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What Happens When the Court Reverses a Dumping or Countervailing Duty Case? What Should Happen?

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WHAT HAPPENS WHEN THE COURT REVERSES A DUMPING OR COUNTERVAILING DUTY CASE? WHAT SHOULD HAPPEN?*

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I.	INTRODUCTION	151
II.	BACKGROUND	152
	A. *The* Cabot *Decisions*	152
	1. The CIT's Remand in *Zenith*	153
	B. *The* Jeannette *Decisions*	154
	C. *The* Philipp Brothers *Decision*	155
	D. *The* Badger-Powhatan *Decision*	156
III.	DISCUSSION	157
	A. *Judicially Created Exceptions to the Finality Rule*	158
	B. *Recent Narrowing of the Finality Exceptions*	160
	C. *Recent Court of Appeals Decisions Permitting Appeals of Remands of Administrative Determinations*	161
	D. *The Special Circumstances of CIT Remands*	162
IV.	CONCLUSION	165

I. INTRODUCTION

Finality of CIT Remand Orders

(or, "Whatever Happened to the Right of Appeal?")[1]

A specter is haunting the Department of Commerce (hereinafter Commerce). Recent decisions of the Court of International Trade and

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*This article is based upon the author's presentations at the Fourth Annual Judicial Conference on the Court of International Trade (1987).

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1. Some of the research in this paper was taken from L. Concannon & B. Browne, *Whatever Happened to the Right of Appeal?*, in THE COMMERCE DEPARTMENT SPEAKS OUT S11 (Practicing Law Institute 1987).

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Florida Journal of International Law, Vol. 3, Iss. 2 [1988], Art. 1

the Federal Circuit Court of Appeals predict that the Court of International Trade will be able to dictate to Commerce the methodology that Commerce has to employ in anti-dumping and countervailing duty proceedings, and Commerce will not be able to appeal. Cloaked in the doctrine of finality, the apparition has appeared with increasing frequency in recent years, seriously disrupting administration of the anti-dumping and countervailing duty laws.

II. BACKGROUND

A. *The* Cabot *Decisions*

The specter first materialized in 1983, when Commerce determined that the government of Mexico was conferring a subsidy of 0.88 percent on carbon black exported to the United States.[2] Commerce did not consider as a subsidy the savings to Mexican producers from using feedstock and natural gas obtained from the Mexican government at low rates because feedstock and natural gas were "generally available" in Mexico at those rates. Commerce based this determination on its long-standing rule that benefits generally available to all producers in a country are not countervailable subsidies.[3]

A domestic producer of carbon black (the Cabot Corporation) sued in the United States Court of International Trade (CIT), contesting Commerce's failure to countervail the savings from the low-priced inputs. The CIT ruled in Cabot's favor, overturning Commerce's "generally available" standard and substituting a test of whether the benefits in question conferred a "competitive advantage" on the producers receiving them.[4] The court remanded the proceeding to Commerce with instructions to determine whether the low-priced inputs were conferring a competitive advantage on the Mexican producers.[5]

Not wanting to perform a remand under a standard to which it was fundamentally opposed, Commerce appealed. The Federal Circuit Court of Appeals (hereinafter Federal Circuit) dismissed the appeal on the ground that the CIT's remand order was not final.[6] Having no

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2. 48 Fed. Reg. 29,564 (June 27, 1983).

3. The "generally available" rule, also called the "specificity test," most visibly derives from the definition of the term "subsidy" (as it is used in both § 303 and § 701 of the Act) set forth in § 771(5). That definition provides that subsidies include domestic subsidies provided to "a specific enterprise or industry, or group of enterprises or industries." Tariff Act of 1930 § 771(s) (*amended by* 19 U.S.C. § 1677(s) (1984)).

4. Cabot Corp. v. United States, 620 F. Supp. 722 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986).

5. 620 F. Supp. at 734.

6. 788 F.2d at 1539, 1543.

other choice, Commerce duly performed the remand under the "competitive advantage" standard.

Before the remand results were filed with the CIT, however, Commerce completed its first administrative review under the carbon black order. In that review, Commerce changed its position about the low-priced feedstocks, finding that they were not "generally available" and therefore constituted subsidies.[7] Publication of the results of that review rendered Cabot's challenge to the deposit rate set in the investigation moot.[8] Consequently, since no countervailing duties have yet been assessed on the basis of the "commercial advantage" test, Commerce had not had an opportunity to exorcise the ghost of *Cabot* on appeal.[9] Commerce's inability to appeal *Cabot* has left unresolved an issue fundamental to every countervailing duty proceeding since 1985.

1. The CIT's Remand in *Zenith*

The specter reappeared in April 1986, less than three weeks after the Federal Circuit denied the Government's appeal in *Cabot.* In *Zenith v. United States,*[10] the CIT overturned a second administrative review of televisions from Japan, partly because Commerce failed to limit an adjustment to offset the forgiveness of a commodity tax on televisions exported from Japan against the amount of the tax that the manufacturers actually "passed onto" customers in domestic sales. The court remanded the proceeding to Commerce with directions to measure the amount of tax "passed onto" domestic customers.

Although the *Zenith* decision overturned a basic practice of Commerce being applied to most anti-dumping proceedings,[11] it seemed evident from *Cabot* that the Federal Circuit would dismiss an appeal. Accordingly, Commerce set about the task of measuring the amount

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7. Commerce found that products comparable to the feedstocks were not generally available at prices comparable to those which the Mexican Government had charged the carbon black producers and raised the subsidy rate to reflect the savings to the producers from using those feedstocks. 51 Fed. Reg. 30,385 (Aug. 26, 1986).

8. Accordingly, the CIT vacated its original order of remand in *Cabot* on November 20, 1986. Unlike a final determination in an investigation (which covers entries which are not subject to anti-dumping or countervailing duties), the results of an administrative review cannot become moot, because they cover discrete entries for which duty is payable and must be determined.

9. In PPG Indus. v. United States, 662 F. Supp. 258 (Ct. Int'l Trade 1987), a challenge to Commerce's final determination on unprocessed float glass from Mexico, the CIT de-emphasized the "competitive advantage" test and simply stressed the need for Commerce to insure that a given benefit is generally available in effect as well as in nominal design.

10. Zenith Elec. Corp. v. United States, 633 F. Supp. 1382 (Ct. Int'l Trade 1986).

11. Commerce's standard practice has been to assume that such indirect taxes are fully passed-through to domestic customers.

Florida Journal of International Law, Vol. 3, Iss. 2 [1988], Art. 1

of the commodity tax "passed on" in sales in Japan. This task took an entire year to complete and was so complex that it required the extensive participation of an expert econometrician at a cost of $25,000. Commerce reported the results of the remand to the CIT in April 1987. However, since the court has not yet ruled on the remand results, Commerce has not had an opportunity to appeal the remand decision. This has left a second key issue, potentially involved in a majority of anti-dumping duty proceedings, unresolved since April 1986.

B. *The* Jeannette *Decisions*

In June 1986, the specter once again appeared in an anti-dumping investigation of sheet glass from Switzerland, Belgium, and the Federal Republic of Germany. Several years earlier, the International Trade Commission (the "Commission") had preliminarily determined that sheet glass imports were not injuring the U.S. industry,[12] leading Commerce to terminate its investigation.[13] *Jeannette* (the domestic petitioner) successfully challenged the negative preliminary determination in the CIT, and the CIT remanded the case to the Commission with instructions to make a new injury determination according to a different legal standard.[14] The Commission then applied the new standard and thus preliminarily determined that sheet glass imports were injuring the United States industry. The CIT affirmed the remand result,[15] and the foreign producer joined the Commission in appealing the order of affirmance.

The Federal Circuit dismissed the appeal as not being of a final order because no final injury determination had been made.[16] By way of explanation, the court simply cited *Cabot* and the portion of the statute[17] which provides for judicial review of dispositive injury determinations but not positive preliminary injury determinations.

One can easily understand that the CIT's decision in *Jeannette* was not final in the sense that the Commission's final injury determination

12. *Thin Sheet Glass from Switzerland, Belgium, and The Federal Republic of Germany*, U.S.I.T.C. Pub. No. 1376 (May 1983).

13. 48 Fed. Reg 21,213 (May 11, 1983).

14. Jeannette Sheet Glass Corp. v. United States, 607 F. Supp. 123 (Ct. Int'l Trade 1985), *appeal dismissed* 803 F.2d 1576 (Fed. Cir. 1986), *aff'd*, 654 F. Supp. 179 (Ct. Int'l Trade 1987).

15. Jeannette Sheet Glass Corp. v. United States, No. 83-5-00729 (Ct. Int'l Trade Sept. 10, 1985) (unpublished order affirming remand result).

16. *Jeannette*, 803 F.2d at 1583 (The Federal Circuit also dismissed an appeal of the CIT's March 22, 1985 order, remanding the proceeding to the Commission.).

17. Tariff Act of 1930 § 516 (*amended by* 19 U.S.C. § 1516(a)(1)-(2)(1984)).

might still have been negative, despite the different legal standard prescribed by the CIT. This would have mooted the Commission's and the foreign producer's challenges to the affirmative preliminary determination.[18] Had mootness occurred, the only harm to the foreign producer would have been the inconvenience of participating in the remainder of the investigation.[19] The Commission's position, however, was far more difficult. When the Federal Circuit dismissed the appeal, the Commission lost what might well have been its only chance to vindicate the legal standard supporting its negative preliminary injury determination. Since the CIT's reasoning in *Jeannette* would apply to every affirmative preliminary injury determination, the Commission's original standard could effectively be overturned without it ever having an opportunity to appeal.[20]

C. *The* Philipp Brothers *Decisions*

Then, in July 1986, only a month after *Jeannette*, the specter appeared again under the guise of a Brazilian producer's challenge to an administrative review of a countervailing duty order on pig iron from Brazil.[21] In the original investigation, Commerce had calculated the estimated countervailing duties on a company-specific basis. In the annual review, however, Commerce switched to a valuation based on the weighted average rate for all companies. The Brazilian producer did not question this change before Commerce, and, as a result, Commerce's final determination did not explain the reasons for the switch. When the Brazilian producer then sought to challenge the switch before the CIT, Commerce opposed on the ground that the producer had failed to exhaust its administrative remedies.

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18. As it turned out, after the case was remanded to the Commission, a separate decision of the Federal Circuit (on interlocutory review) in American Lamb Co. v. United States, 611 F. Supp. 979 (Ct. Int'l Trade 1985), 785 F. 2d 994 (Fed. Cir. 1986) overturned the legal test that the CIT had applied in reversing the Commission's negative preliminary injury determination. The Commission subsequently persuaded the CIT to vacate its earlier orders in *Jeannette* and reinstate the original preliminary injury determination. *Jeannette*, 654 F. Supp. at 185.

19. The Federal Circuit has ruled that participation in Commerce proceedings does not constitute irreparable harm. Matsushita Electric Indus. Co. v. United States, Appeal No. 86-1678 (Fed. Cir. July 2, 1987).

20. The Commission could have been deprived of an appeal on this issue after a final determination in several ways. First, its final injury determination could have been negative, mooting the question. Second, even if its final injury determination had been affirmative, the basis for that determination would be different than the basis for the preliminary. The issues relating to the preliminary would be irrelevant in a challenge to the final determination.

21. The Order was published at 45 Fed. Reg. 23,045 (Apr. 4, 1980). Annual reviews are conducted pursuant to § 751 of the Tariff Act of 1930 (*amended by* 19 U.S.C. § 1675 (1984)).

After invoking an exception to the exhaustion requirement, the CIT held that Commerce's failure to explain its reasons for the switch was contrary to law and remanded the proceeding to Commerce with instructions to provide the missing explanation.[22] Commerce sought to appeal,[23] but the Federal Circuit dismissed the appeal as not being of a final order, citing *Cabot*.[24] As a consequence, Commerce never obtained a resolution of the exhaustion issue, an important question in many proceedings.

D. *The* Badger-Powhatan *Decisions*

The most recent and most disturbing incident occurred in December 1986. Commerce had previously determined that seven categories of brass fire-protection equipment from Italy were being sold in the United States at less than fair value.[25] In its investigation, however, the Commission concluded that only two of those seven categories of equipment were injuring the United States industry.[26] Accordingly, Commerce's final anti-dumping duty order covered only those two categories. The domestic petitioner, Badger-Powhatan ("Badger"), challenged the injury determination in the CIT, maintaining that the determination should have covered all seven categories of equipment. Badger's challenge was unsuccessful.[27]

Then Badger sought to persuade the CIT that, at least, the deposit rate established by the order (which equalled the weighted average of the margins on all seven categories of equipment) should be recalculated to equal the higher weighted average of the only two categories covered by the Commission's injury determination. Commerce agreed with Badger and requested the CIT to remand the proceeding so that the deposit rate could be recalculated. The CIT concurred and, over the opposition of the Italian manufacturer, remanded the proceeding to Commerce.[28] When the Italian manufacturer sought to appeal the

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22. Philipp Bros., Inc. v. United States, 630 F. Supp. 1317 (Ct. Int'l Trade), *appeal denied*, 640 F. Supp. 261 (Ct. Int'l Trade), *aff'd*, 647 F. Supp. 150 (Ct. Int'l Trade 1986).

23. Commerce's principal contention was that *Philipp Brothers* was barred from challenging the switch from company-specific to average rates because it had not raised the issue in the 751 review, and thus had not exhausted its administrative remedies. 630 F. Supp. at 1318-19.

24. Philipp Bros., Inc. v. United States, (Fed. Cir. July 22, 1986) (unpublished order dismissing appeal).

25. U.S.I.T.C. Pub. No. 1649, 50 Fed. Reg. 7971 (Feb. 19, 1985).

26. *Id.*

27. Badger-Powhatan v. United States, 608 F. Supp. 653 (Ct. Int'l Trade 1985).

28. Badger-Powhatan v. United States, 633 F. Supp. 1364 (Ct. Int'l Trade 1986).

remand order, the Federal Circuit dismissed the appeal as not being of a final order, citing *Cabot*.[29]

While the dismissal of the appeal may not have been surprising, in light of *Cabot*, the Federal Circuit's explanation certainly was. The court stated that "[t]he case lack[ed] trial court 'finality' because the parties will still need to appear before the Court of International Trade if any of them challenges the amended determination . . . ."[30] This statement was followed by a citation to the statutory provision delineating the CIT's original jurisdiction[31] and implying that Commerce's determination on remand would give rise to an entirely new cause of action in the CIT.

Apparently, the Federal Circuit thought that once Commerce issued a new anti-dumping order in accordance with the CIT's instructions (setting a new deposit rate on the basis of the two categories of equipment covered by the injury determination), the Italian manufacturer could challenge that rate in an entirely new suit in the CIT. However, such an action would involve the identical parties and raise the identical issues on which the CIT already ruled in the remand determination and would therefore be barred by *res judicata*.[32] As a result, the Italian manufacturer would permanently be barred from appealing the CIT's decision requiring the deposit rate to be calculated on the basis of two companies.[33]

III. Discussion

The Federal Circuit evidently believes that no decision remanding an administrative determination to an agency can ever be final. Its series of brief or summary orders and opinions inflexibly applying the finality rule to the cases described above has produced some harsh, perhaps unintended, results. Moreover, these decisions have not even discussed the substantial body of jurisprudence recognizing that it is appropriate to make exceptions to the finality rule in certain circumstances, particularly where a district court reverses an agency on

29. Badger-Powhatan v. United States, 808 F.d 2d 823 (Fed. Cir. 1986).

30. *Id.* at 825.

31. Tariff Act of 1930 (*amended by*, 19 U.S.C. § 1516a(a)(2) (1984)).

32. For a discussion of the proper role of res judicata in challenges to remand results, see the section of Commerce's 1986 CIT Conference paper entitled "Can Remand Results be Challenged Anew?"

33. Perhaps the Federal Circuit intended only that the foreign manufacturer would have to wait to appeal until after the remand results were reported back to the CIT and affirmed by that court. However, the CIT had not ordered Commerce to report the remand results back to the court.

an important issue of administrative law. Were the Federal Circuit to include these additional considerations when it next meets over the finality issue, it might derive a more salutary result.

A. *Judicially Created Exceptions to the Finality Rule*

The finality rule derives from 28 U.S.C. § 1291, which provides that appeals will be allowed from all "final" decisions of the district courts. The usual definition of a final decision is one that "ends the litigation on the merits and leaves nothing for the Court to do but to execute the judgment."[34] The courts have often cautioned, however, that "[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."[35] The purposes of the rule are to conserve judicial resources by avoiding piecemeal review of district court decisions in single proceedings[36] and to prevent the obstruction of justice through the delay that such appeals occasion.[37]

Experience has shown that rigid application of the finality rule occasionally serves neither the ends of justice nor judicial economy.[38] Accordingly, a number of legislative[39] and judicial exceptions to the rule have been developed. The original judicial exception is the "collateral order" exception announced by the United States Supreme Court

34. Catlin v. United States, 324 U.S. 229, 233 (1945).

35. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974).

36. Stated conversely, "[t]he purpose [of the finality rule] is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1948).

37. The Supreme Court observed that:

> [C]ongress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 467, n.8 (1978) (quoting Cobbledick v. United States, 309 U.S. 323, 325 (1940)).

38. *See Coopers*, 437 U.S. at 471.

39. The two legislative exceptions are: (1) 28 U.S.C. § 1292(a)(1), which provides for review of certain interlocutory orders (mostly injunctions); and (2) 28 U.S.C. § 1292(b), which provides for discretionary interlocutory review of orders certified by the district court judge as involving a controlling question of law about which there is substantial ground for difference of opinion, the immediate resolution of which would materially advance the ultimate disposition of the litigation.

in *Cohen v. Beneficial Industrial Loan Corp.*[40] *Cohen* was a shareholder's derivative action against the officers of the corporation for fraud. The issue before the Supreme Court was whether the shareholder could be required under New Jersey law (it was a diversity case) to post a bond to compensate the corporation for litigation expenses in the event that the suit proved unsuccessful. The Court explained that "[t]his decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[41]

The Court did not describe what types of issues were generally "collateral" to a cause of action; it simply identified the bond requirement in *Cohen* as being collateral. In fact, the Court's opinion suggests that "collateralness" was only one factor leading the Court to permit review of that issue. The Court noted that, once the district court had disposed of the case, it could be "too late to review effectively the present order" and emphasized that it had "long given this provision of the statute this practical, rather than technical, construction."[42]

In 1964, the United States Supreme Court added a further exception to the finality rule in *Gillespie v. United States Steel Corp.*[43] *Gillespie* expanded on the pragmatic aspects of *Cohen* by introducing a balancing test in which the cost to the parties of continuing the litigation absent appellate review was weighed against the burden on the courts resulting from granting immediate review.[44] A few years later, the Second Circuit Court of Appeals added a "death knell" exception to the finality rule in *Eisen v. Carlisle & Jacquelin.*[45] The "death knell" exception permitted appeals of decisions which, as a practical matter, brought the litigation to an end. The Supreme Court indicated in 1974 that it was at least willing to tolerate the new exception.[46]

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40. 337 U.S. 541, 546 (1949).

41. *Id.* at 546.

42. *Id.*

43. 379 U.S. 148, 152 (1964).

44. *Id.* at 152-155. Applying the rule, the court permitted an appeal of the issue of whether the right of recovery for wrongful death under the Jones Act precluded any other recovery under state law.

45. 370 F.2d 119 (2d Cir. 1966).

46. In *Eisen* the Supreme Court upheld the Second Circuit's decision primarily as a collateral order under *Cohen,* neither expressly approving nor disproving the death-knell exception. *Eisen,* 417 U.S. at 169-172.

Florida Journal of International Law, Vol. 3, Iss. 2 [1988], Art. 1

B. *Recent Narrowing of the Finality Exceptions*

As in many other areas of the law, a flexible application of the finality rule in the 1960's gave way to a more rigid treatment in the 1980's. The trend may be traced to the Supreme Court's 1978 decision in *Coopers & Lybrand v. Livesay.*[47] *Coopers & Lybrand* was a class action against an accounting firm by plaintiffs-investors who had lost the money they had invested in a company, after the accounting firm certified the company's earnings, which had been allegedly overstated. When the district court decertified the plaintiffs-investors as a class, the plaintiffs-investors brought an appeal. The Court of Appeals agreed to hear the appeal, but the Supreme Court reversed, holding that the district court's order of decertification was not final.

In *Coopers & Lybrand,* the Supreme Court broadly criticised the "death knell" exception as turning on a district court's perception of the tactical and financial considerations involved in particular litigations and thus undermining the policies served by the finality rule.[48] The Supreme Court also limited the balancing test of *Gillespie* strictly to the "unique" facts of that case, which it described as being of "national significance."[49]

The *Coopers & Lybrand* opinion also takes a narrow view of the collateral order exception. The opinion states that in order to come within the "small class" of decisions excepted from the final judgment rule by *Cohen,* an order has to (1) "determine conclusively" the disputed question; (2) resolve "an important issue completely separate[50] from the merits of the action;" and (3) be "effectively unreviewable" on appeal from a final judgment.[51] Applying this test to the facts before it in *Coopers & Lybrand,* the Court found that the order of decertification was not final because (1) it was subject to revision in the District Court (and therefore presumably not conclusive); (2) it involved considerations which were "enmeshed" in the factual and legal issues comprising plaintiff's cause of action (and hence not separate); and (3) it would be subject to effective review after the final judgment.[52]

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47. 437 U.S. 463 (1978).

48. *Id.* at 475-476.

49. The court asserted that "[i]f *Gillespie* were extended beyond [its facts], § 1291 would be stripped of all significance." *Id.* at 477 n.30.

50. *Id.* at 468. The *Cohen* court used "separable." The *Coopers & Lybrand* court used "separate." In subsequent decisions, the Supreme Court has used the terms interchangeably, depending on which decision it is quoting.

51. 437 U.S. at 468.

52. *Id.* at 469.

The Supreme Court's most significant pronouncement on finality since *Coopers & Lybrand* is probably *Firestone Tire & Rubber Co. v. Risjord*,[53] in which it decided that an order denying a motion to disqualify counsel in a products liability case was not final. *Firestone* restated the *Cohen* test without further elaboration and held that *Cohen*'s first two criteria were satisfied, in that the challenged order in *Firestone* conclusively determined a severable (and important) legal issue. However, the Court found that the *Firestone* petitioner had failed to demonstrate that it would not be able to obtain effective review of the district court's disqualification order after final judgment,[54] and thus concluded that the order was not final. Perhaps more significantly, the Court stated that "the order denying petitioner's motion to disqualify respondent is appealable under section 1291 only if it falls within the *Cohen* doctrine."[55] In contrast to *Coopers & Lybrand*, the Court did not even consider the other exceptions to the finality rule.

Since *Firestone*, the United States Supreme Court's decisions involving the finality issue have been "more of the same." They contain little, if any, reference to the other exceptions to the finality rule, and rather strictly apply the tripartite test of *Coopers & Lybrand* for collateral orders.[56]

C. *Recent Court of Appeals Decisions Permitting Appeals of Remands of Administrative Determinations*

Despite the recent pronouncements of the Supreme Court, some courts of appeals have held orders by district courts remanding administrative determinations to agencies to be final and thus appealable. The cases mainly involved remands to HEW for reconsideration of the legal standard under which claimants had been found ineligible for disability payments, and similar situations.[57] Two of the factors which the district courts emphasized in permitting the appeals were that the decision would affect "potential rights of an unknown number

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53. 449 U.S. 368 (1981).

54. *Id.* at 377-378.

55. *Id.* at 375.

56. *See, e.g.*, J.B. Stringfellow, Jr. v. Concerned Neighbors in Action, 55 U.S.L.W. 4299 (1987); Richardson-Merrill Inc. v. Koller, 472 U.S. 424 (1985); Flanagan v. United States, 465 U.S. 259 (1984); Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1 (1983); United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982).

57. *See* Maier v. Orr, 754 F.2d 973 (Fed. Cir. 1985); Stone v. Heckler, 722 F.2d 464 (9th Cir. 1983); Paluso v. Matthews 573 F.2d 4 (10th Cir. 1978). *But see* Newpark Shipbuilding & Repair, Inc. v. Roundtree, 723 F.2d 399 (5th Cir. 1984) (reversing *en banc* the court's earlier opinion (698 F.2d 743) permitting appeal).

of persons who are likely to be affected by [the] significant ruling"[58] and that "[t]he district court's decision . . . if wrong, would result in a totally wasted proceeding below, from which the Secretary may not be able to appeal."[59]

Bender v. Clark[60] involved an order remanding a determination to the Interior Board of Land Appeals with instructions to redetermine a factual issue under a different standard of proof. Although the Tenth Circuit Court of Appeals thought the Board's standard of proof "too intertwined with the ultimate factual determination to qualify as collateral," it permitted the appeal under the balancing exception, finding that the need for a prompt appeal of the "serious and unsettled issue" outweighed the compromise to judicial efficiency.[61] The Tenth Circuit also noted that the "government in such a case has no avenue for obtaining judicial review of its own administrative decisions, [and] may well be foreclosed from again appealing the district court's determination at any later stage . . . ."[62] The court found the possibility that the government might subsequently be able to appeal "too conjectural to avoid reaching a more just result" and permitted the appeal.[63]

It is therefore evident that some circuit courts of appeal are not persuaded that the Supreme Court's decisions restricting the exceptions to the finality rule (which are limited to a few specialized issues, such as disqualification of counsel and class certifications) to the very different circumstances presented by remands of administrative determinations.

D. *The Special Circumstances of CIT Remands*

Commerce determinations in anti-dumping and countervailing duty cases arise in peculiar circumstances contrasting sharply with those of typical commercial litigation. First, typical commercial litigation normally involves a series of issues which all have to be resolved in the plaintiff's favor in order for the action to succeed. In an investor's suit, such as *Coopers & Lybrand*, for example, the issues might roughly be as follows: whether the investors had standing to bring

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58. The *Paluso* court, citing *Gillespie*, balanced "the inconvenience and costs that accompany piecemeal reviews, on the one hand, and the danger of denying justice by delay, on the other hand . . . [and held] that the remand order was appealable." 573 F.2d at 8.

59. Stone, 722 F.2d at 467.

60. 744 F.2d 1424 (10th Cir. 1984).

61. *Id.* at 1427.

62. *Id.* at 1428.

63. *Id.*

the suit; whether they constituted a proper class; whether the accounting firm was negligent in performing the audit; and whether the negligence caused the injury. Failure to prevail on any of these issues would normally be fatal to the suit, for either legal or practical reasons. In contrast, a challenge to an anti-dumping or countervailing duty determination often raises not so much the existence of dumping or a subsidy, but the amount thereof. That amount is the outcome of a series of independent, rather than serial, determinations of fact and law. A change in one simply raises or lowers the number, usually without affecting the existence of the order.[64] In *Cabot,* for example, Commerce determined that a subsidy of 0.88 percent existed, notwithstanding its conclusion that carbon black feedstocks were generally available at the prices paid by Mexican producers, and that therefore their use did not constitute a subsidy. Finding that the feedstock were subsidized would simply have increased the subsidy by the amount of savings to the Mexican producers from using it.

The result in *Cabot* is not anomalous. Countervailing duty proceedings typically involve allegations that the product under investigation benefits from subsidies under several (and often a dozen or more) government programs. Resolution of a legal issue arising under one program frequently has no effect on the subsidies determined to exist under the others. The same is normally true in dumping proceedings, where the dumping margin is the result of a series of adjustments to foreign market value and the United States price. A decision disallowing an adjustment to foreign market value for an advertising or credit expense raise or lower the dumping margin, but it would not normally affect the other steps in the calculation of the margin. Thus, far from being "enmeshed" in the facts of particular anti-dumping and countervailing duty proceedings, legal issues arising in such proceedings can normally be separated from the other issues in them with ease.

Because the issues in these cases are so severable, the remand of a case could normally proceed unhindered while the separated issue was being resolved on appeal. The parties could obtain an injunction preventing liquidation of the entries of affected merchandise pending the outcome of the appeal, very much as they do now. If the decision on appeal resulted in a different dumping margin or subsidy rate, the final liquidation order could provide for the change without disturbing the other conclusions and adjustments inherent in the original determination.

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64. Of course, a change in the number *can* change the final result where it makes the difference between a positive and a zero or *de minimis* subsidy rate or dumping margin.

Moreover, unlike most commercial litigation, the *only* remedy available in anti-dumping and countervailing duty cases is a remand to Commerce or the Commission.[65] There are no issues which the CIT can settle by simply reversing the agency. A remand results from *every* decision adverse to the Government, regardless of whether a remand is necessary to implement the decision.

Furthermore, determinations in anti-dumping and countervailing duty proceedings often are not one-time determinations. Anti-dumping and countervailing duty orders have been known to remain in effect for over twenty years, and a legal issue raised in the first year (such as the effect of an export tax rebate in the country under investigation) has the potential to come up in each succeeding year. This feature is compounded by the constant stream of other proceedings involving different products but essentially the same issue. Consequently, if an argument on a legal issue prevails in one case before the CIT, the chances that it will not be argued again in the near future are slim. Given this situation, it is fanciful to argue that judicial economy is served by postponing appellate review of decisions overruling Commerce on major issues affecting many anti-dumping or countervailing duty proceedings. Prompt appellate review of such issues would simply avoid multiple litigation over the same issue.

In light of these considerations, it is apparent that most of the CIT remand orders to Commerce and the Commission discussed above would qualify as collateral orders under *Cohen* and *Coopers & Lybrand*. First, the CIT remand orders conclusively determined a disputed question of law of considerable (or even critical, as in *Cabot* and *Zenith*) importance. Second, most of the issues (especially those in *Cabot* and *Zenith*) were completely separable from the other issues in the proceeding. Finally, the government and/or a private party was effectively deprived of the chance to appeal the issue in most instances. The proceeding became moot (as in *Cabot*); the issue became irrelevant (as in *Jeannette*); or a party was barred by *res judicata* from bringing the new suit necessary to raise the issue (as in *Badger-Powhatan*). Commerce and the Commission have the additional problem that, once they have carried out the CIT's instructions on remand, the CIT will tend to affirm the results, arguably leaving Commerce without an "adverse" decision to appeal (as in *Philipp Brothers*).

In addition to the collateral order exception, the obvious applicability of the balancing exception of *Gillespie* to administrative remands

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65. Tariff Act of 1930, § 516 (*amended by*, 19 U.S.C. § 1516a(c)(3) (1984)).

should not be overlooked.[66] Remands of Commerce determinations are so distinct from the facts of *Coopers & Lybrand* and *Firestone* that the possibility of the Supreme Court's applying the balancing test to CIT remands should not be ruled out. As explained above, however, since the issues in Commerce remands are highly separable from one another, inability to appeal a decision on a particular issue would rarely sound the death knell of the litigation.

The correctness of permitting appeals of some CIT remand orders stands out even more clearly when one considers the purpose behind the finality rule of conserving judicial resources and preventing obstruction of justice through delay. Postponing appeal of important legal issues pending the results of a remand may not even speed resolution of the immediate controversy, since remands (which can be multiple) can easily take longer than an appeal. If resolution of the immediate litigation is accelerated, it will be at the expense of efficient handling of subsequent administrative reviews (of that and other products) and will result in a series of suits arising from those reviews.

IV. Conclusion

The main thrust of Commerce's efforts has to be to persuade the Federal Circuit that certain CIT remand orders are final and appealable. As long as Commerce has not succeeded in that task, however, there are ways in which the CIT can help reduce the confusion about the finality of its decisions and the attendant uncertainty about the legal conclusions they contain. First and foremost, the CIT should state clearly in the remand order whether Commerce has to report back to the court. In a case like *Badger-Powhatan*, for example, where nothing is left for Commerce to do but to change a number according to a stipulated formula, the CIT should indicate that its remand order is final. A corollary would be that the CIT should stipulate the purpose of the remand as clearly as possible — whether it is to apply a new legal standard or only to clarify or support the previous determination. In more complicated cases (such as *Cabot*), where Commerce has to report back to the CIT, the Court should develop a clear procedure for determining whether the determination on remand complies with its remand order. Once the Court affirms the remand results, there is a final order for the parties to appeal, and Commerce can publish the final order. Absent some relief from either the Federal Circuit or the CIT, the trade bar has no choice but to continue handling trade cases under the shadow of unnecessarily uncertain rules.

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66. The Supreme Court has not overruled *Gillespie*, despite the restrictions which it has placed on that decision.