendices B.4, C.A.4.a-.b. The plaintiff in *Kahrs International* also asserted jurisdiction pursuant to 28 U.S.C. § 1581(a)/19 U.S.C. § 1514(a)(2). Complaint, Kahrs Int'l v. United States, 791 F. Supp. 2d 1228 (Ct. Int'l Trade 2011) (No. 07-00343), Doc. No. 4.
79. *Infra* Appendices B.4, C.A.4.c.

latter protest is filed within the 180-day limitation period and whether CBP prematurely liquidated entries of merchandise subject to an antidumping duty order.[80]

The fact that parties settled these issues through mediation in one liquidation/reliquidation case, and that parties settled 46% of liquidation/reliquidation cases that were not considered for mediation through one of the two methods by which mediated cases are disposed at the CIT, indicates that liquidation cases are amenable to mediation.[81] Nonetheless, the same question arises as in the other cases brought under 19 U.S.C. § 1581(a). That is, whether the 10% of the otherwise eligible liquidation/reliquidation cases would have been disposed of through, or assisted by, mediation.[82]

2. 28 U.S.C. § 1581(c)—AD/CVD Cases

It is unclear whether, as a practical matter, antidumping and countervailing duty (AD/CVD) determinations issued by Commerce and the ITC are amenable to mediation. 28 U.S.C. § 1581(c) grants the CIT exclusive jurisdiction over "any civil action commenced under section 516A of the Tariff Act of 1930 [(19 U.S.C. § 1516a)]." 19 U.S.C. § 1516a sets forth the procedure by which the court will review AD/CVD determinations. Generally, parties have thirty days in which to file a summons contesting those administrative determinations.[83]

The court has never considered an AD/CVD determination for mediation, despite judicial review of those determinations ranking as the third most frequent type of cases closed during the period reviewed.[84] Moreover, during the period reviewed, no § 1581(c) cases were settled through a CIT Rule 58.1 "Stipulated Judgment on Agreed Statement of

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80. *Infra* Appendix C.A.4.c.

81. *Infra* Appendices A.2, B.4. Row (a)(5) Liquidation/Reliquidation ((25 (41(a)(1)(A)(ii) Vol. Dism.) + 235 (SJOAF)—1 (Settled)) / 557 (Total)).

82. *Infra* Appendix A.2. Row (a)(5) Liquidation/Reliquidation ((47 (Slip Op.) + 6 (Jdgmt. Order) + 4) / 557 (Total)).

83. 19 U.S.C. § 1516a(a)(2) (2012).

84. These cases comprised 14% of the cases judicially reviewed and closed during the period reviewed. Appendix A.2 (1195 (§ 1581(c) Total) / 4022 (§ 1581(a) Total) + 1 (§ 1581(b) Total) + 1195 (§ 1581(c) Total) + 188 (§ 1581(d) Total) + 1 (§ 1581(e) Total) + 15 (§ 1581(g) Total) + 7 (§ 1581(h) Total) + 2762 (§ 1581(i) Residual Total) + 138 (§ 1582 Total)). Relative to other cases over which the court has exclusive jurisdiction, § 1581(i) cases ranked second with 33% (2762 (§ 1581(i) Residual Total) / (4022 (§ 1581(a) Total) + 1 (§ 1581(b) Total) + 1195 (§ 1581(c) Total) + 188 (§ 1581(d) Total) + 1 (§ 1581(e) Total) + 15 (§ 1581(g) Total) + 7 (§ 1581(h) Total) + 2762 (§ 1581(i) Residual Total) + 138 (§ 1582 Total)), and § 1581(a) cases ranked first with 48% (4022 (§ 1581(a) Total) / (4022 (§ 1581(a) Total) + 1 (§ 1581(b) Total) + 1195 (§ 1581(c) Total) + 188 (§ 1581(d) Total) + 1 (§ 1581(e) Total) + 15 (§ 1581(g) Total) + 7 (§ 1581(h) Total) + 2762 (28 U.S.C. § 1581(i) Residual Total) + 138 (§ 1582 Total)).

Fact," the reason being that such a disposition method would not be accordance with the Rules of the court.[85] However, the parties settled 318 of § 1581(c) cases, or 27%, through CIT Rule 41(a)(1(A)(ii), "Voluntary Dismissals," one of the same settlement disposition methods in the court's Mediation Guidelines.[86]

For purposes of this discussion, it may be notable that, at least at one time, there was a movement to exclude § 1581(c) cases from mediation. That movement manifested itself in two ways. First, a draft amendment in the United States Court of International Trade Improvement Act of 2008 specifically excluded from the court's ADR programs "civil actions arising under Title VII of the Tariff Act of 1930 (19 U.S.C. § 1671 et seq.) (relating to countervailing duty and antidumping proceedings) . . . ."[87] Second, the Federal Circuit's mediation program may exclude § 1581(c) cases from mediation.[88]

As a practical matter, parties do settle § 1581(c) cases outside of mediation through CIT Rule 41(a)(1)(A)(ii), "Voluntary Dismissals," the same method of disposition that parties would have to settle those cases inside mediation. Nonetheless, § 1581(c) cases are unusual in that there are frequently third-party interveners involved in the litigation,[89] thereby potentially creating a three-way mediated negotiation, which may be more complex and difficult to settle than a two-way mediated negotiation

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85. CIT Rule 58.1, "Stipulated Judgment on Agreed Statement of Facts," is limited to §§ 1581(a) and (b) cases, i.e., "[a]n action described in 28 U.S.C. § 1581(a) or (b) may be stipulated for judgment." CIT Form 9, "Stipulated Judgment on Agreed Statement of Facts," also appears to be so limited. *Form 9*, CT. INT'L TRADE (Sept. 1, 2010), http://www.cit.uscourts.gov/Rules/Rules_Forms%20Page/Rules_Forms_Guide_AO%20Page/Rules_Forms_Guide_AO%20PDF%27s/Form%2009.pdf.

86. *Infra* Appendix A.2. Row § 1581(c) (318 (41(a)(1)(A)(ii) Vol. Dism.) / 1195 (Total)). MEDIATION GUIDELINES, *supra* note 9, § II(D).

87. *See* 28 U.S.C. § 2647(a) (2012). Anecdotal evidence suggests that the draft amendment excluding § 1581(c) cases from mediation at the court was stricken not because of a change in position, but because the Judiciary Committee of the United States House of Representatives would have jurisdiction over the issue, rather than the Ways and Means Committee. Nonetheless, the question arises as to why parties felt that draft legislation was necessary to change the court's rules regarding mediation when the court has its own rulemaking power pursuant to 28 U.S.C. § 2071(a).

88. *Compare Appellate Mediation Program Guidelines*, U.S. CT. APPEALS FOR FED. CIR. R. 2 (Dec. 6, 2013), http://www.cafc.uscourts.gov/mediation/guidelines.html ("All cases where the parties are represented by counsel are eligible for the program."), *with* ROBERT J. NIEMIC, FED. JUDICIAL CTR., MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS 110 (2d ed. 2006), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/MediCon2.pdf/$file/MediCon2.pdf (describing eligible case types for Federal Circuit mediation as "[a]ll cases in which the parties are represented by counsel are eligible for the program, with the exception of . . . antidumping and countervailing duty cases [and] International Trade Commission cases").

89. *See* 28 U.S.C. § 2631(j)(1)(B); CT. INT'L TRADE R. 24(a)(3).

under § 1581(a).[90] Nonetheless, the above-referenced voluntary dismissals and anecdotal evidence indicating that parties to § 1581(c) litigation settle their differences before trial raises the issue of whether the introduction of a court-appointed neutral third party could facilitate additional settlements.

3. 28 U.S.C. § 1581(d)—Trade Adjustment Assistance

Given that parties often settle litigation in which parties challenge the United States' final determinations pertaining to eligibility of workers for trade adjustment assistance (TAA), such cases are amenable to mediation. 28 U.S.C. § 1581(d) grants the CIT exclusive jurisdiction over final determinations issued by the United States Department of Labor or the United States Department of Agriculture, depending on the type of workers seeking eligibility for TAA.[91]

The court only considered one § 1581(d) case for mediation.[92] The issues leading up to the court's *sua sponte* order of referral to mediation were issues of law and issues of fact.[93] Mediation of that case did not result in settlement, as it was ultimately disposed of by the court in a dispositive opinion.[94]

The fact that parties settled 39% of § 1581(d) cases via CIT Rule 41(a)(1)(A)(ii), "Voluntary Dismissals," and the court disposed of 54% of such cases via dispositive opinions or orders, indicates that the court may be underutilizing mediation in TAA cases.[95] This appears particularly true given the high statistic for settlement in the form of voluntary dismissals, i.e., parties settle a large portion of TAA cases prior to the court's issuing final judgment.[96]

4. 28 U.S.C. § 1581(i)—Residual

The residual nature of 28 U.S.C. § 1581(i) makes generalizations regarding mediation difficult. In addition to the exclusive jurisdiction conferred by 28 U.S.C. §§ 1581(a)-(h), § 1581(i) grants the court

90. 28 U.S.C. § 1581(a) (Denied Protests).

91. *See* 19 U.S.C. § 2273 (2012) (U.S. Dep't of Labor); *id.* § 2272 (U.S. Dep't of Agric.).

92. *Infra* Appendices B.5, C.B.1.

93. *Infra* Appendix C.B.1.

94. United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, Local 2911 v. United States Sec'y of Labor (*Steelworkers III*), 33 Ct. Int'l Trade 418 (2009).

95. *Infra* Appendix A.2. Row § 1581(d) (74 (41(a)(1)(A)(ii) Vol. Dism.) / 188 (Total)) and ((76 (Slip Op.) + 7 (Jdgmt. Order) + 19 (Order of the Court)) / 188 (Total)), respectively.

96. CIT Rule 58.1, "Stipulated Judgment on Agreed Statement of Facts," is limited to cases brought under 28 U.S.C. §§ 1581(a) or 1581(b) (2012). CT. INT'L TRADE R. 58.1.

exclusive jurisdiction over "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for" the subject of any one of four paragraphs.[97] Plaintiffs often plead § 1581(i) as a basis for jurisdiction, in addition to the more specific bases set forth in §§ 1581(a)-(h), to ensure that jurisdiction attaches[98]; however, that is not always the case.[99] For purposes of this section, only those cases in which the plaintiff used § 1581(i) as the sole basis for jurisdiction will be discussed.

The court considered three cases for mediation in which the plaintiffs used § 1581(i) as the sole basis for jurisdiction. Of those cases, the court ordered one to mediation *sua sponte*, the plaintiff moved the court for referral to mediation in another, and the defendant moved the court for referral to mediation in the third.[100]

In the case where the court issued its order of referral to mediation *sua sponte*, there were three pending legal issues.[101] The parties were unable to resolve any of those issues in mediation; however, during the stay initiated by the court's order, plaintiff was able to enter its merchandise, thereby resolving all but the nonjusticiable issues for which the court granted the defendant's motion to dismiss.[102]

In the second case, the issue prompting the plaintiff's motion was a legal issue.[103] The defendant opposed the plaintiff's motion for an order of referral to mediation, and the court denied the plaintiff's motion.[104] The Federal Circuit ultimately disposed of the case in favor of the defendant-appellant.[105]

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97. The four paragraphs of 28 U.S.C. §§ 1581(i) are as follows:

(1) revenue of imports or tonnage;
(2) tariff duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

98. *Infra* Appendix C; *see, e.g.*, Family Delight Foods, Inc. v. United States, No. 10-00136 (Ct. Int'l Trade filed Apr. 19, 2010); Kahrs Int'l Inc. v. United States, 791 F. Supp. 2d 1228 (Ct. Int'l Trade 2011).

99. *Infra* Appendix C; *see, e.g.*, City of Fresno/Fresno−Yosemite Int'l Airport v. United States, No. 10-00137 (Ct. Int'l Trade filed Apr. 20, 2010); Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States, 533 F. Supp. 2d 1290 (Ct. Int'l Trade 2007); Int'l Custom Prods., Inc. v. United States, 29 Ct. Int'l Trade 1292 (2005).

100. *Infra* Appendix C.C.1.a-.b, C.C.1.d.

101. *Infra* Appendix C.C.1.a.

102. *Infra* Appendix C.C.1.a.

103. *Infra* Appendix C.C.1.b.

104. *Infra* Appendix C.C.1.b.

105. Rubber Tread Co. v. United States, 593 F.3d 1290, 1357 (Ct. Int'l Trade 2007).

The third case is unique for a number of reasons, one of which is that it is the only case in which the defendant, the United States, moved the court for an order of referral to mediation.[106] The basis for the defendant's motion was that mediation would be helpful in assisting the parties with their settlement negotiations.[107] The plaintiff's opposition was based on the defendant's not having filed the administrative record or its answer which, according to the plaintiff, would put it at a disadvantage entering mediation.[108] The court denied the defendant's motion, but the parties later settled the case pursuant to a CIT Rule 41(a)(1)(A)(ii) "Voluntary Dismissal."[109]

As previously stated, the residual nature of § 1581(i) cases makes generalizations difficult. Moreover, given that parties often plead § 1581(i) as an alternative or additional jurisdictional basis, the fact that the parties settled 3% of such cases outside of mediation is not necessarily indicative of the amenability of such cases to mediation.[110] Notwithstanding that it is difficult to draw generalizations from the § 1581(i) cases, the cases appear to be amenable to mediation, albeit on a more selective basis than the cases over which the court has specific jurisdiction, because parties were able to settle these cases in which the court's residual jurisdiction attached.

5. 28 U.S.C. § 1582—Civil Actions Commenced by the United States

Cases brought by the United States under 28 U.S.C. § 1582 (penalty cases) are amenable to mediation. Under 28 U.S.C. § 1582, the United States serves as the plaintiff in an action to recover duties, bonds, and/or penalties associated with various type of customs transactions.[111] Private

106. *Infra* Appendix C.C.1.d.

107. *Infra* Appendix C.C.1.d. There was also an issue of whether § 1581(i) was the proper basis for the court's jurisdiction.

108. *Infra* Appendix C.C.1.d.

109. *Infra* Appendix C.C.1.d.

110. *Infra* Appendix A.2. Row § 1581(i) Residual Total (95 (41(a)(1)(A)(ii) Vol. Dism.) / 2762 (Total)). That CM/ECF No. also reports that 139 § 1581(i) cases were also disposed of through CIT Rule 58.1, "Stipulated Judgments on Agreed Statements of Fact," must be as a result of the plaintiff asserting both § 1581(a) and § 1581(i) jurisdiction because that Rule is limited to §§ 1581(a) and (b). *Infra* Appendix A.2.

111. 28 U.S.C. § 1582 (2012). 28 U.S.C. § 1582(1) provides the court exclusive jurisdiction of civil actions arising out of an import transaction and commenced by the United States to recover civil penalties for fraud, gross negligence and negligence (19 U.S.C. § 1592 (2012)), false drawback claims (19 U.S.C. § 1593a (2012)), prohibited acts by customs brokers (19 U.S.C. § 1641(b)(6) and (d)(2)(A)), and violations of countervailing and antidumping suspension agreements (19 U.S.C. §§ 1671c(i)(2) and 1673c(i)(2)). 28 U.S.C. § 1581(2) provides the court exclusive jurisdiction of civil actions arising out of an import transaction and commenced by the United States to recover upon an import bond. 28 U.S.C. § 1581(3) provides

parties, such as the importer of record and/or its surety, serve as the defendant in such cases.

In almost half of the 9 penalty cases considered for mediation, all issues of fact and/or law were settled through mediation.[112] It is notable that the underlying issue in 3 of the successfully mediated penalty cases and in 2 other penalty cases that ultimately settled postmediation was classification.[113] Moreover, those settlements not only manifested themselves in terms of negotiated penalties, but also in terms of negotiated lost revenue owed due to the defendant's alleged misclassification.[114] In the period reviewed, the court also settled 40% of the 138 penalty cases it closed through either a CIT Rule 41(a)(1)(A)(ii) "Voluntary Dismissal" or a CIT Rule 58.1 "Stipulated Judgment on Agreed Statement of Fact."[115]

The court should consider utilizing mediation to a greater extent in § 1582 cases. The universe of cases eligible for mediation during the period reviewed was 28% of the cases closed.[116] Furthermore, it is possible that the 40% of cases that were settled through either a CIT Rule 41(a)(1)(A)(ii) "Voluntary Dismissal" or a CIT Rule 58.1 "Stipulated Judgment" may have benefitted from mediation.[117]

B. Party Constraints to Successful Mediation

Given that the United States is either the defendant or plaintiff in all cases over which the court has exclusive jurisdiction,[118] an issue arises as

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the court exclusive jurisdiction of civil actions arising out of an import transaction and commenced by the United States to recover customs duties.

112. Four of the nine penalty cases considered for mediation were settled through mediation. *See infra* Appendices B.7, C.D.3-.5. C.D.7, C.D.9. *United States v. Tenacious Holdings, Inc.*, No. 12-00173 (Ct. Int'l Trade filed June 20, 2012), was pending as of September 2, 2014.

113. *Infra* Appendix C.D.3-.6, C.D.8.

114. *Infra* Appendix B.7.

115. *Infra* Appendix A.2. Row § 1582 ((53 (41(a)(1)(A)(ii) Vol. Dism.) + 2 (SJOAF)) / 138 (Total)). Notwithstanding that CIT Rule 58.1 is limited to 28 U.S.C. §§ 1581(a) and (b), parties settled—without ever having been considered for mediation—two § 1582 cases through CIT Rule 58.1. *See* Stipulated Judgment on Agreed Statement of Facts, United States v. Pacific Printex Corp., No. 02-00317 (Ct. Int'l Trade Nov. 16, 2004), Doc. No. 33; Stipulated Judgment on Agreed Statement of Facts, United States v. Am. Motorists Ins. Co., No. 08-00348 (Ct. Int'l Trade Jan. 13, 2009), Doc. No. 9.

116. *Infra* Appendix A.2. Row 28 U.S.C. § 1582 ((28 (Slip Op.) + 9 (Jdgmt. Order) + 11 (Order of Dism.) - 9 (Penalty Cases Considered for Mediation)) / 138 (Total)).

117. *Infra* Appendix A.2. Row 28 U.S.C. § 1582 ((53 (41(a)(1)(A)(ii) Vol. Dism.) + 2 (SJOASF) - 4 (Penalty Cases Settled Through Mediation)) / 138 (Total)).

118. Recognizing that there may be certain third-party actions emanating from cases over which the court has jurisdiction, the United States is the defendant and plaintiff in cases brought under 28 U.S.C. §§ 1581 and 1582 (2012), respectively.

to whether the United States being a party to the mediation somehow affects the process. Unlike private parties who often conduct a cost/benefit analysis in deciding whether to pursue litigation, the United States Department of Justice's (DOJ) International Trade Field Office (ITFO), the attorneys of which practice before the court, considers its attorney time to be overhead.[119] If true, there is seemingly no incentive for the United States to conform with CIT Rule 1, i.e., the just, speedy, and inexpensive determination of every action and proceeding.

Appearances, however, can be deceiving. Consider, first, anecdotal evidence that indicates that, in 2013, there were 10 attorneys working in ITFO who were responsible for 263 *new* cases in that year (or 26.3 new cases per ITFO attorney, in addition to the cases pending from previous years). Then consider, in creating the Office of Dispute Resolution, that the DOJ issued a policy stating:

> Our commitment to make greater use of [alternative dispute resolution] is long overdue. Clearly, our federal court system is in overload. Delays are all too common, depriving the public of swift, efficient, and just resolution of disputes. The Department of Justice is the biggest user of the federal courts and the nation's most prolific litigator. Therefore, it is incumbent upon those Department attorneys who handle civil litigation from Washington and throughout the country to consider alternatives to litigation.
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> . . . .
>
> If we are successful, the outcome will benefit litigants by producing better and quicker results, and will benefit the entire justice system by preserving the scarce resources of the courts for the disputes that only courts can decide.[120]

Given that, at least on paper, there is a commitment by the United States to use ADR to quickly and inexpensively resolve disputes, DOJ's Commercial Litigation Branch, of which ITFO is a part, considers the following factors in assessing the use of ADR:

1. *Factors Counseling in Favor of ADR*
   (a) The Parties
      (1) There is a continuous relationship
      (2) There may be benefits to either client hearing directly from the opposing side

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119. Anecdotal evidence indicates that, while ITFO may consider attorney time to be overhead, there are separate budgets for some other elements of litigation, e.g., expert witnesses.

120. Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution, 61 Fed. Reg. 36,895, 36,895-96 (Dep't of Justice July 15, 1996) [hereinafter DOJ Policy on ADR].

(3) Either party would be influenced by opinion of neutral third party
(4) The opposition does not have a realistic view of the case
(5) The parties have indicated that they want to settle
(6) Either party needs a swift resolution

(b) Nature of the case
(1) Complex Facts
(2) Technical complexity
(3) Hostile forum or decisionmaker
(4) Flexibility in desired relief
(5) Trial preparation will be difficult, costly, or lengthy
(6) Need to avoid adverse precedent.

2. *Factors Counseling Against ADR*
(a) Need for precedent
(b) Need for public determination or sanction
(c) Case likely to settle soon without assistance
(d) Case likely to be resolved efficiently by motion
(e) Opposing counsel are not trustworthy.[121]

Another issue is whether or not ITFO applies the foregoing criteria. Only once in the history of mediation at the CIT did the United States move the court for an order of referral to mediation.[122] The plaintiff opposed the motion, and it was ultimately denied by the court.[123] However, the parties were able to settle the issues prior to the court issuing a final judgment.[124] In cases in which mediation was requested and the United States did not oppose, the United States took no position in response to 1 plaintiff's motion for mediation in a consolidated case (of 2) and consented to mediation in 8 cases; the cases in which the United States consented to mediation all involved the same facts and arguments.[125] The parties were able to reach mediated settlements in all 9 cases.[126]

With the exception of those 9 cases, the United States opposed all motions for orders of referral to mediation.[127] In all but one, the court denied the party's motion.[128] The bases for the United States' opposition

121. *Id.* at 36,901.
122. *Infra* Appendices B.6, C.C.1.d.
123. *Infra* Appendices B.6, C.C.1.d.
124. *Infra* Appendices B.6, C.C.1.d.
125. *Infra* Appendix C.A.1.b, C.A.1.d.
126. *Infra* Appendix C.A.1.b, C.A.1.d.
127. *Infra* Appendices B.1-.7, C.A.2.b, C.A.3.b, C.C.1.b, C.D.6-.9.
128. *Infra* Appendix C.D.9.

to the motions included conservation of judicial resources,[129] need for additional discovery,[130] and the opposing party's lack of cooperation.[131]

While opposition to a motion for an order for referral to mediation does not itself raise the issue of good faith in mediation, the court addressed that issue in at least two instances relevant to this discussion. First, and most recently, the court granted a motion for referral to mediation over the United States' opposition.[132] Recognizing the United States' opposition, the court stated that, "if the [United States] approaches the [mediation] process with good faith, as the Court expects it to do, it may be surprised to find that the case is more amenable to disposition than the government fears."[133] In the second instance, in denying plaintiff's motion for referral to mediation in conformance with the United States' opposition, the court stated the following:

> We have denied Plaintiff's Motion based primarily on the Government's emphatic representations that "[m]ediation would not expedite the resolution of this action" (and variations on that theme). Nevertheless, we are not unsympathetic to Plaintiff's concerns about the pace of settlement negotiations with Customs—concerns which are only heightened by the Government's description of the "procedure for obtaining approval for a settlement" (set forth in Defendant's Response to Plaintiff's Motion for Referral to Court-Annexed Mediation) and by the general bureaucratic inertia that the Court has witnessed in similar circumstances in other cases.
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> . . . .
>
> In considering whether to grant any requested extension of [the] deadline [for Defendant's Motion to Dismiss] (as well as the duration of such extension, if any), we will give substantial weight to Plaintiff's views and to the Government's demonstrated "good faith" in moving settlement discussions along.
>
> . . . .
>
> Finally, to the extent that either party comes to believe that the other party is not pursuing settlement negotiations in good faith and in a timely manner, we note that we would be receptive to a motion to accelerate the schedule for filing dispositive motions . . . .[134]

The Mediation Guidelines do not set forth a duty of good faith. It is unclear whether the court considered imposing such a duty when it

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129. *Infra* Appendix C.A.2.b, C.A.3.b, C.D.8.

130. *Infra* Appendix C.D.6-.9.

131. *Infra* Appendix C.D.8.

132. *Infra* Appendix C.D.9.

133. United States v. Tenacious Holdings Inc., 6 F. Supp. 3d 1374, 1378 (Ct. Int'l Trade 2014).

134. Marine Transp. Corp. v. United States, No. 06-00046 (Ct. Int'l Trade filed Feb. 7, 2006).

drafted and later amended those guidelines. Nonetheless, from the foregoing there appears to be, at a minimum, an implicit duty of good faith in mediation before the court. That is not necessarily surprising because the court or court rules do not usually set forth such a duty; instead, it is "[left] to the litigation process to flesh out the details of precisely what bargaining behavior is required."[135]

But should a duty of good faith, whether explicit or implicit, be imposed at all? Those in favor of the imposition of such a duty take the position that without a duty of good faith in mediation, "it is possible for one side to engage in intimidation, misrepresentation, or otherwise subvert the goals of mediation."[136] Those taking the opposing view cite the risks of "increased litigation, perhaps involving evidence from the mediator, jeopardizing concerns of confidentiality and even mediator neutrality."[137]

It may be notable that, in one of the foregoing cases, the court used accelerating the schedule for dispositive motions as a possible consequence for a lack of good faith in settlement negotiations, but that was only after the court denied the motion for referral to mediation, i.e., confidentiality was not an issue. As stated above, the Mediation Guidelines do not impose a duty of good faith. If such a duty were imposed, it follows that sanctions could also be imposed for a breach of that duty. This is one of the arguments against the imposition of a good faith duty, i.e., the duty is breached, sanctions are imposed, litigation increases, and confidentiality is compromised. However, that does not appear to be an issue, at least in the Federal Circuit's Appellate Mediation Program Guidelines, wherein a party, counsel, or the outside mediator "who fails to materially comply" with the guidelines may be subject to sanction by the court.[138] Should such failure occur, the Circuit Executive or the Office of General Counsel would be apprised of the "substance of a mediation only to the extent necessary to explain any recommendations for sanctions."[139] Although there is no explicit duty of good faith set forth in the Federal Circuit's Mediation Guidelines, there are sanctions for material breaches of the duties described therein, confidentiality issues

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135. SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, PRACTICE § 9:3 (2014-15 ed.) (defining the parties' duties in court-connected mediation).

136. *Id.* § 9:6 (citations omitted).

137. *Id.* § 9:4 (citations omitted).

138. *Appellate Mediation Program Guidelines*, *supra* note 88, R. 6.

139. *Id.*

aside. For a material breach of a duty of good faith to occur, it would only be reasonable for that duty to be specifically defined.[140]

To summarize, of the relative few cases the court considered for mediation, the United States has not been an active proponent, notwithstanding the DOJ's stated policy goal of producing better and quicker results through ADR.[141] To the extent that the court is seeking to influence the United States' position vis-à-vis mediation, the court could consider making explicit its seemingly implicit duty of good faith in mediation and provide a process by which either party could be sanctioned for a breach of that duty.

C. Timing Constraints to Successful Mediation

This section of the article addresses whether the point at which the court considers mediation can affect the results. There are a number of studies and schools of thought that analyze or discuss the issue. One study concluded that earlier mediation was associated with earlier termination.[142] Another study of mediation and early neutral evaluation concluded that ADR increased time to disposition; however, the study also cited selection bias due to the court only sending the most "intractable" cases to mediation and thus delaying trial.[143] One school of thought believes that discovery should be closed prior to mediation so that the parties are fully informed when entering negotiations.[144] Another school of thought takes a "balancing approach" in which cost savings are

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140. There is no agreed upon definition of "good faith" in mediation. COLE ET AL., *supra* note 135, § 9:6. Apparently, the only statutory definition of good faith in mediation is a Minnesota statute related to farmer-lender mediation and set forth in the negative, i.e., a nonexclusive list of specific actions in farmer-lender mediation that are considered bad faith. *Id.* Given that this nonexclusive list is specific to farm credit, a more generic example of what a court considers bad faith may be more instructive. In a case not subject to mediation, an Ohio court stated that the following:

> A party has not "failed to make a good faith effort to settle" if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer.

Id.

141. *See* DOJ Policy on ADR, 61 Fed. Reg. 36,895, 36,895-96 (Dep't of Justice July 15, 1996).

142. Lisa Blomgren Bingham et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DISP. RESOL. 225, 243-44 (2009).

143. *Id.* at 241. That study also concluded that there were "no significant evidence of cost savings" gained by the use of ADR.

144. COLE ET AL., *supra* note 135, § 5:11.

balanced with informed decision making and suggests that mediation take place "soon after the onset of written discovery but before depositions and other subsequent (and expensive) discovery procedures have taken place."[145]

A study of cases in which the United States was a party examined the issue of whether there is a relationship between the timing of the ADR intervention and final disposition.[146] That study analyzed three elements: the point at which ADR was introduced into the proceeding, the average time from introduction to final disposition, and the average time from filing the case to final disposition.[147] The results of the study indicate that as the time from case filing to the introduction of ADR increases, so does the time to final disposition.[148]

A similar study using the court's own data would not be statistically significant due to the small number of cases mediated at the court. Nonetheless, for purposes of this article, an analysis of mediation results based on whether mediation was introduced before or after the close of discovery was conducted. That analysis fails to establish a pattern by which mediated settlement was always or mostly achieved after the close of discovery, i.e., after the parties were "fully informed."

In the ten years of court-annexed mediation at the CIT, 16 cases reached settlement through mediation.[149] All 11 of the § 1581(a)/ § 1514(a)(1)[150] valuation cases were referred to mediation after the close of discovery, and all 11 cases resulted in a mediated settlement.[151] One § 1582 case was successfully mediated to settlement after the close of discovery.[152] However, 3 of the § 1582 cases were also successfully mediated to settlement prior to the close of discovery.[153] Furthermore, one § 1581 case was successfully mediated while 2 motions to amend the summons were pending before the court, i.e., in the early stages of the case.[154] However, even after a full vetting of facts and law before the

145. *Id.*
146. Bingham et al., *supra* note 143, at 257.
147. *Id.*
148. *Id.*
149. *Infra* Appendix C.A.1.a-.e, C.A.4.c, C.D.3-.5, C.D.7. For purposes of this section of the Article, cases are counted as one regardless of whether it acts as a test case for other cases or it was consolidated with other cases.
150. 28 U.S.C. § 1581(a) (2012) grants the court exclusive jurisdiction over protests denied pursuant to 19 U.S.C. § 1515 (2012). The bases on which protests may be filed are set forth in 19 U.S.C. § 1514(a)(1) through (a)(7). *See supra* Part III.A.1.
151. *Infra* Appendix C.A.1.a-.d.
152. *Infra* Appendix C.D.3.
153. *Infra* Appendix C.D.4-.5, C.D.7.
154. *Infra* Appendix C.A.4.c.

court and the Federal Circuit, 15 of the § 1581(a)/§ 1514(a)(2) classification cases referred to mediation at the court after remand still failed to reach mediated settlements.[155] Recognizing the small sample of cases and the distinct bases on which these cases were brought before the court, there currently does not appear to be a link between discovery being closed prior to mediation and successful mediation results.

Notwithstanding the lack of a current link between when mediation is introduced in a case and mediation results, parties often successfully use discovery as the basis to oppose a party's motion for an order of referral to mediation.[156] With one exception, the court denied a party's motion for an order of referral to mediation when an opposing party wholly or partially based its opposition on the fact that discovery had not yet closed.[157] It is notable that in the 2 cases where the court denied a party's motion for mediation while discovery was ongoing, the parties were still ultimately able to settle all the issues and the court was able to dispose of the cases without full discovery.[158]

There is no question that mediation may fail regardless of the point at which it is introduced in the case. But, as the court recently stated, "Many cases are resolved in mediation prior to the production of all discovery and Rule 16.1 and the Guidelines clearly contemplate referrals to mediation prior to the completion of discovery."[159]

D. Amount in Controversy Constraints to Successful Mediation

A recent CIT opinion raised the issue of whether the amount in controversy may be determinative of the appropriateness or success of mediation. In granting the defendant's motion for an order of referral to mediation over plaintiff's opposition, the court agreed with the defendant's assertion that "mediation is more likely to be successful given that the amount in dispute here [(approximately $50,000)] is relatively low . . . ."[160] However, a low amount in controversy does not necessarily mean that parties agree that mediation is the preferred

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155. *Infra* Appendix C.A.2.a, C.A.2.c.; (Ct. Int'l Trade). The former cases (*Park B. Smith v. United States*, Nos. 94-00546, 95-00043, 95-00184, 95-00701, 95-01180, 96-01810, 96-02594, 97-00936, 98-00019, 99-00419, 99-00749, 00-00411, 01-00084, 01-00952) were ultimately settled after mediation, and the latter case (*BenQ America Corp. v. United States*, No. 05-00637) is still pending before the court. *Infra* Appendix C.A.2.a, C.A.2.c.

156. *Infra* Appendix C.D.6, C.D.8-.9.

157. *Tenacious Holdings* is the exception. *See* United States v. Tenacious Holdings, 6 F. Supp. 3d 1374 (Ct. Int'l Trade 2014).

158. *Infra* Appendix C.D.6, C.D.8.

159. *Tenacious Holdings*, 6 F. Supp. 3d at 1378. As of September 10, 2014, the judge mediator had yet to issue a report of mediation.

160. *Id.*

disposition method.[161] That is particularly true when the parties are already in settlement negotiations and mediation could be considered to expend, rather than conserve, resources.[162] In considering this issue, it may be notable that draft legislation sought to limit a proposed arbitration program at the court to cases in which the amount in controversy was no more than $150,000.[163]

A review of the successfully mediated cases indicates that even such a relatively high prescribed limit applied to the court's mediation program would have prevented the mediated settlement of a number of the court's cases. For example, in one § 1581(a)/§ 1514(a)(1) valuation case, the plaintiff sought an allowance for defective merchandise of $1,122,953.95.[164] The parties reached a mediated settlement of $941,158 in duties and $567,168 in interest.[165] In two successfully mediated § 1582 cases, the amounts in controversy were $240,936.65 and $2,846,230.87 in duties, and $1,746,964.99 and $3,350,923 in penalties, respectively.[166] While a modest cap on the amount in controversy may have prevented both cases from mediation, it is possible that the parties would have reached settlement without mediation due to the defendants' inability to pay their liabilities, notwithstanding the relative merits of either case.[167]

Given the foregoing, it is not unreasonable to conclude that parties may be more amenable to mediation when the amount in controversy is relatively low, but that amount does not necessarily affect the results of mediation. In fact, by omission, the United States' policy indicates that the amount in controversy does not even factor into its analysis whether to consider a case for mediation or any other type of ADR.[168]

E. Successful Mediation

What should the court and parties consider to be successful mediation? CIT Form M-2-1, "Report of Mediation," only gives the

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161. *Infra* Appendices B.7, C.D.8. The amount in controversy was less than $6,000 and mediation failed to result in a settlement of all of the issues. However, the parties were able to settle their differences after the close of mediation, but before trial. *Infra* Appendices B.7, C.D.8.

162. *Infra* Appendices B.7, C.D.8.

163. *See* 28 U.S.C. § 2647(j)(1)(B) (2012).

164. *Infra* Appendices B.1, C.A.1.a.

165. *Infra* Appendices B.1, C.A.1.a.

166. *Infra* Appendices B.7, C.D.3-.4.

167. *Infra* Appendix C.D.4.

168. DOJ Policy on ADR, 61 Fed. Reg. 36,895, 36,901 (Dep't of Justice July 15, 1996). This is consistent with the plaintiff's opposition to the defendant's motion for an order of referral to mediation in *Tenacious Holdings*, in which the plaintiff, the United States, disagreed that the relatively small dollar amount associated with the case makes it "unimportant." Tenacious Holdings, Inc. v. United States, 6 F. Supp. 3d 1374, 1376-77 (Ct. Int'l Trade 2014).

judge mediator three possible results: mediation resulted in a settlement of all of the issues, mediation resulted in a partial settlement, or mediation did not result in a settlement.[169] Of course, judge mediators are not limited to those three options in reporting mediation results.[170] However, when the court was asked to provide a list of the cases it considered for mediation for purposes of this Article, the court's response conformed to the three options and did not include an indication of whether the cases that failed to reach a mediated settlement did ultimately settle prior to the court issuing a final judgment.

Regardless of mediation results, mediation can still add value. One group of dispute resolution researchers "deem the following party goals 'very substantially served by mediation': speed, privacy, minimize costs, maintain/improve relationships, create new solutions, party control of the process, transformation of the parties, provide a satisfying process, and improve understanding of the dispute."[171] Another group

> emphasizes that clients have much to gain (and very little to lose) by trying mediation, including 1) resolving own dispute; 2) selecting forum for all issues—legal and non legal; 3) preserving or continuing relationships; 4) avoiding precedent; 5) developing creative remedies; 6) forming enduring settlement; 7) maintaining confidentiality; 8) saving time and money; and 9) "cleaning up" the case (dispose of some issues, solidify a discovery schedule, and plan for resolving remaining issues).[172]

A review of the cases that failed to settle in mediation but settled postmediation appears to conform with the foregoing research. Of the 16 mediated § 1581(a)/§ 1514(a)(2) classification cases, 14 were settled postmediation, 1 is still pending, and 1 was disposed of in a dispositive opinion.[173] One § 1581(a)/§ 1514(a)(3) case also settled postmediation.[174] It may be notable that, in all 15 cases settled after mediation, the parties

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169. *Mediation Guidelines*, *supra* note 9, § II(E).

170. *See, e.g.*, Settlement Agreement, Mast Indus. v. United States, No. 95-00175 (Ct. Int'l Trade May 12, 2008), Doc. No. 86; Report of Mediation, Family Delight Foods, Inc. v. United States, No. 10-10036 (Ct. Int'l Trade July 26, 2012), Doc. No. 51 ("The mediation resulted in a settlement of all the issues; the Court is to retain jurisdiction over the settlement.").

171. COLE ET AL., *supra* note 135, § 5:9.

172. *Id.*

173. *Infra* Appendices B.2 and C. *Park B. Smith v. United States* involved 17 different cases. However, 3 cases that were settled were not referred to mediation: No. 96-00344 on April 6, 2005, No. 04-00324 on April 26, 2010, and No. 06-00206 on September 28, 2009. It is likely that 2 of those 3 cases settled due to successful mediation in the other 14 cases. The first case, which was the test case (No. 96-00344), was settled prior to the 14 cases being referred to mediation. *Id.*

174. *Infra* Appendices B.4 and C.A.4.a. Note that the CM/ECF No. categorized this case under 28 U.S.C. § 1514(a)(5) (2012).

entered mediation during ongoing settlement negotiations.[175] It may also be notable that in 5 cases in which the court denied a party's motion for an order of referral to mediation, i.e., the parties did not have the above-referenced benefits associated with mediation, the parties were still able to settle their differences prior to the court issuing a final judgment.[176]

Successful mediation should not be judged only by whether a mediated settlement is achieved. As stated, mediation can streamline discovery, narrow the issues, and otherwise increase value and reduce litigation time, even if the parties fail to settle and the case goes to trial and/or the court ultimately disposes of the case through a dispositive opinion.

IV. CONCLUSION

Given the foregoing discussion of the first ten years of mediation at the CIT, it is the position of the author that there is no jurisdictional or amount in controversy impediment to successful mediation at the court. Moreover, while there is not necessarily a timing impediment to "successful" mediation, it appears that mediation is likely to be more "successful" when introduced early in the proceeding. Last, and recognizing that this is stating the obvious, mediation is also likely to be more "successful" when both parties are willing to engage actively in the process. Without such engagement, the next ten years of mediation at the court will likely mirror the previous ten years. Combining such engagement with the introduction of mediation at an earlier stage of the litigation would further the court's goal of the "just, speedy, and inexpensive determination of every action and proceeding."[177]

175. *Infra* Appendix C.A.2.a, C.A.4.a.
176. *Infra* Appendix C.A.2.b, C.A.3.b, C.C.1.d, C.D.6, C.D.8.
177. CT. INT'L TRADE R. 1.

Appendix A.1
Cases Closed at the CIT: 01/01/04—09/01/14

JURISDICTION/CATEGORY	NUMBER OF CASES[1]
28 U.S.C. § 1581(a) Denied Protests[2]	3013
19 U.S.C. § 1514[3] Detail	
(a)(1) Valuation	314
(a)(2) Classification	1819
(a)(2) Rate of Duty	486
(a)(3) Charges or Extractions	567
(a)(4) Exclusion	34
(a)(4) Demand for Redelivery	36
(a)(5) Liquidation/Reliquidation	557
(a)(6) Denial of Drawback	132
(a)(7) Refusal to Reliquidate	77
28 U.S.C. § 1581(a)/19 U.S.C. § 1514 Detail Total[2]	4022
(b) Domestic Interested Parties Petition	1
(c) AD/CVD	1195
(d) Trade Adjustment Assistance	188
(e) Government. Procurement/Country of Origin	1
(f) Disclosure of Proprietary Information	0
(g) Customs Broker's Licensing	15
(h) Pre-Importation Rulings	7
28 U.S.C. § 1581(i) Residual[2]	1867
28 U.S.C. § 1581(i) Residual Detail	
(i)(1) Rev. from Imports or Tonnage	1217
(i)(2) Tariffs, Duties, Fees, etc.	837
(i)(3) Embargoes or Other	45
(i)(4) Administration and Enforcement	663
28 U.S.C. § 1581(i) Residual Detail Total[2]	2762
28 U.S.C. § 1582	138
28 U.S.C. § 1584	0

[1] The number of cases was collected from CM/ECF records, specifically CIT Form 5—Information Statements, on which plaintiffs set forth the jurisdictional basis for their claim(s). CM/ECF uses that information to populate the jurisdiction and category fields.

[2] The totals for 28 U.S.C. §§ 1581(a) and (i) do not equal the sum of the detail subsections because plaintiffs often assert multiple bases for jurisdiction.

[3] 28 U.S.C. § 1581(a) grants the court exclusive jurisdiction over protests denied pursuant to 19 U.S.C. § 1515. The bases on which protests may be filed are set forth in 19 U.S.C. § 1514(a)(1) through (a)(7).

Source: CIT CM/ECF. All cases closed Jan. 1, 2004, through Sept. 1, 2014, sorted by jurisdiction and category.

Appendix A.2
Cases Closed at the CIT by Disposition Method: 01/01/04—09/01/14

JURISDICTION/ CATEGORY	DISPOSITION METHOD								
	Slip Op. (Dispos.)	Jdgmt. Order	Order of the Court	Order of Dism.	Vol. Dism. CIT R. 41(a)(1) (A)(i)	Vol. Dism. CIT R. 41(a)(1) (A)(ii)	SJOASF, CIT R. 58.1	Other[1]	Total
28 U.S.C. § 1581 Denied Protests									
28 U.S.C. § 1581(a) Denied Protests[2]	216	57	389	79	864	193	979	235	3012
19 U.S.C. § 1514[3] Detail									
(a)(1) Valuation	11	19	11	16	77	25	112	43	314
(a)(2) Classification	146	28	25	51	554	102	756	157	1819
(a)(2) Rate of Duty	37	1	2	1	153	27	220	45	486
(a)(3) Charges or Extractions	21	12	348	3	98	28	37	20	567
(a)(4) Exclusion	6	0	1	1	14	5	1	6	34
(a)(4) Demand for Redelivery	1	0	0	0	20	7	7	1	36
(a)(5) Liquidation/ Reliquidation	47	6	4	10	171	25	235	59	557
(a)(6) Denial of Drawback	13	1	3	3	54	10	37	11	132
(a)(7) Refusal to Reliquidate	13	1	7	1	17	10	19	9	77
28 U.S.C. § 1581(a)/19 U.S.C. § 1514 Detail Total[2]	295	68	401	86	1158	239	1424	351	4022
(b) Domestic Interest. Parties Petition	0	0	0	0	1	0	0	0	1
(c) AD/CVD	607	40	65	30	133	318	0	2	1195
(d) Trade Adjustment Assistance	76	7	19	0	12	74	0	0	188
(e) Government Procurement/Country of Origin	0	0	0	0	0	1	0	0	1
(f) Disclosure of Property Information.	0	0	0	0	0	0	0	0	0
(g) Customs Broker's Licensing	8	0	0	0	1	6	0	0	15
(h) Pre-Importation Rulings	4	0	1	0	2	0	0	0	7
28 U.S.C. § 1581(i) Residual[2]	182	48	1033	201	261	75	66	1	1867
28 U.S.C. § 1581(i) Residual Detail									
(i)(1) Rev. from Imports or Tonnage	47	7	875	87	149	26	26	0	1217
(i)(2) Tariffs, Duties, Fees, etc.	70	27	380	140	152	33	35	0	837

JURISDICTION/ CATEGORY	DISPOSITION METHOD								
	Slip Op. (Dispos.)	Jdgmt. Order	Order of the Court	Order of Dism.	Vol. Dism. CIT R. 41(a)(1) (A)(i)	Vol. Dism. CIT R. 41(a)(1) (A)(ii)	SJOASF, CIT R. 58.1	Other[1]	Total
(i)(3) Embargoes or Other	8	1	2	8	0	3	23	0	45
(i)(4) Administration and Enforcement	106	36	258	57	117	33	55	1	663
28 U.S.C. § 1581(i) Residual Detail Total[2]	231	71	1515	292	418	95	139	1	2762
28 U.S.C. § 1582	28	9	0	11	18	53	2	17	138
28 U.S.C. § 1584	0	0	0	0	0	0	0	0	0

[1] This category consists of Reserve Calendar and Suspension Disposition Calendar dismissals, § 1582 Default Judgments, transfers to another court, clerical errors, and blanks.

[2] The case information for this row was collected from CM/ECF records, specifically CIT Form 5—Information Statements, on which plaintiffs set forth the jurisdictional basis for their claim(s). CM/ECF uses that information to populate the jurisdiction and category fields. The totals for CM/ECF 28 U.S.C. § 1581(a) and (i) do not equal the sum of the detail subsections because plaintiffs often assert multiple bases for jurisdiction.

[3] 28 U.S.C. § 1581(a) grants the court exclusive jurisdiction over protests denied pursuant to 19 U.S.C. § 1515. The bases on which protests may be filed are set forth in 19 U.S.C. § 1514(a)(1) through (a)(7).

Source: CIT CM/ECF. All cases closed Jan. 1, 2004, through Sept. 1, 2014, sorted by jurisdiction, category, and disposition method.

Appendix B.1
28 U.S.C. § 1581(a)/19 U.S.C. § 1514(a)(1) Mediation at the CIT:
01/01/04-09/01/14

CASES	CIT Ct. No.	Mediation initiated by motion (M) or Order (O)?	If (M), consent motion (C) or opposed (O)?	If (M), granted (G) or denied (D)?	Amt. originally at issue?	Were the issues settled through mediation?	If (Y), amt. of settlement?	If (N), were the issues ultimately settled?	If (Y), amt. of settlement?
Mast Industries, Inc. v. United States	95-00175	(O)	N/A	N/A	Value of Merch. $11,631,863.22 Allowance for Defective Merch. $1,122,953.95	(Y) No Rule cited as the basis for dismissal.	$941,158 in duties; $567,168 in interest	N/A	N/A
Heng Ngai Jewelry, Inc. v. United States	98-03019	(M) by P	D took no position	(G)	31 entries at 129.6% and 10 entries at 110%	(Y) CIT R. 58.1	All entries at 124.6% ($7,413.00 refund)	N/A	N/A
Skechers USA, Inc. v. United States	98-03245	(O)	N/A	N/A	Unknown on the subject 3 entries	(Y) CIT R. 58.1	Full refund	N/A	31 related cases were ultimately settled with refunds totaling $344,085.81
Cont'l Teves, Inc. v. United States	04-00264 04-00405 04-00620 05-00069 05-00206 05-00421 05-00526 09-00221	(M) by P	(C)	(G)	2002 Assists - 9.9611%; 2003 Assists - 9.116406%; 2004 Assists - 9.579137%	(Y) CIT R. 58.1	2002 Assists - 1.65%; 2003 Assists - 1.58%; 2004 Assists - 2.6%	N/A	N/A

Source: Appendix C.

Appendix B.2
28 U.S.C. § 1581(a)/19 U.S.C. § 1514(a)(2) Mediation at the CIT:
01/01/04-09/01/14

CASES	CIT Ct. No.	Mediation initiated by motion (M) or Order (O)?	If (M), consent motion (C) or opposed (O)?	If (M), granted (G) or denied (D)?	Amt. originally at issue?	Were the issues settled through mediation?	If (Y), amt. of settlement?	If (N), were the issues ultimately settled?	If (Y), amt. of settlement?
Park B. Smith, Ltd. v. United States	94-00546	(O)	N/A	N/A	Duties on all merchandise between 5.4-7.75%, inclusive	(N)	N/A	(Y) CIT R. 58.1	The duties on certain merchandise was reduced to 0.00%
	95-00043								
	95-00184								
	95-00701								
	95-01180								
	96-01810								
	96-02594								
	97-00936								
	98-00019								
	99-00419								
	99-00749								
	00-00411								
	01-00084								
	01-00952								
	96-00344	N/A	N/A	N/A		N/A	N/A		
	04-00324	N/A	N/A	N/A		N/A	N/A		
	06-00206	N/A	N/A	N/A		N/A	N/A		
ABB Flexible Automation, Inc. v. United States	02-00664	(M) by P	(O)	(D)	Duties at 2.5% or 2.7%, depending on the merchandise	N/A	N/A	(Y) CIT R. 58.1	Duties at 0.00%, 1.6%, and 1.8%, depending on the merchandise
BenQ America Corp. v. United States	05-00637	(O)	N/A	N/A	Duties at 5%	(N)	N/A	Pending	Pending

CASES	CIT Ct. No.	Mediation initiated by motion (M) or Order (O)?	If (M), consent motion (C) or opposed (O)?	If (M), granted (G) or denied (D)?	Amt. originally at issue?	Were the issues settled through mediation?	If (Y), amt. of settlement?	If (N), were the issues ultimately settled?	If (Y), amt. of settlement?
Kahrs Int'l Inc. v. United States	07-00343	(O)	N/A	N/A	Duty at 8%	(N)	N/A	(N)	N/A

Source: Appendix C.

Appendix B.3
28 U.S.C. § 1581(a)/19 U.S.C. § 1514(a)(3) Mediation at the CIT:
01/01/04-09/01/14

CASES	CIT Ct. No.	Mediation initiated by motion (M) or Order (O)?	If (M), consent motion (C) or opposed (O)?	If (M), granted (G) or denied (D)?	Amt. originally at issue?	Were the issues settled through mediation?	If (Y), amt. of settlement?	If (N), were the issues ultimately settled?	If (Y), amt. of settlement?
Canadian Reynolds Metal Co. v. United States	00-00444	(O)	N/A	N/A	Unk.	(N)	(N)	(N)	N/A
Aluminerie Becancour, Inc. v. United States	00-00445	(O)	N/A	N/A	Unk.	(N)	(N)	(N)	N/A
Alcan Aluminum Corp. v. United States	00-00446	(O)	N/A	N/A	Unk.	(N)	(N)	(N)	N/A
Alcan Aluminum Corp. v. United States	01-00095	(O)	N/A	N/A	Unk.	(N)	(N)	(N)	N/A
Marine Transport Corp. v. United States	06-00046	(M) by P	(O)	(D)	$545,000 in duties	N/A	N/A	(Y)	$436,000 in duties plus interest

Source: Appendix C.

Appendix B.4
28 U.S.C. § 1581(a)/19 U.S.C. § 1514(a)(5) Mediation at the CIT:
01/01/04-09/01/14

CASES	CIT Ct. No.	Mediation initiated by motion (M) or order (O)?	If (M), consent motion (C) or opposed (O)?	If (M), granted (G) or denied (D)?	Amt. originally at issue?	Were the issues settled through mediation?	If (Y), amt. of settlement?	If (N), were the issues ultimately settled?	If (Y), amt. of settlement?
Allstates Trading & Clothing Co. v. United States	04-00245	(O)	N/A	N/A	$30,000 - $60,000 (estimate)	(N)	N/A	(Y) CIT R. 41(a)(1)(B)	Unk.
Kahrs Int'l Inc. v. United States	07-00343	(O)	N/A	N/A	Duty at 8%	(N)	N/A	(N)	N/A
Family Delight Foods, Inc. v. United States	10-00136	(O)	N/A	N/A	Unk.	(Y)	Unk.	N/A	N/A

Source: Appendix C.

Appendix B.5
28 U.S.C. § 1581(d) Mediation at the CIT: 01/01/04-09/01/14

CASES	CIT Ct. No.	Mediation initiated by motion (M) or Order (O)?	If (M), consent motion (C) or opposed (O)?	If (M), granted (G) or denied (D)?	Amt. originally at issue?	Were the issues settled through mediation?	If (Y), amt. of settlement?	If (N), were the issues ultimately settled?	If (Y), amt. of settlement?
United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Industrial & Service Workers Int'l Union, Local 2911 v. United States Secretary of Labor (*Steelworkers*)	04-00492	(O)	N/A	N/A	Unk.	(N)	N/A	(N)	N/A

Source: Appendix C.

Appendix B.6
28 U.S.C. § 1581(i) Mediation at the CIT: 01/01/04-09/01/14

CASES	CIT Ct. No.	CATE-GORY	Mediation initiated by motion (M) or Order (O)?	If (M), consent motion (C) or opposed (O)?	If (M), granted (G) or denied (D)?	Amt. origi-nally at issue?	Were the issues settled through medi-ation?	If (Y), amt. of settle-ment?	If (N), were the issues ultimately settled?	If (Y), amt. of Settle-ment?
International Custom Products, Inc. v. United States	05-00509	§ 1581(i)(1) —Rev. from Imp. Ton.	(O)	N/A	N/A	Single entry bonds valued at 3 times value	No, but plaintiff was able to enter its merchant-dise unencum-bered by the single entry bonds	N/A	N/A	N/A
Trustees in Bankruptcy of North American Rubber Thread Co. v. United States (Rubber Thread Co.)	05-00539	§ 1581(i)(1) —Rev. from Imp. Ton.	(M) by P	(O)	D	Unk.	N/A	N/A	N/A	N/A
Kahrs International Inc. v. United States	07-00343	§ 1514(a)(2) Class./Rate of Duty; § 1514(a)(5) Liquid./Reliquid.; § 1581(i)(1) —Rev. from Imp. Ton.	(O)	N/A	N/A	Duty at 8%	(N)	N/A	(N)	N/A
City of Fresno/Fresno–Yosemite Int'l Airport v. United States (City of Fresno)	10-00137	§ 1581(i)(1) —Rev. from Imp. Ton.; § 1581(i)(4) —Admin. and Enforce.	(M) by D	(O)	D	$991,517.00 in duties	N/A	N/A	(Y) CIT R. 41(a)(1)(A)(ii)	Unk.
Family Delight Foods, Inc. v. United States	10-00136	§ 1514(a)(5) - Liquid./Reliquid.; § 1581(i)(2) —Duties, Taxes, Fees, etc.	(O)	N/A	N/A	Unk.	(Y)	Unk.	N/A	N/A

Source: Appendix C.

Appendix B.7
28 U.S.C. § 1582 Mediation at the CIT: 01/01/04-09/01/14

CASES	CIT Ct. No.	Mediation initiated by motion (M) or Order (O)?	If (M), consent motion (C) or opposed (O)?	If (M), granted (G) or denied (D)?	Amt. originally at issue?	Were the issues settled through mediation?	If (Y), amt. of settlement?	If (N), were the issues ultimately settled?	If (Y), amt. of settlement?
United States v. ITT Indus., Inc.	97-01777	(O)	N/A	N/A	$619,515.33 in anti-dumping duties; $109,418.81 in penalties (interest)	(N)	N/A	(N)—anti-dumping duties; (Y)—penalty (interest)	$54,709.41—penalty (interest)
United States v. Optrex Am., Inc.	02-00646	(O)	N/A	N/A	$959,635.04 in duties; $1,919,270.08 in penalties.	(N)	N/A	(N)	N/A
United States v. Lee-Hunt Int'l, Inc.	02-00816	(O)	N/A	N/A	Pres. Lee, V.P. Baughman, LHI - $240,936.65 in duties and $1,746,964.99 in penalties; Washington Int'l- $100,000 in duties; Frontier - $50,000 in duties.	(Y) CIT R. 54(b)	Pres. Lee, LHI - $25,000; V.P. Baughman - $2500; Wash. Int'l—$100,000; Pres. Lee to reimburse Wash. Int'l; Frontier not a party to settlement.	N/A	N/A
United States v. Leslie M. Toth	09-00183	(O)	N/A	N/A	$2,846,230.87 in duties; $3,350,923 in penalties.	(Y) CIT R. 41(a)(1)(A)(ii)	Unk. Dismissed without prejudice.	N/A	N/A
United States v. Wash. Int'l Ins. Co. ("Wash. Int'l Ins. I")	09-00449	(O)	N/A	N/A	$63,288.78 in duties.	(Y) CIT R. 41(a)(1)A)(ii)—D only.	Unk.	(Y) CIT R. 41(a)(1)(A)(ii)—3rd party D	Dismissed with prejudice.

United States v. Wash. Int'l Ins. Co. ("Wash. Int'l Ins. II")	09-00459	(M) by 3rd Party D	(O)	(D)	$142,245.00 in duties.	N/A	N/A	(Y) CIT R. 41(a)(1)(A)(ii)	Dismissed with prejudice (all parties).
United States v. Tenneco Auto.	10-00130	(M) by D (M) by P	D's (M) (O) P's (M) (O)	D's (M) [?] P's (M) (D)	$22,332.70 in duties; $44,665.40 in penalties.	(Y) CIT R. 41(a)(1)(A)(ii)	All claims dismissed with prejudice.	N/A	N/A
United States v. ABC Farma, Inc.	12-00041	(M) by D	(O)	(D)	$5,988.76 in penalties.	N/A	N/A	(Y) CIT R. 41(a)(1)(A)(ii)	Dismissed with prejudice.
United States v. Tenacious Holdings, Inc.	12-00173	(M) by D	(O)	(G)	$1339.09 in duties; $51,544.40 in penalties.	pending	pending	pending	pending

Source: Appendix C.

Appendix C
Procedural History of Mediation at the CIT

A. 28 U.S.C. § 1581(a)—Denied Protests

1. 19 U.S.C. § 1514(a)(1)—Appraised Value

a. *Mast Industries, Inc. v. United States*[178]

The procedural history of *Mast Industries* begins nine years prior to the effective date of the court's Mediation Guidelines and spans over thirteen years.[179] In Mast Industries' summons, the issue was characterized as "whether the imported [wearing apparel] is subject to appraisement at the invoice values less allowance for defective merchandise."[180] The issues set for trial, all of which were fact issues, were (1) "[w]hether [the] plaintiff will have established that it contracted for defect free merchandise," (2) "[w]hether [the] plaintiff will have linked the defective articles to specific entries," and (3) "[w]hether [the] plaintiff will have proved the amount of duty allowance for each entry."[181] The value of the apparel at issue was set at $11,631,863.82, and the amount of allowance for defective merchandise sought by Mast Industries was $1,122,953.95.[182]

After spending fifteen months on the Reserve Calendar, Mast Industries filed the first complaint.[183] The United States filed its first answer eight months later.[184] Discovery opened, and one year passed until

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178. *Mast Industries, Inc. v. United States*, No. 95-00175, was the test case number assigned for the following cases: 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142. On May 12, 2006, the court dismissed Nos. 98-00394, 02-00141, and 02-00142 with prejudice and consolidated the remaining cases under No. 95-00175. Order, Mast Indus. v. United States, Nos. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (Ct. Int'l Trade May 12, 2006), Doc. No. 63.

179. *Mediation Guidelines*, *supra* note 9 (added Sept. 30, 2003, effective Jan. 1, 2004; amended May 25, 2004, effective Sept. 1, 2004; amended Dec. 6, 2011, effective Jan. 1, 2012).

180. Summons, *Mast Indus.*, Nos. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (Feb. 14, 1995), Doc. No. 1.

181. Proposed Pretrial Order, Schedule F, *Mast Indus.*, Nos. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (May 12, 2006), Doc. No. 62. The United States characterized the third issue as whether the plaintiff will have proved the amount of allowance for the defect. Pretrial Order sched. F-2, *Mast Indus.*, No. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (May 11, 2006), Doc. No. 60.

182. Joint Proposed Pretrial Order, *supra* note 181, at 26.

183. Complaint, *Mast Indus.*, No. 95-00175 (July 30, 1997).

184. Answer, *Mast Indus.*, No. 95-00175 (Feb. 26, 1998).

the case was suspended and a test case designated.[185] Two years later, the parties notified the court that they had entered into settlement negotiations, and the case was placed on the Suspended Disposition Calendar.[186] Over three years later, the court ordered the parties to either file (1) a stipulated judgment, (2) a scheduling order governing the action until final disposition, or (3) a stipulation of dismissal.[187]

Five months after the close of discovery[188] and one month after the plaintiff filed a request for trial,[189] the court issued a procedural order and a scheduling order. In the former, the court dismissed 3 actions and consolidated the remaining 10 actions.[190] In the latter, the court (1) remanded the case to CBP for further review of documents intended to facilitate settlement and (2) ordered the defendant to report to the court the progress made towards settlement every 30 days.[191] The parties filed no less than 10 status reports with the court.[192] In the last such report, the plaintiff requested a pretrial conference because the defendant stated that settlement was not possible.[193]

Four days after the plaintiff's request, the court held a conference, and one day later, the court issued an order of referral to court-annexed mediation.[194] After one 30-day extension of the stay, the judge mediator issued the mediation report, which indicated that all issues were settled, but not yet reduced to writing.[195] At this point, it had been seven years since the first indication that the parties were in settlement negotiations[196] and five months from the date the case was ordered to mediation.[197] Two

185. Order, Lane Bryant v. United States, No. 95-00823 (Ct. Int'l Trade Mar. 24, 1999).

186. Order, *Lane Bryant*, No. 95-00823 (Mar. 19, 2001), Doc. No. 30 (suspending the case pursuant to CIT Rule 85(a)).

187. Order, *Mast Indus.*, Nos. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (Sept. 30, 2005), Doc. No. 48.

188. Scheduling Order, *Mast Indus.*, Nos. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (Dec. 1, 2005), Doc. No. 50 (indicating discovery due February 15, 2006).

189. Request for Trial, *Mast Indus.*, Nos. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (Apr. 25, 2006), Doc. No. 55.

190. Order, *supra* note 178.

191. Order, *Mast Indus.*, No. 95-00175 (May 12, 2006), Doc. No. 64.

192. Status Reports, *Mast Indus.*, No. 95-00175 (June 12, 2006, July 12, 2006, Aug. 10, 2006, Oct. 20, 2006, Feb. 28, 2007, May 30, 2007, July 2, 2007, Sept. 4, 2007, Nov. 5, 2007, Jan. 4, 2008), Doc. Nos. 66-75.

193. Status Report, *Mast Indus.*, No. 95-00175 (Jan. 4, 2007), Doc. No. 75.

194. Order of Referral to Mediation, *Mast Indus.*, No. 95-00175 (Jan. 9, 2008), Doc. No. 78.

195. Report of Mediation, *Mast Indus.*, No. 95-00175 (May 12, 2008), Doc. No. 85.

196. Order, *supra* note 186.

197. Order of Referral to Mediation, *supra* note 194.

months later, the presiding judge signed the settlement agreement, which provided Mast Industries a refund of $1,508,926,[198] dismissed claims associated with 32 of the 219 entries under review, and dismissed the case.[199] The settlement agreement did not indicate the basis on which the case was dismissed.[200]

b. *Heng Ngai Jewelry, Inc. v. United States*[201]

The procedural history of *Heng Ngai Jewelry* spans seven years. The initial issue brought before the court was whether CBP properly resorted to using computed value, rather than transaction value, in appraising imported jewelry when the exporter and U.S. importer were affiliated with each other.

Once the answer was filed, the next twenty-six months consisted of discovery.[202] The plaintiff and defendant, one and three months after the close of discovery, respectively, filed motions for summary judgment.[203] The court denied both motions because it determined that further findings of fact were necessary to resolve four issues.[204] Three months later, the court issued a scheduling order setting a trial date.[205]

One month before trial, citing the desire to conserve resources that would otherwise be expended during trial, the plaintiff filed an unopposed motion for referral to court-annexed mediation.[206] The

198. $567,168 in duties and $941,758 in interest.

199. Settlement Agreement & Order, *Mast Indus.*, No. 95-00175 (July 7, 2008), Doc. No. 87.

200. *Id.* The two bases by which it could have been dismissed are CIT Rule 58.1, "Stipulated Judgment on Agreed Statement of Facts," or CIT Rule 41, "Voluntary Dismissal." *See Mediation Guidelines*, *supra* note 9, § II(D).

201. The court consolidated *Heng Ngai Jewelry, Inc. v. United States*, Nos. 98-03019 and 99-00352 under No. 98-03019. Order, Heng Ngai Jewelry, Inc. v. United States, 318 F. Supp. 2d 1291 (Ct. Int'l Trade 2004) (Nos. 98-03019, 99-00352) (filed July 25, 2001).

202. Docket Sheet, *Heng Ngai Jewelry*, 318 F. Supp. 2d 1291 (No. 98-03019), Doc. No. 19.

203. Order, *Heng Ngai Jewelry*, 318 F. Supp. 2d 1291 (No. 98-03019), Doc. No. 30; Motion for Summary Adjudication of Issues, *Heng Ngai Jewelry*, 318 F. Supp. 2d 1291 (No. 98-03019) (filed Jan. 27, 2003); Response in Opposition to Motion for Partial Summary Judgment and Cross Motion for Partial Summary Judgment With Response to Plaintiff's Statement of Material Facts to Which There Are No Genuine Issues to be Tried; Separate Statement of Material Facts to Which There Are No Genuine Issues to be Tried; Declarations & Exhibits, *Heng Ngai Jewelry*, 318 F. Supp. 2d 1291 (No. 98-03019) (filed Mar. 24, 2003).

204. *Heng Ngai Jewelry*, 318 F. Supp. 2d at 1295-1304.

205. Order, Heng Ngai Jewelry, Inc. v. United States, No. 98-03019 (Ct. Int'l Trade June 16, 2004), Doc. No. 71.

206. Plaintiff's Motion for Referral to Court-Annexed Mediation & Proposed Order of Referral to Mediation, *Heng Ngai Jewelry*, No. 98-03019 (Oct. 14, 2004), Doc. No. 73. In the plaintiff's memorandum attached to its motion, the plaintiff avers that it sought the defendant's consent, but there was insufficient time for counsel to confer with its client under the thirty-day

plaintiff's order was granted two weeks later.[207] After two 30-day extensions of the original 60-day mediation period, the parties filed a stipulated judgment on an agreed statement of facts.[208] In that document, the parties agreed that CBP originally appraised 31 entries at 129.6% of the invoice price and 10 entries at 110% of the invoice price.[209] Based on the stipulated judgment, however, the parties also agreed that the value of all entries should be appraised at 124.6% of the invoice price, resulting in a $7,314 refund to the plaintiff, with no interest payable.[210]

c. *Skechers USA, Inc. v. United States*[211]

Skechers USA covered hundreds of entries—the associated denied protests were challenged in 34 different actions spanning almost twelve years. The issue common in all 34 cases was whether interest paid on outstanding invoices of imported footwear was dutiable. The parties agreed on the four-part test for excludable interest memorialized in Treasury Decision 85-111 and affirmed in *Luigi Bormioli Corp. v. United States*[212]; however, the parties could not initially agree on whether the plaintiff's proffered facts met two parts of the four-part test.[213] Ten months after the court issued its order designating a test case, the defendant filed a motion for summary judgment.[214] Declining to rule on the defendant's motion, the court issued an order that included guidelines to assist the parties in resolving their factual disputes and instructions to

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deadline set forth in the Mediation Guidelines, i.e., motions for referral to mediation must be made at least thirty days prior to trial. *Id.* at 3.

207. In the order granting the motion and referring the case to mediation, the presiding judge noted a telephone conversation between himself and the defendant in which the defendant consented to mediation. Order of Referral to Mediation at 1, *Heng Ngai Jewelry*, No. 98-03019 (Oct. 28, 2004), Doc. No. 75.

208. Stipulated Judgment on Agreed Statement of Facts, *Heng Ngai Jewelry*, No. 98-03019 (Apr. 8, 2005), Doc. No. 82; Order on Stipulated Judgment, *Heng Ngai Jewelry*, No. 98-03019 (Apr. 13, 2005), Doc. No. 83.

209. *Id.*

210. *Id.*

211. Case No. 98-03245, *Skechers USA, Inc. v. United States*, was the test case number assigned for the following cases: Nos. 96-01966, 96-02780, 96-02793, 97-00149, 97-01077, 97-01628, 98-02361, 99-00240, 99-00406, 99-00516, 99-00562, 99-00632, 99-00697, 00-00005, 00-00094, 00-00111, 00-00175, 00-00236, 00-00370, 00-00419, 00-00456, 00-00474, 00-00520. *See* Order Designating Test Case & Suspending Related Actions, Skechers USA, Inc. v. United States, 27 Ct. Int'l Trade 1225 (2003) (No. 98-03245) (filed Dec. 19, 2000). Later in the case, Nos. 99-00697 and 00-00456 were designated and consolidated under test case No. 98-03245. *Id.*

212. Luigi Bormioli Corp. v. United States, 304 F.3d 1362 (Fed. Cir. 2002).

213. *Skechers USA*, 27 Ct. Int'l Trade at 1230-31.

214. Order Designating Test Case & Suspending Related Actions, *supra* note 211 (designating No. 98-03245 as test case); Docket Sheet, *Skechers USA*, 27 Ct. Int'l Trade 1225 (No. 98-03245), Doc. No. 43.

the parties to report on progress in settlement negotiations or allowing the defendant to update its motion for summary judgment.[215] Presumably, those negotiations resulted in the parties filing a consent motion to consolidate three cases, which the court granted.[216] Two months thereafter, the defendant filed a "renewed" motion for summary judgment and an accompanying memorandum.[217]

After considering the defendant's response and the plaintiff's reply to the plaintiff's renewed motion for summary judgment, the court issued an opinion granting the defendant's motion in part, with the exception of three entries, the associated interest payments of which were supported by written agreements.[218] According to the court, genuine issues of material fact still existed regarding the timing of the interest payments and whether the payments qualified as "interest" pursuant to the "applicable published guidance."[219] With regard to the unresolved issues, the court instructed the parties to attempt to resolve the remaining issues and "report to the court in fifteen days as to whether mediation is desired."[220]

The court issued an order referring the case to mediation only after the court granted the plaintiff's request to set a trial date and conducted a telephone conference with the parties.[221] The parties reached a settlement in which they agreed that the interest payments associated with the three entries was refundable, with interest.[222] The mediation session that appears to have served as the basis for the settlement took less than 30 days. At that time, over six years had passed from the first indication that the parties were in settlement negotiations to the date on which an order of stipulated judgment on an agreed statement of facts was issued.

After the completion of mediation associated with the three entries, settlement negotiations continued in the 31 cases. All were resolved

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215. Order, *Skechers USA*, 27 Ct. Int'l Trade 1225 (No. 98-03245), Doc. No. 44.

216. Order, *Skechers USA*, 27 Ct. Int'l Trade 1225 (No. 98-03245), Doc. No. 59.

217. Defendant's Supplemental Memorandum in Support of Renewed Motion for Summary Judgment, Order, *Skechers USA*, 27 Ct. Int'l Trade 1225 (No. 98-03245), Doc. No. 64.

218. *Skechers USA*, 27 Ct. Int'l Trade at 1225.

219. *Id.* at 1234.

220. *Id.* Note that this opinion was issued five months before the effective date of the Mediation Guidelines. *See Mediation Guidelines*, *supra* note 9.

221. Order of Referral to Mediation, Skechers USA, Inc. v. United States, No. 98-03245 (Ct. Int'l Trade July 19, 2004), Doc. No. 90; Order Granting Trial Request, *Skechers USA*, No. 98-03245 (June 29, 2004), Doc. No. 87; Telephone Conference, *Skechers USA*, No. 98-03245 (July 12, 2004), Doc. No. 88.

222. Settlement Agreement, *Skechers USA*, No. 98-03245 (Aug. 12, 2004), Doc. No. 94; Judgment Order, *Skechers USA*, No. 98-03245 (Aug. 16, 2004), Doc. No. 95.

either through stipulated dismissals[223] or stipulated judgments on agreed statements of fact[224] with a total of $344,085.81 refunded, excluding any interest as provided by law.[225]

d. *Continental Teves, Inc. v. United States*[226]

The underlying issues in *Continental Teves* were CBP's denial of the plaintiff's protests. The plaintiff challenged CBP's assessment of duties

223. The parties agreed to dismiss the following cases: Nos. 96-02780, 96-02793, 97-01077, 97-00149, 97-01628, and 99-00632. Stipulation of Dismissal, *Skechers USA*, No. 96-01966 (Oct. 27, 2005), Doc. No. 20; Stipulation of Dismissal, *Skechers USA*, No. 99-00632 (Oct. 19, 2007), Doc. No. 24.

224. The parties agreed to stipulated judgments on agreed statements of fact on the following cases: Nos. 98-02361, 99-00240, 99-00406, 99-00516, 99-00562, 00-00005, 00-00094, 00-00111, 00-00175, 00-00236, 00-00370, 00-00419, 00-00474, 00-00520, 01-00017, 01-00029, 01-00075, 01-00076, 01-00133, 01-00134, 01-00575, 05-00643, 05-00644, 05-00645. *See, e.g.*, Stipulated Judgment, *Skechers USA*, No. 98-02361 (Nov. 27, 2007), Doc. No. 22.

225. *Id.* at 10 ($151.30 refund); Stipulated Judgment at 12, *Skechers USA*, No. 99-00240 (Dec. 27, 2007), Doc. No. 27 ($6,881.15 refund); Stipulated Judgment at 9, *Skechers USA*, No. 99-00406 (Dec. 27. 2007), Doc. No. 28 ($4,282.44 refund); Stipulated Judgment at 9, *Skechers USA*, No. 99-00516 (Nov. 27, 2007), Doc. No. 18 ($4,367.01 refund); Stipulated Judgment at 10, *Skechers USA*, No. 99-00562 (Dec. 27, 2007), Doc. No. 20 ($6,363.18 refund); Stipulated Judgment at 16, *Skechers USA*, No. 00-00005 (June 24, 2008), Doc. No. 31 ($24,701.82 refund); Stipulated Judgment at 12, *Skechers USA*, No. 00-00094 (Oct. 31, 2007), Doc. No. 21 ($25,051.28 refund); Stipulated Judgment at 9, *Skechers USA*, No. 00-00111 (Nov. 27, 2007), Doc. No. 19 ($2,142.96); Stipulated Judgment at 16, *Skechers USA*, No. 00-00175 (Apr. 10, 2007), Doc. No. 34 ($43,456.53 refund); Stipulated Judgment at 11, *Skechers USA*, No. 00-00236 (Feb. 4, 2008), Doc. No. 22 ($8,991.74 refund); Stipulated Judgment at 15, *Skechers USA*, No. 00-00370 (Feb. 4, 2008), Doc. No. 22 ($24,301.20 refund); Stipulated Judgment at 13, *Skechers USA*, No. 00-00419 (Feb. 4, 2008), Doc. No. 22 ($11,643.92); Stipulated Judgment at 9, *Skechers USA*, No. 00-00474 (Nov. 27, 2007), Doc. No. 20 ($4,497.74 refund); Stipulated Judgment at 15, *Skechers USA*, No. 00-00520 (Mar. 10, 2008), Doc. No. 24 ($20,654.32 refund); Stipulated Judgment at 14, *Skechers USA*, No. 01-00017 (June 24, 2008), Doc. No. 33 ($18,276.16 refund); Stipulated Judgment at 16, *Skechers USA*, No. 01-00029 (Mar. 18, 2008), Doc. No. 25 ($34,122.40); Stipulated Judgment at 15, *Skechers USA*, No. 01-00075 (Mar. 18, 2008), Doc. No. 28 ($24,613.37); Stipulated Judgment at 11, *Skechers USA*, No. 01-00076 (Feb. 4, 2008), Doc. No. 23 ($1400.98 refund); Stipulated Judgment at 11, *Skechers USA*, No. 01-00133 (Feb. 4, 2008), Doc. No. 22 ($1,230.97 refund); Stipulated Judgment at 20, *Skechers USA*, No. 01-00134 (Jun, 24, 2008), Doc. No. 33 ($40,525.52 refund); Stipulated Judgment at 19, *Skechers USA*, No. 01-00575 (June 24, 2008), Doc. No. 33 ($36,429.82 refund). Nos. 05-00643-00645 were consolidated under No. 00-00175. Order, No. 00-00175 (Jan. 12, 2006), Doc. No. 18.

226. In *Continental Teves, Inc. v. United States*, No. 03-00782 was the test case number assigned for the following cases: Nos. 04-00264, 04-00405, 04-00620, 05-00069, 05-00206, 05-00421, 05-00526. Order, Cont'l Teves, Inc. v. United States, 33 Ct. Int'l Trade 325 (2009) (No. 03-00782), Doc. No. 24. After the court issued an opinion whereby it determined that "neither party would take anything on account of this action," the court vacated the test case designation and removed the previously suspended cases from suspension. *Cont'l Teves*, 33 Ct. Int'l Trade at 325; Order, Cont'l Teves, Inc. v. United States, No. 03-00782 (Ct. Int'l Trade Apr. 14, 2009), Doc. No. 94. Thereafter, upon plaintiff's motion, the court ordered certain entries to be severed from No. 04-00264 and designated under a new court number, No. 09-00221. Order, *Cont'l Teves*, No. 04-00264 (May 29, 2009), Doc. No. 18.

on research and development (R&D) as assists.[227] The plaintiff was entering parts for automotive equipment and valuing assists based on a formula memorialized in a written agreement with CBP.[228] The plaintiff took the position that the formula was not legally supportable as it included R&D conducted in the United States and used budgeted R&D costs rather than actual R&D costs, among other alleged deficiencies.[229]

The entire procedural history of the cases took place over the course of seven years. During that period, the court once designated a test case and three times set a date for trial. The parties set both issues of fact and issues of law for trial. After the court set the second trial date, it granted the parties' consent motion to suspend the scheduling order and ordered the parties to provide the court with a status report ninety days thereafter.[230] Settlement negotiations failed, and the court issued an opinion and accompanying memorandum in which it found fault with facts the parties used to support their respective positions.[231] Thereafter, the court vacated the test case designation for *Continental Teves* and removed from suspension the previously suspended cases.[232]

Two months after the court removed the cases from suspension, the parties filed consent motions for referral to mediation in the previously suspended cases, and the court ordered referral to mediation.[233] Mediation resolved all eight cases within five months of the orders being issued.[234] That resolution took the form of stipulated judgments in which CBP applied a different multiplier to the invoice price of the merchandise to calculate amounts attributable to the assists.[235] By that time, over four years passed from the first indication that the parties were in settlement negotiations to the earliest indication that the parties reached

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227. In relevant part, 19 U.S.C. § 1401a(h)(1)(iv) (2012) defines an assist as any "[e]ngineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise." One of the exceptions to that rule is work performed in the United States that would otherwise be considered an assist pursuant to the foregoing. 19 U.S.C. § 1401a(h)(1)(B).

228. Complaint at 2, *Cont'l Teves*, 33 Ct. Int'l Trade 325 (No. 03-00782), Doc. No. 4.

229. *See, e.g.*, *id.* at 3-4.

230. Order, *Cont'l Teves*, 33 Ct. Int'l Trade 325 (No. 03-00782), Doc. No. 32.

231. *Cont'l Teves*, 33 Ct. Int'l Trade at 325; Memorandum, *Cont'l Teves*, 33 Ct. Int'l Trade 325 (No. 03-00782), Doc. No. 90.

232. Order, *Cont'l Teves*, No. 03-00782 (Apr. 14, 2009), Doc. No. 94.

233. *See, e.g.*, Joint Motion for Referral to Mediation, *Cont'l Teves*, No. 04-00264 (June 15, 2009), Doc. No. 20; Order of Referral to Mediation, *Cont'l Teves*, No. 04-00264 (June 16, 2009), Doc. No. 22.

234. *See, e.g.*, Report of Mediation, *Cont'l Teves*, No. 04-00264 (June 15, 2009), Doc. No. 28.

235. *See, e.g.*, Stipulated Judgment on Agreed Statement of Facts, *Cont'l Teves*, No. 04-00264 (Oct. 5, 2010), Doc. No. 27; Stipulated Judgment on Agreed Statement of Facts, *Cont'l Teves*, No. 05-00421 (Jan. 4. 2011), Doc. No. 19.

settlement.[236] Sixteen months had passed from the date the case was ordered to mediation to the date the mediation report was signed, indicating that all issues were settled.[237]

2. 19 U.S.C. § 1514(a)(2)—Classification

a. *Park B. Smith, Ltd. v. United States*[238]

In *Park B. Smith*, the plaintiff challenged CBP's classification of various holiday dhurries, placemats, napkins, and table runners under headings, dutiable between, and including, 5.4% and 7.7% *ad valorem*.[239]

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236. Consent Motion To Suspend Scheduling Order, *Cont'l Teves*, 33 Ct. Int'l Trade 325 (No. 03-00782), Doc. No. 31.

237. Order of Referral to Mediation, *Cont'l Teves*, No. 04-00264 (June 16, 2009), Doc. No. 22; Report of Mediation, *Cont'l Teves*, No. 04-00264 (Oct. 19, 2010), Doc. No. 28.

238. *Park B. Smith, Ltd. v. United States*, No. 96-00344, was designated as a test case for the following cases: Nos. 94-00546, 95-00043, 95-00184, 95-00701, 95-01180, 96-01810, 96-02594, 97-00936. Order, Park B. Smith, Ltd. v. United States, 25 Ct. Int'l Trade 506 (2001) (No. 96-02-00344) (filed Feb. 9, 1999). Nos. 96-00344 and all of the cases listed above, other than 97-00936, were originally suspended under another test case, *Midwest of Cannon Falls, Inc. v. United States*, Consol. No. 92-00206. The parties were unable to settle those actions following the Federal Circuit's decision in that case. Midwest of Cannon Falls, Inc. v. United States, 122 F.3d 1423 (Fed. Cir. 1997). The cases were still on the Suspension Disposition Calendar when the plaintiff in *Park B. Smith* requested a designation of one of its own cases, No. 96-00344, as a new test case and resuspension of its cases under the same new test case. Because No. 97-00936 was on the court's Reserve Calendar and was unassigned, but involved the same plaintiff, class of merchandise, and significant issue of fact or question of law as the other cases for which the plaintiff requested suspension, the court suspended that case under No. 96-00344, as well. *See* Order & Plaintiff's Consent Motion for Designation of a Test Case and for Suspension of Cases at 4 & n.1, *Park B. Smith, Ltd.*, 25 Ct. Int'l Trade 506 (No. 96-00344) (filed Feb. 3, 1999).

As the case progressed, additional cases were added to the No. 96-00344 test case: Order, *Park B. Smith*, 25 Ct. Int'l Trade 506 (No. 98-00019), Doc. No. 4; Order, *Park B. Smith*, 25 Ct. Int'l Trade 206 (No. 99-00419), Doc. No. 3; Order, *Park B. Smith*, Nos. 00-00411, 01-00084, 01-00952 (Dec. 9, 2002), Doc. No. 6; Order, *Park B. Smith*, No. 99-00749 (Feb. 24, 2003), Doc. No. 5. The nontest cases were then placed on a suspension disposition calendar for No. 96-00344. Order, *Park B. Smith*, Nos. 96-00344, 94-00546 (Oct. 3, 2005), Doc. No. 13. Certain of these cases were consolidated under 95-00184. Order, *Park B. Smith*, Nos. 95-00184, 95-00701, 95-01180, 96-01810, 97-00936, 98-00019, 99-00419, 00-00411, 01-00084, 01-00952, 04-00324, 06-00206 (Mar. 20, 2009), Doc. No. 37.

239. *Park B. Smith*, 25 Ct. Int'l Trade at 506. Specifically, CBP classified the merchandise under subheadings 5702.99.1010, HTSUS, as "[c]arpets and other textile floor coverings, woven, not tufted or flocked, whether or not made up, including 'Kelem,' 'Schumacks,' 'Karamanie,' and similar hand-woven rugs: [o]ther, not of pile construction, made up: [o]f other textile materials: [o]f [c]otton, [w]oven, but not made on a power-driven loom," subheading 6302.51.20, HTSUS, as "[o]ther [m]ade [u]p [t]extile [a]rticles; [b]ed [l]inen, table linen, toilet linen, and kitchen linen: [o]ther table linen: [o]f cotton; [t]able cloths and napkins; [o]ther: [p]lain woven," or subheading 6302.51.40, HTSUS, as "[o]ther [m]ade [u]p [t]extile [a]rticles; [b]ed [l]inen, table linen, toilet linen, and kitchen linen: [o]ther table linen: [o]f cotton; [o]ther." *Harmonized Tariff Schedule of the United States (2014): Section XVI*, U.S. INT'L TRADE COMMISSION 2, http://www.usitc.gov/publications/docs/tata/hts/bychapter/1401c84_0.pdf (last visited Mar. 2, 2015).

The plaintiff asserted that the merchandise was properly classified as "festive articles," which were nondutiable.[240]

The case went to trial, and the court found in favor of the plaintiff in part and in favor of the defendant in part. In arriving at that finding, the court determined that some of the merchandise was prima facie classifiable in the tariff headings advocated by both parties;[241] however, the court further determined that the merchandise was excluded from classification in heading 6302, HTSUS, by virtue of Section XI Note 1(t), HTSUS.[242] Both parties appealed the court's final judgment to the United States Court of Appeals for the Federal Circuit.

The Federal Circuit interpreted the term "festive articles" differently than the CIT and affirmed in part, vacated in part, and remanded the case back to the CIT to apply the new definition to the merchandise still at issue.[243]

One month after the Federal Circuit issued its opinion, and one month before the Federal Circuit issued its mandate denying rehearing, the parties held a conference with the CIT.[244] Less than two years after the Federal Circuit issued its mandate, the parties stipulated judgment on an agreed statement of facts in the test case.[245] Eight months after the court signed the order stipulating judgment in the test case, the court removed the suspended cases from the Suspension Disposition Calendar.[246] Presumably, due to the settlement of the test case, the parties continued settlement negotiations in the previously suspended cases.[247]

Less than two weeks later, after CBP issued a Customs Bulletin limiting the application of the Federal Circuit's decision to only the

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240. Park B. Smith, Ltd. v United States, 347 F.3d 922, 924-26, 929 (Fed. Cir. 2003). The court determined some of the subject merchandise was properly classified in either subheading 9505.10.50, HTSUS, as "[f]estive, carnival and other entertainment articles, including magic tricks, and practical joke articles; parts and accessories thereof: [a]rticles for Christmas festivities and parts and accessories thereof: [o]ther; [o]ther," or subheading 9505.90.60, HTSUS, as "[f]estive, carnival and other entertainment articles, including magic tricks, and practical joke articles; parts and accessories thereof: [o]ther; [o]ther."

241. *Park B. Smith*, 25 Ct. Int'l Trade at 508-11.

242. *Id.* at 511. Section XI, note 1(t) of the HTSUS states that section XI, "Textiles and Textile Articles" (chapters 50-63), does not cover articles of chapter 95. *Harmonized Tariff Schedule of the United States (2014): Section XI*, U.S. INT'L TRADE COMMISSION 1, http://www.usitc.gov/publications/docs/tata/hts/bychapter/1401c50.pdf (last visited Mar. 2, 2015).

243. *Park B. Smith*, 347 F.3d at 929.

244. *See* Docket Sheet—Conference Held on Nov. 24, 2003, at 3:00 PM in Chambers, *Park B. Smith*, No. 96-00344 (Nov. 24, 2003), Doc. No. 34; CAFC Mandate in Appeal at 16, *Park B. Smith*, No. 96-00344 (Mar. 26, 2004), Doc. No. 35.

245. Stipulated Judgment, *Park B. Smith*, No. 96-00344 (Mar. 31, 2005), Doc. No. 36; Stipulated Judgment, *Park B. Smith*, No. 96-00344 (Apr. 6, 2005), Doc. No. 37.

246. Order, *supra* note 238 (Doc. No. 13).

247. *See, e.g.*, Status Report, *Park B. Smith*, No. 94-00546 (Apr. 14, 2006), Doc. No. 18.

entries before the court, the plaintiff asked the court to assist it in resolving 14 of then-active cases.[248] Two weeks later, the judge issued orders referring all 14 cases to mediation.[249] At this point, it had been twelve years since the first summons was filed, and two and a half years since the Federal Circuit issued an opinion in the test case.[250] The mediation took less than sixty days and did not result in a settlement of the issues.[251] Notwithstanding the lack of settlement in the context of mediation, the parties were ultimately able to settle the cases in approximately two years.[252] Thirteen of the cases were settled by stipulating judgments on agreed statements of fact and one by voluntary dismissal.[253] Furthermore, the parties also settled 2 related cases that were not subject to mediation by stipulating judgments on agreed statements of fact.[254]

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248. *See* Letter, *Park B. Smith*, Nos. 94-00546, 95-00043, 95-00184, 95-00701, 95-01180, 96-01810, 96-02594, 97-00936, 98-00019, 99-00419, 99-00749, 00-00411, 01-00084, 01-00952 (Apr. 14, 2006), Doc. No. 18 (citing Limitation on the Application of the Decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit, *Park B. Smith v. United States*, 40 Cust. B. 5 (2006)).

249. Order of Referral to Mediation, *Park B. Smith*, Nos. 94-00546, 95-00043, 95-00184, 95-00701, 95-01180, 96-01810, 96-02594, 97-00936, 98-00019, 99-00419, 99-00749, 00-00411, 01-00084, 01-00952 (Apr. 28, 2006), Doc. No. 19.

250. Summons, *Park B. Smith*, 25 Ct. Int'l Trade 506 (2001) (No. 94-00546), Doc. No. 1; *Park B. Smith*, 347 F.3d 922 (Fed. Cir. 2003); Order of Referral to Mediation, *supra* note 249.

251. Report of Mediation, *Park B. Smith*, Nos. 94-00546, 95-00043, 95-00184, 95-00701, 95-01180, 96-01810, 96-02594, 97-00936, 98-00019, 99-00419, 99-00749, 00-00411, 01-00084, 01-00952 (June 1, 2006), Doc. No. 20.

252. *See, e.g.*, Stipulated Judgment, *Park B. Smith*, No. 94-00546 (July 24, 2008), Doc. No. 34.

253. *Id.*; Stipulated Judgment, *Park B. Smith*, No. 95-00043 (Mar. 9, 2009), Doc. No. 35; Stipulated Judgment, *Park B. Smith*, No. 95-00184 (Dec. 21, 2009), Doc. No. 54; Stipulated Judgment, *Park B. Smith*, No. 95-00701 (Oct. 15, 2009), Doc. No. 41; Stipulated Judgment, *Park B. Smith*, No. 95-01180 (Aug. 11, 2009), Doc. No. 40; Stipulated Judgment, *Park B. Smith*, No. 96-01810 (Apr. 26, 2010), Doc. No. 46; Stipulated Judgment, *Park B. Smith*, No. 96-02594 (Mar. 9. 2009), Doc. No. 36; Stipulated Judgment, *Park B. Smith*, No. 97-00936 (Oct. 9, 2009), Doc. No. 42; Stipulated Judgment, *Park B. Smith*, No. 98-00019 (July 15, 2009), Doc. No. 40; Stipulated Judgment, *Park B. Smith*, No. 99-00419 (Oct. 15, 2009), Doc. No. 38; Stipulated Judgment, *Park B. Smith*, No. 9—00749 (Mar. 9, 2009), Doc. No. 41; Stipulated Judgment, *Park B. Smith*, No. 00-00411 (Oct. 15, 2009), Doc. No. 42; Stipulated Judgment, *Park B. Smith*, No. 01-00084 (Nov. 2, 2009), Doc. No. 42; Notice of Dismissal, *Park B. Smith*, No. 01-00952 (Oct. 6, 2009), Doc. No. 41.

254. Nos. 04-00324 and 06-00206 were not subject to mediation, but the parties stipulated judgments on agreed statements of fact in each. Stipulated Judgment, *Park B. Smith*, No. 04-00324 (Apr. 26, 2010), Doc. No. 28; Order on Stipulated Judgment, *Park B. Smith*, No. 06-00206 (Sept. 28, 2009), Doc. No. 15.

b. *ABB Flexible Automation, Inc. v. United States*

ABB Flexible Automation is one of a few cases in which the plaintiff moved the court for an order of referral to mediation. In that case, the defendant opposed and the court denied the plaintiff's motion.

The classification issue in *ABB Flexible Automation* was whether the machinery was properly classified pursuant to its function.[255] Upon entry, CBP assessed duties ranging from 2.5% to 2.7%.[256] In its protests, the plaintiff asserted duties ranging from 0-1.8%.[257]

The case remained on the Reserve Calendar for seven years before the plaintiff filed its motion for referral to mediation.[258] According to the plaintiff, the parties agreed to stipulate as to the proper classification of the merchandise, but could not agree on where the refund checks should be sent.[259] The defendant opposed the plaintiff's motion "[i]n the interest of conserving judicial resources" and suggested the alternative of listing the plaintiff's address on the cover letter to the proposed stipulation.[260] The court denied the plaintiff's motion.[261] One month later, the parties filed their joint stipulation on an agreed statement of facts in which the parties agreed to the classification of the merchandise with duties of 0.00%, 1.6%, or 1.8%, depending on the merchandise.[262] The cover letter

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255. Summons, ABB Flexible Automation, Inc. v. United States, No. 02-00664 (Ct. Int'l Trade Oct. 23, 2002), Doc. No. 1.

256. CBP claimed the merchandise was properly classified as follows: "[i]ndustrial robots, not elsewhere specified or included" under subheading 8479.50.00, HTSUS (2001), dutiable at 2.5%; and as "[b]oards, panels, consoles . . . : [f]or a voltage not exceeding 1,000 V: [o]ther" under subheading 8537.10.90, HTSUS (2001), dutiable at 2.7%. Stipulated Judgment on Agreed Statement of Facts at 1-2, *ABB Flexible Automation*, No. 02-00664 (Jan. 28, 2010), Doc. No. 33.

257. The plaintiff claimed the merchandise was properly classified according to their function as follows: "[o]ther lifting, handling, loading . . . ; [o]ther machinery" under subheading 8428.90.00, HTSUS (2001) dutiable at 1.8%; as "[e]lectric . . . brazing or welding machines . . . : [m]achines and apparatus for resistance welding of metal: [f]ully or partly automatic" under subheading 8515.21.00, HTSUS (2001) not dutiable; as "[m]echanical appliances . . . for . . . spraying liquids or powders; . . . [o]ther appliances: [o]ther: [o]ther" under 8424.89.70, HTSUS (2001) dutiable at 1.8%; and as "Electric . . . brazing or welding machines . . . : [m]achines and apparatus for arc (including plasma arc) welding of metals" under subheading 8515.31.00, HTSUS (2001) dutiable at 1.6%. *Id.* at 2-3.

258. Docket Sheet, *ABB Flexible Automation*, No. 02-00664 (filed Oct. 23, 2002); Plaintiff's Motion for Referral to Mediation, *ABB Flexible Automation*, No. 02-00664 (Nov. 30, 2009), Doc. No. 29.

259. Plaintiff's Motion for Referral to Mediation, *supra* note 258.

260. Defendant's Memorandum in Opposition to Plaintiff's Motion for Referral to Mediation, *ABB Flexible Automation*, No. 02-00664 (Dec. 18, 2009), Doc. No. 30.

261. Order, *ABB Flexible Automation*, No. 02-00664 (Dec. 24, 2009), Doc. No. 31.

262. Stipulated Judgment on Agreed Statement of Facts, *ABB Flexible Automation*, No. 02-00664 (Jan. 20, 2010), Doc. No. 32.

to the joint stipulation included the address to which CBP was to send the refunded duties.[263]

c. *BenQ America Corp. v. United States*

The issue in *BenQ America Corp.* is whether flat-panel monitors of a certain type are classified as units of automatic data processing machines or as video monitors.[264] The former are not dutiable and the latter are dutiable at 5%.[265] In support of its motion for summary judgment, the plaintiff asserted that the proper legal test to resolve the issue was the "principal function" test.[266] The defendant, in its cross motion for summary judgment, claimed the applicable legal test was "principal use"; however, because the plaintiff allegedly failed to provide the court with the requisite information to apply the principal use test, the defendant asserted that the classification issue should be resolved by selecting the highest tariff number of those at issue.[267] After the court issued an opinion granting the defendant's motion for summary judgment on grounds not argued by the defendant, the plaintiff appealed.[268]

The Federal Circuit did not agree with the basis on which the CIT issued its opinion and found principal use to be the applicable legal test.[269] In so doing, the Federal Circuit vacated the ruling below and instructed the CIT to "conduct a principal use analysis to determine the correct classification of the Dell[] monitors."[270]

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263. The judge signed the stipulated judgment soon thereafter. Judgment on Agreed Statement of Facts, *ABB Flexible Automation*, No. 02-00664 (Jan. 28, 2010), Doc. No. 33.

264. Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at 1-3, BenQ Am. Corp. v. United States, 646 F.3d 1371 (Fed. Cir. 2011) (No. 05-00637), Doc. No. 45-2. The plaintiff asserted that the monitors are classified in subheading 8471.60.45, HTSUS (2004) as "[a]utomatic data processing machines and units thereof; . . . [i]nput or output units . . . Other: Other: Other" (non-dutiable). *See id.* at 29.

265. *Id.*; Cross Motion for Summary Judgment & Opposition to Plaintiff's Motion for Summary Judgment at 17, *BenQ Am.*, 646 F.3d 1371 (No. 05-00637), Doc. No. 58.

266. Section XVI, note 3 of HTSUS states, "Unless the context otherwise requires, . . . machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function." *Harmonized Tariff Schedule of the United States (2014): Section XVI*, *supra* note 239.

267. Cross Motion for Summary Judgment & Opposition to Plaintiff's Motion for Summary Judgment, *supra* note 265, at 1.

268. BenQ Am. Corp. v. United States, 683 F. Supp. 2d 1335 (Ct. Int'l Trade 2010); Notice of Appeal, *BenQ Am.*, 646 F.3d 1371 (No. 05-00637), Doc. No. 81.

269. *BenQ Am.*, 646 F.3d at 1379-1380.

270. *Id.* at 1380.

Upon return to the CIT, the court ordered the parties to file a status report and proposed scheduling order.[271] The parties filed their joint status report five months later,[272] informing the court that, notwithstanding settlement discussions, the parties could not agree on the issue of whether the principal use test should be applied to evidence already on the record or should only be applied after discovery is reopened and the parties have an opportunity to place additional evidence on the record.[273]

The court did not address that issue; instead, it issued an order of referral to mediation.[274] Mediation took place over thirteen months and did not result in settlement.[275] Soon after the mediation report was issued, the plaintiff filed an unopposed motion for discovery, which the court granted.[276] As of September 1, 2014, the parties were conducting additional discovery.

d. *Kahrs International Inc. v. United States*

The general classification issue before the court in *Kahrs International* was whether the plaintiff's engineered-wood flooring should be classified under HTSUS subheadings for "parquet flooring," "veneered panels and similar laminated wood," and "edge-glued lumber," or under a "basket" HTSUS subheading for "plywood."[277] Merchandise falling within the first three categories entered the United States free of duty, and merchandise falling within the last category was dutiable at 8%.[278]

The case was very aggressively litigated by both sides to the point where the judge ordered that "for the remainder of this litigation, no motions shall be filed by either party in this case without first obtaining written consent of the Court."[279] By the time the court issued its third opinion, it had addressed both the legal question of how "plywood" was

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271. Order, *BenQ Am.*, No. 05-00637 (Oct. 12, 2011), Doc. No. 91.

272. Joint Status Report, *BenQ Am.*, No. 05-00637 (June 14, 2012), Doc. No. 109.

273. *Id.*

274. Order of Referral to Mediation at 1, *BenQ Am.*, No. 05-00637 (Oct. 18, 2012), Doc. No. 110.

275. Report of Mediation at 1, *BenQ Am. Corp.*, No. 05-00637 (Nov. 6, 2013), Doc. No. 117.

276. Order at 1, *BenQ Am.*, No. 05-00637 (Dec. 3, 2013), Doc. No. 119.

277. Summons at 2-3, Kahrs Int'l Inc. v. United States, 791 F. Supp. 2d 1228 (Ct. Int'l Trade 2011) (No. 07-00343), Doc. No. 1. CBP classified plaintiff's merchandise in subheading 4412.29.3670, HTSUS (2006), dutiable at 8%. Plaintiff asserted that the proper classification for all its merchandise was in subheadings 4412.29.56, 4418.30.00, or 4418.90.00, HTSUS (2006), all free of duty. *Id.*

278. *Id.*

279. Order at 1, *Kahrs Int'l*, 791 F. Supp. 2d 1228 (No. 07-00343), Doc. No. 121.

defined in the context of the HTSUS and the factual question of whether the plaintiff's merchandise fell within the HTSUS subheadings for "plywood."[280] However, even after the court's third opinion, the plaintiff's fifth cause of action, commercial designation, remained.[281] The court referred *Kahrs International* to mediation after it "issued three opinions totaling 135 pages, in the process of resolving multiple procedural and substantive motions."[282]

The plaintiff's commercial designation claim "rest[ed] on the theory that 'the trade designation [was] so universal and well understood that the Congress, and all the trade, are supposed to have been fully acquainted with the practice at the time the law was enacted.'"[283] It was that issue of fact that the parties failed to settle through mediation.[284] After the court issued the report of mediation, the plaintiff amended its complaint to assert an additional claim in an eighth cause of action, that the imported merchandise was not classified in a HTSUS subheading for plywood "because the common meaning of that term does not encompass Plaintiff's product."[285] The court ultimately found in favor of the defendant on both of the remaining causes of action.[286]

280. *Kahrs Int'l*, 791 F. Supp. 2d at 1232.

281. *Id.*

282. *Id.* at 1231; Order of Referral to Mediation & Amended Scheduling Order at 1, *Kahrs Int'l*, 791 F. Supp. 2d 1228 (No. 07-00343), Doc. No. 125.

283. Order, *supra* note 279.

284. Report of Mediation, *Kahrs Int'l*, 791 F. Supp. 2d 1228 (No. 07-00343), Doc. No. 126.

285. *Kahrs Int'l*, 791 F. Supp. 2d at 1232.

286. *Id.*, *aff'd*, 713 F.3d 640 (Fed. Cir. 2013).

3. 19 U.S.C. § 1514(a)(3)—Charges or Extractions

a. *Alcan Aluminum Corp. v. United States*[287]

The relevant facts in *Alcan Aluminum Corp.* start with the plaintiff's voluntary disclosure in which it admitted not paying merchandise processing fees (MPF) on certain entries of unwrought aluminum.[288] After Alcan Aluminum Corp. paid the amount of revenue CBP allegedly lost due to the nonpayment of the MPF,[289] the parties entered into an escrow agreement, which stated that if the resolution of a test case determined that the tendered amount was not owed, CBP would refund the tendered amounts "with interest as may be required by law."[290] Subsequent to the parties entering into that agreement, the plaintiff filed a protest with CBP.[291]

The plaintiff's protest challenged three separate determinations by CBP. First, the plaintiff protested CBP's assessment and its own payment of the MPF.[292] Second, the plaintiff protested its "unanticipated frustration" from "contingencies not anticipated in the [escrow]

287. In an amendment to the escrow agreement, the parties designated *Alcan Aluminum Corp. v. United States*, 353 F. Supp. 2d 1374 (Ct. Int'l Trade 2004), as the test case for the following cases: *Canadian Reynolds Metal Co. v. United States*, 343 F. Supp. 2d 1308 (Ct. Int'l Trade 2004); *Aluminerie Becancour, Inc. v. United States*, No. 00-00445 (Ct. Int'l Trade Sept. 26, 2002); *Alcan Aluminum Corp. v. United States*, No. 00-00446 (Ct. Int'l Trade Sept. 26, 2002); and *Alcan Aluminum*, No. 01-00095 (Ct. Int'l Trade Dec. 8, 2004). *See Alcan Aluminum*, 353 F. Supp. 2d at 1377 n.7 (citing Test Case Summons of Alcan at 1-4, *Alcan Aluminum*, 353 F. Supp. 2d 1374 (No. 94-00539) (filed Sept. 14, 1994)). For all intents and purposes, the foregoing cases all include similar facts and arguments. Moreover, all cases were assigned the same judge who referred the cases to the same judge mediator at the same time. Alcan Aluminum Corp. v. United States, 986 F. Supp. 1436 (Ct. Int'l Trade 1997) was originally referred to as St. Albans Protest No. 0201-93-100281 (HQ 955367) and was subsequently appealed to the Federal Circuit Court of Appeals. Aluminerie Becancour, Inc. v. United States, 343 F. Supp. 2d 1208, 1211 n.8 (Ct. Int'l Trade 2004).

288. Complaint at 1-3, *Alcan Aluminum*, 353 F. Supp. 2d 1374 (No. 00-00446), Doc. No. 7. The underlying issue was whether the unwrought aluminum was of Canadian origin, the entries of which would be exempt from MPF pursuant to the United States—Canada Free Trade Agreement. *See id.*; *see also Alcan Aluminum*, 353 F. Supp. 2d at 1377 n.7.

289. In *Canadian Reynolds Metals*, the plaintiff, in tendering its payment, stated that it expected "a full refund of the tender amount along with accrued interest in the event the subsequent litigation was successful." 350 F. Supp. 2d 1302, 1304-05 (Ct. Int'l Trade 2004). In confirming receipt of the plaintiff's tender, CBP rejected all of the plaintiff's conditions. *Id.* at 1305.

290. *Alcan Aluminum*, 353 F. Supp. 2d at 1376; *see also Canadian Reynolds Metals*, 350 F. Supp. 2d at 1305; *Aluminerie Becancour*, 343 F. Supp. 2d at 1215 n.15.

291. *Alcan Aluminum*, 353 F. Supp. 2d at 1377.

292. *Id.* at 1379.

[a]greement."[293] "Third, [the plaintiff] protested '[CBP]'s decision to accept [its] tender[] [of the MPF].'"[294]

The court resolved the test case in the plaintiffs' favor, and CBP refunded to the plaintiffs the tendered amount.[295] However, when CBP did not include interest payments on those amounts, the plaintiff filed a request for accelerated disposition of the protest.[296]

The court stayed the case pending the parties' briefing on whether CBP's acceptance of MPF payments could constitute a "decision" for purposes of 19 U.S.C. § 1514 and whether *U.S. Shoe Corp. v. United States*, which held that the mere passive acceptance of funds does not constitute a Customs decision,[297] required a rehearing or reconsideration of the court's denial of the defendant's motion to dismiss.[298]

One month after the parties filed supplemental briefs addressing those issues, the court referred the case to mediation.[299] At the time the court referred *Alcan Aluminum Corp.* to mediation, the legal issue before the court in *Alcan Aluminum Corp.* was whether there was a protestable "decision" under 19 U.S.C. § 1514, and the factual issue was, if there was a protestable "decision," whether the protests were timely filed.[300] Less than fifty days later, the judge mediator wrote to counsel, stating, "[I]t is apparent to me that further efforts at mediation of this case will not be fruitful,"[301] and the next day filed a mediation report confirming that the mediation did not result in a settlement.[302]

In ultimately dismissing the case, the court addressed all three of plaintiff's protested objections. First, the court determined that the plaintiff's own protested payment of the MPF could not be considered a

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293. *Id.* at 1379-80.

294. *Id.* at 1380 (quoting Letter from Barnes, Richardson & Colburn to U.S. Customs Serv. at 9-10, *Alcan Aluminum*, 353 F. Supp. 2d 1375 (No. 01-0095), Doc. No. 25 (alterations in original)); *see also Canadian Reynolds Metals*, 350 F. Supp. 2d at 1305.

295. Alcan Aluminum Corp. v. United States, 165 F.3d 898, 905 (Fed. Cir. 1999).

296. Complaint at 3, *Alcan Aluminum*, 353 F. Supp. 2d 1374 (No. 01-00095), Doc. No. 7; *see also Alcan Aluminum*, 353 F. Supp. 2d at 1377; *Canadian Reynolds Metals*, 350 F. Supp. 2d at 1306.

297. U.S. Shoe Corp. v. United States, 114 F.3d 1564, 1569 (Fed. Cir. 1997) (finding that Customs' collection of Harbor Maintenance Tax was not protestable, as Customs merely passively accepted the taxes paid pursuant to statute).

298. Order at 1, *Alcan Aluminum*, 353 F. Supp. 2d 1374 (No. 01-00095), Doc. No. 36.

299. Order of Referral to Mediation at 1, *Alcan Aluminum*, 353 F. Supp. 2d 1374 (No. 01-00095), Doc. No. 39.

300. *See generally Alcan Aluminum*, 353 F. Supp. 2d at 1374; *Canadian Reynolds Metals*, 350 F. Supp. 2d at 1302; Aluminerie Becancour v. United States, 343 F. Supp. 2d 1208, 1209-1210 (Ct. Int'l Trade 2004).

301. Letter, *Alcan Aluminum*, 353 F. Supp. 2d 1374 (No. 01-00095), Doc. No. 40.

302. Report of Mediation, *Alcan Aluminum*, 353 F. Supp. 2d 1374 (No. 01-00095), Doc. No. 41.

CBP "decision" because the plaintiff tendered payment on its own volition.[303] According to the court, CBP's demand for payment could be considered a "decision," but the plaintiff exceeded the 90-day deadline to file its protest on that issue.[304] Second, the court recognized that CBP's refusal to pay interest on the MPF may have constituted a protestable decision; however, plaintiff's protest predated CBP's denial.[305] Third, the court determined that CBP's passive acceptance of the MPF was not a protestable decision.[306]

b. *Marine Transport Corp. v. United States*[307]

In *Marine Transport Corp.*, the plaintiff moved the court for referral to mediation. The defendant opposed and the court denied the plaintiff's motion.

The subject of the plaintiff's complaint was whether CBP miscalculated interest associated with the duties on vessel repair.[308] The plaintiff had made partial payments on the duties owned, which CBP applied in part to principal and in part to interest.[309] In its amended answer, the defendant admitted to an incorrect calculation of the amount remaining due, but claimed that the court lacked jurisdiction because the plaintiff's protest was untimely.[310] Thereafter, the court issued a scheduling order, which set deadlines for the defendant to file its motion to dismiss and for the parties to submit their certification of settlement efforts.[311] With regard to settlement, the court's order stated that the parties estimated the amount in controversy to be approximately $545,000.[312] Three days after the court issued its order, the plaintiff moved the court for referral to mediation.[313]

In its motion, the plaintiff claimed that mediation was appropriate because of "difficulties within Customs in (1) determining the department within the agency with the proper settlement authority, and

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303. *Alcan Aluminum Corp.*, 353 F. Supp. 2d at 1379 n.11.

304. *Id.* at 1379.

305. *Id.* at 1379-80. 19 U.S.C. § 1514(c)(3) (2012) specifically prohibits protests being filed prior to the date of the decision that acts as the basis of the protest. *Id.* at 1379.

306. *Id.* at 1380-81.

307. Complaint at 4-6, Marine Transp. Corp. v. United States, No. 06-00046 (Ct. Int'l Trade Mar. 20, 2006), Doc. No. 5.

308. *Id.*

309. Amended Answer at 3, *Marine Transp.*, No. 06-00046 (Sept. 8, 2006), Doc. No. 11.

310. *Id.* at 3-4.

311. Scheduling Order at 2, *Marine Transp.*, No. 06-00046 (Nov. 27, 2006), Doc. No. 18.

312. *Id.*

313. Motion for Referral to Court-Annexed Mediation & Proposed Order of Referral to Mediation at 2, *Marine Transp.*, No. 06-00046 (Nov. 30, 2006), Doc. No. 19.

(2) identifying an appropriate settlement vehicle."[314] Further, the plaintiff claimed that it was the defendant's view that mediation would be inappropriate because it would "be difficult to bring together the parties within Customs who have settlement authority."[315] Lastly, the plaintiff disputed defendant's claim that the court lacked subject matter jurisdiction.[316]

The defendant, in opposition to the plaintiff's motion, took issue with the plaintiff's characterization of the claimed "difficulties within Customs."[317] After admitting that CBP began its efforts to administratively resolve the issue even before the plaintiff filed its complaint and that the parties were actively involved in settlement negotiations, the defendant stated, "[I]t is impossible for individuals with ultimate settlement authority on behalf of the Government to be present at a mediation session."[318] It was the stated position of the government that mediation would not expedite the resolution of the case and that if the case could be settled, "the parties will do so without the time and expense of mediation."[319]

On the same day, the court denied the plaintiff's motion, the court issued the parties a letter which set forth the basis for the denial.[320] In short, the court denied the plaintiff's motion because of the defendant's position that "[m]ediation would not expedite the resolution of [the case]."[321] Nonetheless, the court also recognized the plaintiff's concerns regarding the pace of settlement negotiations, the government's description of the "procedure for obtaining approval for settlement," and the "general bureaucratic inertia that the Court has witnessed in similar circumstances in other cases."[322] Citing the deadlines for monthly status reports on settlement, the court emphasized that those reports be "sufficiently specific and detailed to enable the Court to monitor the pace of negotiations, and to assure itself that settlement negotiations are proceeding in good faith and are not simply a means of delaying resolution of the case on the merits."[323] The court informed the parties that if it found that a party was not pursuing settlement in good faith, it

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314. *Id.* at 3.
315. *Id.*
316. *Id.*
317. Defendant's Response to Plaintiff's Motion for Referral to Court-Annexed Mediation at 2, *Marine Transp.*, No. 06-00046 (Dec. 15, 2005), Doc. No. 21.
318. *Id.* at 3.
319. *Id.*
320. Letter, *Marine Transp.*, No. 06-00046 (Dec. 19, 2006), Doc. No. 23.
321. *Id.* at 1.
322. *Id.*
323. *Id.* at 2.

"would be receptive to a motion to accelerate the schedule for filing of dispositive motions."[324]

After the parties filed four status reports and while the deadline for the defendant to file its motion to dismiss was pending, the parties filed a settlement agreement with the court.[325] The parties ultimately agreed that CBP would refund to the plaintiff $436,000 plus interest provided by law from the date the plaintiff completed payment.[326]

4. 19 U.S.C. § 1514(a)(5)—Liquidation/Reliquidation

a. *Allstates Trading & Clothing Co. v. United States*[327]

The legal issues for mediation in *Allstates Trading & Clothing* were whether the defendant was liable for storage fees incurred after the plaintiff's merchandise was detained and excluded, and pending resolution of the plaintiff's protest challenging that exclusion, and whether the defendant was obligated to remove the electronic tag, which would allegedly be placed on future entries of the plaintiff's merchandise.[328]

The plaintiff's summons identified the issue as whether CBP properly excluded the plaintiff's apparel on the basis that the plaintiff's proffered entry documentation was insufficient to establish the country of origin.[329] The plaintiff's complaint requested that the court direct CBP to (1) release the excluded merchandise, (2) pay accrued storage fees, and (3) remove the electronic tag from future entries of the plaintiff's merchandise.[330] One month after the defendant filed its answer, the plaintiff filed a proposed scheduling order with a certification of settlement efforts.[331] In that proposed order, the plaintiff estimated the amount in controversy to be between $30,000 and $60,000.[332] In the

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324. *Id.*

325. Settlement Agreement at 1, *Marine Transp.*, No. 06-00046 (Oct. 24, 2007), Doc. No. 44; Order at 3, *Marine Transp.*, No. 06-00046 (Oct. 29, 2007), Doc. No. 45.

326. Order, *supra* note 325, at 3.

327. Allstates Trading & Clothing Co. v. United States, 30 Ct. Int'l Trade 1914 (2006).

328. *Id.* at 1915. The CM/ECF No. system indicates the category for this case as 19 U.S.C. § 1514(a)(5) Liquidation/Reliquidation. *Id.* at 1922. The underlying protest challenged the exclusion of the merchandise pursuant to 19 U.S.C. § 1514(a)(4). *Id.* However, the issues for mediation are arguably better classified as charges and extractions under 19 U.S.C. § 1514(a)(3). *Id.* at 1922.

329. Summons at 2, *Allstates Trading & Clothing*, 30 Ct. Int'l Trade 1914 (No. 04-00245), Doc. No. 1.

330. *Allstates Trading & Clothing*, 30 Ct. Int'l Trade at 1915.

331. Proposed Scheduling Order & Certification of Settlement Efforts at 1, *Allstates Trading & Clothing*, 30 Ct. Int'l Trade 1914 (No. 04-00245), Doc. No. 15-2.

332. *Id.* at 3.

certification, the plaintiff informed the court of the following: "Counsel do not desire a conference with the Court regarding settlement. Parties believe that settlement discussions are premature at this time, but that settlement discussions may again be revisited after discovery."[333]

The plaintiff filed a motion for summary judgment, and the defendant filed a cross-motion for summary judgment.[334] In the defendant's reply to the plaintiff's response to defendant's cross-motion for summary judgment, the defendant conceded that the country of origin of merchandise was that claimed by the plaintiff.[335] Pursuant to that concession, CBP attempted to resolve the case by stipulated judgment; however, the plaintiff refused to abandon its request for storage fees and for the removal of the electronic tag from future entries of its merchandise.[336] Six weeks after the court held a telephonic oral argument, the court referred the case to mediation.[337] Mediation took ninety days and did not result in settlement.[338] The court issued its opinion one year after the judge mediator issued his report. The court denied as moot the plaintiff's motion seeking a declaration of the country of origin of the merchandise.[339] Furthermore, the court denied both parties' summary judgment motions on the issues of storage fees and removal of the electronic tags.[340]

Thereafter, the plaintiff moved the court for reconsideration,[341] the court issued a pretrial order,[342] the defendant responded to the plaintiff's motion for reconsideration,[343] and the parties filed a stipulated notice of dismissal pursuant to CIT Rule 41(a)(1)(B).[344] That notice of dismissal does not provide details of any monetary settlement.

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333. *Id.* at 5.

334. Plaintiff's Motion for Summary Judgment at 1, *Allstates Trading & Clothing*, 30 Ct. Int'l Trade 1914 (No. 04-00245), Doc. No. 27; Defendant's Cross-Motion for Summary Judgment at 2, *Allstates Trading & Clothing*, 30 Ct. Int'l Trade 1914 (No. 04-00245), Doc. No. 33.

335. *Allstates Trading & Clothing*, 30 Ct. Int'l Trade at 1919.

336. *Id.*

337. Order of Referral to Mediation at 1, *Allstates Trading & Clothing*, 30 Ct. Int'l Trade 1914 (No. 04-00245), Doc. No. 41.

338. Report on Mediation, *Allstates Trading & Clothing*, 30 Ct. Int'l Trade 1914 (No. 04-00245), Doc. No. 42.

339. *Allstates Trading & Clothing*, 30 Ct. Int'l Trade at 1924.

340. *Id.*

341. Plaintiff's Motion for Reconsideration at 1, Allstates Trading & Clothing v. United States, No. 04-00245 (Ct. Int'l Trade Jan. 3, 2007), Doc. No. 48.

342. Pretrial Order at 1, *Allstates Trading & Clothing*, No. 04-00245 (Jan. 12, 2007), Doc. No. 50.

343. Defendant's Response to Plaintiff's Motion for Reconsideration at 2, *Allstates Trading & Clothing*, No. 04-00245 (Jan. 23, 2007), Doc. No. 53.

344. Stipulation of Dismissal, *Allstates Trading & Clothing*, No. 04-00245 (Jan. 30, 2007), Doc. No. 54; Order, *Allstates Trading & Clothing*, No. 04-00245 (Jan. 30, 2007), Doc. No. 55.

b. *Kahrs International Inc. v. United States*

The CIT's CM/ECF system categorizes *Kahrs International* under 19 U.S.C. § 1514(a)(2)—Classification, 19 U.S.C. § 1514(a)(5)—Liquidation or Reliquidation, and 28 U.S.C. § 1581(i)(1)—Revenue from Imports or Tonnage.[345] The issues that were the subject of mediation were related to classification and are discussed in Appendix C, part A.2.d. above.

c. *Family Delight Foods, Inc. v. United States*[346]

The underlying legal and factual issues were: (1) whether CBP's denial of a protest prevents another interested party from filing another protest on the same entry if the latter protest is filed within the 180-day limitation period[347] and (2) whether the United States Department of Commerce (Commerce) issued liquidation instructions and/or CBP prematurely liquidated plaintiff's entries while the entries were the subject of an ongoing antidumping duty administrative review, respectively.[348] Mediation was conducted over four months and settled all issues.[349]

The plaintiff's business plan included entering into the United States merchandise included in the scope of an antidumping duty order as warehouse entries (Type 21) before exporting it to Mexico.[350] However, instead of entering some of the merchandise as warehouse entries, the plaintiff's broker entered the merchandise as consumption entries (Type 01).[351] At the request of CBP, the plaintiff changed the code for those entries from consumption (Type 01) to antidumping (Type 03).[352]

Thereafter, Commerce initiated an antidumping duty administrative review, which included the plaintiff's entries.[353] Prior to the completion

345. Docket Sheet, Kahrs Int'l, Inc. v. United States, 791 F. Supp. 2d 1228 (Ct. Int'l Trade 2011) (No. 07-00343).

346. Family Delight Foods, Inc. v. United States, Nos. 10-00136, 10-00331 (Ct. Int'l Trade filed Apr. 19, 2010).

347. *See* 19 U.S.C. § 1514(c)(3) (2012).

348. Transcript of Oral Argument at 4, *Family Delight Foods*, No. 10-00136 (May 3, 2011), Doc. No. 36.

349. Order of Referral to Mediation at 1, *Family Delight Foods*, No. 10-00136 (Mar. 13, 2012), Doc. No. 46; Report of Mediation, *Family Delight Foods*, No. 10-00136 (July 26, 2012), Doc. No. 51.

350. Complaint at 3, *Family Delight Foods*, No. 10-00136 (Apr. 19, 2010), Doc. No. 4. Defendant never filed an answer to the complaint.

351. *Id.*

352. *Id.*

353. *Id.* at 4.

of the administrative review, CBP liquidated the plaintiff's entries and doubled the antidumping duties owed because the plaintiff had not filed a certificate of nonreimbursement prior to liquidation.[354] The plaintiff then filed a certificate of nonreimbursement.[355] After CBP liquidated the plaintiff's entries, Commerce published a notice in the *Federal Register* stating that merchandise entered during the same period in which the plaintiff's merchandise entered the United States should not be liquidated.[356] It is on that basis that the plaintiff filed protests on nine entries, which CBP subsequently denied.[357]

After filing its complaint, the plaintiff noted that its summons contained clerical errors. To cure those errors, the plaintiff filed a motion to amend the summons.[358] The parties exchanged briefs on the issue, and the court ordered oral argument. While the plaintiff's motion to amend was pending, the parties jointly moved for a stay while they conducted settlement negotiations.[359] The court granted the parties' joint motion.[360]

Upon lifting the order to stay the proceedings, the court further ordered that the parties file a joint status report.[361] On the same day of the court's order, the plaintiff filed another motion to amend its summons in which it sought to add 28 U.S.C. § 1581(i) as an alternative or additional basis for jurisdiction.[362] Also on that same day, the plaintiff filed a second summons on the same entries, which allegedly did not suffer from the same issues as did the plaintiff's first summons.[363]

The court twice held oral argument on the plaintiff's motions to amend, the parties filed five joint status reports, and the court held one status conference.[364]

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354. *Id.* at 4-5.

355. *Id.* at 3.

356. *Id.* at 5.

357. *Id.* at 6.

358. Plaintiff's Motion to Amend Summons at 2, *Family Delight Foods*, No. 10-00136 (Apr. 27, 2010), Doc. No. 6.

359. Joint Motion To Stay Verbal Motion Made During Oral Argument, *Family Delight Foods*, No. 10-00136 (Sept. 21, 2010), Doc. No. 29.

360. Order at 1, *Family Delight Foods*, No. 10-00136 (Nov. 9, 2010), Doc. No. 23.

361. Order at 1, *Family Delight Foods*, No. 10-00136 (Nov. 16, 2010), Doc. No. 25.

362. Plaintiff's Motion for Leave to Amend Summons for a Second Time at 2, *Family Delight Foods*, No. 10-00136 (Nov. 16, 2010), Doc. No. 26.

363. Summons, *Family Delight Foods*, No. 10-00331 (Nov. 16, 2010), Doc. No. 1.

364. Docket Sheet, *Family Delight Foods*, No. 10-00136 (Sept. 21, 2010); Joint Status Report at 1, *Family Delight Foods*, No. 10-00136 (July 15, 2011), Doc. No. 38; Joint Status Report at 1, *Family Delight Foods*, No. 10-00136 (Aug. 26, 2011), Doc. No. 39; Status Report at 1-2, *Family Delight Foods*, No. 10-00136 (Oct. 31, 2011), Doc. No. 40; Joint Status Report at 1, *Family Delight Foods*, No. 10-00136 (Feb. 3, 2012), Doc. No. 42; Joint Status Report at 1-2, *Family Delight Foods*, No. 10-00136 (Feb. 17, 2012), Doc. No. 43. Between the parties' two oral

One week after the conference and while the two underlying legal and factual issues and two motions to amend the first summons were pending, the case was referred to mediation.[365] Mediation took less than five months and settled all of the issues.[366] After ordering the parties to file the settlement agreement with the court in the first case, the parties filed a stipulated judgment of an agreed statement of facts in the second case, which the court signed soon thereafter.[367] Five months later, the parties filed a joint stipulation of voluntary dismissal in the first case.[368]

B. 28 U.S.C. § 1581(d)—Trade Adjustment Assistance

1. United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, Local 2911 v. U.S. Secretary of Labor (*Steelworkers I*)[369]

The factual and legal issues before the court when it referred *Steelworkers I* to mediation were (1) whether the United States Department of Labor's (DOL) denial, after reconsideration, of the plaintiff's petition for trade adjustment assistance (TAA) was supported by substantial evidence;[370] (2) whether the DOL's denial of the plaintiff's request to extend the plaintiff's existing TAA certification was supported by substantial evidence;[371] and (3) whether the court's jurisdiction attached to the DOL's determination denying the plaintiff's request to amend an existing TAA certification.[372] The court referred the case to mediation after it held oral argument on the plaintiff's motion for judgment on the agency record and after the plaintiff filed supplemental citations pertaining to the DOL's certification amendments.[373] Mediation was conducted over four months and did not settle the issues.[374]

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arguments, the court matched the parties' deadlines in the second case to benchmark dates in the first case. Order at 1, *Family Delight Foods*, No. 10-00331 (Jan. 4, 2011), Doc. No. 9.

365. Order of Referral to Mediation, *supra* note 349.

366. Report of Mediation, *supra* note 349, at 1.

367. Order, *Family Delight Foods*, No. 10-00136 (Aug. 1, 2012), Doc. No. 52; Stipulated Judgment on Agreed Statement of Facts at 1-3, *Family Delight Foods*, No. 10-00331 (Aug. 15, 2012), Doc. No. 11.

368. Joint Stipulation of Dismissal, *Family Delight Foods*, No. 10-00136 (Jan. 14, 2013), Doc. No. 55.

369. *Steelworkers III*, 33 Ct. Int'l Trade 418 (2009).

370. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, Local 2911 v. U.S. Sec'y of Labor (*Steelworkers I*) , 30 Ct. Int'l Trade 1793, 1794 (2006).

371. *Id.*

372. *Id.* at 1805.

373. Plaintiff's Rule 56.1 Motion for Judgment on the Agency Record at 3, *Steelworkers III*, 33 Ct. Int'l Trade 418 (No. 04-00492), Doc. No. 17; Supplemental Citations to Certification

When the parties were unable to settle the issues through meditation, the court issued an opinion sustaining the DOL's denial, after reconsideration, of the plaintiff's petition for TAA[375] and denying the defendant's motion to dismiss for lack of jurisdiction on the DOL's denial to amend the plaintiff's TAA certification.[376] The court then remanded the case to the DOL to gather and submit the administrative record associated with the DOL's denial of the plaintiff's certification amendment claim.[377]

Upon reviewing the remand record, the court again remanded the case to the DOL, instructing it to specifically delineate the process taken in denying the plaintiff's request to extend its TAA certification.[378] Based on the record in the second remand, the court sustained the DOL's denial of the plaintiff's request to amend its TAA certification.[379]

C. 28 U.S.C. § 1581(i)—Residual Jurisdiction

1. 28 U.S.C. § 1581(i)(1)—Revenue from Imports or Tonnage

a. *International Custom Products, Inc. v. United States*

Two days after the plaintiff filed its summons, the court issued the first of three orders of referral to mediation.[380] As of the date of the first referral, the following legal issues were pending before the court:

Amendments Made by the Dep't of Labor at 3, *Steelworkers III*, 33 Ct. Int'l Trade 418 (No. 04-00492), Doc. No. 29; Defendant's Motion for Leave to Respond to Plaintiff's Supplemental Citations and Defendant's Response to Plaintiff's Supplemental Citations at 1, *Steelworkers III*, 33 Ct. Int'l Trade 418 (No. 04-00492), Doc. No. 30; Plaintiff's Response to Defendant's Motion for Leave to Respond to Plaintiff's Supplemental Citations at 1, *Steelworkers III*, 33 Ct. Int'l Trade 418 (No. 04-00492) (2009), Doc. No. 31; Order at 1, *Steelworkers III*, 33 Ct. Int'l Trade 418 (No. 04-00492), Doc. No. 32; Plaintiff's Reply to Defendant's Response to Plaintiff's Supplemental Citations at 1, *Steelworkers III*, 33 Ct. Int'l Trade 418 (No. 04-00492) (Ct. Int'l Trade Aug. 19, 2005), Doc. No. 33; Order of Referral to Mediation at 1, *Steelworkers III*, 33 Ct. Int'l Trade 418 (No. 04-00492), Doc. No. 34.

374. Order of Referral to Mediation, *supra* note 373; Report of Mediation at 1, *Steelworkers III*, 33 Ct. Int'l Trade 418 (No. 04-00492) (2009), Doc. No. 39.

375. *Steelworkers I*, 30 Ct. Int'l Trade at 1808.

376. *Id.* The court found that it had jurisdiction under 28 U.S.C. § 1581(i)(4).

377. *Id.*

378. United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, Local 2911 v. U.S. Sec'y of Labor (*Steelworkers II*), 32 Ct. Int'l Trade 394 (2008).

379. *Steelworkers III*, 33 Ct. Int'l Trade at 418.

380. Summons at 1, Int'l Custom Prods., Inc. v. United States, 29 Ct. Int'l Trade 1292 (2005) (No. 05-00509), Doc. No. 1; Order of Referral to Mediation at 1, *Int'l Custom Prods.*, 29 Ct. Int'l Trade 1292 (No. 05-00509), Doc. No. 18; Order of Referral to Mediation at 1, *Int'l Custom Prods.*, 29 Ct. Int'l Trade 1292 (No. 05-00509), Doc. No. 20; Order of Referral to Mediation at 1, Int'l Custom Prods., Inc. v. United States, No. 05-00509 (Sept. 19, 2005), Doc. No. 23.

(1) whether the defendant's entry bond requirements, imposed after the defendant issued a notice of action, contravened the defendant's own regulations and the plaintiff's due process rights; (2) whether those entry bond requirements would prohibit the plaintiff from entering its merchandise in the future; and (3) whether the second issue gave rise to a justiciable controversy.

After the defendant issued a notice of action that reclassified the plaintiff's merchandise, which had been the subject of an advance classification ruling request, the defendant imposed a requirement that the plaintiff post single entry bonds at three times the value of the merchandise, in addition to maintaining a $400,000 continuous entry bond.[381] The plaintiff challenged the defendant's "prohibitive bond requirements" and moved the court to order both a temporary restraining order (TRO) and a preliminary injunction (PI) requesting that the court instruct the defendant to rescind all single entry bond requirements and refrain from imposing any such prohibitive bond requirements on the plaintiff's merchandise in the future.[382]

In granting the plaintiff's motion, the court instructed the defendant to rescind all single entry bond requirements on the plaintiff's merchandise,[383] but did not address the issue of whether the defendant could impose bonds other than the existing continuous entry bond on the plaintiff's merchandise in the future. On the same day, the court granted the plaintiff's motion, the court both stayed the action (including the TRO) for eight days and referred the case to mediation.[384]

The judge mediator conducted three sessions of one day each.[385] Mediation did not result in settlement.[386] On the day the report of mediation was issued and the stay in the case was lifted, but before the expiration of the TRO, the plaintiff entered the 11 entries of merchandise from its bonded warehouse under continuous entry bond.[387]

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381. *Int'l Custom Prods.*, 29 Ct. Int'l Trade 1292.

382. Plaintiff's Application for a Temporary Restraining Order & Motion for Preliminary Injunction at 6, *Int'l Custom Prods.*, 29 Ct. Int'l Trade 1292 (No. 05-00509), Doc. No. 5.

383. *Int'l Custom Prods.*, 29 Ct. Int'l Trade at 1294.

384. *Id.*

385. Order of Referral to Mediation, *supra* note 380 (Doc. No. 18); Order of Referral to Mediation, *supra* note 380 (Doc. No. 20); Order of Referral to Mediation, *supra* note 380 (Doc. No. 23).

386. Report of Mediation, *Int'l Custom Prods.*, 29 Ct. Int'l Trade 1292 (No. 05-00509), Doc. No. 24.

387. *Int'l Custom Prods.*, 29 Ct. Int'l Trade at 1294.

Three days later, the defendant filed its response to both the plaintiff's motion for judgment on the agency record and motion for PI.[388] Accompanying the defendant's response was a motion to dismiss for lack of jurisdiction.[389] On that same day, the plaintiff withdrew its motion for PI.[390] The plaintiff stated the reason for withdrawal as follows:

> In reliance on this Court's temporary restraining order, [the plaintiff] was able to enter the merchandise in its bonded warehouse, and [the plaintiff] will not receive any shipments of [the merchandise] from its foreign supplier in the next few weeks. As a result, [the plaintiff] does not require preliminary injunctive relief while it awaits this Court's final ruling on the merits . . . .[391]

After the plaintiff withdrew its motion for PI, the only remaining issue was whether the court's jurisdiction attached to the plaintiff's remaining claims that when the plaintiff sought to enter the merchandise in the future, "it [would] be faced with a renewed demand for single entry bonds or the imposition of other 'requirements or restrictions.'"[392] In granting the defendant's motion to dismiss, the court determined that it did not have jurisdiction to consider those claims because "[t]hey are therefore based on 'speculative contingencies [that] afford no basis for [the court to] decide.'"[393]

b. *Trustees in Bankruptcy of North American Rubber Thread Co. v. United States*

After the court denied the defendant's motion to dismiss for lack of jurisdiction, the plaintiff filed its motion for mediation.[394] The legal issue in the plaintiff's motion for referral to mediation was whether Commerce's denial to initiate a changed circumstances review of an antidumping duty order was in accordance with law. In that case, the domestic industry expressed a lack of interest in the order and requested that it be revoked retroactively.[395] The basis for Commerce's denial was

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388. Response of United States to Motion for Preliminary Injunction and for Judgment on the Agency Record at 7, *Int'l Custom Prods.*, 29 Ct. Int'l Trade 1292 (No. 05-00509), Doc. No. 25.

389. *Id.*

390. *Steelworkers II*, 32 Ct. Int'l Trade 394 (2008).

391. Letter, *Int'l Custom Prods.*, 29 Ct. Int'l Trade 1292 (No. 05-00509), Doc. No. 26.

392. *Int'l Custom Prods.*, 29 Ct. Int'l Trade at 1294 & n.1.

393. *Id.* at 1299.

394. Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States, 464 F. Supp. 2d 1350, 1364 (Ct. Int'l Trade 2006); Motion for Mediation at 2, Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States, 32 Ct. Int'l Trade 1271 (2008) (No. 05-00539), Doc. No. 29.

395. Motion for Mediation, *supra* note 394, at 3.

that "1) all administrative reviews of [the subject imports] have been completed; and 2) there is no existing order for which to initiate a changed circumstances review."[396] The defendant opposed mediation of the issue, and the court denied the plaintiff's motion.[397]

Thereafter, the court twice ordered the case remanded back to Commerce and ultimately ordered Commerce to initiate a changed circumstances review.[398]

c. *Kahrs International Inc. v. United States*

The CIT's CM/ECF system categorizes *Kahrs International* under 19 U.S.C. § 1514(a)(2)—Classification, 19 U.S.C. § 1514(a)(5)—Liquidation or Reliquidation, and 28 U.S.C. § 1581(i)(1)—Revenue from Imports or Tonnage. The issues that were the subject of court-annexed mediation were related to classification and are discussed in Appendix C, part A.2.d above.

d. *City of Fresno/Fresno Yosemite International Airport v. United States*

In *City of Fresno/Fresno Yosemite International Airport*, the defendant moved the court for referral to mediation, the plaintiff opposed and the court denied the defendant's motion.[399]

The legal issue in the complaint was whether CBP's refusal to reimburse the plaintiff for overpayment of $991,517 in airport user fees was "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' and [was] 'in excess of [CBP's] statutory

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396. Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States, 533 F. Supp. 2d 1290, 1292 (Ct. Int'l Trade 2007). Commerce had previously revoked the order pursuant to an earlier changed circumstances review, however, that revocation was effective as of October 1, 2003. There were still unliquidated entries dated as far back as October 1, 1995, and it was that date which the plaintiff argued for as the new effective date associated with its second request for a changed circumstances review. *Id.*

397. The case docket does not indicate that the defendant filed a written opposition to the plaintiff's motion; however, the court's order denying the motion indicates that the defendant opposed mediation of the issue. Order at 1, *Rubber Thread Co.*, 32 Ct. Int'l Trade 1271 (No. 05-00539), Doc. No. 31 (denying motion for mediation, "taking into account defendant United States' opposition thereto, in addition to the representations made during the court-initiated telephone conference").

398. *Rubber Thread Co.*, 533 F. Supp. 2d at 1297-98; Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States, 558 F. Supp. 2d 1367, 1370 (Ct. Int'l Trade 2008); *Rubber Thread Co.*, 32 Ct. Int'l Trade at 1271.

399. Motion for Referral to Mediation at 3, City of Fresno v. United States, No. 10-00137 (Ct. Int'l Trade Sept. 27, 2010), Doc. No. 19; Response in Opposition to Motion for Referral to Mediation, *City of Fresno*, No. 10-00137 (Sept. 29, 2010), Doc. No. 20; Order Denying Referral to Mediation, *City of Fresno*, No. 10-00137 (Oct. 1, 2010), Doc. No. 21.

jurisdiction, authority, or limitations' and thus constitute[d] unlawful agency action.'"[400] While the litigation was pending, another legal issue arose as to whether jurisdiction under 28 U.S.C. § 1581(i) was proper.[401]

The defendant moved the court for mediation before filing the administrative record and before filing its answer.[402] Before the defendant had filed its motion, the court granted the defendant four unopposed motions for extensions of time, during which the parties conducted settlement negotiations.[403] Between the defendant's third and fourth motions for an extension of time, the plaintiff asserted that the parties exchanged their first "informal" settlement offers.[404]

The plaintiff did not oppose the defendant's fourth request for an extension, but advised the defendant that it would oppose any further extension requests.[405] It was at this point that the defendant moved the court for mediation.[406] The stated basis for the plaintiff's opposition to the defendant's motion was that "it seems far more efficient and less prejudicial to [the plaintiff] to defer any proposal to mediate until such time as an Answer and the administrative record is filed (or initial discovery is exchanged) so that all parties can litigate or mediate on a level playing field."[407]

Thereafter, the defendant filed a motion to dismiss for lack of jurisdiction on the basis that the plaintiff's complaint used 28 U.S.C. § 1581(i) for jurisdiction when 28 U.S.C. § 1581(a) was otherwise available.[408] The plaintiff filed a response opposing the defendant's motion.[409] The parties filed a CIT Rule 41(a)(1)(A)(ii) joint stipulation of dismissal while the due date for the defendant's reply to the plaintiff's response was pending before the court.[410]

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400. Complaint at 6, *City of Fresno*, No. 10-00137 (Apr. 20, 2010), Doc. No. 2 (second alteration added).

401. Defendant's Motion to Dismiss & Motion to Stay Filing of the Administrative Record, *City of Fresno*, No. 10-00137 (Oct. 12, 2010), Doc. No. 22; Memorandum in Support of Its Motion to Dismiss at 5-6, *City of Fresno*, No. 10-00137 (Oct. 12, 2010), Doc. No. 22-1.

402. Motion for Referral to Mediation, *supra* note 399, at 3.

403. Order, *City of Fresno*, No. 10-00137 (June 2, 2010), Doc. No. 11; Order, *City of Fresno*, No. 10-00137 (June 23, 2010), Doc. No. 13; Order, *City of Fresno*, No. 10-00137 (July 29, 2010), Doc. No. 16; Order, *City of Fresno*, No. 10-00137 (Sept. 1, 2010), Doc. No. 18.

404. Response in Opposition to Motion for Referral to Mediation, *supra* note 399, at 2.

405. *Id.*

406. Motion for Referral to Mediation, *supra* note 399, at 3.

407. Response in Opposition to Motion for Referral to Mediation, *supra* note 399, at 3.

408. Defendant's Motion to Dismiss & Motion to Stay Filing of the Administrative Record, *supra* note 401; Memorandum in Support of Its Motion To Dismiss, *supra* note 401.

409. Plaintiff's Memorandum of Law in Opposition to the Government's Motion To Dismiss at 5, *City of Fresno*, No. 10-00137 (Nov. 11, 2010), Doc. No. 23.

410. Joint Stipulation of Dismissal, *City of Fresno*, No. 10-00137 (Feb. 7, 2011), Doc. No. 30.

2. 28 U.S.C. § 1581(i)(2)—Tariffs, Duties, Fees, or Other Taxes on the Importation of Merchandise for Reasons Other than the Raising of Revenue

a. *Family Delight Foods, Inc. v. United States*

Family Delight Foods is discussed in Appendix C, part A.4.c above.

3. 28 U.S.C. § 1581(i)(4)—Administration and Enforcement with Respect to the Matters Referred to in Paragraphs (1)—(3) of the 28 U.S.C. § 1581(i) and Subsections (a)–(h) of 28 U.S.C. § 1581

a. *City of Fresno/Fresno Yosemite International Airport v. United States*

City of Fresno/ Fresno Yosemite International Airport is discussed in Appendix C, part C.1.d above.

D. 19 U.S.C. § 1582

1. *United States v. ITT Industries, Inc.*[411]

In *ITT Industries*, the defendant filed a prior disclosure in which it admitted failing to post and pay regular duties and antidumping duties on entries of certain imported bearings from 1988 through 1991.[412] CBP calculated that the defendant owed $36,344.50 in regular duties and $618,127.50 in antidumping duties.[413] The defendant agreed with CBP's calculation of regular duties, but disagreed with its calculation of antidumping duties.[414] After the defendant paid the regular duties, CBP issued the defendant a prepenalty notice for the interest associated with the antidumping duties.[415] CBP calculated the penalty based on the interest lost during the period beginning on the dates of entry and ending on the date of prepenalty notice.[416]

After CBP reviewed the amount of antidumping duties owed, pursuant to the defendant's request, CBP advised the defendant that it must tender the full amount of antidumping duties payable, $619,515.33,

411. After denying plaintiff's motion to dismiss *ITT Jabsco v. United States*, No. 97-00379 (Ct. Int'l Trade filed May 27, 1998), the court consolidated the Nos. 97-01777 and 97-00379 under No. 97-01777. Order, United States v. ITT Indus., Inc., 343 F. Supp. 2d 1322 (Ct. Int'l Trade 2004) (No. 97-01777), Doc. No. 40.

412. *ITT Indus.*, 343 F. Supp. 2d at 1326.

413. *Id.* at 1327.

414. Joint Statement of Material Facts Not in Dispute at 3, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 54.

415. *ITT Indus.*, 343 F. Supp. 2d at 1328.

416. *Id.*

to "perfect its prior disclosure."[417] Furthermore, CBP instructed the defendant that if the full amount was not tendered, CBP would issue a penalty "at the full penalty amount."[418]

Upon paying the full amount of antidumping duties, the defendant filed a protest challenging the calculation of antidumping duties owed.[419] The defendant requested accelerated disposition of its protest pursuant to 19 U.S.C. § 1515(b) and, based on CBP's denial of the protest, filed a summons challenging that denial.[420] Thereafter, CBP issued the defendant a notice of penalty that demanded $109,418.81.[421] CBP calculated this penalty based on the interest lost during the period beginning on the dates of entry and ending on the date of the defendant's prior disclosure.[422] When the defendant declined to pay the penalty, the plaintiff filed suit under 19 U.S.C. § 1592.[423]

While the plaintiff's first motion for summary judgment was pending in No. 97-01777, the court denied the plaintiff's motion to dismiss No. 97-00379 and ordered the two cases consolidated.[424] The plaintiff withdrew its first motion for summary judgment, the defendant filed a partial motion for summary judgment, and the plaintiff filed a second motion for summary judgment.[425] In an attempt to narrow the facts, the court held a number of telephone conferences with the parties during which it posed a number of questions, one of which was whether the case was amenable to settlement.[426] Each party filed two sets of supplemental briefs in response to the questions posed by the court.[427] The plaintiff's position was that the issue was not amenable to

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417. Joint Statement of Material Facts Not in Dispute, *supra* note 414, at 5-6.

418. *Id.*

419. *Id.*

420. *Id.* at 7.

421. *ITT Indus.*, 343 F. Supp. 2d at 1328.

422. *Id.*

423. Joint Statement of Material Facts Not in Dispute, *supra* note 414, at 7.

424. Motion for Summary Judgment and Dismissal of Defendant's Counterclaim, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777) (filed Dec. 20, 1999); Order, *supra* note 411.

425. Letter Re: Withdrawal of Motions, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777) (filed Aug. 7, 2001); Defendant's Motion for Summary Judgment, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 53; Plaintiff's Motion for Summary Judgment, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 55.

426. *See* Plaintiff's Memorandum in Response to Questions Raised by Court During 7/2/02 Teleconference, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 70.

427. Defendant's Supplemental Brief at 2, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 69; Plaintiff's Memorandum in Response to Questions Raised by Court During 7/2/02 Teleconference, *supra* note 426, at 2; Supplemental Brief, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 72; Plaintiff's Memorandum in Response to the Court's Questions, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 73.

settlement.[428] The defendant's position was that the court should apply "equitable principles" in resolving the case.[429] Finding that there were still material facts at issue, the court denied the plaintiff's second motion and the defendant's partial motion for summary judgment.[430]

The parties filed a number of status reports related to discovery, which culminated in a joint statement of material facts not in dispute.[431] Based on the latter document, the plaintiff filed its third motion for summary judgment, and the defendant filed its second motion for summary judgment.[432] While the responses to those motions were pending, the court issued an order of referral to mediation.[433]

Mediation took place seven years after the defendant filed its summons challenging a denied protest and six and a half years after the plaintiff filed its summons seeking to collect a penalty. Originally scheduled for sixty days, mediation was extended an additional 30 days and appears not to have resulted in settlement.[434] No final report of mediation appears on the docket.

On the date the mediation was scheduled to end, the defendant filed its reply in support of its second motion for summary judgment.[435]

Upon consideration of the plaintiff's and the defendant's cross-motions for summary judgment, the court granted in part and denied in part the plaintiff's motion and denied the defendant's motion.[436] The part

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428. *See, e.g.*, Plaintiff's Memorandum in Response to Questions Raised by Court During 7/2/02 Teleconference, *supra* note 426, at 9.

429. *See, e.g.*, Defendant's Supplemental Brief, *supra* note 427, at 10.

430. Order, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 74.

431. Status Report Letter from Mikki Graves Walser, Trial Att'y, U.S. Dep't of Justice to Honorable Donald C. Pogue, Judge, Ct. of Int'l Trade, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777) (Oct. 18, 2002), Doc. No. 75; Status Report Letter from Mikki Graves Walser, Trial Att'y, U.S. Dep't of Justice to Honorable Donald C. Pogue, Judge, Ct. of Int'l Trade, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 77; Status Report Letter from Rufus E. Jarman, Jr., Att'y for Def., Barnes Richardson & Colburn, to Honorable Donald C. Pogue, Judge, Ct. of Int'l Trade, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 79; Public Joint Statement of Material Facts Not in Dispute, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 81.

432. Defendant's Motion for Summary Judgment, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 91; Motion for Summary Judgment & Dismissal of Defendant's Counterclaim, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 92.

433. Memorandum of Law in Response to Motion for Summary Judgment at 1, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 95; Plaintiff's Response to Defendant's Motion for Summary Judgment at 1, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 99; Order of Referral to Mediation at 1, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 100.

434. Order of Referral to Mediation, *supra* note 433; Report of Mediation & Order for Extension of Time at 1, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 101.

435. Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777) (June 18, 2004), Doc. No. 102.

436. *ITT Indus.*, 343 F. Supp. 2d at 1344.

of the plaintiff's motion that the court granted was the amount of antidumping duties assessed. The part of the plaintiff's motion that the court denied was the amount of penalty assessed consisting of interest owed on the antidumping duties.[437] The court ordered a trial to be held on the penalty issue.[438] The parties then filed six status reports, culminating in a settlement agreement whereby the parties agreed that the penalty amount, consisting of the interest associated with the antidumping duties owed, was $54,709.41.[439]

The defendant appealed the issue of whether CBP correctly calculated the antidumping duties owed as reflected in the court's grant in part of the plaintiff's motion for summary judgment.[440] The Federal Circuit affirmed the CIT.[441]

2. *United States v. Optrex America, Inc.*[442]

In *Optrex America*, the United States sought to recover duties pursuant to 19 U.S.C. § 1592(d) for the defendant's alleged negligent misclassification of liquid crystal display (LCD) products and to enforce a civil penalty for violations of 19 U.S.C. § 1592. In its first amended complaint, the plaintiff alleged lost revenue in the amount of $1,515,499.75 and a negligence penalty of $3,030,999.50.[443] The court twice issued opinions related to the parties' motions to compel

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437. *Id.*

438. *Id.*

439. Status Report Letter from Rufus E. Jarman, Jr., Att'y for Def., Barnes, Richardson & Colburn, to Honorable Donald C. Pogue, Judge, Ct. of Int'l Trade at 1, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 107; Status Report Letter from Rufus E. Jarman, Jr., Att'y for Def., Barnes, Richardson & Colburn, to Honorable Donald C. Pogue, Judge, Ct. of Int'l Trade at 1, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 108; Status Report Letter from Rufus E. Jarman, Jr., Att'y for Def., Barnes, Richardson & Colburn, to Honorable Donald C. Pogue, Judge, Ct. of Int'l Trade at 1, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 109; Status Report Letter from Rufus E. Jarman, Jr., Att'y for Def., Barnes, Richardson & Colburn, to Honorable Donald C. Pogue, Judge, Ct. of Int'l Trade at 1, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 110; Status Report Letter from Rufus E. Jarman, Jr., Att'y for Def., Barnes, Richardson & Colburn, to Honorable Donald C. Pogue, Judge, Ct. of Int'l Trade at 1, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 111; Status Report Letter from Rufus E. Jarman, Jr., Att'y for Def., Barnes, Richardson & Colburn, to Honorable Donald C. Pogue, Judge, Ct. of Int'l Trade at 1, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 113; Settlement Agreement, *ITT Indus.*, 343 F. Supp. 2d 1322 (No. 97-01777), Doc. No. 115.

440. Notice of Appeal at 1, United States v. ITT Indus., Inc., 168 F. App'x 942 (Fed. Cir. 2006), Doc. No. 118.

441. *ITT Indus.*, 168 Fed. App'x at 942.

442. Plaintiff's First Amended Complaint at 1, United States v. Optrex Am., Inc., 560 F. Supp. 2d 1326 (Ct. Int'l Trade 2008) (No. 02-00646), Doc. No. 15.

443. *Id.* at 4-5.

discovery.[444] Based on information obtained during the course of discovery, the plaintiff filed a motion to amend its complaint to add claims of gross negligence and fraud.[445]

The court issued four orders referring the case to mediation. The first of those orders was issued (1) following the court's denial of the defendant's partial motion for summary judgment on whether the defendant exercised reasonable care in classifying its merchandise and (2) following the plaintiff's motion for reconsideration of the court's denial of its motion to amend the complaint to add counts alleging gross negligence and fraud.[446] The court ordered the action referred to mediation and gave the parties ninety days in which to settle or dismiss the case.[447] The court subsequently issued three more orders of referral to mediation, totaling an additional 113 days.[448] After over six months, mediation did not result in settlement.[449]

After a trial, the court found the defendant in violation of 19 U.S.C. § 1592 by negligently failing to use reasonable care in its classification of LCD products.[450] The court ordered the recovery of $913,572.79 in duties and the payment of penalties in the amount of "one and one-half 'times the lawful duties, taxes, and fees of which the United States [was] deprived' between November 13, 2007 through June 29, 1999."[451]

3. *United States v. Lee-Hunt International, Inc.*[452]

Lee-Hunt International was a multiparty dispute in which the United States asserted that Lee-Hunt International (LHI), its president, and its vice-president be jointly and severally held liable for fraudulently

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444. United States v. Optrex Am., Inc., 28 Ct. Int'l Trade 987 (2004); United States v. Optrex Am., Inc., 28 Ct. Int'l Trade 993 (2004).

445. United States v. Optrex Am., Inc., 29 Ct. Int'l Trade 1494, 1495 (2005).

446. *Id.*; United States v. Optrex Am., Inc., 30 Ct. Int'l Trade 650 (2006); Plaintiff's Motion for Reconsideration at 9, *Optrex Am.*, 560 F. Supp. 2d 1326 (No. 02-00646), Doc. No. 111.

447. Order of Referral to Mediation at 1, *Optrex Am.*, 560 F. Supp. 2d 1326 (No. 02-00646), Doc. No. 112.

448. Order of Referral to Mediation at 1, *Optrex Am.*, 560 F. Supp. 2d 1326 (No. 02-00646), Doc. No. 113; Order of Referral to Mediation at 1, *Optrex Am.*, 560 F. Supp. 2d 1326 (No. 02-00646), Doc. No. 114; Order of Referral to Mediation at 1, *Optrex Am.*, 560 F. Supp. 2d 1326 (No. 02-00646), Doc. No. 115.

449. *Id.*; Report of Mediation at 1, *Optrex Am.*, 560 F. Supp. 2d 1326 (No. 02-00646), Doc. No. 116; Order of Referral to Mediation, *supra* note 447 (Doc. No. 112).

450. *Optrex Am.*, 560 F. Supp. 2d at 1341.

451. *Id.* at 1322, 1344.

452. Complaint, United States v. Lee-Hunt Int'l, Inc., No. 02-00816 (Ct. Int'l Trade Dec. 19, 2002), Doc. No. 3.

valuing and classifying certain flashlights.[453] The United States sought to recover duties and penalties from the foregoing defendants and also from LHI's two sureties, Washington International Insurance Co. and Frontier Insurance Co.[454]

The complaint set forth the following four counts: (1) through the use of materially false statements, LHI, its president, and its vice-president were jointly and severally liable for $1,746,964.99 in penalties (plus prejudgment and postjudgment interest, as provided by law), which represented the domestic value of 76 entries of the subject merchandise; (2) LHI, its president, and its vice-president were jointly and severally liable for $240,936.65 in lost revenue (plus interest as provided by law); (3) due to the foregoing defendant's failure to pay, Washington International Insurance was liable on its bond for $100,000 ($50,000 per entry year); and (4) due to LHI, its president, and its vice-president's failure to pay the penalties and lost revenue, Frontier Insurance Co. was liable on its bond for $50,000.[455]

Five days before the deadline for the parties to file their pretrial order, the court referred the action to mediation.[456] The mediation was originally scheduled to last 45 days, but the judge mediator issued his report in 134 days, which indicated a settlement of all the issues.[457]

The parties agreed to a stipulated judgment pursuant to CIT Rule 54(b). In that judgment, the parties agreed to the following: LHI's president agreed to pay $25,000 in exchange for the voluntary dismissal of all claims against him and LHI; Washington International Insurance agreed to pay $100,000 in exchange for the voluntary dismissal against it; LHI's president admitted to the possibility of negligence and agreed to reimburse and indemnify Washington International Insurance for the full amount payable by Washington International; and LHI's vice-president agreed to pay $2,500 in exchange for the voluntary dismissal of all claims against him.[458] In addition to the parties releasing each other from any claims arising from the entries subject to the agreement, the parties also agreed that the foregoing stipulations reflected LHI's and its

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453. *Id.* at 4-5.

454. *Id.* at 9-10.

455. *Id.* at 8-10.

456. Order of Referral to Mediation at 1, *Lee-Hunt Int'l*, No. 02-00816 (Dec. 5, 2005), Doc. No. 73; *see also* Revised Scheduling Order, *Lee-Hunt Int'l*, No. 02-00816 (Nov. 3, 2005), Doc. No. 67.

457. Order of Referral to Mediation, *supra* note 456; Report of Mediation, *Lee-Hunt Int'l*, No. 02-00816 (Apr. 18, 2006), Doc. No. 79.

458. Stipulated Judgment Pursuant to Rule 54(b) at 2, *Lee-Hunt Int'l*, No. 02-00816 (Sept. 22, 2006), Doc. No. 81.

president's ability to pay.[459] If plaintiff discovered that LHI or its president held material assets that were undisclosed as of the date of the agreement, a material breach would be declared and the parties again would be liable for the full amount demanded in the complaint, plus interest and attorney's fees.[460] The action is currently stayed with regard to Frontier Insurance Co.'s liability pending the Superintendent of Insurance of the State of New York's lifting of its rehabilitation order, which enjoins all persons from prosecuting any actions against Frontier Insurance Co.[461]

4. *United States v. Leslie M. Toth*[462]

The complaint consisted of two counts, the first of which sought civil penalties of $3,350,923 (the domestic value of imported crawfish) and the second of which sought lost revenue of $2,846,230.87 due to the defendant's alleged misclassification of merchandise subject to an antidumping duty order.[463] After the close of discovery, the defendant filed a motion for judgment on the pleadings asserting that the complainant failed to state a claim upon which relief could be granted.[464] The underlying legal issue in the defendant's motion was whether only the importer and its authorized agents can directly enter the merchandise for purposes of 19 U.S.C. § 1592(a)(1)(A).[465] When the plaintiff filed its response to that motion, it also filed a motion to amend the complaint to add counts of gross negligence and fraud based on information obtained during the course of discovery.[466]

While those two motions were pending, the court referred the action to mediation.[467] Approximately six months after the judge referred the case to mediation, the parties filed a stipulation of dismissal without prejudice.[468] The stipulation of dismissal included a statute of limitations

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459. *Id.* at 4.

460. *Id.* at 5.

461. Joint Status Report at 1, 5, *Lee-Hunt Int'l*, No. 02-00816 (Dec. 1, 2006), Doc. No. 84; Letter from Barton W. Bloom, New York State Ins. Dep't, to Patrick J. Merucrio, Dep't of Justice, *Lee Hunt Int'l*, No. 02-00816 (Dec. 1, 2006), Doc. No. 84-2.

462. Complaint at 1, United States v. Toth, No. 09-00183 (Ct. Int'l Trade May 1, 2009).

463. *Id.* at 4. The plaintiff originally sought $3,896,230.87 in lost revenue, but that amount was reduced when defendant's surety paid $50,000, the limit of its bond.

464. Motion for Judgment on the Pleadings & Accompanying Memorandum at 1-2, *Toth*, No. 09-00183 (July 30, 2010), Doc. No. 36.

465. *Id.* at 4.

466. Plaintiff's Motion To Amend the Complaint & Response to Defendant's Motion for Judgment on the Pleadings at 4, *Toth*, No. 09-00183 (Jan. 26, 2011), Doc. No. 46.

467. Order of Referral to Mediation, *Toth*, No. 09-00183 (Mar. 9, 2011), Doc. No. 51.

468. Order at 1, *Toth*, No. 09-00183 (Sept. 1, 2011), Doc. No. 53.

waiver whereby the defendant agreed not to assert limitations for two years from the date on which the waiver was executed.[469]

5. *United States v. Washington International Insurance Co.*

The plaintiff asserted that the defendant, a surety, was liable for the defendant principal's nonpayment of duties.[470] The amount at issue was $63,288.78.[471] The defendant and the third-party defendant had executed a continuous entry bond for $50,000 per year.[472] The subject merchandise entered the United States over the course of two years.[473] In the defendant's answer, it included a third-party complaint seeking an order from the court compelling the third-party defendant, the defendant's principal, to pay its duty obligations, among other claims.[474] The third-party defendant asserted that the plaintiff failed to exhaust administrative remedies because the third-party defendant's supplemental petition for relief was pending before CBP.[475]

The plaintiff and defendant filed a joint status report wherein the parties recognized that the court twice extended the deadline for a proposed scheduling order in light of settlement negotiations between the plaintiff and the third-party defendant.[476] The parties also recognized that the third-party defendant made an offer in compromise, but the plaintiff took the position that the action should proceed against the defendant.[477] Thereafter, in response to the defendant and third-party defendant's joint motion for a stay, the plaintiff asserted that it had opposed both the third-party defendant's supplemental petition and the offer in compromise.[478]

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469. Statute of Limitations Waiver Form at 1, *Toth*, No. 09-00183 (Sept. 1, 2011), Doc. No. 54.

470. Complaint at 2, United States v. Washington Int'l Ins. Co. (*Washington Int'l Ins. Co. I*), No. 09-00449 (Ct. Int'l Trade Oct. 19, 2009), Doc. No. 3.

471. *Id.* at 3.

472. *Id.* at 2.

473. *Id.*

474. Answer at 5, *Washington Int'l Ins. Co. I*, No. 09-00449 (Nov. 25, 2009), Doc. No. 6.

475. Answer to Amended Third Party Complaint & Affirmative Defenses at 1, *Washington Int'l Ins. Co. I*, No. 09-00449 (May 3, 2010), Doc. No. 12.

476. Plaintiff & Defendant's Joint Status Report Pursuant to the Court's November 9, 2010, Order at 3, *Washington Int'l Ins. Co. I*, No. 09-00449 (Mar. 8, 2011), Doc. No. 20.

477. *Id.* at 2. A third-party defendant filed a separate joint status report wherein it objected to certain matters in the other parties' status report, characterizing them as involving jurisdictional and procedural matters as well as conclusions of law. Third Party Defendant & Defendant's Joint Motion to Stay Court Proceedings at 10, *Washington Int'l Ins. Co. I*, No. 09-00449 (June 27, 2011), Doc. No. 26.

478. Plaintiff's Opposition to Third Party Defendant's & Third Party Plaintiff's Joint Motion to Stay Proceedings at 5, *Washington Int'l Ins. Co. I*, No. 09-00449 (July 18, 2011), Doc. No. 27. The third-party defendant's offer in compromise was to pay all duties owing in

While discovery was still open, the parties filed a letter with the court to inform it that, pursuant to discussions, the parties consented to mediation.[479] The court denied the defendant and third-party defendant's joint motion for a stay and referred the action to mediation.[480]

When the court referred *Washington International Insurance Co. I* to mediation, the pending issues were whether the defendant was liable for $63,288.78, which allegedly represented revenue lost due to the defendant principal's negligent misclassification and for which the defendant provided bond coverage and whether the defendant was liable for statutory interest beginning on the date of demand.[481] Mediation took more than four months and resulted in a settlement of all of the issues associated with the defendant, but the action continued between the defendant (third-party claimant) and the third-party defendant.[482] Almost one and a half years later, the court, upon the defendant's motion, ordered the cross-claim against the third-party defendant dismissed with prejudice.[483]

6. *United States v. Washington International Insurance Co.*[484]

The United States brought *Washington International Insurance Co. II* in an effort to collect unpaid duties of $142,245 resulting from the third-party defendant's, J&B Trading Co.'s, alleged misclassification of video cameras.[485] The defendant, a surety, filed a third-party claim seeking an order compelling the third-party defendant's payment of its duty obligations and indemnification and asserting unjust enrichment.[486]

Approximately one month before the close of discovery, the third-party defendant, J&B Trading Co., filed a motion for referral to court-

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installments. Third Party Defendant & Defendant's Joint Motion to Stay Court Proceedings, *supra* note 477, at 3.

479. Letter from Edmund Maciorowski, Att'y, to Honorable Judith Barzilay, Senior Judge, Ct. Int'l Trade, *Washington Int'l Ins. Co. I*, No. 09-00449 (Aug. 5, 2011), Doc. No. 31.

480. Order, *Washington Int'l Ins. Co. I*, No. 09-00449 (Aug. 8, 2011), Doc. No. 32; Order of Referral to Mediation, *Washington Int'l Ins. Co. I*, No. 09-00449 (Aug. 8, 2011), Doc. No. 33.

481. Complaint, *supra* note 470, at 4.

482. Order of Referral to Mediation, *supra* note 480; Stipulation of Dismissal, *Washington Int'l Ins. Co. I*, No. 09-00449 (Feb. 9, 2012), Doc. No. 35; Report of Mediation, *Washington Int'l Ins. Co. I*, No. 09-00449 (Feb. 13, 2012), Doc. No. 36; Stipulation of Dismissal, *Washington Int'l Ins. Co. I*, No. 09-00449 (Feb. 6, 2012), Doc. No. 34; Order, *Washington Int'l Ins. Co. I*, No. 09-00449 (Aug. 8, 2011), Doc. No. 32.

483. Order, *Washington Int'l Ins. Co. I*, No. 09-00449 (July 29, 2013), Doc. No. 46.

484. Complaint, United States v. Washington Int'l Ins. Co. (*Washington Int'l Ins. Co. II*), No. 09-00459 (Ct. Int'l Trade Oct. 28, 2009), Doc. No. 3.

485. *Id.* at 2-3.

486. Third Party Complaint at 4-5, *Washington Int'l Ins. Co. II*, No. 09-00459 (Apr. 9, 2010), Doc. No. 19.

annexed mediation in which it stated that mediation would likely lead to early and satisfactory resolution of the action to the benefit of all parties and also serve to limit the time and expense of discovery.[487] The defendant consented to J&B Trading Co.'s motion.[488] The issues pending when J&B Trading Co. filed its motion were (1) whether J&B Trading Co. misclassified merchandise upon entry into the United States and (2) if so, whether that misclassification was the result of J&B Trading Co.'s negligence.[489] In the plaintiff's response in opposition, it stated that additional discovery was necessary, but that mediation may be appropriate in the future. It also noted that, notwithstanding J&B Trading Co.'s claim of an early resolution, the action had been pending for nearly four years.[490] The court denied J&B Trading Co.'s motion for referral to court-annexed mediation.[491]

One day before the end of discovery, the plaintiff filed a consent motion to modify the scheduling order for a 120-day extension to determine whether they may be able to reach settlement among other reasons.[492] The court granted the plaintiff's motion.[493] Two months later, the parties filed a stipulation of dismissal pursuant to CIT Rule 41(a)(1)(A)(ii).[494]

7. *United States v. Tenneco Automotive, Inc.*

The plaintiff's complaint sought from the principal, Tenneco Automotive, Inc., and its surety, Washington International Insurance, $22,332.70 in lost revenue and $44,665.40 in penalties, plus interest, as a result of the defendant's alleged undervaluation of an automotive

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487. Motion for Referral to Court-Annexed Mediation at 3, *Washington Int'l Ins. Co. II*, No. 09-00459 (July 31, 2013), Doc. No. 50.

488. *Id.* at 4.

489. Plaintiff's Opposition to Third-Party Defendant's Motion for Referral to Court-Annexed Mediation at 3, *Washington Int'l Ins. Co. II*, No. 09-00459 (Aug. 1, 2013), Doc. No. 51; Parties' Stipulation to Voluntary Dismissal at 1, *Washington Int'l Ins. Co. II*, No. 09-00459 (Mar. 26, 2014), Doc. No. 60; Parties' Stipulation to Voluntary Dismissal at 3, *Washington Int'l Ins. Co. II*, No. 09-00459 (Mar. 27, 2014), Doc. No. 62.

490. Plaintiff's Opposition to Third Party Defendant's Motion for Referral to Court-Annexed Mediation, *supra* note 489, at 3.

491. Order, *Washington Int'l Ins. Co. II*, No. 09-00459 (Aug. 2, 2013), Doc. No. 52 (denying third-party defendant's motion).

492. Plaintiff's Consent Motion To Modify Scheduling Order at 1-2, *Washington Int'l Ins. Co. II*, No. 09-00459 (Jan. 27, 2014), Doc. No. 58.

493. Order, *Washington Int'l Ins. Co. II*, No. 09-00459 (Jan. 27, 2014), Doc. No. 59 (granting Plaintiff's consent motion).

494. Parties' Stipulation to Voluntary Dismissal, *supra* note 489.

maintenance machine.[495] Tenneco Automotive and Washington International Insurance denied the plaintiff's allegations, asserted the affirmative defense of statute of limitations, and claimed that the lost revenue identified by the plaintiff was generated by applying duties on nondutiable charges.[496]

After the court denied the plaintiff's motion to compel, the defendant filed a motion for referral to court-annexed mediation.[497] Washington International consented to the mediation,[498] and the plaintiff indicated that it was unable to consent to the defendant's motion because it first needed to resolve a number of pending issues.[499] First, the plaintiff required the content of the defendant's proposal or written confirmation that the defendant intended to proceed in accordance with the court's rules.[500] Second, the plaintiff requested that the parties discuss and jointly agree to certain additional parameters in an attempt to facilitate the resolution of the matter through mediation.[501] Third, the plaintiff requested that the parties discuss outstanding discovery issues and negotiate a suitable discovery extension to accommodate possible mediation and the completion of Tenneco Automotive's outstanding fact discovery requests.[502]

Before the court ruled on the defendant's motion for referral to mediation, the plaintiff also filed a motion for referral to mediation.[503] In the plaintiff's motion, it sought to modify the court's Mediation Guidelines pertaining to both confidentiality and settlement.[504] The defendant filed a response in opposition.[505] The court denied the plaintiff's motion for referral to court-annexed mediation.[506]

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495. Complaint at 3-5, United States v. Tenneco Auto., Inc., No. 10-00130 (Ct. Int'l Trade Apr. 15, 2010), Doc. No. 3.

496. Answer & Affirmative Defenses at 2-3, *Tenneco Auto.*, No. 10-00130 (June 14, 2010), Doc. No. 10; Answer & Affirmative Defenses at 2-3, *Tenneco Auto.*, No. 10-00130 (June 22, 2010), Doc. No. 14.

497. Order, *Tenneco Auto.*, No. 10-00130 (Ct. Int'l Trade Nov. 10, 2011), Doc. No. 32; Motion for Referral to Court Annexed Mediation, *Tenneco Auto.*, Inc., No. 10-00130 (Nov. 23, 2011), Doc. No. 34.

498. Motion for Referral to Court Annexed Mediation, *supra* note 497.

499. Response to Defendant Tenneco Automotive, Inc.'s Motion for Referral to Court-Annexed Mediation at 1, *Tenneco Auto.*, No. 10-00130 (Nov. 30, 2011), Doc. No. 36.

500. *Id.* at 2.

501. *Id.*

502. *Id.*

503. Plaintiff's Motion for Referral to Court-Annexed Mediation at 3, *Tenneco Auto.*, No. 10-00130 (Dec. 23, 2011), Doc. No. 40.

504. *Id.*

505. Defendant Tenneco Automotive Inc.'s Response to Plaintiff's Motion for Referral to Court-Annexed Mediation at 2, *Tenneco Auto.*, No. 10-00130 (Jan. 10, 2012), Doc. No. 41.

506. Order, *Tenneco Auto.*, No. 10-00130 (Jan. 12, 2012), Doc. No. 42.

Twelve days after denying the plaintiff's motion and without reference to the defendant's still pending motion, the court referred the action to mediation.[507] After one order extending the deadline for the conclusion of mediation, the court signed the parties' joint stipulation of dismissal.[508] The judge mediator's report indicates that the mediation resulted in a settlement of all issues.[509]

8. *United States v. ABC Farma, Inc.*

The plaintiff sought a penalty of $5,998.76 (20% of the domestic value of the merchandise) for the negligent violation of 19 U.S.C. § 1592 due to the defendant's alleged misclassification and misdescription of certain pharmaceuticals and related products upon entry into the United States.[510] In seeking to gather more facts on which to support its argument, the plaintiff also moved the court to compel the defendant to respond to certain discovery.[511] The court granted the plaintiff's motion.[512] When the defendant reportedly failed to comply with the court-ordered discovery requests, the plaintiff moved the court to sanction the defendant.[513]

As the plaintiff's sanctions motion was pending, the defendant moved the court to refer the case to mediation.[514] One of the bases for the defendant's motion was that "[t]he parties have had substantive settlement discussions, and have significantly narrowed their differences but have not been able to reach final agreement on settlement of this action."[515] The defendant also cited "the relatively small amount in controversy, and alleged level of culpability" as reasons that mediation would be appropriate.[516]

The plaintiff opposed the defendant's motion, stating that mediation would not be appropriate due to the defendant's "flagrant refusal to

507. Order, *Tenneco Auto.*, No. 10-00130 (Jan. 24, 2012), Doc. No. 43.

508. Order, *Tenneco Auto.*, No. 10-00130 (Apr. 19, 2012), Doc. No. 44; Joint Stipulation of Dismissal at 1, 3, *Tenneco Auto.*, No. 10-00130 (June 12, 2012), Doc. No. 48.

509. Report of Mediation, *Tenneco Auto.*, No. 10-00130 (July 10, 2012), Doc. No. 49.

510. Complaint at 3-5, United States v. ABC Farma, Inc., No. 12-00041 (Ct. Int'l Trade Feb. 7, 2012), Doc. No. 3.

511. Plaintiff's Motion to Compel Discovery Responses at 10, *ABC Farma*, No. 12-00041 (Aug, 27, 2013), Doc. No. 223.

512. Order Granting Plaintiff's Motion to Compel, *ABC Farma*, No. 12-00041 (Sept. 23, 2013), Doc. No. 23.

513. Plaintiff's Motion for Sanctions Pursuant to Rule 37(b) at 3, *ABC Farma*, No. 12-00041 (Feb. 14, 2013), Doc. No. 26.

514. Motion for Order of Referral to Mediation at 4, *ABC Farma*, No. 12-00041 (Jan. 23, 2014), Doc. No. 29.

515. *Id.*

516. *Id.*

comply with the Court's order" and the defendant's refusal to meet the plaintiff's settlement conditions.[517] The plaintiff concluded its response by stating, "Given these circumstances, the likely result of forced mediation at this stage would be yet another reprieve for Mr. Devesa, another delay in the completion of discovery, the unnecessary expenditure of the resources of the judge mediator and the parties' counsel, and no settlement agreement."[518]

After a telephone conference with the parties, the court denied the defendant's motion for an order referring the action to mediation.[519] Nine days after the court denied the defendant's motion for referral to mediation, the parties filed a joint stipulation of dismissal with prejudice.[520]

9. *United States v. Tenacious Holdings, Inc.*

The plaintiff initiated this case seeking civil penalties of $51,544.40 and unpaid duties of $1,993.09, plus interest, on the basis of the defendant's alleged negligent misclassification of certain gloves upon entry into the United States.[521] Before filing its answer, the defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted.[522] The court denied the defendant's motion.[523] In its answer, the defendant denied the plaintiff's allegations and asserted the affirmative defenses of statute of limitations, laches, and accord and satisfaction.[524]

Three months before the close of discovery, the defendant moved the court to issue an order of referral to mediation.[525] The bases of the

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517. Plaintiff's Response to Defendant's Motion for an Order Referring This Matter to Mediation at 2, *ABC Farma*, No. 12-00041 (Ct. Int'l Trade Feb. 4, 2014), Doc. No. 32.

518. *Id.* at 3.

519. Telephone Conference Between Barbara E. Thomas, Counsel for U.S., Lewis E. Leibowitz, Att'y for Defense, and Honorable R. Kenton Musgrave, Senior Judge, Ct. of Int'l Trade, *ABC Farma*, No. 12-00041 (Ct. Int'l Trade Feb. 11, 2014), Doc. No. 34; Order, *ABC Farma*, Inc., No. 12-00041 (Ct. Int'l Trade Mar. 8, 2014), Doc. No. 35.

520. Order, *supra* note 519; Joint Stipulation of Dismissal at 2, *ABC Farma*, No. 12-00041 (Mar. 27, 2014), Doc. No. 36.

521. Complaint at 2-6, United States v. Tenacious Holdings, Inc., No. 12-00173 (June 20, 2012), Doc. No. 2.

522. Defendant's Motion To Dismiss at 2, United States v. Tenacious Holdings, Inc., 6 F. Supp. 3d 1374 (Ct. Int'l Trade 2014) (No. 12-00173), Doc. No. 10.

523. *Id.* at 4.

524. Answer & Affirmative Defenses at 3-4, *Tenacious Holdings*, 6 F. Supp. 3d 1374 (No. 12-00173), Doc. No. 21.

525. Defendant's Motion for an Order of Referral to Mediation at 2, *Tenacious Holdings*, 6 F. Supp. 3d 1374 (No. 12-00173), Doc. No. 31. At that time, the plaintiff's motion to compel, both parties' motions for partial summary judgment, and the defendant's response to plaintiff's motion for partial summary judgment were pending before the court.

defendant's motion were the following: (1) penalty actions are suited to mediation, (2) the amount in controversy is modest, (3) the controversy involves an ambiguous provision of the tariff schedule, (4) resolution of the action would have no "forward impact" (the HTSUS subheading under which the gloves entered the United States was temporary and had expired), (5) privilege issues make mediation preferable, and (6) mediation promotes the interests set forth in CIT Rule 1.[526]

The plaintiff opposed the defendant's motion, claiming that the motion was the defendant's way to avoid its discovery obligations and that the merits could not be properly weighed in mediation without full discovery.[527] Moreover, the plaintiff took the position that mediation before the close of discovery would be a "waste of time."[528] The plaintiff also took the position that the defendant would "hand-pick" samples of attorney-client communications favorable to the defendant and withhold unfavorable communications.[529] Finally, the plaintiff found the relative small amount in controversy and lack of a forward impact to be "unimportant."[530]

The court granted the defendant's motion over the objection of the plaintiff.[531] In so doing, the court informed the parties that "the results of mandatory mediation resemble those achieved in voluntary mediation in terms of settlement rates and party satisfaction."[532] Noting that the relatively small amount in controversy and the fact that a resolution would have no forward impact were not unimportant, the court stated that those two factors make the action more amenable to mediation.[533] With regard to the plaintiff's objections to mediation because discovery was not yet closed when the defendant filed its motion, the court stated:

> Referral to mediation will not cause any procedural unfairness, since the discovery issues at the core of the [plaintiff's] concerns will be fully address[ed] by order of the Court should mediation be unsuccessful. Although the Court acknowledges the [plaintiff's] concerns about mediating without the robust information that it would have after the

526. *Id.* at 4, 6, 10.

527. Plaintiff's Response to Defendant's Motion for an Order Referring This Matter to Mediation at 3, *Tenacious Holdings*, 6 F. Supp. 3d 1374 (No. 12-00173), Doc. No. 32.

528. *Id.*

529. *Id.* at 5.

530. *Id.* at 3.

531. *Tenacious Holdings*, 6 F. Supp. 3d at 1378.

532. *Id.*

533. *Id.* (quoting COLE ET AL., *supra* note 135, § 9:2).

> completion of discovery, the Court does not agree that mediation is bound to fail at this stage.[534]

The court concluded its opinion by stating that, "if" the plaintiff approaches the process in good faith, as the court expected it to do, the plaintiff may be surprised to find that the case is more amenable to disposition than the plaintiff feared.[535] As of September 10, 2014, the judge mediator had yet to issue a report of mediation.

534. *Id.*
535. *Id.*