

TEN YEARS OF MEDIATION AT THE U.S. COURT OF INTERNATIONAL TRADE:

Perspectives of a Private Practitioner *

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TEN YEARS OF MEDIATION AT THE U.S. COURT OF INTERNATIONAL TRADE:
Perspectives of a Private Practitioner

By William C. Sjoberg¹

MR. SIMON: I've just spoken with counsel for the Government, and we'd like to just jointly move for if we could have a 60-day stay in any decision by the Court so that we can talk about the potential of settling this thing.

THE COURT: Okay, that's fine with me. Mr. Vanderweide?

MR. VANDERWEIDE: Yes. I mean obviously there'd be talks and nothing can be promised at this point. But because there's different aspects to this case, not just involving [28 U.S.C. § 1581(a)] jurisdiction but [(i)] jurisdiction, part of our conversation may be completely academic. Again, I'm not sure. And so, I'd like to have a chance to have Customs evaluate more of the nuances of his claim and see if we can't come to a resolution. *So I don't think talks could hurt anything. I think if anything it will enrich our understanding of where to go from here.*²

I. INTRODUCTION

In the ten years since the United States Court of International Trade adopted USCIT Rule 16.1, Court-Annexed Mediation, and the USCIT Guidelines for Mediation,³ the Court closed 8,329 cases⁴, formally considered mediation in 46 cases⁵, and resolved 16 cases through

¹ William C. Sjoberg is a partner in Adduci, Mastriani & Schaumberg, L.L.P. He would like to thank Emi Ito Ortiz and Colleen Kemp of Adduci, Mastriani & Schaumberg, L.L.P., and the Office of the Clerk, U.S. Court of International Trade, for their assistance in the preparation of this article. The views expressed herein are those of the author personally and should not be attributed to Adduci, Mastriani & Schaumberg, its clients, or the USCIT.

² Transcript of Oral Argument on Motion to Amend Summons, *Family Delight Foods, Inc. v. United States*, Ct. No. 10-00136 (Ct. Int'l Trade Sept. 21, 2010) at 34:6-20 (emphasis added), Doc. No. 29; Report of Mediation, *Family Delight Foods*, Ct. No. 10-00136 (July 26, 2012), Doc. No. 51 (indicating that mediation resulted in a settlement of all issues).

³ For purposes of this article, the period reviewed is January 1, 2004, to September 1, 2014.

⁴ See Appendices A.1 and A.2. The total number of cases reported as closed in the USCIT's Case Management/Electronic Case Filing (CM/ECF) system cannot be precisely reconciled due to the fact that the Jurisdiction and Category fields are populated by CM/ECF staff from the USCIT Form 5, Information Statement, in which the plaintiff often lists multiple bases for jurisdiction, e.g., CM/ECF reports 3013 cases were closed under 28 U.S.C. § 1581(a); however, the CM/ECF system also reports a sum of 4022

mediation.⁶ Stated another way, mediation was considered in less than one percent of the cases. Of those cases, mediation was successful 36 percent of the time.⁷ If only the 42 cases that were mediated are counted, the success rate slightly increases to 39 percent.⁸ Notwithstanding that precise statistics are unavailable from public sources, it is clear that mediation comprises an extremely small part of the Court's overall caseload.

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

Notwithstanding the small universe of cases from which to identify patterns and draw conclusions, the short answer is that all areas over which the Court has exclusive jurisdiction are amenable to mediation, regardless of whether the United States is a party, regardless of the point at which mediation is introduced into the case, and regardless of the amount in controversy.

cases closed when each of the statutory bases on which protests can be filed (and denied) is considered, i.e., 19 U.S.C. §§ 1514 (a)(1) through (a)(7). Unless otherwise indicated, the statistics cited herein are adjusted to avoid double counting.

⁵ Appendices B.1 - B.7. The Court does not traditionally issue a written opinion addressing mediation so Appendices B.1 - B.7 and C were created for purposes of this article. Those appendices, which address the 46 cases the Court considered for mediation, are presented in the context of the Court's jurisdiction, procedural history, parties to the proceeding, issues, the point at which mediation was introduced into the proceeding, and the amount in controversy, to the extent it is known. The list of specific cases "considered" for mediation was provided by the USCIT's Office of Case Management. For purposes of this article, "considered" for mediation includes all cases in which either a party or the parties filed a motion for mediation, regardless of whether it was granted, or the Court ordered mediation *sua sponte*.

⁶ *Id.*

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

⁸ *Id.* (16 cases resolved / (42 cases mediated - 1 case pending)). That success rate would change if the data were adjusted to account for the fact that each denied protest under 19 U.S.C. § 1514(a) is considered a separate cause of action, despite identical underlying products and issues. *Global Sourcing Grp., Inc. v. United States*, 33 C.I.T. 389 (2009) (noting that "[t]he summons must establish the [C]ourt's jurisdiction, and because each protest forms the basis for a separate cause of action, the summons must establish the [CIT's] jurisdiction as to each protest.") (citing *H & H Wholesale Serv., Inc. v. United States*, 437 F. Supp. 2d 1335, 1339 (2006)). Furthermore, the success rate would change if protests suspended by CBP at the administrative level pending the Court's resolution of the case considered for mediation were also included in the statistics.

Moreover, mediation at the Court is more successful than the statistics appear to indicate. As set forth below, there are opportunities for the Court to apply mediation to cases other than the most intractable. For example, the Court can use early mediation to narrow the issues and streamline discovery. Before discussing the support for the foregoing conclusions, however, it is important to first have a common understanding of the process and procedures by which the USCIT conducts mediation.

II. USCIT COURT-ANNEXED MEDIATION GUIDELINES, AS AMENDED

Pursuant to 28 U.S.C. § 2071(a), the USCIT adopted its first set of Guidelines for Court-Annexed Mediation ("Mediation Guidelines"), effective January 1, 2004.⁹ Unlike district courts, the USCIT was not required to adopt a program of alternative dispute resolution ("ADR")¹⁰; however, Congress made the USCIT's adoption of an ADR program seemingly inevitable.¹¹

⁹ U.S. CT. INT'L TRADE, GUIDELINES FOR COURT-ANNEXED MEDIATION (2003) (added Sept. 30, 2003, eff. Jan. 1, 2004; amended May 25, 2004, eff. Sept. 1, 2004; amended Dec. 6, 2011, eff. Jan. 1, 2012) [hereinafter MEDIATION GUIDELINES]. 28 U.S.C. § 2071(a) states that "[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."

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

¹¹ Congress stated in its "Findings and Declaration of Policy," Section 2 of Pub. L. 105-315, 112 Stat. 2993 (1998) (current version at 28 U.S.C. § 651), "Congress finds that—

(1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;

(2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and

(3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.

The Mediation Guidelines were subsequently amended twice, later in 2004 and in 2012.¹² The Guidelines describe mediation at the USCIT as "a flexible non-binding resolution procedure in which a neutral third party, the mediator, facilitates negotiations between parties to assist them in settlement."¹³ "Mediation sessions are confidential and structured to help parties communicate, to clarify their understanding of underlying interests and concerns, probe the strengths and weaknesses of legal positions, explore the consequences of not settling and generate settlement options."¹⁴ The Mediation Guidelines "govern the procedures for Court-Annexed Mediation unless otherwise ordered by the assigned Judge or Judge Mediator."¹⁵

A. Initiating Mediation

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

B. Mediators

The Mediation Guidelines make available as mediators the Judges of the USCIT to serve "throughout the pretrial phase of all litigation."²⁰ A USCIT Judge Mediator may not serve as

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

¹³ MEDIATION GUIDELINES, *supra* note 9, at Preamble.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ MEDIATION GUIDELINES, *supra* note 9, at § I.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ MEDIATION GUIDELINES, *supra* note 9, at Preamble.

mediator in a case on which he or she is the presiding Judge and on which he or she is disqualified pursuant to 28 U.S.C. § 455, "Disqualification of justice, judge, or magistrate judge," or the Canons of Judicial Ethics.²¹

C. Mediation Schedule

Below is a timeline of a USCIT mediation schedule:

Day [?]: The presiding judge or a 3-judge panel may, at any time, refer a case to mediation.²²

Not less than 30 days prior to the scheduled date for the filing of a motion for summary judgment, a motion for judgment on the agency record,²³ or trial (whichever occurs first), any party may file a motion for the referral to mediation of a case pending before the court."²⁴

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

Day 14: Deadline for each party to file with the Judge Mediator a confidential memorandum of no more than 10 pages, which sets forth the following information:

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

²¹ USCIT R. 16.1, "Court-Annexed Mediation."

²² *Id.* Note that USCIT R. 16.1 refers to an "action," whereas the Mediation Guidelines refer to a "case." *See* note 12, *supra*.

²³ USCIT R. 56.1; USCIT R. 56.2.

²⁴ USCIT R. 16.1.

²⁵ MEDIATION GUIDELINES, *supra* note 9, at § I.

²⁶ MEDIATION GUIDELINES, *supra* note 9, at § II(A). Copies of the confidential memoranda are only to be submitted to the Judge Mediator, i.e., not to co-counsel, opposing counsel, or the Clerk's Office for placement on the official record.

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

Day 90: End of Stay.²⁸

D. Confidentiality

Unless a party to the mediation agrees to the contrary, all statements made during the course of mediation and documents used for the purpose of mediation are not shared with the opposing party(ies). The Judge Mediator is prohibited from disclosing such statements and documents to anyone, including the presiding Judge. The parties are prohibited from using any information obtained during the course of mediation in any document filed with or argument made to the Court. However, the mere fact that mediation is a success or failure is not confidential. Mediation sessions at the USCIT are considered negotiations conducted pursuant to Federal Rule of Evidence 408.²⁹

E. Discovery

Outside mediation, unless there is an agreement to the contrary, parties to the mediation may obtain any non-privileged "matter" that a party could lawfully obtain, such as discovery, "regardless of whether the party learned about the existence of the matter while in mediation."³⁰

F. Ending Mediation

Binding settlement can only be demonstrated by a signed document. If the settlement includes a dismissal, in whole or in part, the parties are to file a voluntary dismissal pursuant to USCIT Rule 41 or a stipulated judgment pursuant to USCIT Rule 58.1.³¹ The parties have 30

²⁷ MEDIATION GUIDELINES, *supra* note 9, at § II(B).

²⁸ The Judge Mediator has the discretion to grant extensions for deadlines falling within the mediation schedule. If the proposed deadline extension does fall outside the 90-day period, the extension can only be granted by the presiding Judge or the Judge Mediator with the presiding Judge's concurrence. MEDIATION GUIDELINES, *supra* note 9, at § II(F).

²⁹ MEDIATION GUIDELINES, *supra* note 9, at § II(C).

³⁰ *Id.*

³¹ MEDIATION GUIDELINES, *supra* note 9, at § II(D).

days from the date of the signed agreement or settlement to file the dismissal. Failure to meet that 30-day deadline will act to return the case to the Court's active calendar.³²

Regardless of the outcome of mediation, at its conclusion, the Judge Mediator is required to file a USCIT Form M-2-1, "Report of Mediation," with the Office of the Clerk, and to serve copies on the parties and the presiding Judge.³³ The form only lists the following three possible results: the mediation resulted in the settlement of all issues; the mediation resulted in a partial settlement; or the mediation did not result in a settlement.³⁴

III. ISSUES AND ANALYSIS

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

A. Jurisdictional or Subject Matter Constraints to Successful Mediation

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

The USCIT's exclusive jurisdiction covers most issues related to international trade and customs, including, but not limited to, judicial review of CBP's denial of administrative protests, and antidumping and countervailing duty determinations issued by the U.S. Department of Commerce and the U.S. International Trade Commission.³⁵ In addition, the Court's exclusive jurisdiction extends to certain international trade and customs issues that the Court's other specific grants of exclusive jurisdiction do not address.³⁶

The following analysis will discuss the cases the Court considered for mediation in a jurisdictional context to determine whether issues underlying the Court's jurisdiction made or

³² *Id.*

³³ MEDIATION GUIDELINES, *supra* note 9, at § II(E).

³⁴ *Id.* See also USCIT Form M-2-1.

³⁵ 28 U.S.C. §§ 1581(a) and (c), respectively.

³⁶ 28 U.S.C. § 1581(i).

makes those cases more or less amenable to mediation. This analysis will also include 28 U.S.C. § 1581(c) due to the relative number of cases closed during the period reviewed, notwithstanding that the Court has never considered any such cases for mediation during that time.

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

Title 28 U.S.C. § 1581(a) grants the USCIT exclusive jurisdiction over "any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [(19 U.S.C. § 1515)]." Title 19 U.S.C. § 1515 sets forth the procedure by which CBP will allow or deny a protest in whole or in part filed in accordance with 19 U.S.C. § 1514.³⁷ Title 19 U.S.C. §§ 1514(a)(1)-(7) provides importers and other interested parties the statutory bases to administratively challenge certain decisions of CBP. Those parties or their duly appointed representative(s) have 180 days from the date of liquidation to file a protest that sets forth the facts and arguments associated with the challenged administrative decision.³⁸ Those same parties then have 180 days to file a summons with the USCIT that challenges CBP's denial of the protest.³⁹

In the past ten years, the USCIT closed 4022 cases brought under 28 U.S.C. § 1581(a) and considered 36 such cases for mediation.⁴⁰ Of those cases, the subject matter of the denied protests, which served as jurisdictional prerequisites, were valuation, classification, charges/extractions, and liquidation/reliquidation.⁴¹ Of those cases, 12 were resolved through mediation.⁴²

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

Valuation cases brought to the Court under 28 U.S.C. § 1581(a) and 19 U.S.C. § 1514(a)(1), "the appraised value of [the] merchandise," are amenable to mediation.⁴³ Moreover, increased use of, and/or earlier referral to, mediation in valuation cases may further

³⁷ 19 U.S.C. § 1515(a).

³⁸ 19 U.S.C. § 1514(c)(3).

³⁹ 28 U.S.C. § 2636(a).

⁴⁰ Appendices A.2, B.1-B.4.

⁴¹ 19 U.S.C. §§ 1514(a)(1)-(7) set forth the following statutory bases on which a protest can be filed (and denied): (1) appraised value; (2) classification/rate of duty; (3) charges/extractions; (4) exclusion; (5) liquidation/reliquidation; (6) drawback; and (7) refusal to reliquidate.

⁴² Appendices B.1 - B.4. Because *Kahrs Int'l* was listed under 19 U.S.C. §§ 1514(a)(2) and (a)(5), it was counted twice. *Kahrs Int'l Inc. v. United States*, Ct. No 07-00343 (Ct. Int'l Trade).

⁴³ It is CBP's responsibility to affix the value of, i.e., appraise, merchandise upon entry into the United States. 19 U.S.C. § 1500(a). Title 19 U.S.C. § 1401a establishes the different methods by which merchandise may be valued for purposes of appraisement.

the Court's goal of the "just, speedy, and inexpensive determination of every action and proceeding."⁴⁴

In the period reviewed, the Court closed 314 valuation cases.⁴⁵ Of the 11 valuation cases that the Court considered mediation, all issues, which were fact issues, were settled through mediation.⁴⁶ It may be notable that three of the 11 cases resulting in settlement were initiated well before the 2004 effective date of USCIT Rule 16.1.⁴⁷ The Court ordered mediation *sua sponte* in two of the cases and on plaintiff's motion in the other nine cases. Of the nine cases in which plaintiff moved the Court for mediation, defendant took no position in one and consented to mediation in eight.⁴⁸

One of the reasons why more valuation cases are not referred to mediation may be that 40 percent of all valuation cases that closed during the period reviewed were settled -- without having been mediated -- through either a USCIT Rule 58.1 "Stipulated Judgment on Agreed Statement of Facts," or a USCIT Rule 41(a)(1)(A)(ii) "Voluntary Dismissal."⁴⁹ Given that those two disposition methods are the only methods through which cases settled through mediation are disposed⁵⁰, there does not appear to be a current need for mediation of valuation cases at the Court, particularly when the universe of such cases otherwise eligible for mediation was less than 13 percent of all of the valuation cases closed during the period reviewed.⁵¹

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

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

⁴⁴ See USCIT R. 1.

⁴⁵ Appendix A.1.

⁴⁶ Appendices B.1 and C.

⁴⁷ See Appendix B.1.

⁴⁸ Appendix B.1 at *Heng Ngai Jewelry, Inc. v. United States*, Consol. Ct. No. 98-03019 (Ct. Int'l Trade) and *Continental Teves, Inc. v. United States*, Ct. Nos. 04-00624, 04-00405, 04-00620, 05-00069, 05-00206, 05-00421, 05-00526, and 09-00221 (Ct. Int'l Trade), respectively.

⁴⁹ Appendices A.2 and B.1. Row (a)(1), Valuation ((112 (SJOASF) + 25 (41(a)(1)(A)(ii) Vol. Dism.) – 11 (Settled)) / 314 (Total)).

⁵⁰ No successfully mediated cases were voluntarily dismissed via USCIT R. 41(1)(A)(i). See Appendices B.1 - B.7.

⁵¹ Appendix A.2. Row (a)(1), Valuation ((11 (Slip Op.) + 19 (Jdgmt. Order) + 11 (Order of the Court)) / 314 (Total)).

⁵² 19 U.S.C. § 1514(a)(2) "the classification and rate and amount of duties chargeable."

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

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

The parties settled 14 of the *sua sponte* cases post-mediation, pursuant to a stipulated judgment on agreed statement of facts.⁵⁷ Of the two other *sua sponte* classification cases, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") affirmed the Court's opinion in one⁵⁸, and the other is still pending before the Court.⁵⁹ The case in which the Court denied plaintiff's motion for an order of referral to mediation was nonetheless settled pursuant to a stipulated judgment on agreed statement of facts.⁶⁰

The Court closed 2305 classification cases during the period reviewed, and disposed of 976 and 129 cases pursuant to USCIT Rule 58.1, "Stipulated Judgments on Agreed Statement of Facts," and USCIT Rule 41(a)(1)(A)(ii), "Dismissal of Actions, Voluntary Dismissal," respectively.⁶¹ Stated another way, the Court disposed of 48 percent of classification cases via stipulated judgments on agreed statements of fact and voluntary dismissals in the period

⁵³ It is CBP's responsibility to affix the final classification and rate of duty applicable to merchandise entering the United States. 19 U.S.C. § 1500(b). The General Rules of Interpretation ("GRIs"), Harmonized Tariff Schedule of the United States ("HTSUS"), establish the rules by which merchandise is classified upon entry into the United States. See 19 U.S.C. § 1202; GRI 1-6, HTSUS.

⁵⁴ Appendix B.2.

⁵⁵ Appendix C.

⁵⁶ Appendix B.2.

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

⁵⁸ Appendices B.2 and C at *Kahrs Int'l Inc. v. United States*, 713 F.3d 640 (Fed. Cir. 2013).

⁵⁹ Appendices B.2 and C at *BenQ America Corp. v. United States*, Ct. No. 05-00637 (Ct. Int'l Trade).

⁶⁰ Appendices B.2 and C at *ABB Flexible Automation, Inc. v. United States*, Ct. No. 02-00664 (Ct. Int'l Trade).

⁶¹ Appendix A.2.

reviewed, which is more than any other method of disposition.⁶² Pursuant to the Court's Mediation Guidelines, those methods of disposition also happen to be the only methods of disposition, i.e., settlement, in mediation.⁶³

Given that, the parties settle classification cases post-mediation, and also settled 48 percent of the classification cases in the same manner as mediated cases, it appears that there is no jurisdictional or subject matter impediment to the mediated settlement of classification cases.⁶⁴ With no such impediment, questions arise as to whether the other 10 percent of the classification cases eligible for mediation, or even the additional 48 percent of the classification cases settled other than by mediation, could have benefitted from mediation.⁶⁵

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

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

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

⁶³ MEDIATION GUIDELINES, *supra* note 9, at § II(D).

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

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

⁶⁶ Appendices B.3 and C.

⁶⁷ Appendix C at *Allstates Trading & Clothing Co. v. United States*, Ct. No. 04-00245 (Ct. Int'l Trade).

settlement of that case either.⁶⁸ However, parties have settled 19 U.S.C. § 1514(a)(3) litigation prior to final judgment, which supports the amenability of such cases to mediation.⁶⁹

Of the six charges and extractions cases the Court considered for mediation, five were referred to mediation and one was not, due to the Court denying plaintiff's motion.⁷⁰ Four of the mediated cases involved the same issues of law⁷¹, and the issue in the other mediated case was also an issue of law.⁷² The issue in plaintiff's motion for referral to mediation, which defendant opposed and the Court ultimately denied, was whether mediation was even necessary for settlement.⁷³ The parties ultimately settled the underlying issue of the proper amount of interest due on duties on vessel repair without mediation.⁷⁴ The parties also ultimately settled the charges and extractions issue in the case brought under the denial of a 19 U.S.C. § 1514(a)(5) protest after mediation.⁷⁵

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

⁶⁸ *Id.*

⁶⁹ Appendix A.2.

⁷⁰ Appendices B.3, B.4, and C at *Canadian Reynolds Metal Co. v. United States*, Ct. No. 00-00444 (Ct. Int'l Trade); *Aluminerie Becancour, Inc. v. United States*, Ct. No. 00-00445 (Ct. Int'l Trade); *Alcan Aluminum Corp. v. United States*, Ct. Nos. 00-00446, 01-00095 (Ct. Int'l Trade); *Allstates Trading & Clothing*, Ct. No. 04-00245 (Ct. Int'l Trade); and *Marine Transport Corp. v. United States*, Ct. No. 06-00046 (Ct. Int'l Trade).

⁷¹ Appendix C at *Canadian Reynolds Metal*, Ct. No. 00-00444; *Aluminerie Becancour*, Ct. No. 00-00445; *Alcan Aluminum Corp.*, Ct. Nos. 00-00446, 01-00095.

⁷² Appendix C at *Allstates Trading & Clothing*, Ct. No. 04-00245.

⁷³ Appendix C at *Marine Transport Corp.*, Ct. No. 06-00046.

⁷⁴ *Id.*

⁷⁵ Appendix C at *Allstates Trading & Clothing*, Ct. No. 04-00245.

⁷⁶ Appendix A.2. Row (a)(3) Charges or Extractions ((21 (Slip Op.) + 12 (Jdgmt. Order) + 348 (Order of the Court)) / 567 (Total)).

⁷⁷ *Id.* Row (a)(3) Charges or Extractions ((37 (SJOASF) + 28 (41(a)(1)(A)(ii) Vol. Dism.)) / 567 (Total)).

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

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

The remaining liquidation/reliquidation case was settled through mediation.⁷⁹ The issues in that case consisted of both issues of law and fact. The issues were whether CBP's denial of a protest prevents a different interested party from filing a protest on the same entry if the latter protest is filed within the 180-day limitation period, and whether CBP prematurely liquidated entries of merchandise subject to an antidumping duty order.⁸⁰

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

2. 28 U.S.C. § 1581(c) — AD/CVD Cases

It is unclear whether, as a practical matter, antidumping and countervailing duty ("AD/CVD") determinations issued by the U.S. Department of Commerce and the U.S. International Trade Commission are amenable to mediation. Title 28 U.S.C. § 1581(c) grants the USCIT exclusive jurisdiction over "any civil action commenced under section 516A of the Tariff Act of 1930 [(19 U.S.C. § 1516a)]." Title 19 U.S.C. § 1516a sets forth the procedure by which the Court will review AD/CVD determinations. Generally, parties have 30 days in which to file a summons contesting those administrative determinations.⁸³

⁷⁸ Appendices B.4 and C at *Kahrs Int'l Inc. v. United States*, Ct. No. 07-00343 (Ct. Int'l Trade), and *Allstates Trading & Clothing*, Ct. No. 04-00245 (Ct. Int'l Trade), respectively. Plaintiff in *Kahrs Int'l* also asserted jurisdiction pursuant to 28 U.S.C. § 1581(a)/19 U.S.C. § 1514(a)(2). Complaint, *Kahrs Int'l*, Ct. No. 07-00343 (Ct. Int'l Trade Sept. 12, 2007), Doc. No. 4.

⁷⁹ Appendices B.4 and C at *Family Delight Foods, Inc. v. United States*, Ct. No. 10-00136 (Ct. Int'l Trade).

⁸⁰ Appendix C at *Family Delight Foods*, Ct. No. 10-00136.

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

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

⁸³ 19 U.S.C. § 1516a(a)(2).

The Court has never considered an AD/CVD determination for mediation, despite judicial review of those determinations ranking as the third most frequent type of cases closed during the period reviewed.⁸⁴ Moreover, during the period reviewed, no § 1581(c) cases were settled through a USCIT Rule 58.1 "Stipulated Judgment on Agreed Statement of Fact," the reason being that such a disposition method would not be accordance with the Rules of the Court.⁸⁵ However, the parties settled 318 of § 1581(c) cases, or 27 percent, through USCIT Rule 41(a)(1)(A)(ii) "Voluntary Dismissals," one of the same settlement disposition methods in the Court's Mediation Guidelines.⁸⁶

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

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

⁸⁵ USCIT R. 58.1, Stipulated Judgment on Agreed Statement of Facts, is limited to §§ 1581(a) and (b) cases, i.e., "[a]n action described in 28 U.S.C. § 1581 (a) or (b) may be stipulated for judgment" USCIT Form 9, Stipulated Judgment on Agreed Statement of Facts, also appears to be so limited.

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

⁸⁷ See 28 U.S.C. § 2647(a) at <http://citba.org/documents/CIT-ACT-SEPT-2008.pdf> (last visited Sept. 18, 2014). Anecdotal evidence suggests that the draft amendment excluding § 1581(c) cases from mediation at the Court was stricken not because of a change in position, but because the Judiciary Committee of the U.S. House of Representatives would have jurisdiction over the issue, rather than the Ways and Means Committee of the U.S. House of Representatives. Nonetheless, the question arises as to why parties felt that draft legislation was necessary to change the Court's rules regarding mediation when the Court has its own rulemaking power pursuant to 28 U.S.C. § 2071(a).

⁸⁸ Compare U.S. COURT OF APPEALS FOR THE FED. CIR., APPELLATE MEDIATION PROGRAM GUIDELINES (2013) ("All cases in which parties are represented by counsel are eligible for the program"), available at <http://www.cafc.uscourts.gov/mediation/guidelines.html> (last visited Oct. 15, 2014) with ROBERT J. NIEMIC, FED. JUDICIAL CTR., MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS, *A SOURCEBOOK FOR JUDGES AND LAWYERS*, 2d Ed. 110 (2006) (describing eligible

As a practical matter, parties do settle § 1581(c) cases outside of mediation through USCIT Rule 41(a)(1)(A)(ii) "Voluntary Dismissals," the same method of disposition that parties would have to settle those cases inside mediation. Nonetheless, § 1581(c) cases are unusual in that there are frequently third-party interveners involved in the litigation⁸⁹, thereby potentially creating a three-way mediated negotiation, which may be more complex and difficult to settle than a two-way mediated negotiation under § 1581(a).⁹⁰ Nonetheless, the above-referenced voluntary dismissals and anecdotal evidence indicating that parties to § 1581(c) litigation settle their differences before trial raises the issue of whether the introduction of a court-appointed neutral third party could facilitate additional settlements.

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

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

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

The fact that parties settled 39 percent of § 1581(d) cases via USCIT Rule 41(a)(1)(A)(ii) "Voluntary Dismissals," and the Court disposed of 54 percent of such cases via dispositive opinions or orders, indicates that the Court may be underutilizing mediation in TAA cases.⁹⁵

case types for Federal Circuit mediation as "[a]ll cases in which the parties are represented by counsel, with the exception of . . . antidumping and countervailing duty cases, International Trade Commission cases"), available at [http://www.fjc.gov/public/pdf.nsf/lookup/MediCon2.pdf/\\$file/MediCon2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/MediCon2.pdf/$file/MediCon2.pdf) (last visited Oct. 15, 2014)).

⁸⁹ See 28 U.S.C. § 2631(j)(1)(B); USCIT R. 24(a)(3).

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

⁹¹ See 19 U.S.C. § 2273 (U.S. Dep't of Labor) and 19 U.S.C. § 2272 (U.S. Dep't of Agric.).

⁹² Appendices B.5 and C at *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, Local 2911 v. United States Sec'y of Labor ("Independent Steelworkers Union")*, Ct. No. 04-00492 (Ct. Int'l Trade).

⁹³ Appendix C at *Independent Steelworkers Union*, Ct. No. 04-00492.

⁹⁴ *Independent Steelworkers Union*, 33 C.I.T. 418 (2009).

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

This appears particularly true given the high statistic for settlement in the form of voluntary dismissals, i.e., parties settle a large portion of TAA cases prior to the Court issuing final judgment.⁹⁶

4. 28 U.S.C. § 1581(i) — Residual

The residual nature of 28 U.S.C. § 1581(i) makes generalizations regarding mediation difficult. In addition to the exclusive jurisdiction conferred by 28 U.S.C. §§ 1581(a)-(h), § 1581(i) grants the Court exclusive jurisdiction over "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for" the subject of any one of four paragraphs.⁹⁷ Plaintiffs often plead § 1581(i) as a basis for jurisdiction, in addition to the more specific bases set forth in §§ 1581(a)-(h), to ensure that jurisdiction attaches⁹⁸; however, that is not always the case.⁹⁹ For purposes of this section, only those cases in which plaintiff used § 1581(i) as the sole basis for jurisdiction will be discussed.

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

In the case where the Court issued its order of referral to mediation *sua sponte*, there were three pending legal issues.¹⁰¹ The parties were unable to resolve any of those issues in mediation; however, during the stay initiated by the Court's order, plaintiff was able to enter its

⁹⁶ USCIT R. 58.1, Stipulated Judgment on Agreed Statement of Facts, is limited to cases brought under 28 U.S.C. §§ 1581(a) or 1581(b).

⁹⁷ The four paragraphs of 28 U.S.C. §§ 1581(i) are as follows: "(1) revenue of imports or tonnage; (2) tariff duties, fees or other taxes on the importation of merchandise for reasons other than raising revenue; (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section."

⁹⁸ Appendix C; *see, e.g., Family Delight Foods, Inc. v. United States*, Ct. No. 10-00136 (Ct. Int'l Trade); *Kahrs Int'l Inc. v. United States*, Ct. No. 07-00343 (Ct. Int'l Trade).

⁹⁹ Appendix C; *see, e.g., City of Fresno/Fresno–Yosemite Int'l Airport v. United States* ("City of Fresno"), Ct. No. 10-00137 (Ct. Int'l Trade); *Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States* ("Rubber Thread Co."), Ct. No. 05-00539 (Ct. Int'l Trade); *Int'l Custom Prods., Inc. v. United States*, Ct. No. 05-00509 (Ct. Int'l Trade).

¹⁰⁰ Appendix C at *Int'l Custom Prods.*, Ct. No. 05-00509; *Rubber Thread Co.*, Ct. No. 05-00539; and *City of Fresno*, Ct. No. 10-00137, respectively.

¹⁰¹ Appendix C at *Int'l Custom Prods.*, Ct. No. 05-00509.

merchandise, thereby resolving all but the non-justiciable issues for which the Court granted defendant's motion to dismiss.¹⁰²

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

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

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

¹⁰² *Id.*

¹⁰³ Appendix C at *Rubber Thread Co.*, Ct. No. 05-00539.

¹⁰⁴ *Id.*

¹⁰⁵ *Rubber Thread Co.*, 593 F.3d 1346, 1357 (Fed. Cir. 2010).

¹⁰⁶ Appendix C at *City of Fresno*, Ct. No. 10-00137.

¹⁰⁷ *Id.* There was also an issue of whether § 1581(i) was the proper basis for the Court's jurisdiction.

¹⁰⁸ Appendix C at *City of Fresno*, Ct. No. 10-00137.

¹⁰⁹ *Id.*

¹¹⁰ Appendix A.2. Row § 1581(i) Residual Total (95 (41(a)(1)(A)(ii) Vol. Dism.) / 2762 (Total)). That CM/ECF also reports that 139 § 1581(i) cases were also disposed of through USCIT R. 58.1, Stipulated Judgments on Agreed Statements of Fact, must be as a result of the plaintiff asserting both § 1581(a) and § 1581(i) jurisdiction as that Rule is limited to §§ 1581(a) and (b). *Id.*

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

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

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

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

¹¹² Four of the nine penalty cases considered for mediation were settled through mediation. See Appendices B.7 and C, *United States v. Leslie M. Toth*, Ct. No. 09-00183 (Ct. Int'l Trade); *United States v. Washington Int'l Ins. Co. ("Washington Int'l Ins. Co. I")*, Ct. No. 09-00449 (Ct. Int'l Trade); *United States v. Tenneco Automotive, Inc.*, Ct. No. 10-00130 (Ct. Int'l Trade); and *United States v. Lee-Hunt Int'l, Inc.*, Ct. No. 02-00816 (Ct. Int'l Trade); *United States v. Tenacious Holdings, Inc.*, Ct. No. 12-00173 (Ct. Int'l Trade) was pending as of September 1, 2014.

¹¹³ Appendix C at *Lee-Hunt Int'l*, Ct. No. 02-00816; *Leslie M. Toth*, Ct. No. 09-00183; *Washington Int'l Ins. Co. I*, Ct. No. 09-00449; *United States v. Washington Int'l Ins. Co. ("Washington Int'l Ins. Co. II")*, Ct. No. 09-00459 (Ct. Int'l Trade); *United States v. ABC Farma, Inc.*, Ct No. 12-00041 (Ct. Int'l Trade).

¹¹⁴ Appendix B.7.

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

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

B. Party Constraints to Successful Mediation

Given that the United States is either defendant or plaintiff in all cases over which the Court has exclusive jurisdiction¹¹⁸, an issue arises as to whether the United States being a party to the mediation somehow affects the process. Unlike private parties who often conduct a cost/benefit analysis in deciding whether to pursue litigation, the U.S. Department of Justice's ("DOJ") International Trade Field Office ("ITFO"), the attorneys of which practice before the Court, considers its attorney time to be overhead.¹¹⁹ If true, there is seemingly no incentive for the United States to conform with USCIT Rule 1, i.e., the just, speedy and inexpensive determination of every action and proceeding.

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

Our commitment to make greater use of [alternative dispute resolution] is long overdue. Clearly, our federal court system is in overload. Delays are all too common, depriving the public of swift, efficient, and just resolution of disputes. The Department of Justice is the biggest user of the federal courts and the nation's most prolific litigator. Therefore, it is incumbent upon those Department attorneys who handle civil litigation from Washington and throughout the country to consider alternatives to litigation.

....

If we are successful, the outcome will benefit litigants by producing better and quicker results, and will benefit the entire

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

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

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

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

justice system by preserving the scarce resources of the courts for the disputes that only courts can decide.¹²⁰

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

1. *Factors Counseling in Favor of ADR*

(a) The Parties

- (1) There is a continuous relationship
- (2) There may be benefits to either client hearing directly from the opposing side
- (3) Either party would be influenced by opinion of neutral third party
- (4) The opposition does not have a realistic view of the case
- (5) The parties have indicated that they want to settle
- (6) Either party needs a swift resolution

(b) Nature of the case

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

2. *Factors Counseling Against ADR*

- (a) Need for precedent
- (b) Need for public determination or sanction
- (c) Case likely to settle soon without assistance
- (d) Case likely to be resolved efficiently by motion
- (e) Opposing counsel are not trustworthy.¹²¹

Another issue is whether or not ITFO applies the foregoing criteria. Only once in the history of mediation at the USCIT did the United States move the Court for an order of referral to mediation.¹²² Plaintiff opposed the motion, and it was ultimately denied by the Court.¹²³

¹²⁰ Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution, 61 Fed. Reg. 36,895, 36,895-896 (July 15, 1996) [hereinafter *DOJ Policy on ADR*].

¹²¹ *Id.* at 36,901.

¹²² Appendices B.6 and C at *City of Fresno/Fresno Yosemite Int'l Airport v. United States* ("City of Fresno"), Ct. No. 10-00137 (Ct. Int'l Trade).

However, the parties were able to settle the issues prior to the Court issuing a final judgment.¹²⁴ In cases in which mediation was requested and the United States did not oppose, the United States took no position in response to one plaintiff's motion for mediation in a consolidated case (of two) and consented to mediation in eight cases, the cases in which the United States consented to mediation all involved the same facts and arguments.¹²⁵ The parties were able to reach mediated settlements in all nine cases.¹²⁶

With the exception of those nine cases, the United States opposed all motions for orders of referral to mediation.¹²⁷ In all but one, the Court denied the party's motion.¹²⁸ The bases for the United States' opposition to the motions included: conservation of judicial resources¹²⁹, need for additional discovery¹³⁰, and the opposing party's lack of cooperation.¹³¹

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

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Appendix C, *Heng Ngai Jewelry, Inc. v. United States*, Consol. Ct. No. 98-03019; *Continental Teves, Inc. v. United States*, Ct. Nos. 04-00264, 04-00405, 04-00620, 05-00069, 05-00206, 05-00421, 05-00526, 09-00221.

¹²⁶ *Id.*

¹²⁷ Appendices B.1 - B.7 and C at *ABB Flexible Automation, Inc. v. United States*, Ct. No. 02-00664 (Ct. Int'l Trade); *Marine Transport Corp. v. United States*, Ct. No. 06-00046 (Ct. Int'l Trade); *Trustees in Bankr. of N. Am. Rubber Thread Co., Inc. v. United States ("Rubber Thread Co.")*, Ct. No. 05-00539 (Ct. Int'l Trade); *United States v. Washington Int'l Ins. Co. ("Washington Int'l Ins. II")*, Ct. No. 09-00459 (Ct. Int'l Trade); *United States v. Tenneco Automotive, Inc.*, Ct. No. 10-00130 (Ct. Int'l Trade); *United States v. ABC Farma, Inc.*, Ct. No. 12-00041 (Ct. Int'l Trade); *United States v. Tenacious Holdings, Inc.*, Ct. No. 12-00173 (Ct. Int'l Trade).

¹²⁸ Appendix C at *Tenacious Holdings*, Ct. No. 12-00173.

¹²⁹ Appendix C at *ABB Flexible Automation*, Ct. No. 02-00664; *Marine Transport Corp.*, Ct. No. 06-00046; *ABC Farma*, Ct. No. 12-00041.

¹³⁰ Appendix C at *Washington Int'l Ins. II*, Ct. No. 09-00459; *Tenneco Automotive*, Ct. No. 10-00130; *ABC Farma*, Ct. No. 12-00041; *Tenacious Holdings*, Ct. No. 12-00173.

¹³¹ Appendix C at *ABC Farma*, Ct. No. 12-00041.

¹³² Appendix C at *Tenacious Holdings*, Ct. No. 12-00173.

than the government fears."¹³³ In the second instance, in denying plaintiff's motion for referral to mediation in conformance with the United States' opposition, the Court stated the following:

We have denied Plaintiff's Motion based primarily on the Government's emphatic representations that "[m]ediation would not expedite the resolution of this action" (and variations on that theme). Nevertheless, we are not unsympathetic to Plaintiff's concerns about the pace of settlement negotiations with Customs — concerns which are only heightened by the Government's description of the "procedure for obtaining approval for a settlement" (set forth in Defendant's Response to Plaintiff's Motion for Referral to Court-Annexed Mediation) and by the general bureaucratic inertia that the Court has witnessed in similar circumstances in other cases.

...

In considering whether to grant any requested extension of [the] deadline [for Defendant's Motion to Dismiss] (as well as the duration of such extension, if any), we will give substantial weight to Plaintiff's views and to the Government's demonstrated "good faith" in moving settlement discussions along.

...

Finally, to the extent that either party comes to believe that the other party is not pursuing settlement negotiations in good faith and in a timely manner, we note that we would be receptive to a motion to accelerate the schedule for filing dispositive motions

...¹³⁴

The Mediation Guidelines do not set forth a duty of good faith. It is unclear whether the Court considered imposing such a duty when it drafted and later amended those guidelines. Nonetheless, from the foregoing, there appears to be, at a minimum, an implicit duty of good faith in mediation before the Court. That is not necessarily surprising because the court or court rule does not usually set forth such a duty; instead, "leaving it to the litigation process to flesh out the details of precisely what bargaining behavior is required."¹³⁵

But should a duty of good faith, whether explicit or implicit, be imposed at all? Those in favor of the imposition of such a duty take the position that without a duty of good faith in mediation, "it is possible for one side to engage in intimidation, misrepresentation, or otherwise subvert the goals of mediation."¹³⁶ Those taking the opposing view cite the risks of "increased

¹³³ *Tenacious Holdings*, Ct. No. 12-00173, Slip Op. 14-101, 2014 WL 4345804 at *3 (Ct. Int'l Trade Sept. 2, 2014).

¹³⁴ *Marine Transport Corp.*, Ct. No. 06-00046 (Ct. Int'l Trade Dec. 19, 2006), Doc. No. 23.

¹³⁵ SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* § 9:3 (2013-14 ed.) (citations omitted) (defining the parties' duties in court-connected mediation) [hereinafter COLE, *Mediation*].

¹³⁶ *Id.* at § 9:6 (citations omitted).

litigation, perhaps involving evidence from the mediator, jeopardizing concerns of confidentiality and even mediator neutrality."¹³⁷

It may be notable that, in one of the foregoing cases, the Court used accelerating the schedule for dispositive motions as a possible consequence for a lack of good faith in settlement negotiations, but that was only after the Court denied the motion for referral to mediation, i.e., confidentiality was not an issue. As stated above, the Mediation Guidelines do not impose a duty of good faith. If such a duty were imposed, it follows that sanctions could also be imposed for a breach of the duty, and that is one of the arguments against the imposition of a good faith duty, i.e., the duty is breached, sanctions are imposed, litigation increases, and confidentiality is compromised. However, that does not appear to be an issue, at least in the Federal Circuit's Appellate Mediation Program Guidelines, wherein a party, counsel, or the outside mediator "who fails to materially comply" with the guidelines may be subject to sanction by the Court.¹³⁸ Should such failure occur, the Circuit Executive or the Office of General Counsel would be apprised of the "substance of a mediation only to the extent necessary to explain any recommendations for sanctions."¹³⁹ Although there is no explicit duty of good faith set forth in the Federal Circuit's Mediation Guidelines, there are sanctions for material breaches of the duties described therein, confidentiality issues aside. For a material breach of a duty of good faith to occur, it would only be reasonable for that duty to be specifically defined.¹⁴⁰

To summarize, of the relative few cases the Court considered for mediation, the United States has not been an active proponent, notwithstanding the DOJ's stated policy goal of producing better and quicker results through ADR.¹⁴¹ To the extent that the Court is seeking to

¹³⁷ *Id.* at § 9:4 (citations omitted).

¹³⁸ U.S. COURT OF APPEALS FOR THE FED. CIR., APPELLATE MEDIATION PROGRAM GUIDELINES at 6 (2013).

¹³⁹ *Id.*

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

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

Id.

¹⁴¹ See DOJ Policy on ADR, *supra* note 120.

influence the United States' position vis-à-vis mediation, the Court could consider making explicit its seemingly implicit duty of good faith in mediation, and providing a process by which either party could be sanctioned for a breach of that duty.

C. Timing Constraints to Successful Mediation

This section of the article addresses whether the point at which the Court considers mediation can affect the results. There are a number of studies and schools of thought that analyze or discuss the issue. One study concluded that earlier mediation was associated with earlier termination.¹⁴² Another study of mediation and early neutral evaluation concluded that ADR increased time to disposition; however, the study also cited selection bias due to the Court only sending the most "intractable" cases to mediation and thus delaying trial.¹⁴³ One school of thought believes that discovery should be closed prior to mediation so that the parties are fully informed when entering negotiations.¹⁴⁴ Another school of thought takes a "balancing approach" in which cost savings are balanced with informed decision making, and suggests that mediation take place "soon after the onset of written discovery but before depositions and other subsequent (and expensive) discovery procedures have taken place."¹⁴⁵

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

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

¹⁴² Lisa Blomgren Bingham et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DISP. RESOL. 225, 243-244 (2009) [hereinafter *Dispute Resolution and the Vanishing Trial*].

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

¹⁴⁴ COLE, *Mediation*, *supra* note 135 at § 5:11 (2013-14 ed.).

¹⁴⁵ *Id.*

¹⁴⁶ *Dispute Resolution and the Vanishing Trial*, *supra* note 142 at 257.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

In the ten years of court-annexed mediation at the USCIT, 16 cases reached settlement through mediation.¹⁴⁹ All 11 § 1581(a)/§1514(a)(1)¹⁵⁰ valuation cases were referred to mediation after the close of discovery, and all 11 cases resulted in a mediated settlement.¹⁵¹ One § 1582 case was successfully mediated to settlement after the close of discovery.¹⁵² However, three § 1582 cases were also successfully mediated to settlement prior to the close of discovery.¹⁵³ Furthermore, one § 1581 case was successfully mediated while two motions to amend the summons were pending before the Court, i.e., in the early stages of the case.¹⁵⁴ However, even after a full vetting of facts and law before the Court and the Federal Circuit, 15 § 1581(a)/§1514(a)(2) classification cases referred to mediation at the Court after remand still failed to reach mediated settlements.¹⁵⁵ Recognizing the small sample of cases and the distinct bases on which these cases were brought before the Court, there currently does not appear to be a link between discovery being closed prior to mediation and successful mediation results.

Notwithstanding the lack of a current link between when mediation is introduced in a case and mediation results, parties often successfully use discovery as the basis to oppose a

¹⁴⁹ Appendix C at *Mast Indus. v. United States*, Ct. No. 95-00175; *Heng Ngai Jewelry, Inc. v. United States*, Ct. No. 98-03019; *Skechers USA, Inc. v. United States*, Ct. No. 98-03245; *Continental Teves, Inc. v. United States*, Ct. Nos. 04-00264, 04-00405, 04-00620, 05-00069, 05-00206, 05-00421, 05-00526, and 09-00221; *Family Delight Foods, Inc. v. United State*, Ct. No. 10-00136; *United States v. Lee-Hunt Int'l, Inc.*, Ct. No. 02-00816; *United States v. Leslie M. Toth*, Ct. No. 09-00183; *United States v. Washington Int'l Ins. Co.*, Ct. No. 09-00449 ("*Washington Int'l Ins. I*"); *United States v. Tenneco Automotive, Inc.*, Ct. No. 10-00130. For purposes of this section of the article, cases are counted as one regardless of whether it acts as a test case for other cases or it was consolidated with other cases.

¹⁵⁰ 28 U.S.C. §1581(a) grants the Court exclusive jurisdiction over protests denied pursuant to 19 U.S.C. § 1515. The bases on which protests may be filed are set forth in 19 U.S.C. § 1514(a)(1) through (a)(7). See Section III.A.1, *supra*.

¹⁵¹ Appendix C at *Mast Indus.*, Ct. No. 95-00175; *Heng Ngai Jewelry*, Ct. No. 98-03019; *Skechers USA*, Ct. No. 98-03245; *Continental Teves*, Ct. Nos. 04-00264, 04-00405, 04-00620, 05-00069, 05-00206, 05-00421, 05-00526, 09-00221.

¹⁵² Appendix C at *Lee-Hunt Int'l*, Ct. No. 02-00816.

¹⁵³ Appendix C at *Leslie M. Toth*, Ct. No. 09-00183; *Washington Int'l Ins. I*, Ct. No. 09-00449; *Tenneco Automotive*, Ct. No. 10-00130.

¹⁵⁴ Appendix C at *Family Delight Foods*, Ct. No. 10-00136.

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

party's motion for an order of referral to mediation.¹⁵⁶ With one exception, the Court denied a party's motion for an order of referral to mediation when an opposing party wholly or partially based its opposition on the fact that discovery had not yet closed.¹⁵⁷ It is notable that, in the two cases where the Court denied a party's motion for mediation while discovery was ongoing, the parties were still able ultimately to settle all the issues and the Court was able to dispose of the cases without full discovery.¹⁵⁸

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

D. Amount in Controversy Constraints to Successful Mediation

A recent USCIT opinion raised the issue of whether the amount in controversy may be determinative of the appropriateness or success of mediation. In granting defendant's motion for an order of referral to mediation over plaintiff's opposition, the Court agreed with defendant's assertion that "mediation is more likely to be successful given that the amount in dispute here [(approximately \$50,000)] is relatively low"¹⁶⁰ However, a low amount in controversy does not necessarily mean that parties agree that mediation is the preferred disposition method.¹⁶¹ That is particularly true when the parties are already in settlement negotiations and mediation could be considered to expend, rather than conserve, resources.¹⁶² In considering this issue, it may be notable that draft legislation sought to limit a proposed arbitration program at the Court to cases in which the amount in controversy was no more than \$150,000.¹⁶³

¹⁵⁶ Appendix C at *United States v. Washington Int'l Ins. Co.* ("*Washington Int'l Ins. II*"), Ct. No. 09-00459 (Ct. Int'l Trade); *United States v. ABC Farma, Inc.*, Ct. No. 12-00041 (Ct. Int'l Trade); *Tenacious Holdings Inc. v. United States*, Ct. No. 12-00173 (Ct. Int'l Trade).

¹⁵⁷ *Tenacious Holdings*, Ct. No. 12-00173, is the exception. See *Tenacious Holdings*, 2014 WL 4345804 (Ct. Int'l Trade Sept. 2, 2014).

¹⁵⁸ Appendix C at *Washington Int'l Ins. II*, Ct. No. 09-00459; *ABC Farma*, Ct. No. 12-00041.

¹⁵⁹ *Tenacious Holdings*, 2014 WL 4345804 at *3 (Ct. Int'l Trade Sept. 2, 2014). As of September 10, 2014, the Judge Mediator had yet to issue a Report of Mediation.

¹⁶⁰ *Tenacious Holdings*, 2014 WL 4345804 at *3 (Ct. Int'l Trade May 15, 2013).

¹⁶¹ Appendices B.7 and C at *ABC Farma*, Ct. No. 12-00041. The amount in controversy was less than \$6,000 and mediation failed to result in a settlement of all of the issues. *Id.* However, the parties were able to settle their differences after the close of mediation, but before trial. *Id.*

¹⁶² *Id.*

¹⁶³ See 28 U.S.C. § 2647(j)(1)(B) at <http://citba.org/documents/CIT-ACT-SEPT-2008.pdf> (last visited Sept. 18, 2014).

A review of the successfully mediated cases indicates that even such a relatively high prescribed limit applied to the Court's mediation program would have prevented the mediated settlement of a number of the Court's cases. For example, in one § 1581(a)/§ 1514(a)(1) valuation case, plaintiff sought an allowance for defective merchandise of \$1,122,953.95.¹⁶⁴ The parties reached a mediated settlement of \$941,158 in duties and \$567,168 in interest.¹⁶⁵ In two successfully mediated § 1582 cases, the amounts in controversy were \$240,936.65 and \$2,846,230.87 in duties, and \$1,746,964.99 and \$3,350,923 in penalties, respectively.¹⁶⁶ While a modest cap on the amount in controversy may have prevented both cases from mediation, it is possible that the parties would have reached settlement without mediation due to the defendants' inability to pay their liabilities, notwithstanding the relative merits of either case.¹⁶⁷

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

E. Successful Mediation

What should the Court and parties consider to be successful mediation? USCIT Form M-2-1, "Report of Mediation," only gives the Judge Mediator three possible results: mediation resulted in a settlement of all of the issues, mediation resulted in a partial settlement, or mediation did not result in a settlement.¹⁶⁹ Of course, Judge Mediators are not limited to those three options in reporting mediation results.¹⁷⁰ However, when the Court was asked to provide a list of the cases it considered for mediation for purposes of this article, the Court's response

¹⁶⁴ Appendices B.1 and C at *Mast Indus. v. United States*, Ct. No. 95-00175.

¹⁶⁵ *Id.*

¹⁶⁶ Appendices B.7 and C at *United States v. Leslie M. Toth*, Ct. No. 09-00183, and *United States v. Lee-Hunt Int'l, Inc.*, Ct. No. 02-00816, respectively.

¹⁶⁷ Appendix C at *Leslie M. Toth*, Ct. No. 09-00183; *Lee-Hunt Int'l*, Ct. No. 02-00816.

¹⁶⁸ *DOJ Policy on ADR*, *supra* note 120, at 36,901 (July 15, 1996). This is consistent with plaintiff's opposition to defendant's motion for an order of referral to mediation in *Tenacious Holdings*, in which Plaintiff, United States, disagreed that the relatively small dollar amount associated with the case makes it "unimportant." *Tenacious Holdings, Inc. v. United States*, Ct. No. 12-00173, Slip Op. 13-62, 2014 WL 4345804 at *2 (Ct. Int'l Trade May 15, 2013).

¹⁶⁹ MEDIATION GUIDELINES, *supra* note 9, at § II(E).

¹⁷⁰ *See, e.g., Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade May 12, 2008), Doc. No. 86 ("The mediation resulted in a settlement which has not yet been reduced to writing."); *Family Delight Foods, Inc. v. United States*, Ct. No. 10-10036 (Ct. Int'l Trade July 26, 2012), Doc. No. 51 ("The mediation resulted in a settlement of all the issues; the Court is to retain jurisdiction over the settlement.").

conformed to the three options, and did not include an indication of whether the cases that failed to reach a mediated settlement did ultimately settle prior to the Court issuing a final judgment.

Regardless of mediation results, mediation can still add value. One group of dispute resolution researchers "deem the following party goals 'very substantially served by mediation': speed, privacy, minimize costs, maintain/improve relationships, create new solutions, party control of the process, transformation of the parties, provide a satisfying process, and improve understanding of the dispute."¹⁷¹ Another group "emphasizes that clients have much to gain (and very little to lose) by trying mediation, including 1) resolving own dispute; 2) selecting forum for all issues — legal and non legal [sic]; 3) preserving or continuing relationships; 4) avoiding precedent; 5) developing creative remedies; 6) forming enduring settlement; 7) maintaining confidentiality; 8) saving time and money; and 9) 'cleaning up' the case (dispose of some issues, solidify a discovery schedule, and plan for resolving remaining issues)."¹⁷²

A review of the cases that failed to settle in mediation but settled post-mediation appears to conform with the foregoing research. Of the 16 mediated § 1581(a)/§ 1514(a)(2) classification cases, 14 were settled post-mediation, one is still pending, and one was disposed of in a dispositive opinion.¹⁷³ One § 1581(a)/§ 1514(a)(3) case also settled post-mediation.¹⁷⁴ It may be notable that, in all 15 cases settled after mediation, the parties entered mediation during ongoing settlement negotiations.¹⁷⁵ It may also be notable that in five cases in which the Court denied a party's motion for an order of referral to mediation, i.e., the parties did not have the above-referenced benefits associated with mediation, the parties were still able to settle their differences prior to the Court issuing a final judgment.¹⁷⁶

¹⁷¹ COLE, *Mediation*, *supra* note 135, at § 5:9.

¹⁷² *Id.*

¹⁷³ Appendices B.2 and C. *Park B. Smith* involved 17 different cases; however, three cases that were settled were not referred to mediation. See *Park B. Smith v. United States*, Ct. Nos. 96-00344, 04-00324, 06-00206 (Ct. Int'l Trade). It is likely that two of those three cases settled due to successful mediation in the other 14 cases. The third case, which was the test case (Ct. No. 96-00344), was settled prior to the 14 cases being referred to mediation. *Id.*

¹⁷⁴ Appendices B.4 and C at *Allstates Trading & Clothing Co. v. United States*, Ct. No. 04-00245 (Ct. Int'l Trade). Note that CM/ECF categorized this case under § 1514(a)(5).

¹⁷⁵ Appendix C at *Park B. Smith*, Ct. Nos. 94-00546, 95-00043, 95-00184, 95-00701, 95-01180, 96-01810, 96-02594, 97-00936, 98-00019, 99-00419, 99-00749, 00-00411, 01-00084, 01-00952; *Allstates Trading & Clothing*, Ct. No. 04-00245.

¹⁷⁶ Appendix C at *ABB Flexible Automation, Inc. v. United States*, Ct. No. 02-00664 (Ct. Int'l Trade); *Marine Transport Corp. v. United States*, Ct. No. 06-00046 (Ct. Int'l Trade); *City of Fresno/Fresno–Yosemite Int'l Airport v. United States*, Ct. No. 10-00137 (Ct. Int'l Trade); *United States v. Washington Int'l Ins. Co.*, Ct. No. 09-00459 (Ct. Int'l Trade); *United States v. ABC Farma, Inc.*, Ct. No. 12-00041 (Ct. Int'l Trade).

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

IV. CONCLUSION

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

¹⁷⁷ USCIT R. 1.

APPENDIX A.1 - CASES CLOSED AT THE USCIT: 01/01/04 - 09/01/14

JURISDICTION/CATEGORY	NUMBER OF CASES¹
28 U.S.C. § 1581(a) Denied Protests²	3013
19 U.S.C. § 1514³ Detail	
(a)(1) Valuation	314
(a)(2) Classification	1819
(a)(2) Rate of Duty	486
(a)(3) Charges or Extractions	567
(a)(4) Exclusion	34
(a)(4) Demand for Redelivery	36
(a)(5) Liquidation/Reliquidation	557
(a)(6) Denial of Drawback	132
(a)(7) Refusal to Reliquidate	77
28 U.S.C. § 1581(a)/19 U.S.C. § 1514 Detail Total²	4022
(b) Domestic Interested Parties Petition	1
(c) AD/CVD	1195
(d) Trade Adjustment Assistance	188
(e) Government. Procurement/Country of Origin	1
(f) Disclosure of Proprietary Information	0
(g) Customs Broker's Licensing	15
(h) Pre-Importation Rulings	7
28 U.S.C. § 1581(i) Residual²	1867
28 U.S.C. § 1581(i) Residual Detail	
(i)(1) Rev. from Imports or Tonnage	1217
(i)(2) Tariffs, Duties, Fees, etc.	837
(i)(3) Embargoes or Other	45
(i)(4) Administration and Enforcement	663
28 U.S.C. § 1581(i) Residual Detail Total²	2762
28 U.S.C. § 1582	138
28 U.S.C. § 1584	0

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

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

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

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

APPENDIX A.2 - CASES CLOSED AT THE USCIT BY DISPOSITION METHOD: 01/01/04 - 09/01/14

JURISDICTION/CATEGORY	DISPOSITION METHOD								
	Slip Op. (Dispos.)	Jdgmt. Order	Order of the Court	Order of Dism.	Vol. Dism., USCIT R. 41(a)(1)(A)(i)	Vol. Dism., USCIT R. 41(a)(1)(A)(ii)	SJOASF, USCIT R. 58.1	Other ¹	Total
28 U.S.C. § 1581 Denied Protests									
28 U.S.C. § 1581(a) Denied Protests²	216	57	389	79	864	193	979	235	3012
19 U.S.C. § 1514³ Detail									
(a)(1) Valuation	11	19	11	16	77	25	112	43	314
(a)(2) Classification	146	28	25	51	554	102	756	157	1819
(a)(2) Rate of Duty	37	1	2	1	153	27	220	45	486
(a)(3) Charges or Extractions	21	12	348	3	98	28	37	20	567
(a)(4) Exclusion	6	0	1	1	14	5	1	6	34
(a)(4) Demand for Redelivery	1	0	0	0	20	7	7	1	36
(a)(5) Liquidation/Reliquidation	47	6	4	10	171	25	235	59	557
(a)(6) Denial of Drawback	13	1	3	3	54	10	37	11	132
(a)(7) Refusal to Reliquidate	13	1	7	1	17	10	19	9	77
28 U.S.C. § 1581(a)/19 U.S.C. § 1514 Detail Total²	295	68	401	86	1158	239	1424	351	4022
(b) Domestic Interest. Parties Petition	0	0	0	0	1	0	0	0	1
(c) AD/CVD	607	40	65	30	133	318	0	2	1195
(d) Trade Adjustment Assistance	76	7	19	0	12	74	0	0	188
(e) Government Procurement/Country of Origin	0	0	0	0	0	1	0	0	1
(f) Disclosure of Property Information.	0	0	0	0	0	0	0	0	0
(g) Customs Broker's Licensing	8	0	0	0	1	6	0	0	15
(h) Pre-Importation Rulings	4	0	1	0	2	0	0	0	7
28 U.S.C. § 1581(i) Residual²	182	48	1033	201	261	75	66	1	1867

JURISDICTION/CATEGORY**DISPOSITION METHOD**

	Slip Op. (Dispos.)	Jdgmt. Order	Order of the Court	Order of Dism.	Vol. Dism., USCIT R. 41(a)(1)(A)(i)	Vol. Dism., USCIT R. 41(a)(1)(A)(ii)	SJOASF, USCIT R. 58.1	Other ¹	Total
28 U.S.C. § 1581(i) Residual Detail									
(i)(1) Rev. from Imports or Tonnage	47	7	875	87	149	26	26	0	1217
(i)(2) Tariffs, Duties, Fees, etc.	70	27	380	140	152	33	35	0	837
(i)(3) Embargoes or Other	8	1	2	8	0	3	23	0	45
(i)(4) Administration and Enforcement	106	36	258	57	117	33	55	1	663
28 U.S.C. § 1581(i) Residual Detail Total²	231	71	1515	292	418	95	139	1	2762
28 U.S.C. § 1582	28	9	0	11	18	53	2	17	138
28 U.S.C. § 1584	0	0	0	0	0	0	0	0	0

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

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

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

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

APPENDIX B.1 - 28 U.S.C. § 1581(a)/19 U.S.C. § 1514(a)(1) MEDIATION AT THE USCIT: 01/01/04-09/01/14

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

Source: Appendix C.

APPENDIX B.2 - 28 U.S.C. § 1581(a)/19 U.S.C. § 1514(a)(2) MEDIATION AT THE USCIT: 01/01/04-09/01/14

CASES	USCIT Ct. No.	Mediation initiated by motion (M) or Order (O)?	If (M), consent motion (C) or opposed (O)?	If (M), granted (G) or denied (D)?	Amount originally at issue?	Were the issues settled through mediation?	If (Y), amount of Settlement?	If (N), were the issues ultimately settled?	If (Y), amount of settlement?
<i>Park B. Smith, Ltd. v. United States</i>	94-00546	(O)	N/A	N/A	Duties on all merchandise between 5.4-7.75%, inclusive	(N)	N/A	(Y) USCIT R. 58.1	The duties on certain merchandise was reduced to 0.00%
	95-00043								
	95-00184								
	95-00701								
	95-01180								
	96-01810								
	96-02594								
	97-00936								
	98-00019								
	99-00419								
	99-00749								
	00-00411								
	01-00084								
	01-00952								
	96-00344	N/A	N/A	N/A		N/A	N/A		
	04-00324	N/A	N/A	N/A		N/A	N/A		
	06-00206	N/A	N/A	N/A		N/A	N/A		
<i>ABB Flexible Automation, Inc. v. United States</i>	02-00664	(M) by P	(O)	(D)	Duties at 2.5% or 2.7%, depending on the merchandise	N/A	N/A	(Y) USCIT R. 58.1	Duties at 0.00%, 1.6%, and 1.8%, depending on the merchandise
<i>BenQ America Corp. v. United States</i>	05-00637	(O)	N/A	N/A	Duties at 5%	(N)	N/A	Pending	Pending
<i>Kahrs Int'l Inc. v. United States</i>	07-00343	(O)	N/A	N/A	Duty at 8%	(N)	N/A	(N)	N/A

Source: Appendix C.

APPENDIX B.3 - 28 U.S.C. § 1581(a)/19 U.S.C. § 1514(a)(3) MEDIATION AT THE USCIT: 01/01/04-09/01/14

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

Source: Appendix C.

APPENDIX B.4 - 28 U.S.C. § 1581(a)/19 U.S.C. § 1514(a)(5) MEDIATION AT THE USCIT: 01/01/04-09/01/14

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

Source: Appendix C.

APPENDIX B.5 - 28 U.S.C. § 1581(d) MEDIATION AT THE USCIT: 01/01/04-09/01/14

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

Source: Appendix C.

APPENDIX B.6 - 28 U.S.C. § 1581(i) MEDIATION AT THE USCIT: 01/01/04-09/01/14

CASES	USCIT Ct. No.	CATEGORY	Mediation initiated by motion (M) or Order (O)?	If (M), consent motion (C) or opposed (O)?	If (M), granted (G) or denied (D)?	Amount originally at issue?	Were the issues settled through mediation?	If (Y), amount of Settlement?	If (N), were the issues ultimately settled?	If (Y), amount of settlement?
<i>Int'l Custom Prods., Inc. v. United States</i>	05-00509	§ 1581(i)(1) - Rev. from Imp. Ton.	(O)	N/A	N/A	Single entry bonds valued at 3 times value	No, but plaintiff was able to enter its merchandise unencumbered by the single entry bonds.	N/A	N/A	N/A
<i>Trustees in Bankruptcy of North American Rubber Thread Co. v. United States ("Rubber Thread Co.")</i>	05-00539	§ 1581(i)(1) - Rev. from Imp. Ton.	(M) by P	(O)	D	Unk.	N/A	N/A	N/A	N/A
<i>Kahrs Int'l Inc. v. United States</i>	07-00343	§ 1514(a)(2) Class./Rate of Duty; § 1514(a)(5) Liquid./Reliquid.; § 1581(i)(1) - Rev. from Imp. Ton.	(O)	N/A	N/A	Duty at 8%	(N)	N/A	(N)	N/A
<i>City of Fresno/Fresno-Yosemite Int'l Airport v. United States ("City of Fresno")</i>	10-00137	§ 1581(i)(1) - Rev. from Imp. Ton.; § 1581(i)(4) - Admin. and Enforce.	(M) by D	(O)	D	\$991,517.00 in duties	N/A	N/A	(Y) USCIT R. 41(a)(1)(A)(ii)	Unk.
<i>Family Delight Foods, Inc. v. United States</i>	10-00136	§ 1514(a)(5) - Liquid./Reliquid.; § 1581(i)(2) - Duties, Taxes, Fees, etc.;	(O)	N/A	N/A	Unk.	(Y)	Unk.	N/A	N/A

Source: Appendix C.

APPENDIX B.7 - 28 U.S.C. § 1582 MEDIATION AT THE USCIT: 01/01/04-09/01/14

CASES	USCIT Ct. No.	Mediation initiated by motion (M) or Order (O)?	If (M), consent motion (C) or opposed (O)?	If (M), granted (G) or denied (D)?	Amount originally at issue?	Were the issues settled through mediation?	If (Y), amount of Settlement?	If (N), were the issues ultimately settled?	If (Y), amount of settlement?
<i>United States v. ITT Industries, Inc.</i>	97-01777	(O)	N/A	N/A	\$619,515.33 in antidumping duties; \$109,418.81 in penalties (interest)	(N)	N/A	(N) - antidumping duties; (Y) - penalty (interest)	\$54,709.41 - penalty (interest)
<i>United States v. Optrex America, Inc.</i>	02-00646	(O)	N/A	N/A	\$959,635.04 in duties; \$1,919,270.08 in penalties.	(N)	N/A	(N)	N/A
<i>United States v. Lee-Hunt Int'l, Inc.</i>	02-00816	(O)	N/A	N/A	Pres. Lee, V.P. Baughman, LHI - \$240,936.65 in duties and \$1,746,964.99 in penalties; Washington International- \$100,000 in duties; Frontier - \$50,000 in duties.	(Y) USCIT R. 54(b)	Pres. Lee, LHI - \$25,000; V.P. Baughman - \$2500; Wash. Int'l - \$100,000; Pres. Lee to reimburse Wash. Int'l; Frontier not a party to settlement.	N/A	N/A
<i>United States v. Leslie M. Toth</i>	09-00183	(O)	N/A	N/A	\$2,846,230.87 in duties; \$3,350,923 in penalties.	(Y) USCIT R. 41(a)(1)(A)(ii)	Unk. Dismissed without prejudice.	N/A	N/A
<i>United States v. Washington Int'l Ins. Co. ("Washington Int'l Ins. I")</i>	09-00449	(O)	N/A	N/A	\$63,288.78 in duties.	(Y) USCIT R. 41(a)(1)(A)(ii) - D only.	Unk.	(Y) USCIT R. 41(a)(1)(A)(ii) - 3rd party D	Dismissed with prejudice.
<i>United States v. Washington Int'l Ins. Co. ("Washington Int'l Ins. II")</i>	09-00459	(M) by 3rd Party D	(O)	(D)	\$142,245.00 in duties.	N/A	N/A	(Y) USCIT R. 41(a)(1)(A)(ii)	Dismissed with prejudice (all parties).
<i>United States v. Tenneco Automotive</i>	10-00130	(M) by D (M) by P	D's (M) (O) P's (M) (O)	D's (M) (?) P's (M) (D)	\$22,332.70 in duties; \$44,665.40 in penalties.	(Y) USCIT R. 41(a)(1)(A)(ii)	All claims dismissed with prejudice.	N/A	N/A
<i>United States v. ABC Farma, Inc.</i>	12-00041	(M) by D	(O)	(D)	\$5,988.76 in penalties.	N/A	N/A	(Y) USCIT R. 41(a)(1)(A)(ii)	Dismissed with prejudice.
<i>United States v. Tenacious Holdings, Inc.</i>	12-00173	(M) by D	(O)	(G)	\$1339.09 in duties; \$51,544.40 in penalties.	pending	pending	pending	pending

Source: Appendix C

APPENDIX C: PROCEDURAL HISTORY OF MEDIATION AT THE USCIT

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

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

a) *Mast Industries, Inc. v. United States*¹

The procedural history of *Mast Industries* begins nine years prior to the effective date of the Court's Mediation Guidelines and spans over 13 years.² In Mast's summons, the issue was characterized as "whether the imported [wearing apparel] is subject to appraisal at the invoice values less [an] allowance for defective merchandise."³ The issues set for trial, all of which were fact issues, were: (1) whether the plaintiff will have established that it contracted for defect-free merchandise; (2) whether plaintiff will have linked the defective articles to specific entries; and (3) whether plaintiff will have proved the amount of duty allowance for each entry.⁴ The value of the apparel at issue was set at \$11,631,863.82 and the amount of allowance for defective merchandise sought by Mast was \$1,122,953.95.⁵

After spending 15 months on the Reserve Calendar, Mast filed the first complaint.⁶ The United States filed its first answer eight months later.⁷ Discovery opened, and one year passed

¹ *Mast Industries, Inc. v. United States*, Ct. No. 95-00175 was the test case number assigned for the following cases: 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142. On May 12, 2006, the Court dismissed Ct. Nos. 98-00394, 02-00141, and 02-00142 with prejudice and consolidated the remaining cases under Ct. No. 95-00175. Order, *Mast Indus.*, Ct. Nos. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (Ct. Int'l Trade May 12, 2006), Doc. No. 63.

² U.S. CT. INT'L TRADE, GUIDELINES FOR COURT-ANNEXED MEDIATION (2003) (added Sept. 30, 2003, eff. Jan. 1, 2004; amended May 25, 2004, eff. Sept. 1, 2004; amended Dec. 6, 2011, eff. Jan. 1, 2012) [hereinafter MEDIATION GUIDELINES].

³ Summons, *Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade Feb. 14, 1995), Doc. No. 1.

⁴ Proposed Pretrial Order, Schedule F, *Mast Indus.*, Ct. Nos. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (Ct. Int'l Trade May 12, 2006), Doc. No. 62. The United States characterized the third issue as whether plaintiff will have proved the amount of allowance for the defect. Joint Proposed Pretrial Order at 14, Schedule F-2, Defendant's Statement of the Issues, *Mast Indus.*, Ct. No. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (Ct. Int'l Trade May 11, 2006), Doc. No. 60.

⁵ Proposed Pretrial Order at 26, *Mast Indus.*, Ct. No. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (Ct. Int'l Trade May 11, 2006), Doc. No. 60.

⁶ Complaint, *Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade July 31, 1997), Doc. No. 6.

⁷ Answer, *Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade Mar. 3, 1998), Doc. No. 13.

until the case was suspended and a test case designated.⁸ Two years later, the parties notified the Court that they had entered into settlement negotiations and the case was placed on the Suspended Disposition Calendar.⁹ Over three years later, the Court ordered the parties to either file (1) a stipulated judgment, (2) a scheduling order governing the action until final disposition, or (3) a stipulation of dismissal.¹⁰

Five months after the close of discovery¹¹ and one month after plaintiff filed a request for trial¹², the Court issued a procedural order and a scheduling order. In the former, the Court dismissed three actions and consolidated the remaining 10 actions.¹³ In the latter, the Court (1) remanded the case to CBP for further review of documents intended to facilitate settlement, and (2) ordered the defendant to report to the court every 30 days the progress made towards settlement.¹⁴ The parties filed no less than 10 status reports with the Court.¹⁵ In the last such report, plaintiff requested a pre-trial conference because defendant stated that settlement was not possible.¹⁶

Four days after plaintiff's request, the Court held a conference, and one day later, the Court issued an order of referral to court-annexed mediation.¹⁷ After one 30-day extension of the

⁸ Order, *Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade Mar. 24, 1999), Doc. No. 26N.

⁹ Order, *Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade Mar. 12, 2001), Doc. No. 30 (suspending the case pursuant to USCIT R. 85).

¹⁰ Order, *Mast Indus.*, Ct. Nos. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (Ct. Int'l Trade Sept. 30, 2005), Doc. No. 48.

¹¹ Order, *Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade Dec. 1, 2005), Doc. No. 50 (indicating discovery due February 15, 2006).

¹² Request for Trial, *Mast Indus.*, Ct. No. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (Ct. Int'l Trade Apr. 25, 2006), Doc. No. 55.

¹³ Order, *Mast Indus.*, Ct. Nos. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (Ct. Int'l Trade May 12, 2006), Doc. No. 63.

¹⁴ Order, *Mast Indus.*, Ct. Nos. 95-00175, 95-00398, 95-00998, 95-01314, 96-01415, 97-00938, 98-00394, 98-03086, 02-00138, 02-00139, 02-00140, 02-00141, 02-00142 (Ct. Int'l Trade May 12, 2006), Doc. No. 64.

¹⁵ Status Reports, *Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade, June 12, 2006, July 12, 2006, Aug. 10, 2006, Oct. 20, 2006, Feb. 28, 2007, May 30, 2007, July 2, 2007, Sept. 4, 2007, Nov. 5, 2007, Jan. 4, 2008), Doc. Nos. 66-75.

¹⁶ Status Report, *Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade Jan. 4, 2008), Doc. No. 75.

¹⁷ Order of Referral to Mediation, *Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade Jan. 9, 2008), Doc. No. 78.

stay, the Judge Mediator issued the mediation report, which indicated that all issues were settled, but not yet reduced to writing.¹⁸ At this point, it had been seven years since the first indication that the parties were in settlement negotiations¹⁹, and five months from the date the case was ordered to mediation.²⁰ Two months later, the presiding Judge signed the settlement agreement, which provided Mast a refund of \$1,508,926²¹, dismissed claims associated with 32 of the 220 entries under review, and dismissed the case.²² The settlement agreement did not indicate the basis on which the case was dismissed.²³

b) *Heng Ngai Jewelry, Inc. v. United States*²⁴

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

Once the answer was filed, the next 26 months consisted of discovery.²⁵ Plaintiff and defendant, one and three months after the close of discovery, respectively, filed motions for summary judgment.²⁶ The Court denied both motions because it determined that further findings

¹⁸ Report of Mediation, *Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade May 12, 2008), Doc. No. 85.

¹⁹ Order, *Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade Mar. 12, 2001), Doc. No. 30.

²⁰ Order of Referral to Mediation, *Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade Jan. 9, 2008), Doc. No. 78.

²¹ \$567,168 in duties and \$941,758 in interest.

²² Order & Settlement Agreement, *Mast Indus.*, Ct. No. 95-00175 (Ct. Int'l Trade July 7, 2008), Doc. No. 87.

²³ *Id.* The two bases by which it could have been dismissed are USCIT Rule 58.1, Stipulated Judgment on Agreed Statement of Facts, or USCIT Rule 41, Voluntary Dismissal. See MEDIATION GUIDELINES, *supra* note 2, at § II(D).

²⁴ The Court consolidated *Heng Ngai Jewelry, Inc. v. United States*, Ct. Nos. 98-03019 and 99-00352 under Ct. No. 98-00319. Order, *Heng Ngai Jewelry*, Ct. No. 98-03019 (Ct. Int'l Trade July 25, 2001), Doc. No. 14.

²⁵ Docket Sheet, *Heng Ngai Jewelry*, Ct. No. 98-03019 (Ct. Int'l Trade Aug. 26, 2002).

²⁶ Order, *Heng Ngai Jewelry*, Ct. No. 98-03019 (Ct. Int'l Trade Dec. 20, 2002), Doc. No. 30; Motion for Summary Judgment With Statement of Material Facts to Which There Are No Genuine Issues to be Tried, Declarations and Exhibits, *Heng Ngai Jewelry*, Ct. No. 98-03019 (Ct. Int'l Trade Jan. 27, 2003), Doc. No. 31; Response in Opposition to Motion for Partial Summary Judgment and Cross Motion for Partial Summary Judgment With Response to Plaintiff's Statement of Material Facts to Which There Are No Genuine Issues to be Tried; Separate Statement of Material Facts to Which There Are No Genuine Issues to be Tried; Declarations & Exhibits, *Heng Ngai Jewelry*, Ct. No. 98-03019 (Ct. Int'l Trade Mar. 24, 2003), Doc. No. 36.

of fact were necessary to resolve four issues.²⁷ Three months later, the Court issued a scheduling order setting a trial date.²⁸

One month before trial, citing the desire to conserve resources that would otherwise be expended during trial, plaintiff filed an unopposed motion for referral to court-annexed mediation.²⁹ Plaintiff's order was granted two weeks later.³⁰ After two 30-day extensions of the original 60-day mediation period, the parties filed a stipulated judgment on an agreed statement of facts.³¹ In that document, the parties agreed that CBP originally appraised 31 entries at 129.6 percent of the invoice price, and 10 entries at 110 percent of the invoice price.³² Based on the stipulated judgment, however, the parties also agreed that the value of all entries should be appraised at 124.6 percent of the invoice price, resulting in a \$7314 refund to the plaintiff, with no interest payable.³³

²⁷ *Heng Ngai Jewelry*, 318 F. Supp. 2d 1291, 1295-1304 (Ct. Int'l Trade 2004).

²⁸ Order, *Heng Ngai Jewelry*, Ct. No. 98-03019 (Ct. Int'l Trade June 16, 2004), Doc. No. 71.

²⁹ Plaintiff's Motion for Referral to Court-Annexed Mediation & Proposed Order of Referral to Mediation, *Heng Ngai Jewelry*, Ct. No. 98-03019 (Ct. Int'l Trade Oct. 14, 2004), Doc. No. 73. In plaintiff's memorandum attached to its motion, plaintiff avers that it sought defendant's consent, but there was insufficient time for counsel to confer with its client under the 30-day deadline set forth in the Mediation Guidelines, i.e., motions for referral to mediation must be made at least 30 days prior to trial. Plaintiff's Motion for Referral to Court-Annexed Mediation, *Heng Ngai Jewelry*, Ct. No. 98-03019 (Ct. Int'l Trade Oct. 14, 2004), Doc. No. 73.

³⁰ In the order granting the motion and referring the case to mediation, the Presiding Judge noted a telephone conversation between him and the defendant in which the defendant consented to mediation. Order of Referral to Mediation, *Heng Ngai Jewelry*, Ct. No. 98-03019 (Ct. Int'l Trade Oct. 28, 2004), Doc. No. 75.

³¹ Stipulated Judgment on Agreed Statement of Facts, *Heng Ngai Jewelry*, Ct. No. 98-03019 (Ct. Int'l Trade Apr. 8, 2005), Doc. No. 82; Order on Stipulated Judgment, *Heng Ngai Jewelry*, Ct. No. 98-03019 (Ct. Int'l Trade Apr. 13, 2005), Doc. No. 83.

³² *Id.*

³³ *Id.*

c) *Skechers USA, Inc. v. United States*³⁴

Skechers USA covered hundreds of entries – the associated denied protests were challenged in 34 different actions spanning almost 12 years. The issue common in all 34 cases was whether interest paid on outstanding invoices of imported footwear was dutiable. The parties agreed on the four-part test for excludable interest memorialized in Treasury Decision 85-111 and affirmed in *Luigi Bormioli Corp. v. United States*³⁵; however, the parties could not initially agree on whether plaintiff's proffered facts met two parts of the four-part test.³⁶ Ten months after the Court issued its order designating a test case, defendant filed a motion for summary judgment.³⁷ Declining to rule on the defendant's motion, the Court issued an order that included guidelines to assist the parties in resolving their factual disputes and instructions to the parties to report on progress in settlement negotiations or allowing defendant to update its motion for summary judgment.³⁸ Presumably, those negotiations resulted in the parties filing a consent motion to consolidate three cases, which the Court granted.³⁹ Two months thereafter, defendant filed a "renewed" motion for summary judgment and an accompanying memorandum.⁴⁰

After considering defendant's response and plaintiff's reply to plaintiff's renewed motion for summary judgment, the Court issued an opinion granting defendant's motion in part, with the exception of three entries, the associated interest payments of which were supported by written agreements.⁴¹ According to the Court, genuine issues of material fact still existed regarding the timing of the interest payments and whether the payments qualified as "interest" pursuant to the

³⁴ *Skechers USA, Inc. v. United States*, Ct. No. 98-03245 (Ct. Int'l Trade). Ct. No. 98-03245 was the test case number assigned for the following cases: Ct. Nos. 96-01966, 96-02780, 96-02793, 97-00149, 97-01077, 97-01628, 98-02361, 99-00240, 99-00406, 99-00516, 99-00562, 99-00632, 99-00697, 00-00005, 00-00094, 00-00111, 00-00175, 00-00236, 00-00370, 00-00419, 00-00456, 00-00474, 00-00520. See Order Designating Test Case & Suspending Related Actions, *Skechers USA*, Ct. No. 98-03245 (Ct. Int'l Trade Dec. 21, 2000). Later in the case, Ct. Nos. 99-00697, 00-00456 were designated and consolidated under test case Ct. No. 98-03245. Order Re: Test Case, *Skechers USA*, Ct. No. 98-03245 (Ct. Int'l Trade Sept. 13, 2002), Doc. No. 59.

³⁵ *Luigi Bormioli Corp. v. United States*, 304 F. 3d 1362 (Fed. Cir. 2002).

³⁶ *Skechers USA*, 27 C.I.T. 1225 at 1230-31 (2003).

³⁷ Order Re: Test Case, *Skechers USA*, Ct. No. 98-03245 (Ct. Int'l Trade Sept. 13, 2002), Doc. No. 59 (designating Ct. No. 98-03245 as test case); Defendant's Renewed Motion for Summary Judgment with Appendix and Memorandum in Support, *Skechers USA*, Ct. No. 98-03245 (Ct. Int'l Trade Oct. 31, 2001), Doc. No. 26.

³⁸ Order, *Skechers USA*, Ct. No. 98-03245 (Ct. Int'l Trade Feb. 8, 2002), Doc. No. 44.

³⁹ Order, *Skechers USA*, Ct. No. 98-03245 (Ct. Int'l Trade Sept. 25, 2002), Doc. No. 59.

⁴⁰ Defendant's Supplemental Memorandum in Support of Renewed Motion for Summary Judgment, *Skechers USA*, Ct. No. 98-03245 (Ct. Int'l Trade Nov. 26, 2002), Doc. No. 64.

⁴¹ *Skechers USA*, 27 C.I.T. 1225 (2003).

"applicable published guidance."⁴² With regard to the unresolved issues, the Court instructed the parties to attempt to resolve the remaining issues and report to the Court in 15 days "as to whether mediation is desired."⁴³

The Court issued an order referring the case to mediation only after the court granted plaintiff's request to set a trial date and conducted a telephone conference with the parties.⁴⁴ The parties reached a settlement, in which they agreed that the interest payments associated with the three entries was refundable, with interest.⁴⁵ The mediation session that appears to have served as the basis for the settlement took less than 30 days. At that time, over six years had passed from the first indication that the parties were in settlement negotiations to the date on which an order of stipulated judgment on an agreed statement of facts was issued.

After the completion of mediation associated with the three entries, settlement negotiations continued in the 31 cases. All were resolved either through stipulated dismissals⁴⁶ or stipulated judgments on agreed statements of fact⁴⁷ with a total of \$344,085.81 refunded, excluding any interest as provided by law.⁴⁸

⁴² *Id.* at 1234-35.

⁴³ Note that this opinion was issued five months before the effective date of the Mediation Guidelines. *See* MEDIATION GUIDELINES, *supra* note 2.

⁴⁴ Order of Referral to Mediation, *Skechers USA*, Ct. No. 98-03245 (Ct. Int'l Trade July 19, 2004), Doc. No. 90; Order Granting Trial Request, *Skechers USA*, Ct. No. 98-03245 (Ct. Int'l Trade June 29, 2004), Doc. No. 87; and Telephone Conference, *Skechers USA*, Ct. No. 98-03245 (Ct. Int'l Trade July 12, 2004), Doc. No. 88

⁴⁵ Proposed Settlement Agreement, *Skechers USA*, Ct. No. 98-03245 (Ct. Int'l Trade Aug. 12, 2004), Doc. No. 94; Judgment Order, *Skechers USA*, Ct. No. 98-03245 (Ct. Int'l Trade Aug. 16, 2004), Doc. No. 95.

⁴⁶ The parties agreed to dismiss the following cases: Ct. Nos. 96-01966, 96-02780, 96-02793, 97-01077, 97-00149, and 97-01628. Stipulation and Order of Dismissal, *Skechers USA*, Ct. No. 96-01966 (Ct. Int'l Trade Oct. 27, 2005), Doc. No. 20, Order, *Skechers USA*, Ct. No. 99-00632 (Ct. Int'l Trade Ct. 19, 2007), Doc. No. 24.

⁴⁷ The parties agreed to stipulated judgments on agreed statements of fact on the following cases: Ct. Nos. 98-02361, 99-00240, 99-00406, 99-00516, 99-00562, 00-00005, 00-00094, 00-00111, 00-00175, 00-00236, 00-00370, 00-00419, 00-00474, 00-00520, 01-00017, 01-00029, 01-00075, 01-00076, 01-00133, 01-00134, 01-00575, 05-00643, 05-00644, 05-00645. *See, e.g.*, Order on Stipulated Judgment, *Skechers USA*, Ct. No. 98-02361 (Ct. Int'l Trade Nov. 27, 2007), Doc. No. 22.

⁴⁸ Order on Stipulated Judgment, *Skechers USA*, Ct. No. 98-02361 (Ct. Int'l Trade Nov. 27, 2007), Doc. No. 22 (\$151.30 refund); Ct. No. 99-00240 (Ct. Int'l Trade Dec. 27, 2007), Doc. No. 27 (\$6,881.15 refund); Ct. No. 99-00406 (Ct. Int'l Trade Dec. 27, 2007), Doc. No. 28 (\$4,282.44 refund); Ct. No. 99-00516 (Ct. Int'l Trade Nov. 27, 2007), Doc. No. 18 (\$4,367.07 refund); Ct. No. 99-00562 (Ct. Int'l Trade Dec. 27, 2007), Doc. No. 20 (\$6,363.18 refund); Ct. No. 00-00005 (Ct. Int'l Trade June 24, 2008), Doc. No. 31 (\$24,701.82 refund); Ct. No. 00-00094 (Ct. Int'l Trade Oct. 31, 2007), Doc. No. 21 (\$25,051.28 refund); Ct. No. 00-00111 (Ct. Int'l Trade Nov. 27, 2007), Doc. No. 19 (\$2,142.96); Ct. No.

d) *Continental Teves, Inc. v. United States*⁴⁹

The underlying issues in *Continental Teves* were CBP's denial of plaintiff's protests. Plaintiff challenged CBP's assessment of duties on research and development ("R&D") as assists.⁵⁰ Plaintiff was entering parts for automotive equipment and valuing assists based on a formula memorialized in a written agreement with CBP.⁵¹ Plaintiff took the position that the formula was not legally supportable as it included R&D conducted in the United States and used budgeted R&D costs, rather than actual R&D costs, among other alleged deficiencies.⁵²

The entire procedural history of the cases took place over the course of seven years. During that period, the Court once designated a test case and three times set a date for trial. The parties set both issues of fact and issues of law for trial. After the Court set the second trial date, it granted the parties' consent motion to suspend the scheduling order and ordered the parties to

00-00175 (Ct. Int'l Trade Apr. 10, 2007), Doc. No. 34 (\$43,456.53 refund); Ct. No. 00-00236 (Ct. Int'l Trade Feb. 4, 2008), Doc. No. 22 (\$8,991.74 refund); Ct. No. 00-00370 (Ct. Int'l Trade Feb. 4, 2008), Doc. No. 22 (\$24,301.20 refund); Ct. No. 00-00419 (Ct. Int'l Trade Feb. 4, 2008), Doc. No. 22 (\$11,643.92); Ct. No. 00-00474 (Ct. Int'l Trade Nov. 27, 2007), Doc. No. 20 (\$4,497.74 refund); Ct. No. 00-00520 (Ct. Int'l Trade Mar. 10, 2008), Doc. No. 24 (\$20,654.32 refund); Ct. No. 01-00017 (Ct. Int'l Trade June 24, 2008), Doc. No. 33 (\$18,276.16 refund); Ct. No. 01-00029 (Ct. Int'l Trade Mar. 18, 2008), Doc. No. 25 (\$34,122.40), Ct. No. 01-00075 (Ct. Int'l Trade Mar. 18, 2008), Doc. No. 28 (\$24,613.37); Ct. No. 01-00076 (Ct. Int'l Trade Feb. 4, 2008), Doc. No. 23 (\$1400.98 refund); Ct. No. 01-00133 (Ct. Int'l Trade Feb. 4, 2008), Doc. No. 22 (\$1,230.97 refund); Ct. No. 01-00134 (Ct. Int'l Trade Jun, 24, 2008), Doc. No. 33 (\$40,525.52 refund); Ct. No. 01-00575 (Ct. Int'l Trade June 24, 2008), Doc. No. 33 (\$36,429.82 refund); Ct. Nos. 05-00643-00645 were consolidated under Ct. No. 00-175. Order, Ct. No. 00-175 (Ct. Int'l Trade Jan. 12, 2006), Doc. No. 18.

⁴⁹ *Continental Teves, Inc. v. United States*, Ct. No. 03-00782 (Ct. Int'l Trade). Ct. No. 03-00782 was the test case number assigned for the following cases: Ct. Nos. 04-00264, 04-00405, 04-00620, 05-00069, 05-00206, 05-00421, 05-00526. Order, *Continental Teves*, Ct. No. 03-00782 (Ct. Int'l Trade Feb. 2, 2006), Doc. No. 24. After the Court issued an opinion whereby it determined that "neither party would take anything on account of this action," the Court vacated the test case designation and removed the previously suspended cases from suspension. *Continental Teves*, 33 C.I.T. 325 (Apr. 2, 2009); Order, *Continental Teves*, Ct. No. 03-00782 (Ct. Int'l Trade Apr. 14, 2009), Doc. No. 94. Thereafter, upon plaintiff's motion, the Court ordered certain entries to be severed from Ct. No. 04-00264 and designated under a new Ct. No., 09-00221. Order, *Continental Teves*, Ct. No. 04-00264 (Ct. Int'l Trade May 29, 2009), Doc. No. 18.

⁵⁰ In relevant part, 19 U.S.C. § 1401a(h)(1)(iv) defines an assist as any "engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise." One of the exceptions to that rule is work performed in the United States that would otherwise be considered an assist pursuant to the foregoing. 19 U.S.C. § 1401a(h)(1)(B).

⁵¹ Complaint at ¶¶ 7-9, *Continental Teves*, Ct. No. 03-00782 (Ct. Int'l Trade Jan. 13, 2005), Doc. No. 4.

⁵² See, e.g., *id.* at ¶¶ 14-21.

provide the Court with a status report 90 days thereafter.⁵³ Settlement negotiations failed, and the Court issued an opinion and accompanying memorandum in which it found fault with facts the parties used to support their respective positions.⁵⁴ Thereafter, the Court vacated the test case designation for Ct. No 03-00782, and removed from suspension the previously suspended cases.⁵⁵

Two months after the Court removed the cases from suspension, the parties filed consent motions for referral to mediation in the previously suspended cases, and the Court ordered referral to mediation.⁵⁶ Mediation resolved all eight cases within five months of the orders being issued.⁵⁷ That resolution took the form of stipulated judgments in which CBP applied a different multiplier to the invoice price of the merchandise to calculate amounts attributable to the assists.⁵⁸ By that time, over four years passed from the first indication that the parties were in settlement negotiations to the earliest indication that the parties reached settlement.⁵⁹ Sixteen months had passed from the date the case was ordered to mediation to the date the mediation report was signed, indicating that all issues were settled.⁶⁰

⁵³ Order, *Continental Teves*, Ct. No. 03-00782 (Ct. Int'l Trade July 14, 2006), Doc. No. 32.

⁵⁴ *Continental Teves*, 33 C.I.T. 325 (Apr. 2, 2009); Memorandum, *Continental Teves*, Ct. No. 03-00782 (Ct. Int'l Trade Apr. 2, 2009), Doc. No. 90.

⁵⁵ Order, *Continental Teves*, Ct. No. 03-00782 (Ct. Int'l Trade Apr. 14, 2009), Doc. No. 94.

⁵⁶ See, e.g., Joint Motion for Referral to Mediation, *Continental Teves*, Ct. No. 04-00264 (Ct. Int'l Trade June 15, 2009), Doc. No. 20; Order of Referral to Mediation, *Continental Teves*, Ct. No. 04-00264 (Ct. Int'l Trade June 16, 2009), Doc. No. 22.

⁵⁷ See, e.g., Report of Mediation, *Continental Teves*, Ct. No. 04-00264 (Ct. Int'l Trade June 15, 2009), Doc. No. 28.

⁵⁸ See, e.g., Stipulated Judgment on Agreed Statement of Facts, *Continental Teves*, Ct. No. 04-00264 (Ct. Int'l Trade Oct. 5, 2010), Doc. No. 27; Stipulated Judgment on Agreed Statement of Facts, *Continental Teves*, Ct. No. 05-00421 (Ct. Int'l Trade Jan. 4, 2011), Doc. No. 19.

⁵⁹ Consent Motion to Suspend Scheduling Order, *Continental Teves*, Ct. No. 03-00782 (Ct. Int'l Trade July 12, 2006), Doc. No. 31.

⁶⁰ Order of Referral to Mediation, *Continental Teves*, Ct. No. 04-00264 (Ct. Int'l Trade June 16, 2009), Doc. No. 22; Report of Mediation, *Continental Teves*, Ct. No. 04-00264 (Ct. Int'l Trade Oct. 19, 2010), Doc. No. 28.

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

a) *Park B. Smith, Ltd. v. United States*⁶¹

In *Park B. Smith*, plaintiff challenged CBP's classification of various holiday dhurries, placemats, napkins, and table runners under headings, dutiable between, and including, 5.4 percent and 7.7 percent *ad valorem*.⁶² Plaintiff asserted that the merchandise was properly classified as "festive articles," which were non-dutiable.⁶³

⁶¹ *Park B. Smith, Ltd. v. United States*, Ct. No. 96-00344 (Ct. Int'l Trade) was designated as a test case for the following cases: Ct. Nos. 94-00546, 95-00043, 95-00184, 95-00701, 95-01180, 96-01810, 96-02594, 97-00936. Order, *Park B. Smith*, Ct. No. 96-02-00344 (Ct. Int'l Trade Feb. 9, 1999), Doc. No. 11.

Ct. Nos. 96-00344 and all of the cases listed above, other than 97-00936, were originally suspended under another test case, *Midwest of Cannon Falls, Inc. v. United States*, Consol. Ct. No. 92-00206. The parties were unable to settle those actions following the Federal Circuit's decision in that case. *Midwest of Cannon Falls*, 122 F.3d 1423 (Fed. Cir. 1997). The cases were still on the Suspension Disposition Calendar when plaintiff in *Park B. Smith* requested a designation of one of its own cases, Ct. No. 96-00344, as a new test case, and re-suspension of its cases under the same new test case. Because Ct. No. 97-00936 was on the Court's Reserve Calendar and was unassigned, but involved the same plaintiff, class of merchandise, and significant issue of fact or question of law as the other cases for which the plaintiff requested suspension, the court suspended that case under Ct. 96-00344, as well. See Plaintiff's Consent Motion for Designation of a Test Case and for Suspension of Cases at 1 n.1 and accompanying text, *Park B. Smith*, Ct. No. 96-00344 (Ct. Int'l Trade Feb. 3, 1999), Doc. No. 10; Order, *Park B. Smith*, Ct. No. 96-00344 (Ct. Int'l Trade Feb. 9, 1999), Doc. No. 11.

As the case progressed, additional cases were added to the Ct. No. 96-00344 test case: Order, *Park B. Smith*, Ct. No. 98-00019 (Ct. Int'l Trade Nov. 16, 1999), Doc. No. 4; Order, *Park B. Smith*, Ct. No. 99-00419 (Ct. Int'l Trade Dec. 22, 1999), Doc. No. 3; Order, *Park B. Smith*, Ct. Nos. 00-00411, 01-00084, 01-00952 (Ct. Int'l Trade Dec. 9, 2002), Doc. No. 6; Order, *Park B. Smith*, Ct. No. 99-00749 (Ct. Int'l Trade Feb. 24, 2003), Doc. No. 5. The non-test cases were then placed on a Suspension Disposition Calendar for Ct. No. 96-00344. Order, *Park B. Smith*, Ct. Nos. 96-00344, 94-00546 (Ct. Int'l Trade Oct. 3, 2005), Doc. No. 13. Certain of these cases were consolidated under 95-00184. Order, *Park B. Smith*, Ct. Nos. 95-00184, 95-00701, 95-01180, 96-01810, 97-00936, 98-00019, 99-00419, 00-00411, 01-00084, 01-00952, 04-00324, 06-00206 (Ct. Int'l Trade Mar. 20, 2009), Doc. No. 37.

⁶² *Park B. Smith*, 25 C.I.T. 506 (2001). Specifically, CBP classified the merchandise under subheadings 5702.99.1010, HTSUS, as "[c]arpet and other textile floor coverings, woven, not tufted or flocked, whether or not made up, including 'Kelem', 'Schumacks', 'Karamanie', and similar hand-woven rugs: [o]ther, not of pile construction, made up: [o]f other textile materials: [o]f [c]otton, [w]oven, but not made on a power-driven loom," subheading 6302.51.20, HTSUS, as "[o]ther [m]ade [u]p [t]extile [a]rticles; [b]ed [l]inen, table linen, toilet linen, and kitchen linen: [o]ther table linen: [o]f cotton; [t]able cloths and napkins; [o]ther: [p]lain woven," or subheading 6302.51.40, HTSUS, as "[o]ther [m]ade [u]p [t]extile [a]rticles; [b]ed [l]inen, table linen, toilet linen, and kitchen linen: [o]ther table linen: [o]f cotton; [o]ther."

⁶³ *Park B. Smith*, 25 C.I.T. 506 (2001). The Court determined some of the subject merchandise was properly classified in either subheading 9505.10.50, HTSUS, as "[f]estive, carnival and other entertainment articles, including magic tricks, and practical joke articles; parts and accessories thereof:

The case went to trial and the Court found in favor of plaintiff in part and in favor of defendant in part. In arriving at that finding, the Court determined that some of the merchandise was prima facie classifiable in the tariff headings advocated by both parties⁶⁴; however, the Court further determined that the merchandise was excluded from classification in heading 6302, HTSUS, by virtue of Section XI Note 1(t), HTSUS.⁶⁵ Both parties appealed the Court's final judgment to the Federal Circuit.

The Federal Circuit interpreted the term "festive articles" differently than the USCIT, and affirmed in part, vacated in part, and remanded the case back to the USCIT to apply the new definition to the merchandise still at issue.⁶⁶

One month after the Federal Circuit issued its opinion, and one month before the Federal Circuit issued its mandate denying rehearing, the parties held a conference with the USCIT.⁶⁷ Less than two years after the Federal Circuit issued its mandate, the parties stipulated judgment on agreed statement of facts in the test case.⁶⁸ Six months after the Court signed the order stipulating judgment in the test case, the Court removed the suspended cases from the Suspension Disposition Calendar.⁶⁹ Presumably, due to the settlement of the test case, the parties continued settlement negotiations in the previously suspended cases.⁷⁰

Less than two weeks later, after CBP issued a Customs Bulletin limiting the application of the Federal Circuit's decision to only the entries before the Court, plaintiff asked the Court to assist it in resolving 14 of then-active cases.⁷¹ Two weeks later, the Judge issued orders referring

[a]rticles for Christmas festivities and parts and accessories thereof: [o]ther; [o]ther", or subheading 9505.90.60, HTSUS, as "[f]estive, carnival and other entertainment articles, including magic tricks, and practical joke articles; parts and accessories thereof: [o]ther; [o]ther."

⁶⁴ *Park B. Smith*, 25 C.I.T. 506, 2001 WL 576159 at *2-4 (2001).

⁶⁵ *Id.* at *4. Section XI, Note 1(t), HTSUS (2001), states that Section XI, Textiles and Textile Articles (Chapters 50-63, HTSUS), does not cover articles of Chapter 95, HTSUS.

⁶⁶ *Park B. Smith*, 347 F.3d 922, 929 (Fed. Cir. 2003).

⁶⁷ See Docket Sheet – Conference Held on Nov. 24, 2003, at 3:00 pm in Chambers, *Park B. Smith*, Ct. No. 96-00344 (Ct. Int'l Trade Nov. 24, 2003), Doc. No. 34; CAFC Mandate in Appeal at 16, *Park B. Smith*, Ct. No. 96-00344 (Ct. Int'l Trade Mar. 26, 2004), Doc. No. 35.

⁶⁸ Stipulated Judgment, *Park B. Smith*, Ct. No. 96-00344 (Ct. Int'l Trade Mar. 31, 2005), Doc. No. 36; Order on Stipulated Judgment, *Park B. Smith*, Ct. No. 96-00344 (Ct. Int'l Trade Apr. 6, 2005), Doc. No. 37.

⁶⁹ Order, *Park B. Smith*, Ct. Nos. 96-00344, 94-00546 (Ct. Int'l Trade Oct. 3, 2005), Doc. No. 13.

⁷⁰ See, e.g., Status Report, *Park B. Smith*, Ct. No. 94-00546 (Ct. Int'l Trade Apr. 14, 2006), Doc. No. 18.

⁷¹ See Letter, *Park B. Smith*, Ct. Nos. 94-00546, 95-00043, 95-00184, 95-00701, 95-01180, 96-01810, 96-02594, 97-00936, 98-00019, 99-00419, 99-00749, 00-00411, 01-00084, 01-00952 (Ct. Int'l

all 14 cases to mediation.⁷² At this point, it had been 12 years since the first summons was filed, and two and one-half years since the Federal Circuit issued an opinion in the test case.⁷³ The mediation took less 60 days and did not result in a settlement of the issues.⁷⁴ Notwithstanding the lack of settlement in the context of mediation, the parties were ultimately able to settle the cases in approximately two years.⁷⁵ Thirteen of the cases were settled by stipulating judgments on agreed statements of fact and one by voluntary dismissal.⁷⁶ Furthermore, the parties also settled two related cases that were not subject to mediation by stipulating judgments on agreed statements of fact.⁷⁷

Trade Apr. 14, 2006), Doc. No. 18 (citing *Limitation on the Application of the Decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit in Park B. Smith*, 25 C.I.T. 506 (2001), *aff'd in part, vacated in part, and remanded*, 347 F.3d 922 (Fed. Cir. 2003)).

⁷² Order of Referral to Mediation, *Park B. Smith*, Ct. Nos. 94-00546, 95-00043, 95-00184, 95-00701, 95-01180, 96-01810, 96-02594, 97-00936, 98-00019, 99-00419, 99-00749, 00-00411, 01-00084, 01-00952 (Ct. Int'l Trade Apr. 28, 2006), Doc. No. 19.

⁷³ Summons, *Park B. Smith*, Ct. No. 94-00546 (Ct. Int'l Trade Sept. 20, 1994); *Park B. Smith*, 347 F. 3d 922 (Fed. Cir. 2003); Order of Referral to Mediation, *Park B. Smith*, Ct. Nos. 94-00546, 95-00043, 95-00184, 95-00701, 95-01180, 96-01810, 96-02594, 97-00936, 98-00019, 99-00419, 99-00749, 00-00411, 01-00084, 01-00952 (Ct. Int'l Trade Apr. 28, 2006), Doc. No. 19.

⁷⁴ Report of Mediation, *Park B. Smith*, Ct. Nos. 94-00546, 95-00043, 95-00184, 95-00701, 95-01180, 96-01810, 96-02594, 97-00936, 98-00019, 99-00419, 99-00749, 00-00411, 01-00084, 01-00952 (Ct. Int'l Trade June 1, 2006), Doc. No. 20.

⁷⁵ See, e.g., Order on Stipulated Judgment, *Park B. Smith*, Ct. No. 94-00546 (Ct. Int'l Trade July 24, 2008), Doc. No. 34.

⁷⁶ Order, *Park B. Smith*, Ct No. 94-00546 (Ct. Int'l Trade June 24, 2008), Doc. No. 34; Order, *Park B. Smith*, Ct No. 95-00043 (Ct. Int'l Trade Mar. 9, 2009), Doc. No. 35; Order, *Park B. Smith*, Ct No. 95-00184 (Ct. Int'l Trade Dec. 21, 2009), Doc. No. 54; Order, *Park B. Smith*, Ct No. 95-00701 (Ct. Int'l Trade Oct. 15, 2009), Doc. No. 41; Order, *Park B. Smith*, Ct No. 95-01180 (Ct. Int'l Trade Aug. 11, 2009), Doc. No. 40; Order, *Park B. Smith*, Ct No. 96-01810 (Ct. Int'l Trade Apr. 26, 2010), Doc. No. 46; Order, *Park B. Smith*, Ct No. 96-02594 (Ct. Int'l Trade Mar. 9, 2009), Doc. No. 36; Order, *Park B. Smith*, Ct No. 97-00936 (Ct. Int'l Trade Oct. 9, 2009), Doc. No. 42; Order, *Park B. Smith*, Ct No. 98-00019 (Ct. Int'l Trade July 15, 2009), Doc. No. 40; Order, *Park B. Smith*, Ct No. 99-00419 (Ct. Int'l Trade Oct. 15, 2009), Doc. No. 38; Order, *Park B. Smith*, Ct No. 9--00749 (Ct. Int'l Trade Mar. 9, 2009), Doc. No. 41; Order, *Park B. Smith*, Ct No. 00-00411 (Ct. Int'l Trade Oct. 15, 2009), Doc. No. 42 Order, *Park B. Smith*, Ct No. 01-00084 (Ct. Int'l Trade Nov. 2, 2009), Doc. No. 42; Order, *Park B. Smith*, Ct No. 01-00952 (Ct. Int'l Trade Oct. 6, 2009), Doc. No. 41.

⁷⁷ Ct. Nos. 04-00324 and 06-00206 were not subject to mediation, but the parties stipulated judgments on agreed statements of fact in each. Order on Stipulated Judgment, *Park B. Smith*, Ct. No. 04-00324 (Apr. 26, 2010), Doc. No. 28; Order on Stipulated Judgment, *Park B. Smith*, Ct. No. 06-00206 (Ct. Int'l Trade Sept. 28, 2009), Doc. No. 15.

b) *ABB Flexible Automation, Inc. v. United States*⁷⁸

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

The classification issue in *ABB Flexible Automation* was whether the machinery was properly classified pursuant to its function.⁷⁹ Upon entry, CBP assessed duties ranging from 2.5 percent to 2.7 percent.⁸⁰ In its protests, the plaintiff asserted duties ranging from 0 to 1.8 percent.⁸¹

The case remained on the Reserve Calendar for seven years before plaintiff filed its motion for referral to mediation.⁸² According to plaintiff, the parties agreed to stipulate as to the proper classification of the merchandise, but could not agree on where the refund checks should be sent.⁸³ Defendant opposed plaintiff's motion "[i]n the interest of conserving judicial resources" and suggested the alternative of listing plaintiff's address on the cover letter to the proposed stipulation.⁸⁴ The Court denied plaintiff's motion.⁸⁵ One month later, the parties filed

⁷⁸ *ABB Flexible Automation, Inc. v. United States*, Ct. No. 02-00664 (Ct. Int'l Trade).

⁷⁹ Summons, *ABB Flexible Automation*, Ct. No. 02-00664 (Ct. Int'l Trade Oct. 23, 2002), Doc. No. 1.

⁸⁰ CBP claimed the merchandise was properly classified as follows: as "[i]ndustrial robots, not elsewhere specified or included" under subheading 8479.50.00, HTSUS (2001), dutiable at 2.5%; and as "[b]oards, panels, consoles . . . : [f]or a voltage not exceeding 1,000 V: [o]ther" under subheading 8537.10.90, HTSUS (2001), dutiable at 2.7%. Stipulated Judgment on Agreed Statement of Facts at ¶¶ 3-4, *ABB Flexible Automation*, Ct. No. 02-00664 (Ct. Int'l Trade Jan. 28, 2010), Doc. No. 33.

⁸¹ Plaintiff claimed the merchandise was properly classified according to their function as follows: "[o]ther lifting, handling, loading . . . ; [o]ther machinery" under subheading 8428.90.00, HTSUS (2001) dutiable at 1.8%; as "[e]lectric . . . brazing or welding machines . . . : [m]achines and apparatus for resistance welding of metal: [f]ully or partly automatic" under subheading 8515.21.00, HTSUS (2001) not dutiable; as "[m]echanical appliances . . . for . . . spraying liquids or powders; . . . [o]ther appliances: [o]ther: [o]ther" under 8424.89.70, HTSUS (2001) dutiable at 1.8%; and as "Electric . . . brazing or welding machines . . . : [m]achines and apparatus for arc (including plasma arc) welding of metals" under subheading 8515.31.00, HTSUS (2001) dutiable at 1.6%. Stipulated Judgment on Agreed Statement of Facts at ¶¶ 7-10, *ABB Flexible Automation*, Ct. No. 02-00664 (Jan. 28, 2010 Ct. Int'l Trade), Doc. No. 33.

⁸² Docket Sheet, *ABB Flexible Automation*, Ct. No. 02-00664 (Ct. Int'l Trade); Plaintiff's Motion for Referral to Mediation, *ABB Flexible Automation*, Ct. No. 02-00664 (Ct. Int'l Trade Nov. 30, 2009), Doc. No. 29.

⁸³ Plaintiff's Motion for Referral to Mediation, *ABB Flexible Automation*, Ct. No. 02-00664 (Ct. Int'l Trade Nov. 30, 2009), Doc. No. 29.

⁸⁴ Defendant's Memorandum in Opposition to Plaintiff's Motion for Referral to Mediation, *ABB Flexible Automation*, Ct. No. 02-00664 (Ct. Int'l Trade Dec. 18, 2009), Doc. No. 30.

their joint stipulation on agreed statement of facts in which the parties agreed to the classification of the merchandise with duties of 0.00 percent, 1.6 percent, or 1.8 percent, depending on the merchandise.⁸⁶ The cover letter to the joint stipulation included the address to which CBP was to send the refunded duties.⁸⁷

c) *BenQ America Corp. v. United States*⁸⁸

The issue in *BenQ America Corp.* is whether flat panel monitors of a certain type are classified as units of automatic data processing machines or as video monitors.⁸⁹ The former are not dutiable and the latter are dutiable at 5 percent.⁹⁰ In support of its motion for summary judgment, plaintiff asserted that the proper legal test to resolve the issue was the "principal function" test.⁹¹ Defendant, in its cross motion for summary judgment, claimed the applicable legal test was "principal use"; however, because plaintiff allegedly failed to provide the Court with the requisite information to apply the principal use test, defendant asserted that the classification issue should be resolved by the selecting the highest tariff number of those at issue.⁹² After the Court issued an opinion granting defendant's motion for summary judgment on grounds not argued by defendant, plaintiff appealed.⁹³

⁸⁵ Order, *ABB Flexible Automation*, Ct. No. 02-00664 (Ct. Int'l Trade Dec. 24, 2009), Doc. No. 31.

⁸⁶ Stipulated Judgment on Agreed Statement of Facts, *ABB Flexible Automation*, Ct. No. 02-00664 (Ct. Int'l Trade Jan. 20, 2010), Doc. No. 32.

⁸⁷ The judge signed the stipulated judgment soon thereafter. Judgment on Agreed Statement of Facts, *ABB Flexible Automation*, Ct. No. 02-00664 (Ct. Int'l Trade Jan. 28, 2010), Doc. No. 33.

⁸⁸ *BenQ America Corp. v. United States*, Ct. No. 05-00637 (Ct. In'tl Trade).

⁸⁹ Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at 1-3, *BenQ America Corp.*, Ct. No. 05-00637 (Ct. Int'l Trade Nov. 16, 2007), Doc. No. 45-2. The plaintiff asserted that the monitors are classified in subheading 8471.60.45, HTSUS (2004) as "Automatic data processing machines and units thereof; . . . Input or output units . . . Other: Other: Other" (non-dutiable). *See id.* at 29.

⁹⁰ *Id.*; Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment at 1, *BenQ America Corp.*, Ct. No. 05-00637 (Ct. Int'l Trade June 12, 2008), Doc. No. 58.

⁹¹ Section XVI, Note 3, HTSUS (2004) states that "[u]nless the context otherwise requires, . . . machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function."

⁹² Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, *BenQ America Corp.*, Ct. No. 05-00637 (Ct. Int'l Trade June 12, 2008).

⁹³ Order, *BenQ America Corp.*, Ct. No. 05-00637 (Ct. Int'l Trade June 12, 2008), Doc. No. 58.

The Federal Circuit did not agree with the basis on which the USCIT issued its opinion, and found principal use to be applicable legal test.⁹⁴ In so doing, the Federal Circuit vacated the ruling below and instructed the USCIT "conduct a principal use analysis to determine the correct classification of the Dell[] monitors."⁹⁵

Upon return to the USCIT, the Court ordered the parties to file a status report and proposed scheduling order.⁹⁶ The parties filed their joint status report five months later,⁹⁷ informing the Court that, notwithstanding settlement discussions, the parties could not agree on the issue of whether the principal use test should be applied to evidence already on the record or should only be applied after discovery is reopened and the parties have an opportunity to place additional evidence on the record.⁹⁸

The Court did not address that issue; instead it issued an order of referral to mediation.⁹⁹ Mediation took place over 13 months and did not result in settlement.¹⁰⁰ Soon after the Mediation Report was issued, plaintiff filed an unopposed motion for discovery, which the Court granted.¹⁰¹ As of September 1, 2014, the parties were conducting additional discovery.

d) *Kahrs International Inc. v. United States*¹⁰²

The general classification issue before the Court in *Kahrs Int'l* was whether plaintiff's engineered wood flooring should be classified under HTSUS subheadings for "parquet flooring," "veneered panels and similar laminated wood," and "edge-glued lumber," or under a "basket" HTSUS subheading for "plywood."¹⁰³ Merchandise falling within the first three categories

⁹⁴ *BenQ America Corp.*, 646 F. 3d 1371, 1379-1380 (Fed. Cir. 2011).

⁹⁵ *BenQ America Corp.*, 646 F. 3d at 1380.

⁹⁶ Order, *BenQ America Corp.*, Ct. No. 05-00637 (Ct. Int'l Trade Oct. 12, 2011), Doc. No. 91.

⁹⁷ Joint Status Report, *BenQ America Corp.*, Ct. No. 05-00637 (Ct. Int'l Trade June 14, 2012), Doc. No. 109.

⁹⁸ *Id.*

⁹⁹ Order of Referral to Mediation, *BenQ America Corp.*, Ct. No. 05-00637 (Ct. Int'l Trade (Oct. 18, 2012), Doc. No. 110.

¹⁰⁰ Order of Referral to Mediation, *BenQ America Corp.*, Ct. No. 05-00637 (Ct. Int'l Trade Oct. 18, 2012), Doc. No. 110; Report of Mediation, *BenQ America Corp.*, Ct. No. 05-00637 (Ct. Int'l Trade Nov. 6, 2013), Doc. No. 117.

¹⁰¹ Order, *BenQ America Corp.*, Ct. No. 05-00637 (Ct. Int'l Trade Dec. 3, 2013), Doc. No. 119.

¹⁰² *Kahrs Int'l Inc. v. United States*, Ct. No. 07-00343 (Ct. Int'l Trade).

¹⁰³ Summons, *Kahrs Int'l*, Ct. No. 07-00343 (Ct. Int'l Trade Sept. 12, 2007), Doc. No. 1. CBP classified plaintiff's merchandise in subheading 4412.29.3670, HTSUS (2006), dutiable at 8%. Plaintiff asserted that the proper classification for all its merchandise was in subheadings 4412.29.56, 4418.30.00, or 4418.90.00, HTSUS (2006), all free of duty. *Id.*

entered the United States free of duty and merchandise falling within the last category was dutiable at 8 percent.¹⁰⁴

The case was very aggressively litigated by both sides, to the point where the Judge ordered that "for the remainder of this litigation, no motions shall be filed by either party in this case without first obtaining written consent of the Court."¹⁰⁵ By the time the Court issued its third opinion, it had addressed both the legal question of how "plywood" was defined in the context of the HTSUS, and the factual question of whether plaintiff's merchandise fell within the HTSUS subheadings for "plywood."¹⁰⁶ However, even after the Court's third opinion, plaintiff's fifth cause of action, commercial designation, remained.¹⁰⁷ The Court referred *Kahrs Int'l* to mediation after it "issued three opinions totaling 135 pages, in the process of resolving multiple procedural and substantive motions."¹⁰⁸

Plaintiff's commercial designation claim "rest[ed] on the theory that 'the trade designation [was] so universal and well understood that the Congress, and all the trade, are supposed to have been fully acquainted with the practice at the time the law was enacted.'"¹⁰⁹ It was that issue of fact that the parties failed to settle through mediation.¹¹⁰ After the Court issued the report of mediation, plaintiff amended its complaint to assert an additional claim in an eighth cause of action, that the imported merchandise was not classified in a HTSUS subheading for plywood "because the common meaning of that term does not encompass plaintiff's product."¹¹¹ The Court ultimately found in favor of defendant on both of the remaining causes of action.¹¹²

¹⁰⁴ *Id.*

¹⁰⁵ Order, *Kahrs Int'l*, Ct. No. 07-00343 (Ct. Int'l Trade Nov. 9, 2009), Doc. No. 121.

¹⁰⁶ *Kahrs Int'l*, Ct. No. 07-00343, 791 F. Supp. 2d 1228, 1232 (Ct. Int'l Trade July 26, 2011), Doc. No. 249.

¹⁰⁷ *Id.*

¹⁰⁸ *Kahrs Int'l*, 791 F. Supp. 2d 1228, 1231 (Ct. Int'l Trade July 26, 2011); Order of Referral to Mediation and Amended Scheduling Order, *Kahrs Int'l*, Ct. No. 07-00343 (Ct. Int'l Trade Apr. 1, 2010), Doc. No. 125.

¹⁰⁹ *Id.*

¹¹⁰ Report of Mediation, *Kahrs Int'l*, Ct. No. 07-00343 (Ct. Int'l Trade June 3, 2010), Doc. No. 126.

¹¹¹ *Kahrs Int'l*, 791 F. Supp. 2d at 1232.

¹¹² *Id.*, *aff'd* 713 F. 3d 640 (Fed. Cir. 2013).

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

a) *Alcan Aluminum Corp. v. United States*¹¹³

The relevant facts in *Alcan Aluminum Corp.* start with the plaintiff's voluntary disclosure in which it admitted not paying merchandise processing fees ("MPF") on certain entries of unwrought aluminum¹¹⁴. After Alcan paid the amount of revenue CBP allegedly lost due to the non-payment of MPF¹¹⁵, the parties entered into an escrow agreement, which stated that if the resolution of a test case determined that the tendered amount was not owed, CBP would refund the tendered amounts "with interest as may be required by law."¹¹⁶ Subsequent to the parties entering into that agreement, plaintiff filed a protest with CBP.¹¹⁷

Plaintiff's protest challenged three separate determinations by CBP. First, plaintiff protested CBP's assessment and its own payment of MPF.¹¹⁸ Second, plaintiff protested its

¹¹³ In an amendment to the escrow agreement, the parties designated *Alcan Aluminum Corp. v. United States*, Ct. No. 09-00539 as the test case for the following cases: *Canadian Reynolds Metal Co. v. United States*, Ct. No. 00-00444 (Ct. Int'l Trade), *Aluminerie Becancour, Inc. v. United States*, Ct. No. 00-00445 (Ct. Int'l Trade), *Alcan Aluminum Corp.*, Ct. No. 00-00446 (Ct. Int'l Trade), and *Alcan Aluminum, Corp.* Ct. No. 01-00095 (Ct. Int'l Trade). See *Alcan Aluminum Corp.*, Ct. No. 01-00095, 353 F. Supp. 2d 1374, 1377 n.7 (Ct. Int'l Trade 2004)) (citing to Test Case Summons of Alcan (Ct. No. 94-00539 at 1-4) (Sept. 14, 1994)). For all intents and purposes, the foregoing cases all include similar facts and arguments. Moreover, all cases were assigned the same Judge who referred the cases to the same Judge Mediator at the same time. *Alcan Aluminum Corp.*, 986 F. Supp. 1436, Ct. No. 94-00539 (Ct. Int'l Trade 1997) was originally referred to as St. Albans Protest No. 0201-93-100281 (HQ 955367) and was subsequently appealed to the Federal Circuit Court of Appeals. *Aluminerie Becancour*, 343 F. Supp. 2d 1208, 1211 n.8 (Ct. Int'l Trade Apr. 23, 2004).

¹¹⁴ Complaint, *Alcan Aluminum Corp.*, Ct. No. 00-00446 (Ct. Int'l Trade Sept. 30, 2002), Doc. No. 7. The underlying issue was whether the unwrought aluminum was of Canadian origin, the entries of which would be exempt from MPF pursuant to the United States – Canada Free Trade Agreement. See Complaint at ¶ 9, *Alcan Aluminum Corp.*, Ct. No. 00-00446 (Ct. Int'l Trade Sept. 26, 2002), Doc. No. 7; see also *Alcan Aluminum Corp.*, 353 F. Supp. 2d 1374, 1377 n.7 (Ct. Int'l Trade 2004).

¹¹⁵ In *Canadian Reynolds Metals*, plaintiff, in tendering its payment, stated that it expected "a full refund of the tender amount along with accrued interest in the event the subsequent litigation was successful." 350 F. Supp. 2d 1302, 1304-05 (Ct. Int'l Trade 2004). In confirming receipt of the plaintiff's tender, CBP rejected all of the plaintiff's conditions. *Id.* at 1305.

¹¹⁶ *Alcan Aluminum Corp.*, 353 F. Supp. 2d at 1376; see also *Canadian Reynolds Metals*, 350 F. Supp. 2d at 1305; *Aluminerie Becancour*, 343 F. Supp. 2d 1208, 1215 n.15 (Ct. Int'l Trade 2004).

¹¹⁷ *Alcan Aluminum Corp.*, 353 F. Supp. 2d at 1377.

¹¹⁸ *Id.* at 1379.

"unanticipated frustration" from "contingencies not anticipated in the [escrow] [a]greement."¹¹⁹ Third, plaintiff protested "[CBP]'s decision to accept . . . [its] tender[] . . . [of the MPF]."¹²⁰

The Court resolved the test case in plaintiffs' favor, and CBP refunded to plaintiffs the tendered amount.¹²¹ However, when CBP did not include interest payments on those amounts, plaintiff filed a request for accelerated disposition of the protest.¹²²

The Court stayed the case pending the parties' briefing on whether CBP's acceptance of MPF payments could constitute a "decision" for purposes of 19 U.S.C. § 1514 and whether *U.S. Shoe Corp. v. United States*,¹²³ which held that the mere passive acceptance of funds does not constitute a Customs decision, required a rehearing or reconsideration of the Court's denial of defendant's motion to dismiss.¹²⁴

One month after the parties filed supplemental briefs addressing those issues, the Court referred the case to mediation.¹²⁵ At the time the Court referred *Alcan Aluminum Corp.* to mediation, the legal issue before the Court in *Alcan Aluminum Corp.* was whether there was a protestable "decision" under 19 U.S.C. § 1514 and the factual issue was, if there was a protestable "decision," whether the protests were timely filed.¹²⁶ Less than 50 days later, the Judge Mediator wrote to counsel, stating that "it is apparent to me that further efforts at

¹¹⁹ *Id.* at 1379-80.

¹²⁰ *Id.* at 1380; *see also Canadian Reynolds Metals*, 350 F. Supp. 2d at 1305.

¹²¹ *Alcan Aluminum Corp.*, 165 F.3d 898, 905 (Fed. Cir. 1999).

¹²² Complaint at ¶ 17, *Alcan Aluminum Corp.*, Ct. No. 01-00095 (Ct. Int'l Trade Sept. 26, 2002); *see also Alcan Aluminum Corp.*, 353 F. Supp. 2d at 1377; *Canadian Reynolds Metals*, 350 F. Supp. 2d at 1306.

¹²³ *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997) (finding that Customs' collection of Harbor Maintenance Tax was not protestable, as Customs merely passively accepted the taxes paid pursuant to statute).

¹²⁴ Order, *Alcan Aluminum Corp.*, Ct. No. 01-00095 (Ct. Int'l Trade Aug. 12, 2004), Doc. No. 36.

¹²⁵ Order of Referral to Mediation, *Alcan Aluminum Corp.*, Ct. Nos. 01-00095, 01-00446 (Ct. Int'l Trade Sept. 20, 2004), Doc. No. 39.

¹²⁶ *See generally, Alcan Aluminum Corp.*, 353 F. Supp. 2d 1374 (Ct. Int'l Trade 2004); *Canadian Reynolds Metals*, 350 F. Supp. 2d 1302 (Ct. Int'l Trade 2004); *Aluminerie Becancour*, 343 F. Supp. 2d 1208, 1209-1210 (Ct. Int'l Trade 2004).

mediation of this case will not be fruitful,"¹²⁷ and the next day filed a mediation report confirming that the mediation did not result in a settlement.¹²⁸

In ultimately dismissing the case, the Court addressed all three of plaintiff's protested objections. First, the Court determined that plaintiff's own protested payment of MPF could not be considered a CBP "decision" because plaintiff tendered payment on its own volition.¹²⁹ According to the Court, CBP's demand for payment could be considered a "decision," but plaintiff exceeded the 90-day deadline to file its protest on that issue.¹³⁰ Second, the Court recognized that CBP's refusal to pay interest on the MPF may have constituted a protestable decision; however, plaintiff's protest predated CBP's denial.¹³¹ Third, the Court determined that CBP's passive acceptance of the MPF was not a protestable decision.¹³²

b) *Marine Transport Corp. v. United States*¹³³

In *Marine Transport*, plaintiff moved the Court for referral to mediation. Defendant opposed, and the Court denied plaintiff's motion.

The subject of plaintiff's complaint was whether CBP miscalculated interest associated with the duties on vessel repair.¹³⁴ Plaintiff had made partial payments on the duties owed, which CBP applied part to principal and part to interest.¹³⁵ In its amended answer, defendant admitted to an incorrect calculation of the amount remaining due, but claimed that the Court lacked jurisdiction because plaintiff's protest was untimely.¹³⁶ Thereafter, the Court issued a scheduling order, which set deadlines for defendant to file its motion to dismiss and for the

¹²⁷ Letter, *Alcan Aluminum Corp.*, Ct. Nos. 00-00445, 00-00446, 01-00095, 00-00444 (Nov. 8, 2004), Doc. No. 40.

¹²⁸ Report of Mediation, *Alcan Aluminum Corp.*, Ct. Nos. 01-00095, 01-00446 (Ct. Int'l Trade Nov. 9, 2004), Doc. No. 41.

¹²⁹ *Alcan Aluminum Corp.*, 353 F. Supp. 2d at 1379 n.11.

¹³⁰ *Id.* at 1379.

¹³¹ *Id.* at 1379-1380. 19 U.S.C. § 1514(c)(3) specifically prohibits protests being filed prior to the date of the decision that acts as the basis of the protest. *Id.* at 1379.

¹³² *Id.* at 1380-1381.

¹³³ *Marine Transport Corp. v. United States*, Ct. No. 06-00046 (Ct. Int'l Trade).

¹³⁴ Complaint at ¶¶ 8-19, *Marine Transport*, Ct. No. 06-00046 (Ct. Int'l Trade Mar. 20, 2006), Doc. No. 5.

¹³⁵ Amended Answer at ¶ 15, *Marine Transport*, Ct. No. 06-00046 (Ct. Int'l Trade Sept. 8, 2006), Doc. No. 11.

¹³⁶ *Id.* at ¶¶ 19, 22.

parties to submit their certification of settlement efforts.¹³⁷ With regard to settlement, the Court's order stated that the parties estimated the amount in controversy to be approximately \$545,000.¹³⁸ Three days after the Court issued its order, plaintiff moved the Court for referral to mediation.¹³⁹

In its motion, plaintiff claimed that mediation was appropriate because of "difficulties within Customs in (1) determining the department within the agency with the proper settlement authority, and (2) identifying an appropriate settlement vehicle."¹⁴⁰ Further, plaintiff claimed that it was defendant's view that mediation would be inappropriate because it would be difficult to bring together the parties within Customs who have settlement authority.¹⁴¹ Last, plaintiff disputed defendant's claim that the Court lacked subject matter jurisdiction.¹⁴²

Defendant, in opposition to plaintiff's motion, took issue with plaintiff's characterization of the claimed "difficulties within Customs."¹⁴³ After admitting that CBP began its efforts to administratively resolve the issue even before plaintiff filed its complaint, and that the parties were actively involved in settlement negotiations, defendant stated that "it is impossible for individuals with ultimate settlement authority on behalf of the Government to be present at a mediation session."¹⁴⁴ It was the stated position of the Government that mediation would not expedite the resolution of the case and that if the case could be settled, "the parties will do so without the time and expense of mediation."¹⁴⁵

On the same day the Court denied plaintiff's motion, the Court issued the parties a letter which set forth the basis for the denial.¹⁴⁶ In short, the Court denied plaintiff's motion because of defendant's position that mediation would not expedite the resolution of the case.¹⁴⁷

¹³⁷ Scheduling Order, *Marine Transport*, Ct. No. 06-00046 (Ct. Int'l Trade Nov. 27, 2006), Doc. No. 18.

¹³⁸ *Id.*

¹³⁹ Motion for Referral to Court-Annexed Mediation & Proposed Order of Referral to Mediation, *Marine Transport*, Ct. No. 06-00046 (Ct. Int'l Trade Nov. 30, 2006), Doc. No. 19.

¹⁴⁰ *Id.* at 2.

¹⁴¹ *Id.* at 3.

¹⁴² *Id.*

¹⁴³ Defendant's Response to Plaintiff's Motion for Referral to Court-Annexed Mediation, *Marine Transport*, Ct. No. 06-00046 (Ct. Int'l Trade Dec. 15, 2005), Doc. No. 21.

¹⁴⁴ *Id.* at 3.

¹⁴⁵ *Id.*

¹⁴⁶ Letter, *Marine Transport*, Ct. No. 06-00046 (Ct. Int'l Trade Dec. 19, 2006), Doc. No. 23.

¹⁴⁷ *Id.* at 1.

Nonetheless, the Court also recognized plaintiff's concerns regarding the pace of settlement negotiations, the Government's description of the "procedure for obtaining approval for settlement," and the "general bureaucratic inertia that the Court has witnessed in similar circumstances in other cases."¹⁴⁸ Citing the deadlines for monthly status reports on settlement, the Court emphasized that those reports be "sufficiently specific and detailed to enable the Court to monitor the pace of negotiations, and to assure itself that settlement negotiations are proceeding in good faith and are not simply a means of delaying resolution of the case on the merits."¹⁴⁹ The Court informed the parties that if it found that a party was not pursuing settlement in good faith, it would be receptive to a motion to accelerate the schedule for filing of dispositive motions.¹⁵⁰

After the parties filed four status reports, and while the deadline for defendant to file its motion to dismiss was pending, the parties filed a settlement agreement with the Court.¹⁵¹ The parties ultimately agreed that CBP would refund to plaintiff \$436,000 plus interest provided by law, from the date plaintiff completed payment.¹⁵²

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

a) *Allstates Trading & Clothing Co. v. United States*¹⁵³

The legal issues for mediation in *Allstates Trading & Clothing* were whether defendant was liable for storage fees incurred after plaintiff's merchandise was detained and excluded, and pending resolution of plaintiff's protest challenging that exclusion, and whether defendant was obligated to remove the electronic tag, which would be allegedly placed on future entries of plaintiff's merchandise.¹⁵⁴

Plaintiff's summons identified the issue as whether CBP properly excluded plaintiff's apparel on the basis that plaintiff's proffered entry documentation was insufficient to establish

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 2.

¹⁵⁰ *Id.*

¹⁵¹ Settlement Agreement, *Marine Transport*, Ct. No. 06-00046 (Ct. Int'l Trade Oct. 24, 2007), Doc. No. 44; Order, *Marine Transport*, Ct. No. 06-00046 (Ct. Int'l Trade Oct. 29, 2007), Doc. No. 45.

¹⁵² Order, *Marine Transport*, Ct. No. 06-00046 (Ct. Int'l Trade Oct. 29, 2007), Doc. No. 45.

¹⁵³ *Allstates Trading & Clothing Co. v. United States*, Ct. No. 04-00245 (Ct. Int'l Trade).

¹⁵⁴ *Allstates Trading & Clothing*, 30 C.I.T. 1914 (Dec. 8, 2006). The CM/ECF system indicates the Category for this case as 19 U.S.C. § 1514(a)(5) Liquidation/Reliquidation. The underlying protest challenged the exclusion of the merchandise pursuant to 19 U.S.C. § 1514(a)(4). However, the issues for mediation are arguably better classified as charges and extractions under 19 U.S.C. § 1514(a)(3). *Id.* at 1922.

the country of origin.¹⁵⁵ Plaintiff's complaint requested that the Court direct CBP to (1) release the excluded merchandise, (2) pay accrued storage fees, and (3) remove the electronic tag from future entries of plaintiff's merchandise.¹⁵⁶ One month after defendant filed its answer, plaintiff filed a proposed scheduling order with a certification of settlement efforts.¹⁵⁷ In that proposed order, plaintiff estimated the amount in controversy to be between \$30,000 and \$60,000.¹⁵⁸ In the certification, plaintiff informed the Court of the following:

Counsel do not desire a conference with the Court regarding settlement. Parties believe that settlement discussions are premature at this time, but that settlement discussions may again be revisited.¹⁵⁹

Plaintiff filed a motion for summary judgment and defendant filed a cross-motion for summary judgment.¹⁶⁰ In defendant's reply to plaintiff's response to defendant's cross-motion for summary judgment, defendant conceded that the country of origin of merchandise was that claimed by plaintiff.¹⁶¹ Pursuant to that concession, CBP attempted to resolve the case by stipulated judgment; however, plaintiff refused to abandon its request for storage fees and for the removal of the electronic tag from future entries of its merchandise.¹⁶² Six weeks after the Court held a telephonic oral argument, the Court referred the case to mediation.¹⁶³ Mediation took 90 days and did not result in settlement.¹⁶⁴ The Court issued its opinion one year after the Judge Mediator issued his report. The Court denied as moot plaintiff's motion seeking a declaration of

¹⁵⁵ Summons, *Allstates Trading & Clothing*, Ct. No. 04-00245 (Ct. Int'l Trade June 21, 2004), Doc. No. 1.

¹⁵⁶ *Allstates Trading & Clothing*, 30 C.I.T. 1914, 1915 (Dec. 8, 2006).

¹⁵⁷ Proposed Scheduling Order & Certification of Settlement Efforts, *Allstates Trading & Clothing*, Ct. No. 04-00245 (Ct. Int'l Trade Nov. 23, 2004), Doc. No. 15-2.

¹⁵⁸ *Id.*

¹⁵⁹ Certification of Settlement Efforts, *Allstates Trading & Clothing*, Ct. No. 04-00245 (Ct. Int'l Trade Nov. 23, 2004), Doc. No. 15-2.

¹⁶⁰ Plaintiff's Motion for Summary Judgment, *Allstates Trading & Clothing*, Ct. No. 04-00245 (Ct. Int'l Trade Mar. 10, 2005), Doc. No. 27; Defendant's Cross-Motion for Summary Judgment, *Allstates Trading & Clothing*, Ct. No. 04-00245 (Ct. Int'l Trade Apr. 22, 2005), Doc. No. 33.

¹⁶¹ *Allstates Trading & Clothing*, 30 C.I.T. at 1919.

¹⁶² *Id.*

¹⁶³ Order of Referral to Mediation, *Allstates Trading & Clothing*, Ct. No. 04-00245 (Ct. Int'l Trade Aug. 30, 2005), Doc. No. 41.

¹⁶⁴ Report on Mediation, *Allstates Trading & Clothing*, Ct. No. 04-00245 (Ct. Int'l Trade Dec. 8, 2005), Doc. No. 42.

the country of origin of the merchandise.¹⁶⁵ Furthermore, the Court denied both parties' summary judgment motions on the issues of storage fees and removal of the electronic tags.¹⁶⁶

Thereafter, plaintiff moved the Court for reconsideration¹⁶⁷, the Court issued a pretrial order¹⁶⁸, defendant responded to plaintiff's motion for reconsideration¹⁶⁹, and the parties filed a stipulated notice of dismissal pursuant to USCIT Rule 41(a)(1)(B).¹⁷⁰ That notice of dismissal does not provide details of any monetary settlement.

b) *Kahrs International Inc. v. United States*¹⁷¹

The USCIT's CM/ECF system categorizes *Kahrs Int'l* under 19 U.S.C. § 1514(a)(2) – Classification, 19 U.S.C. § 1514(a)(5) – Liquidation or Reliquidation, and 28 U.S.C. § 1581(i)(1) – Revenue from Imports or Tonnage.¹⁷² The issues that were the subject of mediation were related to classification, and are discussed in Appendix C, Section A.2.d. above.

c) *Family Delight Foods, Inc. v. United States*¹⁷³

The underlying legal and factual issues were: (1) whether CBP's denial of a protest prevents another interested party from filing another protest on the same entry, if the latter protest is filed within the 180-day limitation period¹⁷⁴; and (2) whether the U.S. Department of Commerce ("Commerce") issued liquidation instructions and/or CBP prematurely liquidated plaintiff's entries while the entries were the subject of an ongoing antidumping duty

¹⁶⁵ *Allstates Trading & Clothing*, 30 C.I.T. at 1923.

¹⁶⁶ *Id.*

¹⁶⁷ Plaintiff's Motion for Reconsideration, *Allstates Trading & Clothing*, Ct. No. 04-00245 (Ct. Int'l Trade Jan. 3, 2007), Doc. No. 48.

¹⁶⁸ Pretrial Order, *Allstates Trading & Clothing*, Ct. No. 04-00245 (Ct. Int'l Trade Jan. 12, 2007), Doc. No. 50.

¹⁶⁹ Defendant's Response to Plaintiff's Motion for Reconsideration, *Allstates Trading & Clothing*, Ct. No. 04-00245 (Ct. Int'l Trade Jan. 23, 2007), Doc. No. 53.

¹⁷⁰ Stipulation of Dismissal and Order, *Allstates Trading & Clothing*, Ct. No. 04-00245 (Ct. Int'l Trade Jan. 30, 2007), Doc. Nos. 54 & 55.

¹⁷¹ *Kahrs Int'l v. United States*, Ct. No. 07-00343 (Ct. Int'l Trade).

¹⁷² Docket, *Kahrs Int'l*, Ct. No. 07-00343 (Ct. Int'l Trade).

¹⁷³ *Family Delight Foods, Inc. v. United States*, Ct. Nos. 10-00136, 10-00331 (Ct. Int'l Trade).

¹⁷⁴ *See* 19 U.S.C. § 1514(c)(3).

administrative review, respectively.¹⁷⁵ Mediation was conducted over four months and settled all issues.¹⁷⁶

Plaintiff's business plan included entering into the United States merchandise included in the scope of an antidumping duty order as warehouse entries ("Type 21") before exporting it to Mexico.¹⁷⁷ However, instead of entering some of the merchandise as warehouse entries, plaintiff's broker entered the merchandise as consumption entries ("Type 01").¹⁷⁸ At the request of CBP, plaintiff changed the code for those entries from consumption ("Type 01") to antidumping ("Type 03").¹⁷⁹

Thereafter, Commerce initiated an antidumping duty administrative review, which included plaintiff's entries.¹⁸⁰ Prior to the completion of the administrative review, CBP liquidated plaintiff's entries and doubled the antidumping duties owed because plaintiff had not filed a certificate of non-reimbursement prior to liquidation.¹⁸¹ Plaintiff then filed a certificate of non-reimbursement.¹⁸² After CBP liquidated plaintiff's entries, Commerce published a notice in the *Federal Register* stating that merchandise entered during the same period in which plaintiff's merchandise entered the United States should not be liquidated.¹⁸³ It is on that basis that plaintiff filed protests on nine entries, which CBP subsequently denied.¹⁸⁴

After filing its complaint, plaintiff noted that its summons contained clerical errors. To cure those errors, plaintiff filed a motion to amend the summons.¹⁸⁵ The parties exchanged

¹⁷⁵ Transcript of Oral Argument, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade May 3, 2011), Doc. No. 36.

¹⁷⁶ Order of Referral to Mediation, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Mar. 13, 2012), Doc. No. 46; Report of Mediation, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade July 26, 2012), Doc. No. 51.

¹⁷⁷ Complaint at ¶¶ 11-14, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Apr. 19, 2010), Doc. No. 4. Defendant never filed an answer to the complaint.

¹⁷⁸ Complaint at ¶ 12, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Apr. 19, 2010), Doc. No. 4.

¹⁷⁹ *Id.* at ¶¶ 14, 17.

¹⁸⁰ *Id.* at ¶ 20.

¹⁸¹ *Id.* at ¶¶ 24, 25.

¹⁸² *Id.* at ¶ 18.

¹⁸³ *Id.* at ¶ 26.

¹⁸⁴ *Id.* at ¶ 32.

¹⁸⁵ Plaintiff's Motion to Amend Summons, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Apr. 27, 2010), Doc. No. 6.

briefs on the issue and the Court ordered oral argument. While plaintiff's motion to amend was pending, the parties jointly moved for a stay while they conducted settlement negotiations.¹⁸⁶ The Court granted the parties' joint motion.¹⁸⁷

Upon lifting the order to stay the proceedings, the Court further ordered that the parties file a joint status report.¹⁸⁸ On the same day of the Court's order, plaintiff filed another motion to amend its summons in which it sought to add 28 U.S.C. § 1581(i) as an alternative or additional basis for jurisdiction.¹⁸⁹ Also on that same day, plaintiff filed a second summons on the same entries, which allegedly did not suffer from the same issues as did plaintiff's first summons.¹⁹⁰

The Court twice held oral argument on plaintiff's motions to amend, the parties filed five joint status reports, and the Court held one status conference.¹⁹¹

One week after the conference, and while the two underlying legal and factual issues and two motions to amend the first summons were pending, the case was referred to mediation.¹⁹² Mediation took less than five months and settled all of the issues.¹⁹³ After ordering the parties to file the settlement agreement with the Court in the first case, the parties filed a stipulated judgment of agreed statement of facts in the second case, which the Court signed soon

¹⁸⁶ Joint Motion to Stay Verbal Motion Made During Oral Argument, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Sept. 21, 2010), Doc. No. 21.

¹⁸⁷ Order, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Nov. 9, 2010), Doc. No. 23.

¹⁸⁸ Order, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Nov. 16, 2010), Doc. No. 25.

¹⁸⁹ Plaintiff's Motion for Leave to Amend Summons for a Second Time, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Nov. 16, 2010), Doc. No. 26.

¹⁹⁰ Summons, *Family Delight Foods*, Ct. No. 10-00331 (Nov. 16, 2010), Doc. No. 1.

¹⁹¹ Docket Sheet (Oral Argument Held), *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Sept. 21, 2010), Doc. No. 20; Transcript of Oral Argument, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade May 3, 2011), Doc. No. 36; Joint Status Report, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade July 15, 2011), Doc. No. 38; Joint Status Report, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Aug. 26, 2011), Doc. No. 39; Status Report, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Oct. 31, 2011), Doc. No. 40; Joint Status Report, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Feb. 3, 2012), Doc. No. 42; Joint Status Report, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Feb. 17, 2012), Doc. No. 43; Docket Sheet (Status Conference Held), *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Mar. 7 2012), Doc. No. 45.

Between the parties' two oral arguments, the Court matched the parties' deadlines in the second case to benchmark dates in the first case. Order, *Family Delight Foods*, Ct. No. 10-00331 (Jan. 4, 2011), Doc. No. 9.

¹⁹² Order of Referral to Mediation, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Mar. 13, 2012), Doc. No. 46.

¹⁹³ Report of Mediation, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade July 26, 2012), Doc. No. 51.

thereafter.¹⁹⁴ Five months later, the parties filed a joint stipulation of voluntary dismissal in the first case.¹⁹⁵

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

1. *United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, Local 2911 v. U.S. Secretary of Labor*¹⁹⁶

The factual and legal issues before the Court when it referred *Independent Steelworkers Union* to mediation were: (1) whether the U.S. Department of Labor's ("DOL") denial, after reconsideration, of plaintiff's petition for trade adjustment assistance ("TAA") was supported by substantial evidence¹⁹⁷; (2) whether the DOL's denial of plaintiff's request to extend plaintiff's existing TAA certification was supported by substantial evidence¹⁹⁸; and (3) whether the Court's jurisdiction attached to the DOL's determination denying plaintiff's request to amend an existing TAA certification.¹⁹⁹ The Court referred the case to mediation after it held oral argument on plaintiff's motion for judgment on the agency record and after plaintiff filed supplemental

¹⁹⁴ Order, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Aug. 1, 2012), Doc. No. 52; Order on Stipulated Judgment on Agreed Statement of Facts, *Family Delight Foods*, Ct. No. 10-00331 (Ct. Int'l Trade Aug. 15, 2012), Doc. No. 11.

¹⁹⁵ Joint Stipulation of Dismissal, *Family Delight Foods*, Ct. No. 10-00136 (Ct. Int'l Trade Jan. 14, 2013), Doc. No. 55.

¹⁹⁶ *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Service Workers Int'l Union, Local 2911 v. U.S. Secretary of Labor ("Independent Steelworkers Union")*, Ct. No. 04-00492 (Ct. Int'l Trade).

¹⁹⁷ *Independent Steelworkers Union*, 30 C.I.T. 1793, 1794 (Nov. 17, 2006).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1805.

citations pertaining to the DOL's certification amendments.²⁰⁰ Mediation was conducted over four months and did not settle the issues.²⁰¹

When the parties were unable to settle the issues through meditation, the Court issued an opinion sustaining the DOL's denial, after reconsideration, of plaintiff's petition for TAA²⁰², and denying defendant's motion to dismiss for lack of jurisdiction on DOL's denial to amend plaintiff's TAA certification.²⁰³ The Court then remanded the case to the DOL to gather and submit the administrative record associated with the DOL's denial of plaintiff's certification amendment claim.²⁰⁴

Upon reviewing the remand record, the Court again remanded the case to the DOL, instructing it to specifically delineate the process taken in denying plaintiff's request to extend its TAA certification.²⁰⁵ Based on the record in the second remand, the Court sustained the DOL's denial of plaintiff's request to amend its TAA certification.²⁰⁶

²⁰⁰ Plaintiff's Rule 56.1 Motion for Judgment on the Agency Record, *Independent Steelworkers Union*, Ct. No. 04-00492 (Ct. Int'l Trade Mar. 25, 2005), Doc. No. 17; Supplemental Citations to Certification Amendments Made by the Dept. of Labor, *Independent Steelworkers Union*, Ct. No. 04-00492 (Ct. Int'l Trade July 29, 2005), Doc. No. 29; Defendant's Motion for Leave to Respond to Plaintiff's Supplemental Citations and Defendant's Response to Plaintiff's Supplemental Citations, *Independent Steelworkers Union*, Ct. No. 04-00492 (Ct. Int'l Trade Aug. 2, 2005), Doc. No. 30; Plaintiff's Response to Defendant's Motion for Leave to Respond to Plaintiff's Supplemental Citations, *Independent Steelworkers Union*, Ct. No. 04-00492 (Ct. Int'l Trade Aug. 4, 2005), Doc. No. 31; Order, *Independent Steelworkers Union*, Ct. No. 04-00492 (Ct. Int'l Trade Aug. 10, 2005), Doc. No. 32; Plaintiff's Reply to Defendant's Response to Plaintiff's Supplemental Citations, *Independent Steelworkers Union*, Ct. No. 04-00492 (Ct. Int'l Trade Aug. 19, 2005), Doc. No. 33; Order of Referral to Mediation, *Independent Steelworkers Union*, Ct. No. 04-00492 (Ct. Int'l Trade Aug. 19, 2005), Doc. No. 34.

²⁰¹ Order of Referral to Mediation, *Independent Steelworkers Union*, Ct. No. 04-00492 (Ct. Int'l Trade Aug. 19, 2005), Doc. No. 34; Report of Mediation, *Independent Steelworkers Union*, Ct. No. 04-00492 (Ct. Int'l Trade Dec. 15, 2005), Doc. No. 39.

²⁰² *Independent Steelworkers Union*, 30 C.I.T. at 1808.

²⁰³ *Id.* The Court found that it had jurisdiction under 28 U.S.C. § 1581(i)(4).

²⁰⁴ *Id.*

²⁰⁵ *Independent Steelworkers Union*, 32 C.I.T. 394 (Apr. 30, 2008).

²⁰⁶ *Independent Steelworkers Union*, 33 C.I.T. 418 (Apr. 30, 2009).

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

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

a) *International Custom Products, Inc. v. United States*²⁰⁷

Two days after plaintiff filed its summons, the Court issued the first of three orders of referral to mediation.²⁰⁸ As of the date of the first referral, the following legal issues were pending before the Court: (1) whether defendant's entry bond requirements, imposed after defendant issued a Notice of Action, contravened defendant's own regulations and plaintiff's due process rights; (2) whether those entry bond requirements would prohibit plaintiff from entering its merchandise in the future; and (3) whether the second issue gave rise to a justiciable controversy.

After defendant issued a Notice of Action that reclassified plaintiff's merchandise, which had been the subject of an advance classification ruling request, defendant imposed a requirement that plaintiff post single entry bonds at three times the value of the merchandise, in addition to maintaining a \$400,000 continuous entry bond.²⁰⁹ Plaintiff challenged defendant's "prohibitive bond requirements" and moved the Court to order both a temporary restraining order ("TRO") and a preliminary injunction ("PI") requesting that the Court instruct defendant to rescind all single entry bond requirements and refrain from imposing any such prohibitive bond requirements on plaintiff's merchandise in the future.²¹⁰

In granting plaintiff's motion, the Court instructed defendant to rescind all single entry bond requirements on plaintiff's merchandise²¹¹, but did not address the issue of whether defendant could impose bonds other than the existing continuous entry bond, on plaintiff's merchandise in the future. On the same day the Court granted plaintiff's motion, the Court both stayed the action (including the TRO) for eight days and referred the case to mediation.²¹²

²⁰⁷ *Int'l Custom Prods., Inc. v. United States*, Ct. No. 05-00509 (Ct. Int'l Trade).

²⁰⁸ Summons, *Int'l Custom Prods.*, Ct. No. 05-00509 (Ct. Int'l Trade Sept. 13, 2005), Doc. No. 1; Order of Referral to Mediation, *Int'l Custom Prods.*, Ct. No. 05-00509 (Ct. Int'l Trade Sept. 15, 2005), Doc. No. 18; Order of Referral to Mediation, *Int'l Custom Prods.*, Ct. No. 05-00509 (Ct. Int'l Trade Sept. 16, 2005), Doc. No. 20; Order of Referral to Mediation, *Int'l Custom Prods.*, Ct. No. 05-00509 (Ct. Int'l Trade Sept. 19, 2005), Doc. No. 23.

²⁰⁹ *Int'l Custom Prods.*, 29 C.I.T. 1292, 1293-94 (Nov. 8, 2005).

²¹⁰ Plaintiff's Application for a Temporary Restraining Order and Motion for Preliminary Injunction, *Int'l Custom Prods.*, Ct. No. 05-00509 (Sept. 13, 2005), Doc. No. 5.

²¹¹ *Int'l Custom Prods.*, 29 C.I.T. at 1294.

²¹² *Id.*

The Judge Mediator conducted three sessions of one day each.²¹³ Mediation did not result in settlement.²¹⁴ On the day the report of mediation was issued and the stay in the case was lifted, but before the expiration of the TRO, plaintiff entered the 11 entries of merchandise from its bonded warehouse under continuous entry bond.²¹⁵

Three days later, defendant filed its response to both plaintiff's motion for judgment on the agency record and motion for PI.²¹⁶ Accompanying defendant's response was a motion to dismiss for lack of jurisdiction.²¹⁷ On that same day, plaintiff withdrew its motion for PI.²¹⁸ Plaintiff stated the reason for withdrawal as follows:

In reliance on this Court's temporary restraining order, [plaintiff] was able to enter the merchandise in its bonded warehouse, and [plaintiff] will not receive any shipments of [the merchandise] from its foreign supplier in the next few weeks. As a result, [plaintiff] does not require preliminary injunctive relief while it awaits this Court's final ruling on the merits²¹⁹

After plaintiff withdrew its motion for PI, the only remaining issue was whether the Court's jurisdiction attached to plaintiff's remaining claims that, when plaintiff sought to enter the merchandise in the future, "it [would] be faced with a renewed demand for single entry bonds or the imposition of other 'requirements or restrictions.'"²²⁰ In granting defendant's motion to dismiss, the Court determined that it did not have jurisdiction to consider those claims because "[t]hey are 'speculative contingencies [that] afford the [Court] no basis [to] . . . decide'"²²¹

²¹³ Order of Referral to Mediation, *Int'l Custom Prods.*, Ct. No. 05-00509 (Ct. Int'l Trade Sept. 15, 2005), Doc. No. 18; Order of Referral to Mediation, *Int'l Custom Prods.*, Ct. No. 05-00509 (Ct. Int'l Trade Sept. 16, 2005), Doc. No. 20; Order of Referral to Mediation, *Int'l Custom Prods.*, Ct. No. 05-00509 (Ct. Int'l Trade Sept. 19, 2005), Doc. No. 23.

²¹⁴ Report of Mediation, *Int'l Custom Prods.*, Ct. No. 05-00509 (Ct. Int'l Trade Sept. 19, 2005), Doc. No. 24.

²¹⁵ *Int'l Custom Prods.*, 29 C.I.T. at 1294.

²¹⁶ Response of United States to motion for preliminary injunction and for judgment on the agency record, *Int'l Custom Prods.*, Ct. No. 05-00509 (Ct. Int'l Trade Sept. 22, 2005), Doc. No. 25.

²¹⁷ *Id.*

²¹⁸ *Int'l Custom Prods.*, 33 C.I.T. 418, at n.1.

²¹⁹ Letter, *Int'l Custom Prods.*, Ct. No. 05-00509 (Ct. Int'l Trade Sept. 22, 2005), Doc. No. 26.

²²⁰ *Int'l Custom Prods.*, 29 C.I.T. 1292 at n.1, 1294.

²²¹ *Int'l Custom Prods.*, 29 C.I.T. at 1299.

b) *Trustees in Bankruptcy of North American Rubber Thread Co. v. United States*²²²

After the Court denied defendant's motion to dismiss for lack of jurisdiction, plaintiff filed its motion for mediation.²²³ The legal issue in plaintiff's motion for referral to mediation was whether the Department of Commerce's denial to initiate a changed circumstances review of an antidumping duty order was in accordance with law. In that case, the domestic industry expressed a lack of interest in the order and requested that it be revoked retroactively.²²⁴ The basis for Commerce's denial was that "1) all administrative reviews of [the subject imports] have been completed; and 2) there is no existing order for which to initiate a changed circumstances review."²²⁵ The defendant opposed mediation of the issue, and the Court denied plaintiff's motion.²²⁶

Thereafter, the Court twice ordered the case remanded back to Commerce and ultimately ordered Commerce to initiate a changed circumstances review.²²⁷

c) *Kahrs International Inc. v. United States*²²⁸

The USCIT's CM/ECF system categorizes *Kahrs International* under 19 U.S.C. § 1514(a)(2) – Classification, 19 U.S.C. § 1514(a)(5) – Liquidation or Reliquidation, and 28 U.S.C. § 1581(i)(1) – Revenue from Imports or Tonnage.²²⁹ The issues that were the subject of

²²² *Trustees in Bankr. of N. Am. Rubber Thread Co., Inc v. United States ("Rubber Thread Co.")*, Ct. No. 05-00539 (Ct. Int'l Trade).

²²³ *Rubber Thread Co.*, 464 F. Supp. 2d 1350 (Ct. Int'l Trade 2006); Motion for Mediation, *Rubber Thread Co.*, Ct. No. 05-00539 (Ct. Int'l Trade Apr. 16, 2007), Doc. No. 29.

²²⁴ Motion for Mediation, *Rubber Thread Co.*, Ct. No. 05-00539 (Ct. Int'l Trade Apr. 16, 2007), Doc. No. 29.

²²⁵ *Rubber Thread Co.*, 533 F. Supp. 2d 1290, 1292 (Ct. Int'l Trade 2007). Commerce had previously revoked the order pursuant to an earlier changed circumstances review; however, that revocation was effective as of October 1, 2003. There were still unliquidated entries dated as far back as October 1, 1995, and it was that date which plaintiff argued for as the new effective date associated with its second request for a changed circumstances review. *Id.*

²²⁶ The case docket does not indicate that defendant filed a written opposition to plaintiff's motion; however the Court's order denying the motion indicates that defendant opposed mediation of the issue. Order, *Rubber Thread Co.*, Ct. No. 05-00539 (Ct. Int'l Trade Apr. 25, 2007), Doc. No. 31 (denying motion for mediation, "taking into account defendant United States' opposition thereto, in addition to the representations made during the court-initiated telephone conference . . .").

²²⁷ *Rubber Thread Co.*, 533 F. Supp. 2d at 1297-98; *Rubber Thread Co.*, 558 F. Supp. 2d 1367, 1370 (Ct. Int'l Trade 2008); *Rubber Thread Co.*, 32 C.I.T. 1271 (Nov. 21, 2008).

²²⁸ *Kahrs Int'l Inc. v. United States*, Ct. No. 07-00343 (Ct. Int'l Trade).

²²⁹ Docket Sheet, *Kahrs Int'l*, Ct. No. 07-00343 (Ct. Int'l Trade).

court-annexed mediation were related to classification and are discussed in Appendix C, Section A.2.d above.

d) *City of Fresno/Fresno Yosemite International Airport v. United States*²³⁰

In *City of Fresno*, defendant moved the Court for referral to mediation, plaintiff opposed, and the Court denied defendant's motion.²³¹

The legal issue in the complaint was whether CBP's refusal to reimburse plaintiff for overpayment of \$991,517 in airport user fees was "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' and was 'in excess of [Customs'] statutory jurisdiction, authority, or limitations' and thus constitute[d] unlawful agency action" ²³² While the litigation was pending, another legal issue arose as to whether jurisdiction under 28 U.S.C. § 1581(i) was proper.²³³

Defendant moved the Court for mediation before filing the administrative record and before filing its answer.²³⁴ Before defendant had filed its motion, the Court granted defendant four unopposed motions for extensions of time, during which the parties conducted settlement

²³⁰ *City of Fresno/Fresno Yosemite Int'l Airport v. United States ("City of Fresno")*, Ct. No. 10-00137 (Ct. Int'l Trade).

²³¹ Motion for Referral to Mediation, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade Sept. 27, 2010), Doc. No. 19; Response in Opposition to Motion for Referral to Mediation, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade Sept. 29, 2010), Doc. No. 20; Order Denying Referral to Mediation, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade Oct. 1, 2010), Doc. No. 21.

²³² Complaint at ¶¶ 1, 19, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade Apr. 20, 2010), Doc. No. 2 (second alteration added).

²³³ Defendant's Motion to Dismiss and Motion to Stay Filing of the Administrative Record and Memorandum in Support Thereof, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade Oct. 12, 2010), Doc. Nos. 22 & 22-1.

²³⁴ Motion for Referral to Mediation, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade Sept. 27, 2010), Doc. No. 19.

negotiations.²³⁵ Between defendant's third and fourth motions for an extension of time, plaintiff asserted that the parties exchanged their first "informal" settlement offers.²³⁶

Plaintiff did not oppose defendant's fourth request for an extension, but advised defendant that it would oppose any further extension requests.²³⁷ It was at this point that defendant moved the Court for mediation.²³⁸ The stated basis for plaintiff's opposition to defendant's motion was that "it seems far more efficient and less prejudicial to [plaintiff] to defer any proposal to mediate until such time as an answer and the administrative record is filed (or initial discovery is exchanged) so that all parties can litigate or mediate on a level playing field."²³⁹

Thereafter, defendant filed a motion to dismiss for lack of jurisdiction on the basis that plaintiff's complaint used 28 U.S.C. § 1581(i) for jurisdiction when 28 U.S.C. § 1581(a) was otherwise available.²⁴⁰ Plaintiff filed a response opposing defendant's motion.²⁴¹ The parties filed a USCIT Rule 41(a)(1)(A)(ii) joint stipulation of dismissal while the due date for defendant's reply to plaintiff's response was pending before the Court.²⁴²

²³⁵ Order Granting Defendant's Unopposed Motion for an Extension of Time for U.S. Customs & Border Patrol to File the Administrative Record Motion for Referral to Mediation, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade June 2, 2010), Doc. No. 11; Order Granting Defendant's Unopposed Motion for an Extension of Time to Respond to the Complaint and to File the Administrative Record, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade June 23, 2010), Doc. No. 13; Order Granting Defendant's Unopposed Motion for an Extension of Time to Answer the Complaint and to File the Administrative Record, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade July 29, 2010), Doc. No. 16; Order Granting Defendant's Unopposed Motion for an Extension of Time to Respond to the Complaint and to File the Administrative Record, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade Sept. 1, 2010), Doc. No. 18.

²³⁶ Response in Opposition to Motion for Referral to Mediation at ¶ 9, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade Sept. 29, 2010), Doc. No. 20.

²³⁷ *Id.* at ¶ 10.

²³⁸ Motion for Referral to Mediation, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade Sept. 27, 2010), Doc. No. 19.

²³⁹ Response in Opposition to Motion for Referral to Mediation at ¶ 9, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade Sept. 29, 2010), Doc. No. 20.

²⁴⁰ Defendant's Motion to Dismiss and Motion to Stay Filing of the Administrative Record and Memorandum in Support Thereof, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade Oct. 12, 2010), Doc. Nos. 22, 22-1.

²⁴¹ Plaintiff's Memorandum of Law in Opposition to the Government's Motion to Dismiss, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade Nov. 11, 2010), Doc. No. 23.

²⁴² Joint Stipulation of Dismissal, *City of Fresno*, Ct. No. 10-00137 (Ct. Int'l Trade Feb. 7, 2011), Doc. No. 30.

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

a) *Family Delight Foods, Inc. v. United States*²⁴³

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

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

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

City of Fresno is discussed in Appendix C, Section C.1.d above.

D. 19 U.S.C. § 1582

1. *United States v. ITT Industries, Inc.*²⁴⁴

In *ITT Industries*, defendant filed a prior disclosure, in which it admitted failing to post and pay regular duties and antidumping duties on entries of certain imported bearings from 1988 through 1991.²⁴⁵ CBP calculated that defendant owed \$36,344.50 in regular duties and \$618,127.50 in antidumping duties.²⁴⁶ Defendant agreed with CBP's calculation of regular duties, but disagreed with its calculation of antidumping duties.²⁴⁷ After defendant paid the regular duties, CBP issued defendant a pre-penalty notice for the interest associated with the antidumping duties.²⁴⁸ CBP calculated the penalty based on the interest lost during the period beginning on the dates of entry and ending on the date of pre-penalty notice.²⁴⁹

²⁴³ *Family Delight Foods, Inc. v. United States*, Ct. Nos. 10-00136, 10-00331 (Ct. Int'l Trade).

²⁴⁴ *United States v. ITT Indus., Inc.*, Ct. No. 97-01777 (Ct. Int'l Trade). After denying plaintiff's motion to dismiss *ITT Jabsco v. United States*, Ct. No. 97-00379 (Ct. Int'l Trade), the Court consolidated the Ct. Nos. 97-01777 and 97-00379 under Ct. No. 97-01777. *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade May 30, 2001), Doc. No. 40.

²⁴⁵ *ITT Indus.*, 343 F. Supp. 2d 1322, 1326 (Ct. Int'l Trade 2004).

²⁴⁶ *Id.* at 1327.

²⁴⁷ Joint Statement of Material Facts Not in Dispute at ¶ 25, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Feb. 28, 2002), Doc. No. 54.

²⁴⁸ *ITT Indus.*, 343 F. Supp. 2d at 1328.

²⁴⁹ *Id.*

After CBP reviewed the amount of antidumping duties owed, pursuant to defendant's request, CBP advised defendant that it must tender the full amount of antidumping duties payable, \$619,515.33, to "perfect its prior disclosure."²⁵⁰ Furthermore, CBP instructed defendant that, if the full amount was not tendered, CBP would issue a penalty "at the full penalty amount."²⁵¹

Upon paying the full amount of antidumping duties, defendant filed a protest challenging the calculation of antidumping duties owed.²⁵² Defendant requested accelerated disposition of its protest pursuant to 19 U.S.C. § 1515(b) and, based on CBP's denial of the protest, filed a summons challenging that denial.²⁵³ Thereafter, CBP issued defendant a notice of penalty that demanded \$109,418.81.²⁵⁴ CBP calculated that penalty based on the interest lost during the period beginning on the dates of entry and ending on the date of defendant's prior disclosure.²⁵⁵ When defendant declined to pay the penalty, plaintiff filed suit under § 1582.²⁵⁶

While plaintiff's first motion for summary judgment was pending in Ct. No. 97-01777, the Court denied plaintiff's motion to dismiss Ct. No. 97-00379 and ordered the two cases consolidated.²⁵⁷ Plaintiff withdrew its first motion for summary judgment, defendant filed a partial motion for summary judgment, and plaintiff filed a second motion for summary judgment.²⁵⁸ In an attempt to narrow the facts, the Court held a number of telephone conferences with the parties during which it posed a number of questions, one of which was whether the case

²⁵⁰ Joint Statement of Material Facts Not in Dispute at ¶¶ 27-31, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Feb. 28, 2002), Doc. No. 54.

²⁵¹ *Id.*

²⁵² *Id.* at ¶¶ 32-33.

²⁵³ *Id.* at ¶ 35.

²⁵⁴ *ITT Indus.*, 343 F. Supp. 2d at 1328.

²⁵⁵ *Id.*

²⁵⁶ Joint Statement of Material Facts Not in Dispute at ¶ 37, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Feb. 28, 2002), Doc. No. 54.

²⁵⁷ Motion for Summary Judgment and Dismissal of Defendant's Counterclaim, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Dec. 20, 1999), Doc. No. 22.; Order, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade May 30, 2001), Doc. No. 40.

²⁵⁸ Letter re: Withdrawal of Motions, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Aug. 7, 2001), Doc. No. 45; Motion for Summary Judgment, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Feb. 28, 2002), Doc. No. 53; Motion for Summary Judgment, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Feb. 28, 2002), Doc. No. 55.

was amenable to settlement.²⁵⁹ Each party filed two sets of supplemental briefs in response to the questions posed by the Court.²⁶⁰ Plaintiff's position was that the issue was not amenable to settlement.²⁶¹ Defendant's position was that the Court should apply "equitable principles" in resolving the case.²⁶² Finding that there were still material facts at issue, the Court denied plaintiff's second motion and defendant's partial motion for summary judgment.²⁶³

The parties filed a number of status reports related to discovery, which culminated in a joint statement of material facts not in dispute.²⁶⁴ Based on the latter document, plaintiff filed its third motion for summary judgment and defendant filed its second motion for summary judgment.²⁶⁵ While the responses to those motions were pending, the Court issued an order of referral to mediation.²⁶⁶

Mediation took place seven years after defendant filed its summons challenging a denied protest and six and one-half years after plaintiff filed its summons seeking to collect a penalty.

²⁵⁹ Phone conferences held on 7/2/02, 7/23/02, and 9/23/02, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade), Docket Sheet; *see, e.g.*, Brief in Response to Questions Raised by Court during 7/2/02 teleconference, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade July 22, 2002), Doc. No. 70.

²⁶⁰ Supplemental Brief, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade July 22, 2002), Doc. No. 69; Brief in Response to Questions Raised by Court during 7/2/02 Teleconference, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade July 22, 2002), Doc. No. 70; Supplemental Brief, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Aug. 20, 2002), Doc. No. 72; Brief in Response to the Court's Questions, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Aug. 20, 2002), Doc. No. 73.

²⁶¹ *See, e.g.*, Brief in Response to Questions Raised by Court during 7/2/02 Teleconference at 9, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade July 22, 2002), Doc. No. 70.

²⁶² *See, e.g.*, Supplemental Brief, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Aug. 20, 2002), Doc. No. 72 at 7-9.

²⁶³ Order, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Sept. 10, 2002), Doc. No. 74.

²⁶⁴ Status Reports, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Oct. 18, 2002, Dec. 16, 2002, Feb. 3, 2003), Doc. Nos. 75, 77, 79; Confidential and Public Joint Statement of Material Facts Not in Dispute, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Mar. 20, 2003), Doc. No. 81.

²⁶⁵ Motion for Summary Judgment, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Jan. 16, 2004), Doc. No. 91; Motion for Summary Judgment and Dismissal of Defendant's Counterclaim, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Jan. 16, 2004), Doc. No. 92.

²⁶⁶ Response to Motion for Summary Judgment, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Mar. 4, 2004), Doc. No. 95; Response to Motion by Plaintiff for Summary Judgment, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Mar. 11, 2004), Doc. No. 99; Order of Referral to Mediation, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Mar. 16, 2004), Doc. No. 100.

Originally scheduled for 60 days, mediation was extended an additional 30 days and appears not to have resulted in settlement.²⁶⁷ No final report of mediation appears on the docket.

On the date the mediation was scheduled to end, defendant filed its reply in support of its second motion for summary judgment.²⁶⁸

Upon consideration of plaintiff's and defendant's cross-motions for summary judgment, the Court granted in part and denied in part plaintiff's motion, and denied defendant's motion.²⁶⁹ The part of plaintiff's motion that the Court granted was the amount of antidumping duties assessed. The part of plaintiff's motion that the Court denied was the amount of penalty assessed consisting of interest owed on the antidumping duties.²⁷⁰ The Court ordered a trial to be held on the penalty issue.²⁷¹ The parties then filed six status reports, culminating in a settlement agreement, whereby the parties agreed that the penalty amount, consisting of the interest associated with the antidumping duties owed, was \$54,709.41.²⁷²

Defendant appealed the issue of whether CBP correctly calculated the antidumping duties owed as reflected in the Court's grant in part of plaintiff's motion for summary judgment.²⁷³ The Federal Circuit affirmed the USCIT.²⁷⁴

2. *United States v. Optrex America, Inc.*²⁷⁵

In *Optrex America*, the United States sought to recover duties pursuant to 19 U.S.C. § 1592(d) for defendant's alleged negligent misclassification of liquid crystal display ("LCD") products and to enforce a civil penalty for violations of 19 U.S.C. § 1592. In its first amended complaint, plaintiff alleged lost revenue in the amount of \$1,515,499.75 and a negligence penalty

²⁶⁷ Order of Referral to Mediation, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Mar. 16, 2004), Doc. No. 100; Report of Mediation and Order for Extension of Time, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade May 14, 2004), Doc. No. 101.

²⁶⁸ Reply, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade June 18, 2004), Doc. No. 102.

²⁶⁹ *ITT Indus.*, 343 F. Supp. 2d at 1344.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Status Reports, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade July 29, Aug. 23, Aug. 31, Sept. 22, Oct. 4, Nov. 17, 2004), Doc. Nos. 107-111, 113; Order (Settlement Agreement) at ¶ 1, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Nov. 30, 2004), Doc. No. 115.

²⁷³ Notice of Appeal, *ITT Indus.*, Ct. No. 97-01777 (Ct. Int'l Trade Jan. 19, 2005), Doc. No. 118.

²⁷⁴ *ITT Indus.*, 168 Fed. Appx. 942 (Fed. Cir. 2006).

²⁷⁵ *United States v. Optrex America, Inc.*, Ct. No. 02-00646 (Ct. Int'l Trade).

of \$3,030,999.50.²⁷⁶ The Court twice issued opinions related to the parties' motions to compel discovery.²⁷⁷ Based on information obtained during the course of discovery, plaintiff filed a motion to amend its complaint to add claims of gross negligence and fraud.²⁷⁸

The Court issued four orders referring the case to mediation. The first of those orders was issued (1) following the Court's denial of defendant's partial motion for summary judgment on whether defendant exercised reasonable care in classifying its merchandise, and (2) following plaintiff's motion for reconsideration of the Court's denial of its motion to amend the complaint to add counts alleging gross negligence and fraud.²⁷⁹ The Court ordered the action referred to mediation, and gave the parties 90 days in which to settle or dismiss the case.²⁸⁰ The Court subsequently issued three more orders of referral to mediation, totaling an additional 113 days.²⁸¹ After over six months, mediation did not result in settlement.²⁸²

After a trial, the Court found defendant in violation of 19 U.S.C. § 1592 by negligently failing to use reasonable care in its classification of LCD products.²⁸³ The Court ordered the recovery of \$913,572.79 in duties, and the payment of penalties in the amount of "one and one-half 'times the lawful duties, taxes, and fees of which the United States [was] deprived' between November 13, 2007 [sic] through June 29, 1999."²⁸⁴

²⁷⁶ Plaintiff's First Amended Complaint, ¶¶ 13, 16, *Optrex America*, Ct. No. 02-00646 (Ct. Int'l Trade July 12, 2006), Doc. No. 15.

²⁷⁷ *Optrex America*, 28 C.I.T. 987 (July 1, 2004); *Optrex America*, 28 C.I.T. 993 (July 1, 2004).

²⁷⁸ *Optrex America*, 29 C.I.T. 1494, 1495 (Dec. 15, 2005).

²⁷⁹ *Optrex America*, 30 C.I.T. 650 (May 17, 2006); *Optrex America*, 29 C.I.T. 1494 (Dec. 15, 2005); Plaintiff's Motion for Reconsideration, *Optrex America*, Ct. No. 02-00646 (Ct. Int'l Trade July 10, 2006), Doc. No. 111.

²⁸⁰ Order of Referral to Mediation, *Optrex America*, Ct. No. 02-00646 (Ct. Int'l Trade July 12, 2006), Doc. No. 112.

²⁸¹ Order of Referral to Mediation, *Optrex America*, Ct. No. 02-00646 (Ct. Int'l Trade Oct. 10, 2006), Doc. No. 113; Order of Referral to Mediation, *Optrex America*, Ct. No. 02-00646 (Ct. Int'l Trade Nov. 21, 2006), Doc. No. 114; Order of Referral to Mediation, *Optrex America*, Ct. No. 02-00646 (Ct. Int'l Trade Jan. 5, 2007), Doc. No. 115.

²⁸² Report of Mediation, *Optrex America*, Ct. No. 02-00646 (Ct. Int'l Trade Jan. 17, 2007), Doc. No. 116. Order of Referral to Mediation, *Optrex America*, Ct. No. 02-00646 (Ct. Int'l Trade July 12, 2006), Doc. No. 112; Order of Referral to Mediation, *Optrex America*, Ct. No. 02-00646 (Ct. Int'l Trade Oct. 10, 2006), Doc. No. 113; Order of Referral to Mediation, *Optrex America*, Ct. No. 02-00646 (Ct. Int'l Trade Nov. 21, 2006), Doc. No. 114; Order of Referral to Mediation, *Optrex America*, Ct. No. 02-00646 (Ct. Int'l Trade Jan. 5, 2007), Doc. No. 115; Report of Mediation, *Optrex America*, Ct. No. 02-00646 (Ct. Int'l Trade Jan. 17, 2007), Doc. No. 116.

²⁸³ *Optrex America*, 560 F. Supp. 2d 1326, 1341 (Ct. Int'l Trade 2008).

²⁸⁴ *Id.* at 1344.

3. *United States v. Lee-Hunt International, Inc.*²⁸⁵

Lee-Hunt International was a multi-party dispute in which the United States asserted that Lee-Hunt International ("LHI"), its president, and its vice president be jointly and severally held liable for fraudulently valuing and classifying certain flashlights.²⁸⁶ The United States sought to recover duties and penalties from the foregoing defendants and also from LHI's two sureties, Washington International Insurance Co. and Frontier Insurance Co.²⁸⁷

The complaint set forth the following four counts: (1) through the use of materially false statements, LHI, its President, and its Vice-President were jointly and severally liable for \$1,746,964.99 in penalties (plus pre-judgment and post-judgment interest, as provided by law), which represented the domestic value of 76 entries of the subject merchandise; (2) LHI, its President, and its Vice-President were jointly and severally liable for \$240,936.65 in lost revenue (plus interest as provided by law); (3) due to the foregoing defendant's failure to pay, Washington International Insurance Co. was liable on its bond for \$100,000 (\$50,000 per entry year); and (4) due to LHI, its President, and its Vice-President's failure to pay the penalties and lost revenue, Frontier Insurance Co. was liable on its bond for \$50,000.²⁸⁸

Five days before the deadline for the parties to file their pre-trial order, the Court referred the action to mediation.²⁸⁹ The mediation was originally scheduled to last 45 days, but the Judge Mediator issued his report in 134 days, which indicated a settlement of all the issues.²⁹⁰

The parties agreed to a stipulated judgment pursuant to USCIT Rule 54(b). In that judgment, the parties agreed to the following: LHI's President agreed to pay \$25,000 in exchange for the voluntary dismissal of all claims against him and LHI; Washington Int'l agreed to pay \$100,000 in exchange for the voluntary dismissal against it; LHI's President admitted to the possibility of negligence and agreed to reimburse and indemnify Washington Int'l for the full amount payable by Washington Int'l; and LHI's Vice-President agreed to pay \$2,500 in exchange

²⁸⁵ *United States v. Lee-Hunt Int'l, Inc.*, Ct. No. 02-00816 (Ct. Int'l Trade).

²⁸⁶ Complaint at ¶¶ 14, 17, *Lee-Hunt Int'l*, Ct. No. 02-00816 (Ct. Int'l Trade Dec. 19, 2002), Doc. No. 3.

²⁸⁷ *Id.* at ¶¶ 38, 41.

²⁸⁸ Complaint at ¶¶ 32, 35, 38, 41, *Lee-Hunt Int'l*, Ct. No. 02-00816 (Ct. Int'l Trade Dec. 19, 2002), Doc. No. 3.

²⁸⁹ Order of Referral to Mediation, *Lee-Hunt Int'l*, Ct. No. 02-00816 (Ct. Int'l Trade Dec. 5, 2005), Doc. No. 73; *see also* Revised Scheduling Order, *Lee-Hunt Int'l*, Ct. No. 02-00816 (Ct. Int'l Trade Nov. 3, 2005), Doc. No. 67.

²⁹⁰ Order of Referral to Mediation, *Lee-Hunt Int'l*, Ct. No. 02-00816 (Ct. Int'l Trade Dec. 5, 2005), Doc. No. 73; Report of Mediation, *Lee-Hunt Int'l*, Ct. No. 02-00816 (Ct. Int'l Trade Apr. 18, 2006), Doc. No. 79.

for the voluntary dismissal of all claims against him.²⁹¹ In addition to the parties releasing each other from any claims arising from the entries subject to the agreement, the parties also agreed that the foregoing stipulations reflected LHI's and its President's ability to pay.²⁹² If plaintiff discovered that LHI or its President held material assets that were undisclosed as of the date of the agreement, a material breach would be declared and the parties again would be liable for full amount demanded in the complaint, plus interest and attorney's fees.²⁹³ The action is currently stayed with regard to Frontier's liability pending the Superintendent of Insurance of the State of New York's lifting of its rehabilitation order, which enjoins all persons from prosecuting any actions against Frontier.²⁹⁴

4. *United States v. Leslie M. Toth*²⁹⁵

The Complaint consisted of two counts, the first of which sought civil penalties of \$3,350,923.00, the domestic value of imported crawfish, and the second of which sought lost revenue of \$2,846,230.87 due to defendant's alleged misclassification of merchandise subject to an antidumping duty order.²⁹⁶ After the close of discovery, defendant filed a motion for judgment on the pleadings asserting that the complainant failed to state a claim upon which relief could be granted.²⁹⁷ The underlying legal issue in defendant's motion was whether only the importer and its authorized agents can directly enter the merchandise for purposes of 19 U.S.C. § 1592(a)(1)(A).²⁹⁸ When plaintiff filed its response to that motion, it also filed a motion to amend the complaint to add counts of gross negligence and fraud based on information obtained during the course of discovery.²⁹⁹

²⁹¹ Stipulated Judgment Pursuant to Rule 54(b), *Lee-Hunt Int'l*, Ct. No. 02-00816 (Ct. Int'l Trade Sept. 22, 2006), Doc. No. 81.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Joint Status Report, *Lee-Hunt Int'l*, Ct. No. 02-00816 (Ct. Int'l Trade Dec. 1, 2006), Doc. No. 84.

²⁹⁵ *United States v. Leslie M. Toth*, Ct. No. 09-00183 (Ct. Int'l Trade).

²⁹⁶ Complaint at ¶¶ 17, 19, *Leslie M. Toth*, Ct. No. 09-00183 (Ct. Int'l Trade May 1, 2009), Doc. No. 2. The plaintiff originally sought \$3,896,230.87 in lost revenue, but that amount was reduced when defendant's surety paid \$50,000, the limit of its bond.

²⁹⁷ Motion for Judgment on the Pleadings & Accompanying Memorandum, *Leslie M. Toth*, Ct. No. 09-00183 (Ct. Int'l Trade July 30, 2010), Doc. No. 36.

²⁹⁸ *Id.*

²⁹⁹ Plaintiff's Motion to Amend the Complaint and Response to Defendant's Motion for Judgment on the Pleadings, *Leslie M. Toth*, Ct. No. 09-00183 (Ct. Int'l Trade Jan. 26, 2011), Doc. No. 46.

While those two motions were pending, the Court referred the action to mediation.³⁰⁰ Approximately six months after the Judge referred the case to mediation, the parties filed a stipulation of dismissal without prejudice.³⁰¹ The stipulation of dismissal included a statute of limitations waiver whereby defendant agreed not to assert limitations for two years from the date on which the waiver was executed.³⁰²

5. *United States v. Washington International Insurance Co.*³⁰³

Plaintiff asserted that defendant, a surety, was liable for the defendant principal's non-payment of duties.³⁰⁴ The amount at issue was \$63,288.87.³⁰⁵ Defendant and third-party defendant had executed a continuous entry bond for \$50,000 per year.³⁰⁶ The subject merchandise entered the United States over the course of two years.³⁰⁷ In defendant's answer, it included a third-party complaint seeking an order from the court compelling the third-party defendant, defendant's principal, to pay its duty obligations, among other claims.³⁰⁸ Third-party defendant asserted that plaintiff failed to exhaust administrative remedies because third-party defendant's supplemental petition for relief was pending before CBP.³⁰⁹

Plaintiff and defendant filed a joint status report wherein the parties recognized that the Court twice extended the deadline for a proposed scheduling order in light of settlement negotiations between the plaintiff and the third-party defendant.³¹⁰ The parties also recognized

³⁰⁰ Order of Referral to Mediation, *Leslie M. Toth*, Ct. No. 09-00183 (Ct. Int'l Trade Mar. 9, 2011), Doc. No. 51.

³⁰¹ Stipulation of Dismissal without Prejudice, *Leslie M. Toth*, Ct. No. 09-00183 (Ct. Int'l Trade Sept. 1, 2011), Doc. No. 53.

³⁰² Exhibits to Stipulation of Dismissal without Prejudice, *Leslie M. Toth*, Ct. No. 09-00183 (Ct. Int'l Trade Sept. 1, 2011), Doc. No. 54.

³⁰³ *United States v. Washington Int'l Ins. Co. ("Washington Int'l Ins. Co. I")*, Ct. No. 09-00449 (Ct. Int'l Trade).

³⁰⁴ Complaint at ¶ 6, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade Oct. 19, 2009), Doc. No. 3.

³⁰⁵ *Id.* at ¶ 13.

³⁰⁶ *Id.* at ¶ 6.

³⁰⁷ *Id.*

³⁰⁸ Answer at 5-8, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade Nov. 25, 2009), Doc. No. 6.

³⁰⁹ Answer to Amended Third Party Complaint & Affirmative Defenses at ¶ 1, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade May 3, 2010), Doc. No. 12.

³¹⁰ Plaintiff and Defendant's Joint Status Report Pursuant to the Court's November 9, 2010, Order at ¶¶ 7-8, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade Mar. 8, 2011), Doc. No. 20.

that the third-party defendant made an offer in compromise, but plaintiff took the position that the action should proceed against defendant.³¹¹ Thereafter, in response to defendant and third-party defendant's joint motion for a stay, plaintiff asserted that it had denied both third-party defendant's supplemental petition and the offer in compromise.³¹²

While discovery was still open, the parties filed a letter with the Court to inform it that, pursuant to discussions, the parties consented to mediation.³¹³ The Court denied defendant and third-party defendant's joint motion for a stay, and referred the action to mediation.³¹⁴

When the Court referred *Washington International Insurance Co. I* to mediation, the pending issues were whether defendant was liable for \$63,288.78, which allegedly represented revenue lost due to defendant principal's negligent misclassification and for which defendant provided bond coverage, and whether defendant was liable for statutory interest beginning on the date of demand.³¹⁵ Mediation took more than four months and resulted in a settlement of all of the issues associated with defendant, but the action continued between defendant (third-party claimant) and the third-party defendant.³¹⁶ Almost one and one-half years later, the Court, upon

³¹¹ *Id.* at ¶ 9. Third-party defendant filed a separate joint status report wherein it objected to certain matters in the other parties' status report, characterizing them as involving jurisdictional and procedural matters as well as conclusions of law. Third Party Defendant and Defendant's Joint Motion to Stay Court Proceedings, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade June 27, 2011), Doc. No. 26.

³¹² Plaintiff's Opposition to Third Party Defendant's and Third Party Plaintiff's Joint Motion to Stay Proceedings, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade July 18, 2011), Doc. No. 27. Third party defendant's offer in compromise was that it offered to pay all duties owing in installments. Third Party Defendant and Defendant's Joint Motion to Stay Court Proceedings at 3, *U.S. v. Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade June 27, 2011), Doc. No. 26.

³¹³ Letter, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade Aug. 5, 2011), Doc. No. 31.

³¹⁴ Order, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade Aug. 8, 2011), Doc. No. 32; Order of Referral to Mediation, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade Aug. 8, 2011), Doc. No. 33.

³¹⁵ Complaint at ¶¶ 13, 15, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade Oct. 19, 2009), Doc. No. 3.

³¹⁶ Order of Referral to Mediation, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade Aug. 8, 2011), Doc. No. 33; Stipulation of Dismissal, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade Feb. 9, 2012), Doc. No. 35; Report of Mediation, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade Feb. 13, 2012), Doc. No. 36; Stipulation of Dismissal, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade Feb. 6, 2012), Doc. No. 34; Order, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade Aug. 8, 2011), Doc. No. 32.

defendant's motion, ordered the cross-claim against third-party defendant dismissed with prejudice.³¹⁷

6. *United States v. Washington International Insurance Co.*³¹⁸

The United States brought *Washington International Insurance Co. II* in an effort to collect unpaid duties of \$142,245.00 resulting from third-party defendant, J&B Trading Co.'s, alleged misclassification of video cameras.³¹⁹ Defendant, a surety, filed a third-party claim seeking an order compelling third-party defendant's payment of its duty obligations, indemnification, and asserting unjust enrichment.³²⁰

Approximately one month before the close of discovery, third-party defendant, J&B Trading Co., filed a motion for referral to court-annexed mediation in which it stated that mediation would likely lead to early and satisfactory resolution of the action to the benefit of all parties and also serve to limit the time and expense of discovery.³²¹ Defendant consented to J&B Trading Co.'s motion.³²² The issues pending when J&B Trading Co. filed its motion were (1) whether J&B Trading Co. misclassified merchandise upon entry into the United States and, (2) if so, whether that misclassification was the result of J&B Trading Co.'s negligence.^{323, 324} In plaintiff's response in opposition, it stated that additional discovery was necessary, but that mediation may be appropriate in the future. It also noted that, notwithstanding J&B Trading

³¹⁷ Order, *Washington Int'l Ins. Co. I*, Ct. No. 09-00449 (Ct. Int'l Trade July 29, 2013), Doc. No. 46.

³¹⁸ *United States v. Washington Int'l Ins. Co. ("Washington Int'l Ins. Co. II")*, Ct. No. 09-00459 (Ct. Int'l Trade).

³¹⁹ Complaint at ¶¶ 8-11, 15, *Washington Int'l Ins. Co. II*, Ct. No. 09-00459 (Ct. Int'l Trade Oct. 28, 2009), Doc. No. 3.

³²⁰ Third-Party Complaint, *Washington Int'l Ins. Co. II*, Ct. No. 09-00459 (Ct. Int'l Trade Apr. 9, 2010), Doc. No. 19.

³²¹ Motion for Referral to Court-Annexed Mediation, *Washington Int'l Ins. Co. II*, Ct. No. 09-00459 (Ct. Int'l Trade July 31, 2013), Doc. No. 50.

³²² *Id.*

³²³ Plaintiff's Opposition to Third-Party Defendant's Motion for Referral to Court-Annexed Mediation at 2, *Washington Int'l Ins. Co. II*, Ct. No. 09-00459 (Ct. Int'l Trade Aug. 1, 2013), Doc. No. 51.

³²⁴ Parties' Stipulation to Voluntary Dismissal, *Washington Int'l Ins. Co. II*, Ct. No. 09-00459 (Ct. Int'l Trade Mar. 26, 2014), Doc. No. 60; Order of Dismissal, *Washington Int'l Ins. Co. II*, Ct. No. 09-00459 (Ct. Int'l Trade Mar. 27, 2014), Doc. No. 62.

Co.'s claim of an early resolution, the action had been pending for nearly four years.³²⁵ The Court denied J&B Trading Co.'s motion for referral to court-annexed mediation.³²⁶

One day before the end of discovery, plaintiff filed a consent motion to modify the scheduling order for a 120-day extension to determine whether they may be able to reach settlement, among other reasons.³²⁷ The Court granted plaintiff's motion.³²⁸ Two months later, the parties filed a stipulation of dismissal pursuant to USCIT Rule 41(a)(1)(A)(ii).³²⁹

7. *United States v. Tenneco Automotive, Inc.*³³⁰

Plaintiff's complaint sought from the principal, Tenneco Automotive, Inc., and its surety, Washington International Insurance Company ("Washington Int'l"), \$22,332.70 in lost revenue and \$44,665.40 in penalties, plus interest, as a result of defendant's alleged undervaluation of an automotive maintenance machine.³³¹ Tenneco and Washington Int'l denied plaintiff's allegations, asserted the affirmative defense of statute of limitations, and claimed that the lost revenue identified by plaintiff was generated by applying duties on non-dutiable charges.³³²

After the Court denied plaintiff's motion to compel, defendant filed a motion for referral to court-annexed mediation.³³³ Washington Int'l consented to the mediation³³⁴, and plaintiff

³²⁵ Plaintiff's Opposition to Third Party Defendant's Motion for Referral to Court-Annexed Mediation, *Washington Int'l Ins. Co. II*, Ct. No. 09-00459 (Ct. Int'l Trade Aug. 1, 2013), Doc. No. 51.

³²⁶ Order, *Washington Int'l Ins. Co. II*, Ct. No. 09-00459 (Ct. Int'l Trade Aug. 2, 2013), Doc. No. 52 (denying third party defendant's motion).

³²⁷ Plaintiff's Consent Motion to Modify Scheduling Order, *Washington Int'l Ins. Co. II*, Ct. No. 09-00459 (Ct. Int'l Trade Jan. 27, 2014), Doc. No. 58.

³²⁸ Order, *Washington Int'l Ins. Co. II*, Ct. No. 09-00459 (Ct. Int'l Trade Jan. 27, 2014), Doc. No. 59 (granting Plaintiff's consent motion).

³²⁹ Parties' Stipulation to Voluntary Dismissal, *Washington Int'l Ins. Co. II*, Ct. No. 09-00459 (Ct. Int'l Trade Mar. 26, 2014), Doc. No. 60.

³³⁰ *United States v. Tenneco Automotive, Inc.*, Ct. No. 10-00130 (Ct. Int'l Trade).

³³¹ Complaint at ¶¶ 7, 10, 18, 20, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade Apr. 15, 2010), Doc. No. 3.

³³² Answer at ¶¶ 18, 20, 22, Affirmative Defenses at ¶¶ 1, 2, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade June 14, 2010), Doc. No. 10; Answer at ¶¶ 18, 20, 22, Affirmative Defenses at ¶¶ 1, 2, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade June 22, 2010), Doc. No. 14.

³³³ Order, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade Nov. 10, 2011), Doc. No. 32; Motion for Referral to Court-Annexed Mediation, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade Nov. 23, 2011), Doc. No. 34.

³³⁴ Motion for Referral to Court-Annexed Mediation, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade Nov. 23, 2011), Doc. No. 34.

indicated that it was unable to consent to the defendant's motion because it first needed to resolve a number of pending issues.³³⁵ First, plaintiff required the content of defendant's proposal or written confirmation that defendant intended to proceed in accordance with the Court's rules.³³⁶ Second, plaintiff requested that the parties discuss and jointly agree to certain additional parameters in an attempt to facilitate the resolution of the matter through mediation.³³⁷ Third, plaintiff requested that the parties discuss outstanding discovery issues and negotiate a suitable discovery extension to accommodate possible mediation and the completion of Tenneco's outstanding fact discovery requests.³³⁸

Before the Court ruled on defendant's motion for referral to mediation, plaintiff also filed a motion for referral to mediation.³³⁹ In plaintiff's motion, it sought to modify the court's Mediation Guidelines pertaining to both confidentiality and settlement.³⁴⁰ Defendant filed a response in opposition.³⁴¹ The Court denied plaintiff's motion for referral to court-annexed mediation.³⁴²

Twelve days after denying plaintiff's motion, and without reference to defendant's still pending motion, the Court referred the action to mediation.³⁴³ After one order extending the deadline for the conclusion of mediation, the Court signed the parties' joint stipulation of dismissal.³⁴⁴ The Judge Mediator's report indicates that the mediation resulted in a settlement of all issues.³⁴⁵

³³⁵ Response to Defendant Tenneco Automotive, Inc.'s Motion for Referral to Court-Annexed Mediation, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade Nov. 30, 2011), Doc. No. 36.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ Plaintiff's Motion for Referral to Court-Annexed Mediation, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade Dec. 23, 2011), Doc. No. 40.

³⁴⁰ *Id.*

³⁴¹ Defendant Tenneco Automotive Inc.'s Response to Plaintiff's Motion for Referral to Court-Annexed Mediation, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade Jan. 10, 2012), Doc. No. 41.

³⁴² Order, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade Jan. 12, 2012), Doc. No. 42.

³⁴³ Order, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade Jan. 24, 2012), Doc. No. 43.

³⁴⁴ Order, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade Apr. 19, 2012), Doc. No. 44; Joint Stipulation of Dismissal, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade June 12, 2012), Doc. No. 48.

³⁴⁵ Report of Mediation, *Tenneco Automotive*, Ct. No. 10-00130 (Ct. Int'l Trade July 10, 2012), Doc. No. 49.

8. *United States v. ABC Farma, Inc.*³⁴⁶

Plaintiff sought a penalty of \$5,998.76 (20 percent of the domestic value of the merchandise) for the negligent violation of 19 U.S.C. § 1592, due to defendant's alleged misclassification and misdescription of certain pharmaceuticals and related products upon entry into the United States.³⁴⁷ In seeking to gather more facts on which to support its argument, plaintiff also moved the Court to compel defendant to respond to certain discovery.³⁴⁸ The Court granted plaintiff's motion.³⁴⁹ When defendant reportedly failed to comply with the court-ordered discovery requests, plaintiff moved the court to sanction defendant.³⁵⁰

As plaintiff's sanctions motion was pending, defendant moved the Court to refer the case to mediation.³⁵¹ One of the bases for defendant's motion was that "[t]he parties have had substantive settlement discussions, and have significantly narrowed their differences but have not been able to reach final agreement on settlement of this action."³⁵² Defendant also cited "the relatively small amount in controversy . . . and alleged level of culpability" as reasons that mediation would be appropriate.³⁵³

Plaintiff opposed defendant's motion, stating that mediation would not be appropriate due to defendant's "flagrant refusal to comply with the Court's order" and defendant's refusal to meet plaintiff's settlement conditions.³⁵⁴ Plaintiff concluded its response by stating:

Given these circumstances, the likely result of forced mediation at this stage would be yet another reprieve for Mr. Devesa, another delay in the completion of discovery, the unnecessary expenditure

³⁴⁶ *United States v. ABC Farma, Inc.*, Ct. No. 12-00041 (Ct. Int'l Trade).

³⁴⁷ Complaint at ¶¶ 7-10, 18-19, *ABC Farma*, Ct. No. 12-00041 (Ct. Int'l Trade Feb. 7, 2012), Doc. No. 3.

³⁴⁸ Motion to Compel Discovery Responses, *ABC Farma*, Ct. No. 12-00041 (Ct. Int'l Trade Aug. 27, 2013), Doc. No. 223.

³⁴⁹ Order, *ABC Farma*, Ct. No. 12-00041 (Ct. Int'l Trade Sept. 23, 2013), Doc. No. 23.

³⁵⁰ Motion for Sanctions, *ABC Farma*, Ct. No. 12-00041 (Ct. Int'l Trade Feb. 14, 2013), Doc. No. 26.

³⁵¹ Motion for Order of Referral to Mediation, *ABC Farma*, Ct. No. 12-00041 (Ct. Int'l Trade Jan. 23, 2014), Doc. No. 29.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ Plaintiff's Response to Defendant's Motion for an Order Referring This Matter to Mediation, *ABC Farma*, Ct. No. 12-00041 (Ct. Int'l Trade Feb. 4, 2014), Doc. No. 32.

of the resources of the judge mediator and the parties' counsel, and no settlement agreement.³⁵⁵

After a telephone conference with the parties, the Court denied defendant's motion for an order referring the action to mediation.³⁵⁶ Nine days after the Court denied defendant's motion for referral to mediation, the parties filed a joint stipulation of dismissal with prejudice.³⁵⁷

9. *United States v. Tenacious Holdings, Inc.*³⁵⁸

Plaintiff initiated this case seeking civil penalties of \$51,544.40 and unpaid duties of \$1,993.09, plus interest, on the basis of defendant's alleged negligent misclassification of certain gloves upon entry into the United States.³⁵⁹ Before filing its answer, defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted.³⁶⁰ The Court denied defendant's motion.³⁶¹ In its answer, defendant denied plaintiff's allegations and asserted the affirmative defenses of statute of limitations, laches, and accord and satisfaction.³⁶²

Three months before the close of discovery, defendant moved the Court to issue an order of referral to mediation.³⁶³ The bases of defendant's motion were the following: (1) penalty actions are suited to mediation; (2) the amount in controversy is modest; (3) the controversy involves an ambiguous provision of the tariff schedule; (4) resolution of the action would have no "forward impact" (the HTSUS subheading under which the gloves entered the United States

³⁵⁵ *Id.*

³⁵⁶ Telephone Conference, *ABC Farma*, Ct. No. 12-00041 (Ct. Int'l Trade Feb. 11, 2014), Doc. No. 34; Order, *ABC Farma*, Ct. No. 12-00041 (Ct. Int'l Trade Mar. 8, 2014), Doc. No. 35.

³⁵⁷ Order, *ABC Farma*, Ct. No. 12-00041 (Ct. Int'l Trade Mar. 8, 2014) Doc. No. 35; Joint Stipulation of Dismissal, *ABC Farma*, Ct. No. 12-00041 (Ct. Int'l Trade Mar. 27, 2014), Doc. No. 36.

³⁵⁸ *United States v. Tenacious Holdings, Inc.*, Ct. No. 12-00173 (Ct. Int'l Trade).

³⁵⁹ Complaint at ¶¶ 7-8, 12, 25, 27, 30, *Tenacious Holdings*, Ct. No. 12-00173 (Ct. Int'l Trade June 20, 2012), Doc. No. 2.

³⁶⁰ Defendant's Motion to Dismiss, *Tenacious Holdings*, Ct. No. 12-00173 (Ct. Int'l Trade May 15, 2013), Doc. No. 10.

³⁶¹ *Id.*

³⁶² Answer at ¶¶ 24-30, Affirmative Defenses at ¶¶ 1-3, *Tenacious Holdings*, Ct. No. 12-00173 (Ct. Int'l Trade May 28, 2013), Doc. No. 21.

³⁶³ Defendant's Motion for an Order of Referral to Mediation, *Tenacious Holdings*, Ct. No. 12-00173 (Ct. Int'l Trade June 9, 2014), Doc. No. 31. At that time, plaintiff's motion to compel, both parties' motions for partial summary judgment, and defendant's response to plaintiff's motion for partial summary judgment were pending before the Court.

was temporary and had expired); (5) privilege issues make mediation preferable; and (6) mediation promotes the interests set forth in USCIT Rule 1.³⁶⁴

Plaintiff opposed defendant's motion, claiming that the motion was defendant's way to avoid its discovery obligations and that the merits could not be properly weighed in mediation without full discovery.³⁶⁵ Moreover, plaintiff took the position that mediation before the close of discovery would be a "waste of time."³⁶⁶ Plaintiff also took the position that defendant would "hand-pick" samples of attorney client communications favorable to defendant and withhold unfavorable communications.³⁶⁷ Finally, plaintiff found the relative small amount in controversy and lack of a forward impact to be unimportant.³⁶⁸

The Court granted defendant's motion over the objection of plaintiff.³⁶⁹ In so doing, the Court informed the parties that "the results of mandatory mediation resemble those achieved in voluntary mediation in terms of settlement rates and party satisfaction."³⁷⁰ Noting that the relatively small amount in controversy and the fact that a resolution would have no forward impact were not unimportant, the Court stated that those two factors make the action more amenable to mediation.³⁷¹ With regard to plaintiff's objections to mediation because discovery was not yet closed when defendant filed its motion, the Court stated:

Referral to mediation will not cause any procedural unfairness, since the discovery issues at the core of the [plaintiff's] concerns will be fully addressed by order of the Court should mediation be unsuccessful. Although the Court acknowledges the government's concerns about mediating without the robust information that it would have after the completion of discovery, the Court does not agree that mediation is bound to fail at this stage.³⁷²

³⁶⁴ *Id.*

³⁶⁵ Plaintiff's Response to Defendant's Motion for an Order Referring This Matter to Mediation, *Tenacious Holdings*, Ct. No. 12-00173 (June 16, 2014), Doc. No. 32.

³⁶⁶ *Id.* at 3.

³⁶⁷ *Id.* at 4.

³⁶⁸ *Id.*

³⁶⁹ Order and Opinion, *Tenacious Holdings*, Ct. No. 12-00173, Slip Op. 14-101, 2014 WL 4345804, at *4 (Ct. Int'l Trade Sept. 2, 2014), Doc. No. 43.

³⁷⁰ *Id.* at *3.

³⁷¹ *Id.*

³⁷² *Id.*

The Court concluded its opinion by stating that, "if" plaintiff approaches the process in good faith, as the Court expected it to do, plaintiff may be surprised to find that the case is more amenable to disposition than plaintiff feared.³⁷³ As of September 10, 2014, the Judge Mediator had yet to issue a Report of Mediation.

*This is a draft of an article that is forthcoming in 23 Tul. J. Int'l & Comp. L. (2015). Reprinted with the permission of the Tulane Journal of International and Comparative Law.

³⁷³ *Id.*