How Useful is 28 U.S.C. § 1292(d)(1) in Preventing Protracted Litigation and Uncorrectable Harm to Litigants in Trade Remedies Cases? *

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The interlocutory appeal provision codified at 28 U.S.C. § 1292(d)(1) expressly permits parties to seek interlocutory review before the United States Court of Appeals for the Federal Circuit ("Federal Circuit") from certain rulings of the Court of International Trade. This provision on its face could provide a vehicle for reducing instances in which agency remands are necessary due to differences in views between the agency and the presiding Court of International Trade judge as to controlling questions of law about which there is not yet Federal Circuit precedent. In actuality, however, the use and effect of this provision has been limited. Congress enacted 28 U.S.C. § 1292(d) as part of the Federal Courts Improvement Act of 1982.[2] During the over quarter-century in which the provision has been effective, the Court of International Trade appears to have certified only eleven interlocutory appeals under 28 U.S.C. § 1292(d)(1). Six of the cases involved appeals of trade remedies decisions; five involved customs matters. As discussed later in this paper, this number was further narrowed in that the Federal Circuit did not agree to hear interlocutory appeals in all cases where the Court of International Trade certified such appeals.[3]

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[2] Pub. L. No. 97-164, 96 Stat. 25 (1982).

[3] To locate cases, the authors used online research services, as well as the respective

This paper will examine practice under 28 U.S.C. § 1292(d). It will then examine other procedural mechanisms litigants have attempted to use, largely without success, to seek Federal Circuit review of Court of International Trade remand orders on issues of law. Finally, it will consider the consequences of the limited impact of the statutory interlocutory appeal provision.

I. Statutory Provision Permitting Interlocutory Appeals: 28 U.S.C. § 1292(d)(1)

The statutory provision permitting interlocutory appeals of Court of International Trade rulings under certain circumstances reads as follows:

> When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved to which there is a substantial difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if the application is made to that Court within ten days after the entry of the order.[4]

This provision in 28 U.S.C. § 1292(d)(1) concerning appeals to the Federal Circuit of certain interlocutory orders of the Court of International Trade is essentially identical to provisions in other portions of 28 U.S.C. § 1292 permitting Federal Circuit review of interlocutory orders of the Court of Federal Claims[5] and of district courts in patent matters[6] and permitting appellate

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courts' electronic search systems, to conduct electronic database searches of Court of International Trade and Federal Circuit opinions. Because neither all Court of International Trade orders certifying interlocutory appeals nor all Federal Circuit orders are published, and because the courts' electronic databases are less comprehensive for earlier years, it is possible that there may be additional unreported interlocutory appeals. Nevertheless, it is significant that since 2000 – when electronic database coverage is more likely to be complete – there are only three reported instances in which the Court of International Trade has certified an interlocutory appeal – or an average of less than one every three years.

[4] 28 U.S.C. § 1292(d)(1).

[5] 28 U.S.C. § 1292(d)(2).

review of district court interlocutory orders in certain circumstances.[7] There is also an identically structured provision permitting Federal Circuit review of interlocutory orders of the Court of Appeals for Veterans Claims in certain circumstances.[8]

The statute establishes three requirements that must be satisfied before any interlocutory appeal may proceed. Notwithstanding the limited number of decisions arising under this statute, and even fewer number of such decisions that are explained,[9] some observations are possible concerning how the Court of International Trade has construed each of these requirements.

The first is that the appeal involve a "controlling question of law." One Court of International Trade judge has cited this as precluding the certification of an appeal on issues that

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[6] 28 U.S.C. § 1292(c).

[7] 28 U.S.C. § 1292(b).

[8] 38 U.S.C. § 7292(b)(1).

[9] *Cf. Washington Int'l Ins. Co. v. United States*, 12 CIT 259 (1988) (dissent noting lack of explanation in the unpublished order issued by other two judges in three judge panel certifying manner for interlocutory appeal, which the Federal Circuit subsequently heard). In several cases where the Federal Circuit has accepted an interlocutory appeal under 28 U.S.C. § 1292(d)(1), neither that court nor the Court of International Trade has provided an explanation as to why the matter is worthy of certification and interlocutory appeal. *See, e.g., Borlem, S.A. – Empreedimentos Industriais v. United States*, 913 F.2d 933 (Fed. Cir. 1990) (issue concerned Court of International Trade's authority to remand matter to International Trade Commission (ITC) for reconsideration based on changes in Department of Commerce margins after ITC reached its determination); *Chapparal Steel Co. v. United States*, 901 F.2d 1097 (Fed. Cir. 1990) (issue concerned which imports were "subject to investigation" for purposes of cumulation in ITC antidumping investigation); *American Lamb Co. v. United States*, 785 F.2d 984 (Fed. Cir. 1986) (issue concerned evidentiary standard ITC should use in making preliminary antidumping and countervailing duty determinations); *Zenith Radio Corp. v. United States*, 764 F.2d 1578 (Fed. Cir. 1985) (issue concerned denial of governmental claim of privilege in discovery); *Consumer Products Div., SCM Corp. v. Silver Reed America, Inc.*, 753 F.2d 1033 (Fed. Cir. 1985) (issue concerned validity of Commerce regulation limiting amount of direct costs that could be deducted from foreign market value).

involve mixed questions of fact and law.[10] Another judge stated that the "question of law" requirement ensures that interlocutory appeals involve issues that the Federal Circuit can decide quickly without having to study a record.[11] The same judge commented that for a question of law to be "controlling," it need not dispositive, but should be one whose resolution "could materially affect the outcome of the litigation."[12] Legal issues whose resolution is critical to whether a case can proceed have been deemed "controlling."[13] The Court of International Trade has certified interlocutory appeals in some cases raising constitutional claims and jurisdictional issues,[14] but denied certification in other such cases.[15]

The second requirement is that the issue be one "with respect to which there is a

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[10] *Chung Ling Co. v. United States*, 805 F. Supp. 56, 65 (Ct. Int'l Trade 1989).

[11] *United States v. UPS Customhouse Brokerage, Inc.*, 464 F. Supp.2d 1364, 1371 (Ct. Int'l Trade 2006).

[12] *UPS Customshouse Brokerage*, 464 F. Supp.2d at 1371.

[13] *See UPS Customshouse Brokerage*, 464 F. Supp.2d at 1372 (whether government may proceed with multiple penalty claims for Customs misclassification when defendant claimed there was merely a single violation); *USEC Inc. v. United States*, Slip Op. 03-170 at 8 (Ct. Int'l Trade Dec. 22, 2003) (issue concerned Commerce's decision not to apply tolling regulations to transactions involving enrichment of uranium feedstock).

[14] *See Orleans Int'l, Inc. v. United States*, 219 F. Supp.2d 1355 (Ct. Int'l Trade 2002) (whether Court of International Trade lacked jurisdiction to consider constitutional challenge to assessments applied to plaintiff's beef exports); *Carnival Cruise Lines, Inc. v. United States*, 929 F. Supp. 1570, 1577 (Ct. Int'l Trade 1996) (whether unconstitutional provisions of Harbor Maintenance Tax severable from constitutional provisions).

[15] *See Totes-Isotoner Corp. v. United States*, 580 F. Supp. 1371, 1379-80 (Ct. Int'l Trade 2008) (claim Harmonized Tariff Schedule of the United States unconstitutionally discriminates on the basis of gender by imposing different rates for men's and women's gloves); *Consolidated Fibers, Inc. v. United States*, 2007 Ct. Int'l Trade LEXIS 194 (Ct. Int'l Trade Jan. 12, 2007) (whether court had jurisdiction to consider action challenging ITC's refusal to institute reconsideration proceeding).

substantial ground for a difference of opinion." The reported cases provide little elaboration on this requirement. In some cases, it appears the Court of International Trade was persuaded by the fact that there were substantial differences of opinion between the parties to the litigation.[16] In other cases, the court emphasized that the litigant's disagreement with the court was an insufficient basis to find a substantial difference in opinion.[17] In denying certification, several judges have emphasized that their rulings on the legal issues for which certification is sought for an interlocutory appeal do not conflict with prior Court of International Trade rulings.[18]

The third requirement is that the interlocutory appeal "may materially advance the ultimate termination of the investigation." As with the second requirement, the criteria the court uses to determine whether such an appeal will materially advance the termination of the litigation are not entirely clear. Reasons cited in cases granting certification include that an appellate ruling may prove dispositive,[19] or may serve to "clarify[] the issues of the proceeding . . . enabling the parties and the Court to allocate resources efficiently."[20] On the other hand, several opinions denying certification have emphasized that the remaining proceedings needed to reach a

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[16] *See UPS Customshouse Brokerage*, 464 F. Supp.2d at 1374; *USEC, Inc.*, Slip Op. 03-170 at 8; *Republic Steel Corp v. United States*, 572 F. Supp. 275, 277 (Ct. Int'l Trade 1983).

[17] *See Consolidated Fibers*, 2007 Ct. Int'l Trade LEXIS 194; *Usinor Industeel, S.A. v. United States*, 215 F. Supp. 1356, 1360 (Ct. Int'l Trade 2002).

[18] *See Volkswagen of America, Inc. v. United States*, 4 F. Supp.2d 1259, 1263 (Ct. Int'l Trade 1998); *Chung Ling Co. v. United States*, 805 F. Supp. 56, 64 (Ct. Int'l Trade 1989). *But cf. UPS Customshouse Brokerage*, 464 F. Supp.2d at 1372-74 (emphasizing ruling consistent with opinions by other Court of International Trade judges, but still finding "substantial difference of opinion" requirement satisfied).

[19] *UPS Customshouse Brokerage*, 464 F. Supp.2d at 1372-73.

[20] *USEC Inc*, Slip Op. 03-170 at 8.

final order in the case would not be extensive.[21]

Finally, even if the Court of International Trade should certify an interlocutory appeal after finding all statutory requirements to be satisfied, the Federal Circuit still must determine whether or not to entertain the appeal. The Federal Circuit has indicated that "[s]uch a ruling is within this court's complete discretion."[22] In at least two instances, the Federal Circuit has declined to hear interlocutory appeals certified by the Court of International Trade.[23]

II. Federal Circuit Precedent Permitting Appeals of Some Remand Orders

Under 28 U.S.C. § 1295, the Federal Circuit has exclusive jurisdiction over "a final decision" from several trial-level courts. These include the Court of International Trade,[24] the Court of Federal Claims,[25] and district courts with respect to patent law issues and certain claims against the United States.[26] Another statutory provision gives the Federal Circuit jurisdiction over decisions of the Court of Appeals for Veterans Claims insofar as they construe statutory or

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[21] *Totes-Isotoner Corp.*, 580 F. Supp.2d at 1380 (noting that judgment would be final if plaintiff did not amend complaint); *United States v. Dantzler Lumber & Export Co.*, 17 CIT 178, 180 (1993) (trial imminent); *National Corn Growers Ass'n v. Baker*, 623 F. Supp. 1262, 1273 (Ct. Int'l Trade 1985) (discovery had been completed; issues raised did not portend protracted trial).

[22] *Orleans, Int'l, Inc. v. United States*, 49 Fed. Appx. 892 (Fed. Cir. 2002) (nonprecedential opinion).

[23] *United States v. UPS Customshouse Brokerage, Inc.*, 213 Fed. Appx. 985 (Fed. Cir. 2006) (nonprecedential opinion); *Carnival Cruise Lines, v. United States*, 1996 U.S. App. LEXIS 18677 (Fed. Cir. 1996) (nonprecedential opinion).

[24] 28 U.S.C. § 1295(a)(5).

[25] 28 U.S.C. § 1295(a)(3)

[26] 28 U.S.C. § 1295(a).

regulatory provisions.[27]

The Federal Circuit in the 1986 *Cabot Corp.* decision held that orders directing an agency remand are not generally appealable final orders because they do not end the litigation on the merits and generally address the central issues in the case, rather than collateral issues.[28] Nevertheless, the Federal Circuit has applied some exceptions to this general rule that permit certain orders directing remands, or that otherwise do not conclude the administrative proceedings that are the subject of the legal action, to be appealable as final orders.

In 1992, the Federal Circuit created a prominent exception to the *Cabot* rule in a case involving an appeal of an order of the Court of Veterans Appeals (CVA). In that case -- *Travelstead v. Derwinski*[29] -- the government directly appealed the CVA's holding that the Veterans Administration (VA) used an incorrect legal standard in ascertaining whether the holder of a VA-guaranteed home loan that defaulted on the loan was entitled to a retroactive release of liability. Based on its holding, the CVA had remanded the matter to the Board of Veterans Appeals to make a determination under the legal standard that the CVA had identified as correct.

The Federal Circuit acknowledged that the CVA's order remanding the proceeding would not constitute an appealable final order under the rule of *Cabot*.[30] It stated, however, that intervening Supreme Court precedent militated against any *per se* rule precluding the

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[27] 38 U.S.C. § 7292.

[28] *See Cabot Corp. v. United States*, 788 F.2d 1539, 1542-43 (Fed. Cir. 1986).

[29] 978 F.2d 1244 (Fed. Cir. 1992).

[30] *Id*. at 1247.

appealability of remand orders.[31] Instead, the Court opined that "remands are not all of the same nature. Some are final; some are not." Moreover, the availability of an interlocutory appeal mechanism (which the government did not attempt to invoke in the case) did not affect whether a remand might be subject to appeal as a matter of right.[32] The court concluded that the remand order at issue was an appealable final order on the grounds that it reversed the decision of the VA, decided that the VA could not follow its own interpretation of the agency regulations, and terminated the action before the CVA.[33] It also expressed the concern that the government might not be able to appeal any judgment issued after remand.[34]

The Federal Circuit has applied the *Travelstead* holding to other cases which involve a common procedural background – CVA remand orders involving individual claim or benefit proceedings before the agency now known as the Department of Veterans Affairs.[35] The Federal Circuit has been disinclined, however, to extend the rationale of *Travelstead* to orders remanding matters to other agencies. For example, shortly after the *Travelstead* decision, the ITC and the Department of Commerce individually filed appeals of several different orders that they each

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[31] *Id*. at 1247-48, *citing Sullivan v. Finklestein*, 496 U.S. 617 (1990).

[32] *Id*. at 1249.

[33] *Id*. at 1247-48.

[34] *Id*. at 1249.

[35] *See Adams v. Principi*, 265 F.3d 1318, 1321 (Fed. Cir. 2001) (appeal by veteran of decision that veteran not entitled to disability compensation as a matter of law, notwithstanding remand of matter to ascertain whether factual basis for compensation might exist); *Dombach v. Gober*, 223 F.3d 1376, 1379 (Fed. Cir. 2000) (appeal by veteran rejecting his statutory claim to entitlement for disability compensation, notwithstanding remand of matter to ascertain whether factual basis for compensation might exist); *Jones v. West*, 136 F.3d 1298, 1299 (Fed. Cir. 1998) (appeal by veteran's widow rejecting widow's statutory interpretation underlying claim for benefit, notwithstanding remand of matter for further factual development).

contended improperly directed the agencies on remand to apply different statutory legal standards from those standards the respective agency had applied; the ITC and Commerce contended that each of these remand orders were consequently final orders appealable under *Travelstead*. The Federal Circuit dismissed each appeal for lack of jurisdiction in largely identical non-precedential opinions which distinguished *Travelstead* on two grounds. First, the Federal Circuit emphasized that the only litigants in *Travelstead* were the plaintiff and the government, while parties in the Commerce and ITC cases included the plaintiff, the government, and defendant-intervenors. The Federal Circuit reasoned that while the government might not have any recourse if the plaintiff prevailed after remand in *Travelstead*, any administrative decision the ITC or Commerce would make after remand could be appealed by the defendant-intervenors. The court dismissed the government argument that defendant-intervenors might withdraw from an investigation, or decide not to pursue an appeal of a judgment affirming an adverse determination after remand, as "speculative." Second, the Federal Circuit observed that while the *Travelstead* remand order finally disposed of the litigation before the CVA, the Court of International Trade still had jurisdiction over the litigation before it and would review any agency remand results.[36]

Nevertheless, the Federal Circuit has declined to provide a *per se* ruling that remand orders issued by the Court of International Trade pertaining to Commerce and ITC antidumping and countervailing duty investigations are never appealable final orders. In *Viraj Group, Ltd. v.*

[36] *See Hosiden Corp. v. USITC*, 1993 U.S. App. LEXIS 19060 (Fed. Cir. July 13, 1993) (non-precedential opinion); *Chr. Bjelland Seafoods A/S v. USITC*, 1993 U.S. App. LEXIS 15507 (Fed. Cir. June 15, 1993) (non-precedential opinion); *Brother Industries (USA), Inc. v. United States*, 1993 U.S. App. LEXIS 15463 (Fed. Cir. June 15, 1993) (non-precedential opinion); *Suramerica de Aleaciones Laminadas, C.A. v. USITC*, 1993 U.S. App. LEXIS 14879 (Fed. Cir., May 26, 1993) (non-precedential opinion).

United States,[37] the appellate court suggested that the *Travelstead* requirements were "arguably satisfied" when the Court of International Trade, after two remands, precluded Commerce from using an "unreliable" methodology for computing exchange rates in an antidumping investigation, notwithstanding that the court also found that Commerce's methodology was consistent with the agency's regulations.[38] Nevertheless, the Federal Circuit found that the government had standing to challenge the decisions requiring remands as part of an appeal of the Court of International Trade's judgment upholding the agency result on third remand on the basis that because Commerce used the exchange rate methodology mandated by the Court of International Trade under protest in the third remand "in substance, the government is truly the non-prevailing party in this case."[39]

The Federal Circuit has also held that, as long as an antidumping or countervailing duty investigation was completed when the original complaint was filed in the Court of International Trade, a subsequent remand determination that reopens the case for further phases of the investigation does not change the finality and appealability of the Court of International Trade's ultimate decision affirming the agency, In *Co-Steel Raritan v. USITC*,[40] the ITC reached a preliminary determination of negligible imports, which had the effect of terminating the

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[37] 343 F.3d 1371 (Fed. Cir. 2003).

[38] *Id*. at 1376.

[39] *Id*. *See also Thai I-Mei Frozen Foods Co. v. United States*, __ F.3d ___, Ct. No. 2009-1516 (Fed. Cir. Aug. 12, 2010) (Without discussion, Court finds jurisdiction over Government appeal of Court of International Trade judgment affirming Commerce Department determination on third remand, in which Commerce applied statutory construction compelled by Court of International Trade).

[40] 357 F.3d 1294, 1303-08 (Fed. Cir. 2004).

investigation.[41] As allowed by statute,[42] petitioners appealed to the Court of International Trade. That court remanded the matter to the ITC with instructions to allow certain evidence into the record, and the consideration of that evidence led the ITC to reach an affirmative preliminary determination on remand. The Court of International Trade then affirmed the Commission's preliminary affirmative remand determination on remand. Although the Court of International Trade's affirmance resulted in the continuation of the investigation to a final phase and did not terminate the Commission investigation as had the originally-appealed preliminary determination, the Federal Circuit held it was an appealable decision, because it ended the litigation concerning the preliminary determination.[43]

III. Consequences of Current Approach

As the previous discussion indicates, availability of appellate review of Court of International Trade remand orders is highly circumscribed and the circumstances under which such review are available are both limited and to some extent difficult to ascertain. The criteria established under 28 U.S.C. § 1292(d)(1) – like those in the district court interlocutory provision at 28 U.S.C. § 1292(b) upon which § 1292(d)(1) was modeled – are intentionally difficult to satisfy.[44] The legislative history likewise confirms that permissive interlocutory appeals under §

[41] *See id*. at 1298.

[42] 19 U.S.C. § 1516a(a)(1).

[43] *Id*. at 1303-08. The court distinguished *Jeannette Sheet Glass Co. v. United States*, 803 F.2d 1576, 1578 (Fed. Cir. 1986), on the grounds that no entry of judgment has been entered in *Jeannette*.

[44] The wording of 28 U.S.C. § 1292(d) is adapted from that of 28 U.S.C. § 1292(b), a provision generally applicable to interlocutory orders issued by United States District Courts. *See* S. Rep. 97-125 at 28 (1982). The legislative history of 28 U.S.C. § 1292(b) indicates that the provision originated from a proposal that the Administrative Office of the United States Courts

1292(b) are discretionary, first with the lower court judge and ultimately with the appellate court.[45] Because the provision accords considerable discretion both to the Court of International Trade in deciding whether to certify an appeal and to the Federal Circuit in deciding whether to hear one, its application has not been susceptible to any predictable test. In several respects (particularly with respect to the requirement that the issue be one where there is "a substantial difference of opinion") the courts have applied a range of discretion in applying the criteria. As a result, Court of International Trade judges have only granted requests for certification for interlocutory appeal rarely; moreover, even in some of the unusual cases where a Court of International Trade judge has certified a matter for interlocutory appeal, the Federal Circuit has still exercised its discretion not to consider the appeal. Additionally, while there is Federal Circuit precedent suggesting that a trial court order remanding a matter to an agency may be appealable as of right as a final judgment in certain circumstances, the Federal Circuit has uniformly rejected attempts to appeal Court of International Trade remand orders as final orders appealable as of right. The courts' disinclination to certify or entertain appeals of remand orders provides a significant disincentive to counsel to attempt to pursue such appeals.

The stringent standards for permitting appeals of remand orders has led to several instances where disagreements between the agencies and judges at the Court of International

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developed. That proposal indicated that interlocutory appeals should be available only in "exceptional cases." S. Rep. 2434, *reprinted in* 1958 U.S. Code Cong. & Ad. News 5255, 5258-59. *See United States v. UPS Customhouse Brokerage, Inc.*, 464 F. Supp. 2d at 1617.

[45] *See* S. Rep. 2434, *reprinted in* 1958 U.S. Code Cong. & Ad. News at 5256-57. *See In re Convertible Rowing Exerciser Patent Litigation*, 903 F.2d 822 (Fed. Cir. 1990); *Nebraska Public Power District v. United States*, 74 Fed. Cl. 762, 763 (2006), *permission to appeal granted*, 219 Fed. Appx. 980 (Fed. Cir. 2007) (nonprecedential)**.** *See generally James J. Cummins v. EG&G Sealol, Inc.*, 697 F. Supp. 6 (D.R.I. 1988).

Trade persist over time without resolution, or with a delayed resolution. One of the most prominent instances of this occurred in the 1980s, when a number Court of International Trade decisions – the first issued in 1984 – rejected the evidentiary standard the ITC used in ascertaining whether there was a "reasonable indication of material injury" in making preliminary antidumping and countervailing duty determinations.[46] While the ITC continued to register its disagreement with the evidentiary standards promulgated by the Court of International Trade, its initial request to certify the question for interlocutory review was denied by the Court of International Trade.[47] It was not until a subsequent request for interlocutory review was subsequently granted by both another Court of International Trade judge and the Federal Circuit that the Federal Circuit was able to review the issue, upholding the standard applied by the ITC.[48]

The experience of these 1980s cases involving preliminary determinations indicates that application of strict standards for certifying remand orders for interlocutory appeal may be detrimental where recurring disputes confined to legal interpretation recur. Likewise, use of the interlocutory appeal mechanism could be useful in situations where the Court of International Trade judges disagree among themselves on controlling legal questions. In such cases, absent a ruling from the Federal Circuit, the agency will lack proper guidance as to how it should act in

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[46] *See Republic Steel Corp. v. United States*, 591 F. Supp. 640 (Ct. Int'l Trade 1984); *Jeannette Sheet Glass Corp. v. United States*, 607 F. Supp. 123 (Ct. Int'l Trade 1985); *app. dismissed*, 803 F.2d 1576 (Fed. Cir. 1986), *modified*, 654 F. Supp. 179 (Ct. Int'l Trade 1987); *American Grape Growers Alliance v. United States*, 615 F. Supp. 603 (Ct. Int'l Trade 1985).

[47] *See Jeannette Sheet Glass Corp. v. United States*, 9 CIT 306, 308 (1985).

[48] *See American Lamb Co. v. United States*, 785 F.2d 994 (Fed. Cir. 1986).

future cases.[49] It bears note, however, that whether resolution of a question of law will likely aid an agency in its administration of a statute is not a consideration implicated by the language of 28 U.S.C. § 1292(d)(1).

Of, course, even in cases that raise legal issues that can be expected to arise repeatedly, such as the standards for five-year reviews and the application of the statutory causation provision, not all cases would be best served by the use of interlocutory appeals. Indeed, the experience in many cases suggests that application of strict standards for certifying remand orders for interlocutory appeal may not always be detrimental, even if it results in instances when disputes on legal standards between an agency and the Court of International Trade may remain unresolved. Some legal disputes are triggered by specific fact patterns that do not recur.[50] In other instances, after further clarification from the court, the agency may be able to frame its future analyses in a manner that avoids conflict with Court of International Trade opinions, as occurred in the progression of cases addressing the meaning of the term "likely" in the sunset

[49] There is at least one example where one Court of International Trade judge has invalidated a Department of Commerce policy, a second judge has upheld the policy, and there has been no opportunity by the Federal Circuit to resolve the matter. *Compare SKF USA, Inc. v. United States*, 675 F. Supp.2d 1264, 1280-85 (Ct. Int'l Trade 2009) (Stanceu, J.) (concluding that Commerce's policy of issuing liquidation instructions 15 days after publication of final results of an administrative review contrary to law) *with Mittal Steel Galati S.A. v. United States*, 491 F. Supp.2d 1273, 1280-81 (Ct. Int'l Trade 2007) (Gordon, J.) (upholding Commerce policy although finding it "not without its flaws").

[50] *See Fresh and Chilled Atlantic Salmon from Norway*, Inv. Nos. 701-TA-302, 731-TA-454 (Final) (Remand), USITC Pub. 2589 at 14 & n.61 (Dec. 1992) (use of "continuing effects" in injury analysis; remand determination sustained and not appealed; issue has not recurred); *Certain Cold-Rolled Steel Products from Argentina, Brazil, China, Indonesia, Japan, Russia, Slovakia, South Africa, Taiwan, Thailand, Turkey, and Venezuela*, Inv. Nos. 701-TA-393, 731-TA-829-840 (Final), USITC Pub. 3691 at 3-4 (May 2004) (interpretation of the term "internally transfer" in 19 U.S.C. § 1677(7)(C)(iv); remand determination sustained and not appealed; issue has not recurred)

provisions of the statute.[51] While these cases were resolved without the need for a definitive resolution of the narrow legal issue, it is not always possible to come to an efficient resolution without Federal Circuit intervention.

A second difficulty that recurs under current practice is that in several instances the agency perceives that what is framed as a remand order is effectively a reversal,[52] and compels the agency to reach a certain result on remand. There have been numerous Court of International Trade remands to the ITC fitting this pattern.[53] It is as best unclear whether the agency can

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[51] Thus, in *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, Inv. Nos. AA1921-197, 701-TA-231, 319-320, 322, 325-328, 340, 342, 348-350, 731-TA-573-576, 578, 582-587, 604, 607-608, 612, 614-618 (Review) (Remand), USITC Pub. 3526 (July 2002), the ITC majority indicated it disagreed with the Court of International Trade concerning the construction of the term "likely" in 19 U.S.C. § 1675(c)(1)). While certain ITC Commissioners and the Court of International Trade continue to dispute how to construe this term, the dispute has never proven to be outcome-dispositive in any five-year review. Moreover, most of the current Commissioners apply without protest the "likely" standard articulated by the Court of International Trade. *See*, *e.g.*, *Preserved Mushrooms from Chile, China, India, and Indonesia*, Inv. Nos. 731-TA-776-779 (Second Review), USITC Pub. 4135 at 15 (Apr. 2010).

[52] The Federal Circuit has declined to rule on whether the Court of International Trade may expressly reverse an ITC or Commerce decision in an antidumping or countervailing duty matter pursuant to 19 U.S.C. § 1516a. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006).

[53] *See Tapered Roller Bearings and Parts Thereof and Certain Housings Incorporating Tapered Rollers from Hungary*, Inv. No. 731-TA-341 (Final) (Remand), USITC Pub. 2245 a t 6 (Dec. 1989) (Commission plurality concludes that remand order compelled negative determination on subject imports from Hungary); *Certain Electrical Conductor Aluminum Redraw Rod from Venezuela*, Inv. Nos. 701-TA-287, 731-TA-378 (Final) (Remand), USITC Pub. 2869 at 5-7 (Feb. 1995) (legal standards Court of International Trade directed ITC to apply in remand, combined with court's interpretation of evidence in directing remand, found to compel negative determination); *Tin- and Chromium-Steel Sheet from Japan*, Inv. No. 731-TA-860 (Final) (Third Remand), USITC Pub. 3751 at 5-6 (Dec. 2004) (ITC issues negative present injury determination at direction of Court of International Trade and determine that court's instructions compel a negative threat determination as well); *Certain Ball Bearings and Parts Thereof from Japan and the United Kingdom*, Inv. Nos. 731-TA-391-394, 396, 399 (Second

appeal such an order as a final order. As discussed above, there is language in the *Viraj* opinion indicating that the Federal Circuit perceives such an order may be appealable as a final order, although we unaware of any instance in which this scenario has played out and the Federal Circuit has permitted appeal of a Court of International Trade remand order as a final order. Absent a mechanism for appeals of such orders, either as final orders or interlocutory orders, the agency is required to undertake a remand proceeding to reach the result compelled by the Court of International Trade, and the remand result must then be approved by the Court of International Trade before there may be any appeal to the Federal Circuit.

Another source of inefficiency with deferring any appeal of a remand order until final disposition of the case is the fact that the appeal potentially encompasses all interlocutory orders of the Court of International Trade – including those directing remands – as well as the final judgment. Should the agency determination change as a result of a remand order, and should the agency or one of the litigants challenge one of the remand orders on appeal, the agency may be required to defend two contrary determinations on appeal. The ITC has found itself in this situation repeatedly in Federal Circuit appeals of investigations where its determination changed as a result of a Court of International Trade remand order.[54]

Review) (Third Remand), Public Slip Op. at 12 (Aug. 2010) (public slip op. available as USITC EDIS Doc. 433599) (ITC issues negative determination on subject imports from United Kingdom at direction of Court of International Trade).

[54] *See, e.g.*, *Diamond Sawblades Mfrs. Coalition v. United States*, 612 F.3d 1348 (Fed. Cir. 2010); *Nippon Steel Corp. v. USITC*, 494 F.3d 1371 (Fed. Cir. 2007); *Nippon Steel Corp. v. United States*, 458 F.3d 1345 (Fed. Cir. 2006); *Altx, Inc. v. United States*, 370 F.3d 1108 (Fed. Cir. 2004); *Co-Steel Raritan v. USITC*, 357 F.3d 1294, 1303-08 (Fed. Cir. 2004); *Taiwan Semiconductor Indus. Ass'n v. United States,* 266 F.3d 1339 (Fed. Cir. 2001).