Settlements in the United States Court of International Trade: Practices and Policies

Joseph W. Dorn*

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I. INTRODUCTION

Settlements of litigation are favored by public policy. They relieve the pressure on growing court dockets and conserve scarce judicial resources.[1] They are faster and less expensive than litigation.[2]

1. Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 36 (1996); *see also* Cheyenne River Sioux Tribe v. United States, 806 F.2d 1046, 1050 (Fed. Cir. 1986) ("The law . . . favors settlement of litigation which reduces the burden on courts."); Reichenbach v. Smith, 528 F.2d 1072, 1074 (5th Cir. 1976) ("With today's burgeoning dockets and the absolute impossibility of [c]ourts ever beginning to think that they might even be able to hear every case, the cause of justice is advanced by settlement compromises.").

2. 15 AM. JUR. 2D *Compromise and Settlement* § 6 (2010).

Settlements save attorney fees, expert witness fees, court costs, and the costs of litigants' own time spent responding to discovery requests and otherwise preparing for trial.[3] Settlements also enable the parties to negotiate a more satisfying outcome, because parties are more inclined to cooperate fully.[4]

Statutes and regulations reflect the policy of favoring settlement agreements. For example, the United States Supreme Court has held that the "plain purpose" of Federal Rule of Civil Procedure (FRCP) 68, concerning offers of judgment, "is to encourage settlement and avoid litigation."[5] Federal Rule of Evidence (FRE) 408 protects offers to settle and settlement discussions from admission into evidence at trial in order to promote "the public policy favoring the compromise and settlement of disputes."[6] In the Civil Justice Reform Act of 1990, Congress encouraged federal district courts to consider and employ various mechanisms to facilitate settlement among the parties.[7]

The Supreme Court has recognized that "settlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored."[8] The federal courts of appeals have made similar observations.[9] The United States Court of International Trade (CIT), while not discussing settlements in detail, has also recognized the public interest in promoting settlement over litigation.[10]

The Department of Justice (DOJ) compiles statistics reporting the use and benefits of mechanisms for alternative dispute resolution (ADR), which can often lead to settlement. In 2009, 528 cases were authorized

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3. Cordray, *supra* note 1, at 36-37.

4. *See Cheyenne River Sioux Tribe*, 806 F.2d at 1050 ("The law . . . favors settlement of litigation which . . . mitigates the antagonism and hostility that protracted litigation leading to judgment may cause.").

5. FED. R. CIV. P. 68; Marek v. Chesny, 473 U.S. 1, 5 (1985).

6. FED. R. EVID. 408 advisory committee's note.

7. *See* 28 U.S.C. §§ 471, 473 (2006).

8. St. Louis Mining & Milling Co. v. Mont. Mining Co., 171 U.S. 650, 656 (1898); *see also* Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts.").

9. *See* Bergh v. Dep't of Transp., 794 F.2d 1575, 1577 (Fed. Cir. 1986) ("The law favors settlements of cases." (citing United States v. Contra Costa Cnty. Water Dist., 678 F.2d 90, 92 (9th Cir. 1982)); Stotts v. Memphis Fire Dep't, 679 F.2d 541, 565 (6th Cir. 1982), *rev'd*, 467 U.S. 561 (1984); Airline Stewards & Stewardesses Ass'n v. Am. Airlines, 573 F.2d 960, 963 (7th Cir. 1978); Fla. Trailer & Equip. Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960)).

10. *See, e.g.*, Ontario Forest Indus. Ass'n v. United States, 30 Ct. Int'l Trade 1117, 1128 (2006) ("It is hard to see how the public interest is advanced by forcing litigation during the pendency of settlement negotiations.").

for funding for the ADR program.[11] Of those, 78% of voluntary ADR proceedings and 42% of court-ordered ADR proceedings were settled or otherwise resolved without a trial.[12] The DOJ calculates that engaging in alternative dispute resolution saved $5,940,287 and 5829 days of attorney and staff time,[13] and 849 months of litigation and discovery.[14]

The public policy favoring settlement over litigation and the DOJ statistics reflecting the cost savings achieved through ADR proceedings raise the question of whether the CIT should do more to facilitate settlement of the cases before it. Based on a comparison of the rules of the CIT and those of the United States Court of Appeals for the Federal Circuit and the U.S. district courts, it appears that the CIT could do more to promote settlements. In particular, the CIT would benefit from the enactment of proposed legislation to increase the availability of settlement procedures at the CIT, including the use of neutral third parties as mediators in lieu of judges.

Admittedly, many cases before the CIT are not susceptible to settlement given the nature of the issues. In addition, the government's presence as a litigant in every case before the CIT raises special considerations for settlement that do not exist when only private parties are involved. Cases in which governmental policy interests or legal interpretations of statutes are at issue are generally weak candidates for settlement. These principally include actions challenging classification and valuation decisions by United States Customs and Border Protection (CBP) and actions challenging determinations of the United States International Trade Commission (ITC) and the United States Department of Commerce (DOC) in antidumping and countervailing duty (AD/CVD) proceedings. On the other hand, with encouragement of the CIT, more cases could be resolved short of a final disposition on the merits. For example, CBP's penalty actions and certain cases brought under the court's residual jurisdiction are susceptible to settlement through compromise of the amount of money owed. In short, it appears that the court could do more to facilitate settlements.

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11. *See Statistical Summary: Use and Benefits of Alternative Dispute Resolution by the Department of Justice*, U.S. DEP'T OF JUST., http://www.justice.gov/odr/doj-statistics.htm (last visited Jan. 17, 2011).

12. *Id.*

13. *Id.*

14. *Id.*

II. THE UNITED STATES COURT OF INTERNATIONAL TRADE'S CURRENT SETTLEMENT PRACTICE

A. Current Rules and Practices

The CIT's Rule 16 relates to postassignment conferences. It states that one of the purposes for these conferences that can be held at a judge's discretion is "facilitating settlement."[15] The only requirement for the parties in these conferences is that an attorney representing each party must attend and have authorization "to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a postassignment conference."[16]

Rule 16.1 allows a judge to refer a case to mediation at any time.[17] The mediation is then conducted by a CIT judge who is not assigned to the case.[18] Any party may also request mediation, although the judge is not obligated to grant such a request.[19] The CIT's *Guidelines for Court-Annexed Mediation* provide detailed procedures for mediation. These Guidelines state that a ninety-day stay of all proceedings is the standard practice when a case is referred to Court-Annexed Mediation.[20] Other provisions of the Guidelines outline requirements for submission of position papers,[21] procedures for mediation sessions,[22] confidentiality requirements,[23] settlement procedures,[24] and a requirement for the judge mediator to file a Report of Mediation with the Clerk's Office.[25] Related forms provided by the court include Form M-1, a model Order of Referral to Mediation;[26] and Form M-2, the Report of Mediation for the judge mediator to complete after mediation is finished.[27] On Form M-2, the judge mediator reports whether the mediation resulted in a complete settlement, partial settlement, or no settlement.

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15. CT. INT'L TRADE R. 16(a).
16. *Id.* R. 16(c).
17. *Id.* R. 16.1.
18. *Id.*
19. *Id.*
20. *Guidelines for Court-Annexed Mediation*, U.S. CT. OF INT'L TRADE 1 (Jan. 1, 2004), http://www.cit.uscourts.gov/Rules/POSTED%202004%20AMENDMENTS/New%20Mediation%20Guidelines.pdf.
21. *Id.* at 2.
22. *Id.* at 2-3.
23. *Id.* at 3.
24. *Id.* at 3-4.
25. *Id.* at 4.
26. *Order of Referral to Mediation*, U.S. CT. INT'L TRADE (Jan. 1, 2004), http://www.cit.uscourts.gov/Rules/POSTED%202004%20AMENDMENTS/NEW%20FORM%20M-1.pdf.
27. *Report of Mediation*, U.S. CT. INT'L TRADE (Jan. 1, 2004), http://www.cit.uscourts.gov/Rules/POSTED%202004%20AMENDMENTS/New%20FORM-M2.pdf.

The Court-Annexed Mediation program is limited by the fact that only CIT judges are allowed to serve as mediators.[28] Not including senior judges, a total of nine judges serve at the CIT.[29] Each judge's existing docket limits the number of mediations he or she could reasonably oversee. Moreover, parties may be reluctant to participate in mediation with a CIT judge rather than an outside mediator. In appeals of trade remedy cases under Title VII of the Tariff Act of 1930, for example, the same or similar issues that would be the subject of mediation could arise in appeals from later segments of the same proceeding or from different proceedings that involve the same issue. Parties and their counsel are fully aware that their judge mediator in one case might be their judge in a future case, and this dynamic could limit interest in mediation.

B. Rules and Practices Under Proposed Legislation

Legislation is currently proposed that, among other things, would modify the CIT's ADR procedures.[30] The key changes include a provision requiring the CIT to make some form of ADR available in all civil actions other than AD/CVD proceedings, and a provision allowing professional neutrals from the private sector to serve as mediators as an alternative to CIT judges.[31] Both provisions mirror legislation governing ADR in U.S. district courts.[32]

Congress has not acted on this proposed legislation, but if it were to be enacted, one would expect the use of ADR to increase significantly. The use of the CIT's ADR program would likely increase due to both the availability of ADR options in more cases and the availability of a larger pool of potential mediators.

C. Statistics

Statistics about settlement rates and participation in Court-Annexed Mediation at the CIT are not available. Based on general caseload statistics, however, we know that of the 418 cases terminated at the CIT in the twelve months ending in September 2009, 237 cases, or 57%, were

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28. *Guidelines for Court-Annexed Mediation*, *supra* note 20, at 1.

29. 28 U.S.C. § 251 (2006).

30. *See, e.g.*, *Proposed United States Court of International Trade Improvement Act*, CUSTOMS & INT'L TRADE BAR ASS'N (2009), http://www.citba.org/CITJurisdictionLegislation.php. The author notes that as of February 2011, Congress had not taken up this proposed legislation for consideration.

31. *Id.* § 309.

32. 28 U.S.C. §§ 651, 653, 655. See discussion of U.S. district court practices for alternative dispute resolution *infra* Part III.B.

terminated after a dispositive order or dismissal.[33] Of the 181 cases not resolved through a dispositive order or dismissal, 95 cases were terminated after trial, a hearing, or a submission, and 86 were terminated after submission of an agreed statement of facts.[34] In all likelihood, some portion of these two latter categories of cases did settle, indicating that in some instances the process of attaining more information about the other party's case helped bring the case to settlement.

Anecdotal evidence indicates that Court-Annexed Mediation currently is used infrequently. In the five years from September 2005 to September 2010, a total of 30 cases underwent mediation. Those 30 cases account for just 1.26% of the 2373 cases filed during the period. Although 30 cases underwent mediation, only ten separate designations of mediation judges were made during the period, because many of the cases involved CBP protests of similar products and were mediated together. None of the 30 cases that went to mediation was an appeal relating to AD/CVD cases under 28 U.S.C. § 1581(c). It is not clear how many of the ten mediations resulted in settlement, but at least one did not.[35]

III. THE SETTLEMENT PRACTICES OF OTHER COURTS

A. *The United States Court of Appeals for the Federal Circuit*

1. Rules and Practices

All U.S. courts of appeals have long had the authority to schedule mandatory conferences, including mediation conferences, facilitated by a judge or any other person designated by the court.[36] Until 2005, the Federal Circuit was the only U.S. court of appeals that had not invoked this authority to establish an appellate mediation program.[37] That changed when the Federal Circuit enacted a voluntary pilot mediation program in 2005.[38] In 2006, the court replaced the voluntary program

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33. JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORTER OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 297 (2010), http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/G01Sep09.pdf.

34. *Id.*

35. *See, e.g.*, United States v. Optrex Am., 560 F. Supp. 2d 1326, 1329 (Ct. Int'l Trade 2008).

36. FED. R. APP. P. 33.

37. Wendy Levenson Dean, *Let's Make a Deal: Negotiating Resolution of Intellectual Property Disputes Through Mandatory Mediation at the Federal Circuit*, 6 J. MARSHALL REV. INTELL. PROP. L. 365, 365 (2007).

38. *Id.*

with a permanent appellate mediation program that is mandatory in all cases selected by the circuit mediation officers.[39]

The Federal Circuit's mediation officers contact counsel in cases preliminarily selected for mediation in order to determine whether mediation is likely to be fruitful.[40] Counsel also have the opportunity to jointly request that a case be included in the mediation program.[41] The mediators serve pro bono.[42] The Federal Circuit helps facilitate the mediation process by empowering the circuit mediation officers to grant motions for extensions of up to 150 days to file briefs with the court while mediation is ongoing.[43] Although the fact that a case is in mediation is not confidential,[44] the parties are able to file a consent motion requesting an extension without revealing that the extension is sought in order to facilitate mediation.[45]

2. Statistics

Statistics are not available regarding the general settlement rate at the Federal Circuit, but the Federal Circuit does provide fairly detailed statistics relating to its mediation program. The stated goal of the Federal Circuit's appellate mediation program is settlement of the case,[46] and statistics released by the Federal Circuit's Circuit Mediation Office suggest that the program largely has been successful in achieving this goal. In 2009, a total of 48 cases in the mediation program were settled, comprising 48% of the total cases selected for mediation.[47] By type of case, 41% of patent cases and 68% of nonpatent cases selected for mediation were settled.[48] These trends carried forward in the first quarter of 2010, with 53% of the appeals selected for mediation resulting in settlement, including 50% of patent cases and 67% of nonpatent cases.[49] The 48 appeals that were settled after mediation in 2009 constituted a

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39. *Id.* at 366.
40. *Appellate Mediation Program Guidelines*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT (May 1, 2008), http://www.cafc.uscourts.gov/mediation/guidelines.html.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, CIRCUIT MEDIATION OFFICE STATISTICS: 2009 CALENDAR YEAR, http://www.cafc.uscourts.gov/image/stories/the-court/statistics/mediationstats_CY_09.pdf (last visited Jan. 20, 2011).
48. *Id.*
49. U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, CIRCUIT MEDIATION OFFICE STATISTICS: 2010 CALENDAR YEAR—FIRST QUARTER, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/mediationstats_CY_10.pdf (last visited Jan. 20, 2011).

miniscule portion of the Federal Circuit's caseload, less than 4% of the 1367 appeals filed with the Federal Circuit in the twelve months ending September 30, 2009.[50]

B. U.S. District Courts

1. Rules and Practices

The Alternative Dispute Resolution Act of 1998 required all U.S. district courts to adopt local rules authorizing the use of ADR processes in all civil actions.[51] In addition to requiring that ADR options be available in all civil cases, the legislation empowered district courts to require the use of mediation or early neutral evaluation in certain cases.[52] Although the Federal Rules of Civil Procedure do not directly address the use of mediation and other ADR mechanisms, FRCP 26(a), requiring initial disclosures, and FRCP 26(f), requiring an early meeting of counsel, both facilitate the consideration of settlement negotiations.[53] District courts throughout the country have enacted a variety of local rules making ADR available in all civil cases.[54]

2. Statistics

Although the federal policy encouraging alternative dispute resolution is clear, information about settlements in district courts is largely anecdotal.[55] Common claims that 90% or more of civil cases end in settlement are based on a mistaken assumption that if only a few percent of cases filed go to trial, then all other cases must have settled.[56] It is likely that this assumption leads to a significant overstatement of the settlement rate, because there are a variety of other ways a case can terminate, including default judgment, summary judgment, and transfer.[57]

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50. *See* DUFF, *supra* note 33, at 126.
51. Alternative Dispute Resolution Act of 1988, 28 U.S.C. § 651 (2006).
52. *Id.* § 652.
53. FED. R. CIV. P. 26(a), (f).
54. N.D. Cal. Civ. ADR L.R., *available at* http://www.cand.uscourts.gov/adr (last visited Feb. 11, 2011); D. Or. LR. 16-4, *available at* http://ord.uscourts.gov/local-rules-of-civil-procedure/lr-16-pretrial-conferences-scheduling-and-case-management (last visited Feb. 11, 2011).
55. John Barkai, Elizabeth Kent & Pamela Martin, *A Profile of Settlement*, CT. REV., 2006, at 34, 34 ("[A]ccurate empirical data about settlement rates does not exist.").
56. *See, e.g.*, Steven K. Berenson, *Passion Is No Ordinary Word*, 71 ALB. L. REV. 165, 195 n.190 (2008) ("[N]inety-eight percent of civil cases and ninety-five percent of criminal cases settle before trial.") (citing Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 40 (2006)).
57. *See* Barkai, Kent & Martin, *supra* note 55, at 34 n.4.

Nevertheless, it is true that a miniscule percentage of cases filed in U.S. district courts reach trial. The latest statistics from the Administrative Office of the United States Courts state that in 2009 only 1.2% of terminated civil cases reached trial.[58] It seems likely that a large number of the 181,111 cases that were terminated before pretrial (out of a total of 208,209 cases terminated in 2009) were settled.

IV. SHOULD THE UNITED STATES COURT OF INTERNATIONAL TRADE ENCOURAGE MORE SETTLEMENTS?

A. *The United States Court of International Trade Lags Behind the Efforts of Other Courts*

1. Comparison of Rules and Practices

Although the CIT's Court-Annexed Mediation program may increase the chance of settlement in certain cases, this program lags behind the ADR programs of the other courts considered in this Article because ADR is available in a smaller portion of the cases at the CIT. Use of the Federal Circuit's appellate mediation program likely benefits from the fact that mediation is mandatory for all cases selected by circuit mediation officers, unlike the entirely voluntary program in the CIT. The U.S. district courts require that ADR be made available to the parties in all civil cases. This contrasts with the CIT's practice of providing ADR options only at a judge's discretion. Finally, both the Federal Circuit and federal district courts allow private parties to serve as neutrals in mediations or other ADR proceedings, while the CIT only allows its own judges to serve as neutrals.

The proposed CIT jurisdictional legislation discussed above would cure many of these apparent deficiencies in comparison to other courts' programs. ADR would be available in all CIT cases except trade remedy cases,[59] and private parties would be permitted to serve as mediators. These changes would make procedures for ADR more comparable to those in use at other courts and would greatly increase the availability of ADR proceedings and facilitate more settlements.

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58. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2009, at 39 (2010), http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/December2009.aspx.

59. It is unclear why trade remedy cases are excluded.

2. Comparison of Statistics

As discussed above, statistics regarding settlement and use of ADR programs are difficult to obtain and in many cases do not exist. The statistics and anecdotal evidence the author has obtained about settlement rates and ADR participation at the various courts discussed are not comparable with each other. Thus, although the fact that only ten mediations took place in the past five years under the CIT's Court-Annexed Mediation program seems to indicate a lagging emphasis on ADR compared to other courts, meaningful numerical comparison is not possible. The above qualitative comparison of the policies and procedures meant to encourage settlement at each court is more illuminating.

B. Should the United States Court of International Trade's Mediation Program Be Mandatory?

Given the fact that settlements are generally considered to be in the public interest and that mediation and other forms of ADR have a positive impact on settlement rates, the question arises whether mediation should be made mandatory in some or all cases at the CIT. Notably, none of the courts considered in this Article makes mediation or another form of ADR mandatory in most or all cases. The Federal Circuit's appellate mediation program is mandatory, but only for cases selected by the circuit mediation officers. Only 7.4% of the cases filed with the Federal Circuit in 2009 were selected for the appellate mediation program.[60] The legislation governing ADR in the U.S. district courts allows individual districts to require the use of mediation or early neutral evaluation in certain cases, but as a nationwide policy only requires that ADR be made available in all civil cases on a voluntary basis. Thus, there seems to be a near-consensus that unless individual cases are selected as strong candidates for mediation, as in the Federal Circuit, ADR is most effective if it is encouraged and convenient but voluntary.

This is also the view taken in the CIT's proposed jurisdictional legislation, which strengthens its ADR program but does not go so far as to make it mandatory. The proposed legislation focuses on increasing the availability of ADR. This approach seems reasonably aligned with the best practices of other U.S. courts concerning ADR and will likely be more effective than a policy of indiscriminately requiring all cases to enter ADR.

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60. *See* U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, *supra* note 47 (101 appeals mediated); DUFF, *supra* note 33, at 126 (1367 appeals filed).

V. SPECIAL CONSIDERATIONS FOR THE SETTLEMENT OF LITIGATION BEFORE THE UNITED STATES COURT OF INTERNATIONAL TRADE

A. *The United States Court of International Trade Is the Only Article III Court in Which the U.S. Government Is a Plaintiff or Defendant in Every Case*

The U.S. government is a party in all actions at the CIT.[61] The CIT, therefore, is unique[62] because it is the only Article III court[63] that must consider the U.S. government's interests in every case. This fact impacts settlement.

In cases in which the U.S. government is a party, settlement requires that special considerations be taken into account. When the U.S. government is involved, settlement is not simply an agreement between private parties; it must be authorized by a government official. In CBP cases, the Secretary of the Treasury has authority to compromise U.S. government claims before litigation.[64] In litigated cases, officers of the DOJ, under the direction of the Attorney General, represent the United States.[65] The statutes authorizing the DOJ to represent the U.S. government in litigation are also construed to authorize the DOJ to compromise claims.[66] The regulations determine which U.S. government official can authorize compromise in a case.[67] The statutes and

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61. *See* 28 U.S.C. § 1581 (2006) (governing "[c]ivil actions against the United States and agencies and officers thereof" at the CIT); *id.* § 1582 (governing "[c]ivil actions commenced by the United States" at the CIT).

62. There are, however, several Article I courts in which the U.S. government is either a plaintiff or defendant in every case. For example, the U.S. government is always a party at the U.S. Court of Federal Claims, see 28 U.S.C. § 1491(a)(1); the U.S. Court of Appeals for the Armed Forces, 10 U.S.C. § 867(a) (2006); the U.S. Tax Court, see 26a U.S.C. tit. III, R. 20 (2006); and the U.S. Court of Veterans' Appeals, see 38a U.S.C. app. R. 3 (2006). *See also Understanding Federal and State Courts*, U.S. CTS., http://www.uscourts.gov/Educational Resources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx (last visited Jan. 17, 2011) (listing improperly the U.S. Court of Claims as an Article III court, for that court was abolished in 1982).

63. 28 U.S.C. § 251(a) ("The court is a court established under article III of the Constitution of the United States.").

64. *See* 19 U.S.C. § 1617 (2006) ("[T]he Secretary of the Treasury is authorized to compromise [claims arising under Customs laws]."); *see also* 19 C.F.R. § 161.5 (2010) (stating that "[a]n offer made pursuant to section 617, Tariff Act of 1930, as amended (19 U.S.C. 1617), in compromise of a Government claim arising under the Customs laws and the terms upon which it is made shall be stated in writing addressed to the Commissioner of Customs [and that n]o offer in which a specific sum of money is tendered in compromise of a Government claim under the Customs laws will be considered by the Commissioner of Customs").

65. *See* 28 U.S.C. §§ 516-518.

66. *See* 28 C.F.R. § 0.160-.172 (2010).

67. *See, e.g.*, *id.*

regulations apply in cases brought by the U.S. government as well as cases against the U.S. government.

Settlement of cases in which the U.S. government is a party involves special considerations. First, when the DOJ is determining the appropriateness of compromise, it weighs not only the litigation risk but also policy considerations. For example, the U.S. government may decide that if a resolution would help to clarify how the law should be interpreted or administered, it may undertake litigation despite the risk of losing. It may be beneficial to the U.S. government to have a ruling, whether favorable or unfavorable, regarding the interpretation or administration of a statute in order to minimize or eliminate future litigation. Second, while cost is often a major consideration when private parties involved in litigation are considering settlement, it is not as significant a factor in litigation in which the U.S. government is a party. For private parties, settlement is often much less costly than litigation. For the DOJ, however, cost is not a driving factor, because the costs of litigation are considered to be overhead.

B. The Absence of a Cross-Appeal Right and the Effect on Settlement of United States Department of Commerce's Antidumping and Countervailing Duty Determinations

In the CIT, unlike federal appellate courts, there is no right to cross-appeal. For example, in AD/CVD proceedings, an interested party requesting relief from an adverse decision must commence an action at the CIT within thirty days after publication of the determination in the Federal Register.[68] Other courts allow a party a right to cross-appeal. The federal appellate courts require that in cases in which the United States is a party, an appeal must be filed within sixty days after the judgment or order is entered.[69] A cross-appeal can then be filed by another party within fourteen days of the original timely filed notice of appeal.[70]

The right to cross-appeal in federal appellate courts means that a party can wait sixty days to determine whether the opposing party intends to appeal certain issues before initiating a cross-appeal. In a case

68. *See* 19 U.S.C. § 1516a(a); 28 U.S.C. § 1581(c). In some cases, the summons and complaint must be filed simultaneously, see 19 U.S.C. § 1516a(a)(1), while in the review of determinations on record, the summons must be filed within thirty days of publication in the Federal Register and the complaint must be filed within thirty days thereafter, see 19 U.S.C. § 1516a(a)(2).

69. *See* FED. R. APP. P. 4(a)(1)(B).

70. *See* FED. R. APP. P. 4(a)(3).

at the CIT, however, the absence of a cross-appeal right means that it is often in the best interests of parties to appeal every potential claim in the original complain, because it is not clear what claims the opposing party will raise. A cross-appeal right would allow parties to appeal only issues that are important to both parties rather than appealing every issue as a protective measure. Because currently there is no cross-appeal right at the CIT, complaints tend to include an exhaustive list of claims.

Assume, for example, that a foreign producer receives a dumping margin of 4% in an AD investigation. The margin could be revised downward, perhaps below the de minimis threshold of 2%, pursuant to a successful appeal by the foreign producer. On the other hand, the margin could be revised upward pursuant to a successful appeal by the petitioner. Both sides may be pleased with a 4% margin and prefer no appeal, but neither side wants to give up its right of appeal in the event that the other side appeals. As a result, there is no doubt that many appeals would be avoided if there were a right of cross-appeal. Moreover, these situations may lend themselves to a settlement whereby each side drops its appeal or each side drops some of the methodological issues raised on appeal.

Existing rules and procedures can limit the number of claims in the original complaint even in the absence of a cross-appeal right. First, CIT Rule 16 provides such a mechanism by allowing the court to order that any unrepresented parties and the attorneys attend a "postassignment conference."[71] At a Rule 16 conference, the court can discuss the claims with the parties in an effort to come to an agreement regarding which claims are likely to be seriously considered. Claims that are not being seriously considered by the parties can be eliminated at that point.

Second, the court may send written questions to the parties prior to the Rule 16 conference. Some judges have a practice of sending written questions to parties to determine which issues are important to the parties. Judge Donald C. Pogue, for example, routinely sends letters requiring a pretrial conference and asking the parties to "make a good faith attempt to settle the issues of [the] action" prior to the pretrial conference.[72] These letters require the parties to provide a list of each issue they wish to litigate, applicable statutory or regulatory provisions,

71. *See* CT. INT'L TRADE R. 16(a). At a Rule 16 conference, the court may consider "formulating and simplifying the issues, and eliminating frivolous claims or defenses." *See id.* R. 16(c)(2)(A).

72. *See* Donald C. Pogue, *Order Governing Preparation for Trial*, U.S. CT. OF INT'L TRADE, http://www.cit.uscourts.gov/Judges/PDF/Order%20Governing%20Preparation%20For%20Trial.pdf (last modified Oct. 2008).

and the standard of review.[73] This procedure allows the court to facilitate settlement or limit the number of claims.

Third, the page limits typically set by the judges of the CIT are a de facto means of limiting the number of claims.[74] The page limits are useful, because they force the parties to constrain their claims to a set number of pages. Limiting the number of claims encourages the parties not to pursue less meritorious issues on appeal in order to underscore the more important issues for which the parties presumably have a stronger case.

C. Cases That Are More Susceptible to Settlement or Compromise

1. Actions by the United States To Enforce United States Customs and Border Protection Penalties

Section 1582 of Title 28, United States Code, gives the CIT jurisdiction over CBP's penalty enforcement actions. The CBP has the authority to issue penalties to parties that enter, introduce, or attempt to enter or introduce merchandise into the United States by means of a false statement or material omission. These penalties are discretionary and provide an opportunity for settlement.[75]

The CBP has the authority to settle penalty cases prior to litigation.[76] Moreover, the court in certain instances will direct parties to settle § 1582 cases.[77] Although the government's settlement criteria are unclear, the government appears to refuse to settle cases merely to stop a drawn-out litigation (a foreseen result when litigation costs are considered overhead). Because the amount at issue in penalty cases is discretionary with the CBP, penalty cases provide some middle ground where settlements could be achieved.

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73. *See* Donald C. Pogue, *Joint Pretrial Order*, U.S. CT. OF INT'L TRADE, http://www.cit.uscourts.gov/Judges/PDF/Joint%20Pretrial%20Order%20Template.pdf (last visited Jan. 20, 2011).

74. *See Chambers Procedures*, U.S. COURT OF INT'L TRADE 2, http://www.cit.uscourts.gov/Rules/chambers%20procedures.html (last visited Jan. 20, 2011).

75. 28 U.S.C. § 1582 (2006).

76. *See* Brother Int'l Corp. v. United States, 27 Ct. Int'l Trade 1, 7 (2003) ("Customs explicitly refused to hold settlement discussions.").

77. United States v. Yuchius Morality Co., 26 Ct. Int'l Trade 1356, 1356 (2002). In *Yuchius*, the court "directed the parties to settle and submit a proposed final judgment" in conformity with the court's prior order. *Id.*; *see also* United States v. Jac Natori Co., 22 Ct. Int'l Trade 1101, 1101 (1998) ("The court's slip op. 95-126, 19 CIT 930 (1995), in the above action concluded that the plaintiff was entitled to recover on the first and fourth counts of its complaint based upon 19 U.S.C. § 1592 and 28 U.S.C. § 1582 and directed the parties to settle and present a proposed final judgment.").

The government's interest in litigating penalty cases is to ensure that the parties receive an appropriate penalty for their actions in order to deter such actions in the future.[78] The private party wants to minimize its penalty. Between these two positions, there is middle ground where settlement could occur. For example, settlement of a penalty action allows the government to vindicate its policy position as to the existence of a violation of § 1582 and thereby deter future violations, while at the same time allowing the defendant to minimize its out-of-pocket penalty payments. If settlement was not a possibility at the agency level, it appears that the court could play a positive role in directing the settlement negotiations in penalty cases.[79] The court could require parties to submit statements of undisputed facts, make preliminary rulings on certain issues, then require parties to enter into settlement negotiations once certain issues in dispute are preliminarily ruled upon. Penalty cases, therefore, offer an excellent opportunity for settlement.

2. Actions Against the United States Under 28 U.S.C. § 1581(i)

Section 1581(i) gives the CIT jurisdiction over cases involving revenue from imports or tonnage and tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.[80] By definition, claims brought under this section do not fit squarely into any of the CIT's other jurisdictional provisions. In these cases, the CIT typically rules on agency policy decisions, and the relief it accords is injunctive in nature.[81] Because some of these actions ultimately have a monetary effect, however, they can be susceptible to settlement.

Cases dealing with the Continued Dumping And Subsidy Offset Act of 2000 (CDSOA) brought under 28 U.S.C. § 1581(i) are one example. The CDSOA permitted distributions of duties collected during the preceding year to be distributed to affected domestic producers, that is, parties who were petitioners in the underlying AD/CVD investigation or supported the petition. There have been disputes, however, over rejections of untimely petitions by affected domestic producers.[82] In

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78. United States v. New-Form Mfg. Co., 27 Ct. Int'l Trade 905, 920 (2003) (stating that factors used to determine the penalty are "largely remedial and relate essentially to deterring future violations, the primary focus of Congress in enacting § 1592").

79. *See id.* at 905-13.

80. 28 U.S.C. § 1581(i).

81. Although the CIT has all powers in law and equity as the U.S. district courts, *id.* § 1585, the Court of Federal Claims and the U.S. district courts possess jurisdiction over claims against the United States for money damages. *See id.* §§ 1346, 1491.

82. *See, e.g.*, SKF USA, Inc. v. United States, 556 F.3d 1337 (Fed. Cir. 2009).

addition, SKF USA's challenge to the constitutionality of the "support" provision of the CDSOA on First Amendment and equal protection grounds[83] placed in dispute over one billion dollars in CDSOA distributions. In that litigation and the multitude of cases involving similar claims, domestic producers of merchandise subject to an AD/CVD order filed certifications for distributions under the CDSOA even though they were not petitioners or did not indicate support for the petition during the investigation.[84] The CBP withheld all contested distributions of CDSOA duties during that litigation.[85] Affected domestic producers and domestic producers challenging the support provision certainly could have considered negotiated settlements of their competing claims to the CDSOA distribution. For example, a domestic producer could have agreed to withdraw its certification and any complaint filed in the CIT, which would have allowed the CBP to distribute the contested duties to the affected domestic producer subject to the parties' agreement. The author understands that there have been some settlements of disputed CDSOA claims, but with the intervention of the court there might have been more.

3. Actions Against the United States Involving United States Department of Commerce Scope Determinations

Litigation of scope determinations may provide an opportunity for settlement. As the CIT has recognized, "because the descriptions of subject merchandise contained in [the DOC's] determinations must be written in general terms," it is often difficult to determine whether a particular product is included within the scope of an AD/CVD order.[86] Where the scope of an order covers numerous products or a product category, certain products may fall into the scope of an order that were not originally envisioned by the petitioning industry.[87] Such products frequently do not diminish the effectiveness of an order if they are excluded from an order. As a result, there is an opportunity for the government to settle such cases and exclude the product from the order where the petitioners have no objection.

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83. *Id.* at 1340.
84. *See, e.g.*, *id.* at 1343-46.
85. *See* SKF USA, Inc. v. United States, 502 F. Supp. 2d 1325, 1328 (Ct. Int'l Trade 2007) (quoting the CBP's remand determination), *rev'd by* 556 F.3d 1337 (Fed. Cir. 2009).
86. 19 C.F.R. § 351.225(a) (2010).
87. *See* Duferco Steel, Inc. v. United States, 296 F.3d 1087, 1096 (Fed. Cir. 2002).

D. Cases That Are Less Susceptible to Settlement or Compromise

1. Actions Against the United States Under 28 U.S.C. § 1581(a) and (h) Involving United States Customs and Border Protection Decisions and Rulings

Sections 1581(a) and (h) of Title 28, United States Code, relate to claims against duties, charges, or exactions.[88] Section 1581(a) gives the CIT "exclusive jurisdiction of 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."[89] To obtain § 1581(a) jurisdiction, an importer protests duties that it has already paid and protested at the agency.[90] Section 1581(h), on the other hand, gives the CIT exclusive jurisdiction

> to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.[91]

Actions involving the CBP classification and valuation decisions or preimportation ruling requests under subsections (a) and (h) are not strong candidates for settlement. There is little discretion in determining the appropriate harmonized tariff system (HTS) classification. Rather, the CBP considers this exercise to consist of an objective reading of the HTS. The HTS classification determines the appropriate tariff rate and, thus, the amount owed. The CBP does not have the authority to change the tariff rate that applies to a particular HTS number.[92]

Appeals of decisions regarding the appraised value of the merchandise similarly are not particularly good candidates for

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88. 28 U.S.C. § 1581(a), (h).

89. *Id.* § 1581(a).

90. § 2637(a) ("A civil action contesting the denial of a protest . . . may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced.").

91. *Id.* § 1581(h).

92. Since a determination with respect to one importation in Customs classification cases is "not *res judicata* in respect of a subsequent importation involving the same issue of fact and the same question of law," however, there may be an incentive for the government to settle litigation arising from classification because neither the settlement nor the ultimate ruling is controlling in regards to future entries. United States v. Stone & Downer Co., 274 U.S. 225, 234 (1927); *see also* Avenues in Leather, Inc. v. United States, 317 F.3d 1399, 1403 (Fed. Cir. 2003).

settlement.[93] Valuation decisions are made according to the CBP's valuation statute and regulations.[94] Because there frequently is little opportunity to alter the CBP's methodologies, compromise on valuation disputes frequently is difficult to achieve.

Classification and valuation decisions are nonetheless susceptible to resolution short of trial once factual disputes are resolved. One procedure frequently used to resolve actions involving protests of the CBP decisions is the entry of a stipulated judgment on an agreed set of facts under CIT Rule 58.1.[95] Under that rule,

> [a]n action described in 28 U.S.C. § 1581(a) or (b) may be stipulated for judgment, at any time without brief or complaint or formal amendment of any pleading, by filing with the clerk of the court a stipulation for judgment on agreed statement of facts, signed by the parties or their attorneys, together with a proposed stipulated judgment.[96]

Although this is not a settlement per se, it effects a nonadjudicated resolution of a class of cases based upon a more thorough understanding of the facts.

Actions involving challenges to allegedly erroneous liquidation or reliquidation can be good candidates for settlement provided that the CBP acts quickly. The CBP has the authority to voluntarily reliquidate an entry previously liquidated under 19 U.S.C. §§ 1500 or 1504 notwithstanding the filing of a protest within ninety days of the original liquidation.[97] These reliquidations are within the discretion of the CBP, and the CBP's determinations regarding reliquidation of an entry under this provision are not subject to challenge.[98] The CBP's authority to reliquidate entries without challenge can facilitate settlement. Once the ninety-day period expires, however, the CBP lacks the authority to

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93. Actions involving Customs' decisions regarding other charges or exactions and refusal to pay a claim for drawback similarly are not particularly good candidates for settlement. *But see* Halperin Shipping Co. v. United States, 14 Ct. Int'l Trade 438 (1990). In this action, initiated pursuant to 28 U.S.C. § 1581(a), "[plaintiff] and the government engaged in lengthy negotiations towards settling the government's claims on the entry at issue in this case and twenty-seven other entries for which [plaintiff] was delinquent in paying duties." *Id.* at 438-39.

94. *See* 19 U.S.C. § 1401a (2006); 19 C.F.R. § 152.100-.108 (2010).

95. CT. INT'L TRADE R. 58.1.

96. *Id.* Actions brought under 28 U.S.C. § 1581(b) involve decisions made under section 516 of the Tariff Act of 1930, 19 U.S.C. § 1516. Section 516 allows domestic interested parties to petition Customs for a decision as to the correct appraised value, classification, or rate of duty on merchandise to be imported. 19 U.S.C. § 1516.

97. *Id.* § 1501.

98. SSAB N. Am. Div. v. United States, 571 F. Supp. 2d 1347, 1352 (Ct. Int'l Trade 2008) ("[Section] 1501 simply authorizes Customs, in its discretion, to revisit a liquidation within 90 days of the notice. It does not confer any rights on Plaintiffs.").

reliquidate entries voluntarily to correct errors, and the parties' options become circumscribed by a rigid statutory scheme.

2. Actions Against the United States Involving United States International Trade Commission Determinations

The binary nature of determinations at the ITC does not lend itself to settlement of litigation. The ITC votes for or against the imposition (or continuation) of an order. As a result, there is no monetary payment or calculation of duties that can be increased or decreased to reach a settlement agreement. This lack of direct monetary value attached to the appeal makes settlement of ITC appeals unlikely. Although there may be numerous issues raised on appeal, the appellant wishes to reverse the decision of the ITC. The ITC will not reverse itself merely due to the threat of litigation.

3. Actions Against the United States Involving United States Department of Commerce Antidumping and Countervailing Duty Determinations

DOC determinations in AD/CVD proceedings are a function of application of the statute, DOC regulations, and precedents to case-specific facts. This class of cases involves appeals of agency discretionary policy decisions that generally result in an agency decision regarding a rate of duty. Appeals of these cases can involve numerous issues and policy decisions. As a result, settlement of AD/CVD cases is infrequent.

Moreover, as an institutional litigator, the DOC may wish to litigate an issue in order to vindicate an important policy interest or gain court imprimatur for a particular policy decision. Conversely, even if such policy cases are not generally susceptible to settlement, the DOC may have an incentive to settle a case regarding a policy issue due to bad facts. The DOC may want to settle a case in one instance in order to litigate the same issue at a later date with better facts. For example, the DOC may wish to wait to litigate a new policy issue with a record that is more developed rather than test its policy determination on a record with limited facts.

The deference that the CIT is required to give the DOC in AD/CVD determinations also provides a disincentive for the government to settle cases. As the Federal Circuit has stated, "'Commerce is the "master of antidumping law," and reviewing courts must accord deference to the

agency in its selection and development of proper methodologies.'"[99] "The methodologies relied upon by Commerce in making its determinations are presumptively correct."[100] As a result, the agency has lower risk of losing on appeal than a normal defendant. This gives the DOC the incentive to stick to its position and not settle.

The DOC, however, has the authority to request a voluntary remand, which may be used to "settle" cases on at least one or more issues in a case.[101] In certain instances, the DOC may not want to litigate a matter where it made an error. Similarly, the DOC may determine that the instant case has facts that are not compelling. A voluntary remand, however, could be used to settle such cases. The DOC could achieve its desired outcome not by formally settling such cases, but by taking a voluntary remand and revising its determination. As a result, the remand determination and court decision would allow the DOC to achieve its goal in that proceeding while the case would not be particularly useful as precedent.

The DOC has settled AD/CVD cases in the past. In *British Steel Corp. v. United States*, the government and British Steel Corp. litigated the DOC's valuation of countervailable subsidies for five years at the CIT and the Federal Circuit.[102] During this time period, the DOC also completed an administrative review of British Steel's entries, which also was appealed.[103] Due to the extended litigation, the parties in this proceeding decided to settle the dispute. The terms of the settlement included the dismissal of the case with prejudice, British Steel agreeing to pay $194,266.98 through the liquidation of entries subject to the agreement, and the DOC agreeing to consider the effect of any sale of all or any part of British Steel Corp. to extinguish benefits received prior to the sale.[104] Although it appears that this case was settled due to the lengthy nature of the litigation and the prospect of further appeals, it does demonstrate that settling AD/CVD appeals is possible.[105]

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99. Ningbo Dafa Chem. Fiber Co. v. United States, 580 F.3d 1247, 1259 (Fed. Cir. 2009) (quoting Thai Pineapple Pub. Co. v. United States, 187 F.3d 1362, 1365 (Fed Cir. 1999)).

100. *Thai Pineapple Pub. Co.*, 187 F.3d at 1365.

101. *See* British Steel Corp. v. United States, 12 Ct. Int'l Trade 558, 559 (1988).

102. *Id.* at 558-59.

103. *Id.* at 559-60.

104. *Id.* at 562.

105. *See, e.g.*, LG Elecs. U.S.A., Inc. v. United States, 21 Ct. Int'l Trade 1421, 1423 (1997) ("In May 1994, LG and Commerce reached a settlement, setting proper antidumping duty rates lower than the rates imposed at entry, and the preliminary injunctions against liquidation were lifted, permitting liquidation at the new rates set by Commerce.").

4. Actions Against the United States Under the Residual Jurisdiction of 28 U.S.C. § 1581

Certain other actions against the United States are not particularly susceptible to settlement, including cases brought under § 1581(b) and (f). Section 1581(b) gives the CIT jurisdiction over the CBP rulings on domestic industry petitions under 19 U.S.C. § 1516.[106] This provision allows domestic interested parties to request a ruling on the classification and the rate of duty on an imported product.[107] Actions brought under § 1581(b) are not susceptible to settlement for the reasons set forth above with respect to classification and valuation decisions challenged by importers under 28 U.S.C. § 1581(a) and (h).[108] Section 1581(f) provides jurisdiction over court ordered disclosure of business proprietary information.[109] Because the appellant is seeking the disclosure of information, and the court's decision involves a legal interpretation of the applicable statute, regulations, and protective order, such claims are not susceptible to settlement.

VI. CONCLUSION

In the author's experience, commercial litigation is much more likely to settle than litigation before the CIT. That is no doubt due in large part to the nature of the litigation and the participation of the government in CIT cases. On the other hand, opportunities do exist to settle cases before the CIT. The private bar and government lawyers should make a greater effort to settle cases or parts of cases, and the court should do more to facilitate such settlements. Doing so will serve the public interest by reducing the cost of litigation, expediting the resolution of disputes, and preserving scarce judicial resources.

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106. 28 U.S.C. § 1581(b) (2006). Section 516 of the Tariff Act of 1930 is codified at 19 U.S.C. § 1516.

107. 19 U.S.C. § 1516 (2006).

108. *See supra* Part V.D.1 (explaining that there is little discretion in determining the appropriate HTS classification number, which determines the appropriate tariff rate, and that valuation decisions are set by statutes and regulations that are infrequently modified).

109. 28 U.S.C. § 1581(f).