SETTLEMENTS IN THE UNITED STATES COURT OF INTERNATIONAL TRADE: PRACTICES AND POLICIES*

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Presented at the 16th Judicial Conference of the United States Court of International Trade

New York, New York
November 18, 2010

TABLE OF CONTENTS

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By Joseph W. Dorn[1]

I. INTRODUCTION

Settlements of litigation are favored by public policy. They relieve the pressure on growing court dockets and conserve scarce judicial resources.[2] They are faster and less expensive than litigation.[3] 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.[4] Settlements also enable the parties to negotiate a more satisfying outcome, because parties are more inclined to fully cooperate.[5]

Statutes and regulations reflect the policy of favoring settlement agreements. For example, the Supreme Court has held that the "plain purpose" of Federal Rule of Civil Procedure 68, concerning offers of judgment, is "to encourage settlement and avoid litigation."[6] Federal

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[2] Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 36 (1996-97). *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…").

[3] 15 AM. JUR. 2D *Compromise and Settlement* § 6.

[4] Cordray at 36-37.

[5] *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 up to a judgment may cause.").

[6] FED. R. CIV. P. 68; Marek v. Chesny, 473 U.S. 1, 10 (1984).

Rule of Evidence 408 ("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."[7] 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.[8]

The Supreme Court has recognized that "settlements of matters in litigation or in dispute without recourse to litigation are generally favored."[9] The Federal Courts of Appeals have made similar observations.[10] The United States Court of International Trade, while not discussing settlements in detail, has also recognized the public interest in promoting settlement over litigation.[11]

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

[7] FED. R. EVID. 408 advisory committee's note.

[8] *See* 28 U.S.C. §§ 471, 473.

[9] St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U.S. 650, 656 (1898). *See also* Williams v. First National Bank, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts…").

[10] *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 County Water District, 678 F.2d 90, 92 (9th Cir. 1982)); Stotts v. Memphis Fire Department, 679 F.2d 541, 565 (6th Cir. 1982); Airline Stewards & Stewardesses Association, Local 550, TWU, AFL-CIO v. American Airlines, 573 F.2d 960, 963 (7th Cir. 1978); Florida Trailer & Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960)).

[11] *See, e.g.*, Ontario Forest Industries Assoc. v. United States, 444 F.Supp. 2d 1309, 1320 (Ct. Int'l Tr. 2006) ("It is hard to see how the public interest is advanced by forcing litigation during the pendency of settlement negotiations.").

2009, 528 cases were authorized for funding for the ADR program.[12] Of those, 78 percent of voluntary ADR proceedings and 42 percent of Court-Ordered ADR proceedings were settled or otherwise resolved without a trial.[13] The DOJ calculates that engaging in alternative dispute resolution saved $5,940,287 and 46,635 hours of attorney and staff time,[14] and 849 months of litigation and discovery.[15]

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 Court of International Trade should do more to facilitate settlement of the cases before it. Based on a comparison of the rules of the Court of International Trade and those of the U.S. Court of Appeals for the Federal Circuit and the U.S. District Courts, it appears that the Court of International Trade could do more to promote settlements. In particular, the Court would benefit from the enactment of proposed legislation to increase the availability of settlement procedures at the Court of International Trade, including the use of neutral third parties as mediators in lieu of judges.

Admittedly, many cases before the Court of International Trade 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 Court of International Trade 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

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[12] *See* U.S. Department of Justice Office of Dispute Resolution website: DOJ Statistics, available at: http://www.justice.gov/odr/doj-statistics.htm (last visited Oct. 1, 2010).

[13] *Id.*

[14] *Id.*

[15] *Id.*

settlement. These principally include actions challenging classification and valuation decisions by the U.S. Customs Service and actions challenging determinations of the U.S. International Trade Commission and the U.S. Department of Commerce in antidumping ("AD") and countervailing duty ("CVD") proceedings. On the other hand, with encouragement of the Court, more cases could be resolved short of a final disposition on the merits. For example, Customs' 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.

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

A. Current Rules And Practices

The Court of International Trade's Rule 16 relates to post-assignment conferences. It states that one of the purposes for these conferences that can be held at a judge's discretion is "facilitating settlement."[16] 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 post-assignment conference."[17]

Rule 16.1 allows a judge to refer a case to mediation at any time.[18] The mediation is then conducted by a Court of International Trade judge who is not assigned to the case.[19] Any party

[16] USCIT R. 16(a).

[17] USCIT R. 16(c).

[18] USCIT R. 16.1.

[19] USCIT R. 16.1.

may also request mediation, although the judge is not obligated to grant such a request.[20] The Court Of International Trade's *Guidelines for Court-Annexed Mediation* provide detailed procedures for mediation. These Guidelines state that a 90-day stay of all proceedings is the standard practice when a case is referred to Court-Annexed Mediation.[21] Other provisions of the Guidelines outline requirements for submission of position papers,[22] procedures for mediation sessions,[23] confidentiality requirements,[24] settlement procedures,[25] and a requirement for the Judge Mediator to file a Report of Mediation with the Clerk's Office.[26] Related forms provided by the Court include Form M-1, a model Order of Referral to Mediation; 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.

The Court-Annexed Mediation program is limited by the fact that only Court Of International Trade judges are allowed to serve as mediators. Not including senior judges, a total of nine judges serve at the Court of International Trade.[28] Each judge's existing docket limits the

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[20] USCIT R. 16.1.

[21] U.S. Court of International Trade *Guidelines for Court-Annexed Mediation* at 1.

[22] *Id.* at 2.

[23] *Id.*

[24] *Id.* at 3.

[25] *Id.*

[26] *Id.* at 4.

[27] *See* U.S. Court of International Trade: Rules and Forms, available at: http://www.cit.uscourts.gov/Rules/rules-forms.htm (last visited September 29, 2010).

[28] 28 U.S.C. § 251.

number of mediations he or she could reasonably oversee. Moreover, parties may be reluctant to participate in mediation with a Court of International Trade 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 Court of International Trade's ADR procedures.[29] The key changes include a provision requiring the Court of International Trade to make some form of ADR available in all civil actions other than countervailing duty and antidumping duty proceedings, and a provision allowing professional neutrals from the private sector to serve as mediators as an alternative to Court of International Trade judges.[30] Both provisions mirror legislation governing ADR in U.S. district courts.[31]

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 Court of International Trade'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.

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[29] *See* Proposed legislation: United States Court of International Trade Improvement Act, available at: http://www.citba.org/CITJurisdictionLegislation.php (last visited Sep. 29, 2010). The author notes that as of September 2010 Congress had not taken up this proposed legislation for consideration.

[30] *Id.*

[31] 28 U.S.C. § 651, 653. *See* discussion of U.S. district court practices for alternative dispute resolution below, *infra* Section IV.B.

C. Statistics

Statistics about settlement rates and participation in Court-Annexed Mediation at the Court of International Trade are not available. Based on general caseload statistics, however, we know that of the 418 cases terminated at the Court of International Trade in the 12 months ending in September 2009, 237 cases, or 57 percent, were terminated after a dispositive order or dismissal. 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.[32] 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. The 30 cases account for just 1.26 percent of the 2,373 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 customs protests of similar products and were mediated together. None of the 30 cases that went to mediation was an appeal relating to antidumping duty or countervailing duty 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.[33]

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[32] Administrative Office of the United States Courts, *Judicial Business 2009, Table G-1*, Washington, D.C. (2010), available at: http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/G01Sep09.pdf (last visited November 8, 2010).

[33] United States v. Optrex America, 560 F. Supp. 2d 1326, 1329 (Ct. Int'l Trade 2008).

III. THE SETTLEMENT PRACTICE OF OTHER COURTS

A. The U.S. Court Of Appeals For The Federal Circuit

1. Rules and practices

All United States 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.[34] Until 2005, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") was the only U.S. Court of Appeals that had not invoked this authority to establish an appellate mediation program.[35] That changed when the Federal Circuit enacted a voluntary pilot mediation program in 2005.[36] In 2006, the Court replaced the voluntary program with a permanent appellate mediation program that is mandatory in all cases selected by the circuit mediation officers.[37]

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.[38] Counsel also have the opportunity to jointly request that a case be included in the mediation program.[39] The mediators serve *pro bono*.[40] The Federal Circuit helps facilitate the mediation process by

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[34] FED. R. APP. P. 33.

[35] 6 J. MARSHALL REV. INTELL. PROP. L. 365 (2007).

[36] *Id.*

[37] *Id.* at 366.

[38] U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, APPELLATE MEDIATION PROGRAM GUIDELINES 1 (MAY 1, 2008), available at: http://www.cafc.uscourts.gov/index.php?option=com_content&view=article&id=154&Itemid=34 (last visited September 23, 2010) [hereinafter *Guidelines*].

[39] *Id.*

[40] *Id.* at 3.

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.[41] Although the fact that a case is in mediation is not confidential,[42] the parties are able to file a consent motion requesting an extension without revealing that the extension is sought in order to facilitate mediation.[43]

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,[44] 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 percent of the total cases selected for mediation.[45] By type of case, 41 percent of patent cases and 68 percent of non-patent cases selected for mediation were settled.[46] These trends carried forward in the first quarter of 2010, with 53 percent of the appeals selected for mediation resulting in settlement, including 50 percent of patent cases and

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[41] *Id.* at 5.

[42] *Id.* at 4.

[43] *Id.* at 5.

[44] *Id.* at 4.

[45] United States Court of Appeals for the Federal Circuit, Circuit Mediation Office Statistics, 2009 Calendar Year, available at: http://www.cafc.uscourts.gov/index.php?option=com_content&view=article&id=153&Itemid=9 (last visited September 23, 2010).

[46] *Id.*

67 percent of non-patent cases.[47] The 48 appeals that were settled after mediation in 2009 constituted a miniscule portion of the Federal Circuit's caseload, less than four percent of the 1,367 appeals filed with the Federal Circuit in the 12 months ending September 30, 2009.[48]

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 alternative dispute resolution processes in all civil actions.[49] 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.[50] Although the Federal Rules of Civil Procedure do not directly address the use of mediation and other alternative dispute resolution mechanisms, Rule 26(a) requiring initial disclosures and Rule 26(f) requiring an early meeting of counsel both facilitate the consideration of settlement negotiations.[51] District courts throughout the country have enacted a variety of local rules making ADR available in all civil cases.

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[47] United States Court of Appeals for the Federal Circuit, Circuit Mediation Office Statistics, 2010 Calendar Year, available at: http://www.cafc.uscourts.gov/images/stories/the-court/statistics/mediationstats_CY_10.pdf (last visited September 23, 2010).

[48] U.S. Court of Appeals for the Federal Circuit--Appeals Filed, Terminated, and Pending During the 12-Month Period Ending September 30, 2009, available at: http://www.cafc.uscourts.gov/images/stories/the-court/statistics/b08sep09.pdf (last visited September 23, 2010).

[49] Alternative Dispute Resolution Act of 1988, 28 U.S.C. §§ 651-658 (2000).

[50] 28 U.S.C. § 652.

[51] FED. R. CIV. P. 26(A), (F).

2. Statistics

Although the federal policy encouraging alternative dispute resolution is clear, information about settlements in district courts is largely anecdotal.[52] Common claims that 90 percent 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.[53] It is likely 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.[54] 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 percent of terminated civil cases reached trial.[55] 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.

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[52] John Barkai, Elizabeth Kent & Pamela Martin, *A Profile of Settlement*, 42 CT. REV. 34 (2006) (stating that "accurate empirical data about settlement rates does not exist").

[53] *See, e.g.,* Steven K. Berenson, *Passion Is No Ordinary Word*, 71 ALB. L. REV. 165, 199 n.190 (2008) (stating that "ninety-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)).

[54] *See* Barkai, *supra* note 54, at 1 n.4.

[55] Administrative Office of the United States Courts, *Statistical Tables for the Federal Judiciary*: *December 31, 2009, Table C-4*, Washington, D.C. (2010), available at: http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/December2009.aspx (last visited October 1, 2010).

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

A. The Court Of International Trade Lags Behind The Efforts Of Other Courts

1. Comparison of rules and practices

Although the Court of International Trade'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 paper, because ADR is available in a smaller portion of the cases at the Court of International Trade. 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 Court of International Trade. The U.S. district courts require that ADR be made available to the parties in all civil cases. This contrasts with the Court of International Trade'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 Court of International Trade only allows its own judges to serve as neutrals.

The proposed Court of International Trade jurisdictional legislation discussed above would cure many of these apparent deficiencies in comparison to other courts' programs. ADR would be available in all Court of International Trade cases except trade remedy cases[56], 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.

[56] 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 Court of International Trade'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 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 Court of International Trade. Notably, none of the courts considered in this paper 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 percent of the cases filed with the Federal Circuit in 2009 were selected for the appellate mediation program. 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 Court of International Trade'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.

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

A. The 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 Court of International Trade.[57] The Court of International Trade, therefore, is unique[58] because it is the only Article III court[59] 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 Customs cases, the Secretary of the Treasury has authority to compromise U.S. Government

[57] *See* 28 U.S.C. § 1581 (governing "Civil actions against the United States and agencies and officers thereof" at the Court of International Trade) and 28 U.S. § 1582 (governing "Civil actions commenced by the United States" at the Court of International Trade).

[58] 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 Military Appeals, the U.S. Tax Court, *see* 26a U.S.C. Title III Rule 20, and the U.S. Court of Veterans' Appeals, *see* 38a U.S.C. Rule 3. *See also*, Understanding Federal and State Courts, available at http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx.

[59] 28 U.S.C. § 251(a) ("The court is a court established under article III of the Constitution of the United States.").

claims before litigation.[60] In litigated cases, officers of the Department of Justice, under the direction of the Attorney General, represent the United States.[61] The statutes authorizing the Department of Justice to represent the U.S. government in litigation are also construed to authorize the Department of Justice to compromise claims.[62] The regulations determine which U.S. government official can authorize compromise in a case.[63] The statutes and 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 Department of Justice 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

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[60] *See* 19 U.S.C. § 1617 Compromise of Government claims by Secretary of the Treasury (stating that "the Secretary of the Treasury is authorized to compromise" claims arising under Customs laws). *See also* 19 C.F.R. § 161.5 Compromise of Government claims (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 "no 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 until . . . .").

[61] *See* 28 U.S.C. §§ 516-518.

[62] *See* 28 C.F.R. § 0, subpart Y.

[63] *See, e.g., id.*

Department of Justice, 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 Commerce's Antidumping and Countervailing Duty Determinations

In the Court of International Trade, unlike federal appellate courts, there is no right to cross-appeal. For example, in antidumping and countervailing duty proceedings, an interested party requesting relief from an adverse decision must commence an action at the Court of International Trade within 30 days after publication of the determination in the Federal Register.[64] 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 60 days after the judgment or order is entered.[65] A cross-appeal can then be filed by another party within 14 days of the original timely filed notice of appeal.[66]

The right to cross-appeal in federal appellate courts means that a party can wait 60 days to determine whether the opposing party intends to appeal certain issues before initiating a cross-appeal. In a case at the Court of International Trade, 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 complaint, 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

[64] *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).

[65] *See* Federal Rules of Appellate Procedure Rule 4(a)(1).

[66] *See* Federal Rules of Appellate Procedure Rule 4(a)(3).

right at the Court of International Trade, complaints tend to include an exhaustive list of claims.

Assume, for example, that a foreign producer receives a dumping margin of 4.0 percent in an antidumping investigation. The margin could be revised downward, perhaps below the de minimis threshold of 2.0 percent, 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 percent 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 are no doubt many appeals that 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, Rule 16 of the Rules of the Court of International Trade provides such a mechanism by allowing parties to request a "post-assignment conference."[67] 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 pre-trial conference and asking the parties to "make a good faith attempt to

[67] *See* USCIT R. 16, available at http://www.cit.uscourts.gov/Rules/rules-forms.htm. At a Rule 16 conference, the court may consider "formulating and simplifying the issues, and eliminating frivolous claims or defenses." *See* USCIT R.16(c)(2)(A), available at http://www.cit.uscourts.gov/Rules/rules-forms.htm.

settle the issues of {the} action" prior to the pre-trial conference.[68] These letters require the parties to provide a list of each issue they wish to litigate, applicable statutory or regulatory provisions, and the standard of review.[69] 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 Court of International Trade are a *de facto* means of limiting the number of claims.[70] 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 Customs penalties

Section 1582 of Title 28, United States Code, gives the Court of International Trade jurisdiction over Customs' penalty enforcement actions. Customs 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.

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[68] *See* Additional Chambers Procedures Judge Donald C. Pogue (Order Governing Preparation for Trial and Pretrial Order), available at http://www.cit.uscourts.gov/Rules/chambers%20procedures.html.

[69] *See* Order of Judge Donald Pogue, Thai Plastic Bags Indus. Co., Ltd. v. United States, Ct. No. 08-00241 (Feb. 8, 2010).

[70] *See* Court of International Trade Standard Chamber Procedures at 2, available at http://www.cit.uscourts.gov/Rules/chambers%20procedures.html.

Customs has the authority to settle penalty cases prior to litigation.[71] Moreover, the Court in certain instances will direct parties to settle Section 1582 cases.[72] 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 Customs, penalty cases provide some middle ground where settlements could be achieved.

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.[73] 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 section 1592 and thereby deter future violations while at the same time allows 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.[74] The Court could require parties to submit statements of undisputed facts, make preliminary rulings on

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[71] Brother Int'l Corp. v. United States, 27 C.I.T. 1, 7; 246 F. Supp. 2d 1318 (2003) ("Customs explicitly refused to hold settlement discussions.").

[72] United States v. Yuchius Morality Co., 26 C.I.T. 1356 (2002) (The Court "directed the parties to settle and submit a proposed final judgment" in conformity with the Court's prior order.) United States v. Jac Natori Co., 22 C.I.T. 1101 (1998) ("The court's slip op. 95-126, 19 C.I.T. 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.")

[73] United States v. New-Form Mfg. Co., 27 C.I.T. 905, 277 F. Supp. 2d 1313 (2003) (The factors used to determine the size of the penalty are "largely remedial and relate essentially to deterring future violations, the primary focus of Congress in enacting § 1592.").

[74] *See id.*

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 Court of International Trade 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.[75] By definition, claims brought under this section do not fit squarely into any of the Court of International Trade's other jurisdictional provisions. In these cases, the Court of International Trade typically rules on agency policy decisions, and the relief it accords is injunctive in nature.[76] Because certain 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 ("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 antidumping or countervailing duty investigation or supported the petition. There have been disputes, however, over rejections of untimely petitions by affected domestic producers. In addition, SKF USA's challenge to the constitutionality of the "support" provision of the CDSOA on first amendment and equal protection grounds[77] placed in dispute over one billion dollars in CSOA distributions. In that

[75] 28 U.S.C. § 1581(i).

[76] Although the Court of International Trade has all powers in law and equity as the U.S. District Courts, 28 U.S.C. § 1585, the Court of Federal Claims and the U.S. District Courts possess jurisdiction over claims against the United States for money damages. See 28 U.S.C. §§ 1346, 1491.

[77] SKF USA, Inc. v. United States, 556 F.2d 1337 (Fed. Cir. 2009).

litigation and the multitude of cases involving similar claims, domestic producers of merchandise subject to an antidumping or countervailing duty 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. Customs withheld all contested distributions of CDSOA duties during that litigation. 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 Court of International Trade, which would have allowed Customs 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 Commerce Department scope determinations

Litigation of scope determinations may provide an opportunity for settlement. As the Court of International Trade has recognized, "because the descriptions of subject merchandise contained in {Commerce'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 antidumping or countervailing duty order.[78] 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. 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.

[78] *See also* 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 Customs decisions and rulings

Sections 1581(a) and (h) of Title 28, United States Code, relate to claims against duties, charges, or exactions.[79] Section 1581(a) gives the Court of International Trade "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." To obtain Section 1581(a) jurisdiction, an importer protests duties that it has already paid and protested at the agency.[80] Section 1581(h), on the other hand, gives the Court of International Trade 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."

Actions involving Customs classification and valuation decisions or pre-importation 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, Customs considers this exercise to consist of an objective reading of the HTS. The HTS

[79] 19 U.S.C. § 1515(a).

[80] 28 U.S.C. § 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….").

classification determines the appropriate tariff rate and, thus, the amount owed. Customs does not have the authority to change the tariff rate that applies to a particular HTS number.[81]

Appeals of decisions regarding the appraised value of the merchandise similarly are not particularly good candidates for settlement.[82] Valuation decisions are made according to Customs' valuation statute and regulations.[83] Because there frequently is little opportunity to alter Customs' 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 Customs decisions is the entry of a stipulated judgment on an agreed set of facts under Rule 58.1. 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

[81] 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 a 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, 233-37, 47 S. Ct. 616, 71 L. Ed. 1013, Treas. Dec. 42211 (1927). *See also* Avenues in Leather, Inc. v. United States, 317 F.3d 1399 (Fed. Cir. 2003).

[82] Actions involving Customs' decisions regarding other charges or exactions and refusal to pay a claim for drawback similarly also are not particularly good candidates for settlement. *But see*, Halperin Shipping Co. v. United States, 14 C.I.T. 438, 439 (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 Halperin was delinquent in paying duties.").

[83] *See* 19 U.S.C. § 1401(a); 19 C.F.R. § 152.100 *et seq*.

facts, signed by the parties or their attorneys, together with a proposed stipulated judgment."[84] Although this is not a settlement *per se*, it effects a non-adjudicated resolution of a class of cases based upon a more thorough understanding of the facts.

Actions involving challenges to allegedly erroneous liquidation or re-liquidation can be good candidates for settlement provided that Customs acts quickly. Customs has the authority to voluntarily re-liquidate an entry previously liquidated under 19 U.S.C. §§ 1500 or 1504 notwithstanding the filing of a protest within 90 days of the original liquidation.[85] These re-liquidations are within the discretion of Customs, and Customs' determinations regarding re-liquidation of an entry under this provision are not subject to challenge.[86] Customs' authority to re-liquidate entries without challenge can facilitate settlement. Once the 90-day period expires, however, Customs lacks the authority to voluntarily re-liquidate entries to correct errors, and the parties' options become circumscribed by a rigid statutory scheme.

2. Actions against the United States involving ITC determinations

The binary nature of determinations at the ITC does not lend itself to settlement of litigation. The Commission 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,

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[84] Actions brought under 28 U.S.C. § 1581(b) involve decisions made under section 1516 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 of merchandise to be imported.

[85] 19 U.S.C. § 1501.

[86] SSAB N. Am. Div. v. United States 571 F. Supp. 2d 1347, 1352 (CIT 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 . . . .").

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 Commerce Department antidumping and countervailing duty determinations

Commerce determinations in AD/CVD proceedings are a function of application of the statute, Commerce's 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, Commerce 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, Commerce may have an incentive to settle a case regarding a policy issue due to bad facts. Commerce 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, Commerce 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 Court of International Trade is required to give Commerce 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.[87] The "methodologies relied upon by Commerce in making its determinations are presumptively

[87] Ningbo Dafa Chem. Fiber Co. v. United States, 580 F.3d 1247, 1260 (Fed. Cir. 2009) *citing* Thai Pineapple Pub. Co. v. United States, 187 F.3d 1362, 1365 (Fed Cir. 1999).

correct."[88] As a result, the agency has lower risk of losing on appeal than a normal defendant. This gives Commerce the incentive to stick to its position and not settle.

Commerce, however, has the authority to request a voluntary remand, which may be used to "settle" cases or at least one or more issues in a case. In certain instances, Commerce may not want to litigate a matter where it made an error. Similarly, Commerce may determine that the instant case has facts that are not compelling. A voluntary remand, however, could be used to settle such cases. Commerce 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 Commerce to achieve its goal in that proceeding while the case would not be particularly useful as precedent.

Commerce has settled AD/CVD cases in the past. In *British Steel Corp. v. U.S.*, the Government and British Steel Corp. litigated Commerce's valuation of countervailable subsidies for five years at the Court of International Trade and the Federal Circuit.[89] During this time period, Commerce also completed an administrative review of British Steel's entries, which also was appealed.[90] 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 Commerce 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.[91] Although it appears that this case was settled

[88] Fla. Citrus Mut. v. United States, 550 F.3d 1105, 1110 (Fed. Cir. 2008).

[89] British Steel Corp. v. United States, 12 C.I.T. 558 (1988).

[90] *Id.*

[91] *Id.*

due to the lengthy nature of the litigation and the prospect of further appeals, it does demonstrate that settling AD/CVD appeals is possible.[92]

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 sections 1581(b) and (f). Section 1581(b) gives the Court of International Trade jurisdiction over Customs rulings on domestic industry petitions under 19 U.S.C. § 1516. This provision allows domestic interested parties to request a ruling on the classification and the rate of duty of an imported product. Actions brought under section 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). Section 1581(f) provides jurisdiction over court ordered disclosure of business proprietary information. 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 Court of International Trade. That is no doubt due in large part to the nature of the litigation and the participation of the government in Court of International Trade cases. On the other hand, opportunities do exist to settle cases before the Court of International Trade. The private bar and government lawyers should make a greater effort to settle cases or parts of

[92] *See also* LG Elecs. U.S.A., Inc. v. United States, 21 C.I.T. 1421; 991 F. Supp. 668 (CIT 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.").

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.

* This is a draft of an article that is forthcoming in 19 Tul. J. Int'l & Comp. L. (2011). Reprinted with the permission of the Tulane Journal of International and Comparative Law.