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Interlocutory Appeal of Remand Orders by the Court of International Trade Under 28 U.S.C. §1292(d)(1)

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INTERLOCUTORY APPEAL OF REMAND ORDERS BY THE COURT OF INTERNATIONAL TRADE UNDER 28 U.S.C. § 1292(d)(1)*

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I. INTRODUCTION

Recent decisions by the Court of Appeals for the (Federal Circuit)[1] raise serious questions about the availability of appellate review in anti-dumping and countervailing duty cases. As discussed in detail by

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1. The Court of Appeals for the Federal Circuit (formerly the Court of Customs and Patent Appeals) was created by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

Mr. McInerney in the previous article, these decisions advance a narrow view of the final judgment rule.[2] This view effectively prohibits the administrative agencies from challenging, as is their right,[3] important legal decisions having broad application throughout the anti-dumping and countervailing duty statutes. This approach to the requirement of "finality" threatens to disrupt the administration of these laws and tends to produce more litigation than it restrains.[4]

This article briefly analyzes the problems faced by the Department of Commerce (Commerce) when the courts engage in a strict and doctrinaire application of the final judgment rule. In particular, this article focuses on the problems that occur when the Court of International Trade (CIT)[5] rejects a legal standard that Commerce has been applying, substitutes a new legal standard and remands the case for reconsideration of the facts under the new legal standard. Secondly, this article seeks to establish that, in the absence of a final order and a *right* to appeal therefrom, interlocutory appeal under 28 U.S.C. § 1291(d)(1)[6] is appropriate and indeed essential as to *any* CIT remand

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2. The foundation for federal appellate jurisdiction is the final judgment rule which holds that an appeal should only lie from an order which terminates litigation at the trial stage. 28 U.S.C. § 1291 (1982). Section 1291 of Title 28 gives a right of appeal "from all final decisions" of the district courts (including the CIT). Coopers & Lybrand v. Livesay, 437 U.S. 463, 465 (1978); United States v. Washington, 761 F.2d 1404, 1406 (9th Cir. 1985). This policy was first declared in the Judiciary Act of 1789, ch. 20, §§ 21, 22, 25, I Stat. 83-86. For an historical outline of the final judgment rule, see Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932). For a general analysis, see C. WRIGHT, LAW OF FEDERAL COURTS 697-716 (4th ed. 1983).

3. Appeals from interlocutory orders that require lower court certification are generally referred to as "discretionary appeals." Appeals from final orders that do not require lower court certification are often referred to as "appeals as of right." *See, e.g.*, Jasinski v. Adams, Appeal No. 83-5176 (11th Cir. 1986) (order denying rehearing); Pacor, Inc. v. Higgens, 743 F.2d 984, 990 n.9 (3d Cir. 1984).

4. One of the principal goals of the final judgment rule is the avoidance of piecemeal litigation and the conservation of judicial resources. Heat & Control, Inc. v. Hester Indus., Inc., 785 F.2d 1017, 1020 (Fed. Cir. 1986)(quoting United States v. Nixon, 418 U.S. 683, 690 (1974)).

5. The Court of International Trade (formerly the Customs Court) was created by virtue of the Customs Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980).

6. [W]hen any judge of the Court of International Trade, in issuing any . . . . interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for 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 and appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

28 U.S.C. § 1292(d)(1) (1982).

order which articulates a new legal standard that will have a direct effect on other administrative proceedings. This article will show that interlocutory appeal from these types of remand orders helps to conserve the resources of the judiciary and facilitate a smoother administration of the anti-dumping and countervailing duty laws.

II. THE APPEALABILITY OF CIT REMAND ORDERS BEFORE THE FEDERAL CIRCUIT

In a series of cases beginning with *Cabot Corp. v. United States*,[7] and ending, for the time being, with *Badger-Powhatan v. United States*,[8] the Federal Circuit has articulated a strict view of the final judgment rule. This view precludes Commerce from immediately appealing, as is its right, and CIT order remanding an administrative determination for reconsideration. Moreover, as discussed in the previous article, the Court's decisions in *Jeannette Sheet Glass Corp. v. United States*,[9] and *Badger-Powhatan*,[10] cast serious doubt on whether

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7. 620 F. Supp. 722 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539, 1542 (Fed. Cir. 1986).

8. 633 F. Supp. 1364 (Ct. Int'l Trade), *appeal dismissed*, 808 F.2d 823 (Fed. Cir. 1986).

9. 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). Briefly, in *Jeannette*, the Federal Circuit dismissed an appeal by the International Trade Commission (hereinafter "ITC") from an order of the CIT affirming the affirmative preliminary determination reached by the ITC as a result of the remand ordered by the lower court. The Court stated that the order affirming the results on remand was "not final under *Cabot* because further proceedings at the agency level were necessary before the case became final." *Jeannette*, 803 F.2d at 1580. The fundamental flaw in *Jeannette* is the Court's failure to distinguish between the finality of the CIT's proceedings and the "finality," so to speak, of the administrative proceedings. By remanding the ITC's negative preliminary determination and later affirming the agency's results on remand, the CIT completely disposed of the case before it. That futher administrative proceedings would take place following the court's final order was irrelevant to its appealability. Indeed, the occurrence of further proceedings should have confirmed the finality of the CIT's order affirming the remand results. This follows from the fact that, according to the statutory scheme, preliminary and final determinations are separate and distinct determinations (*compare* 19 U.S.C. §§ 1671b and 1673b *with* 19 U.S.C. §§ 1671d and 1673d) which are made on the basis of different factual records and are subject to different standards of review. Thus, if the ITA and ITC proceed to issue final determinations pursuant to the substantive statutory scheme, as the Federal Circuit in *Jeannette* apparently contemplated, the preliminary determination and, most importantly, court orders relating to it, will become irrelevant if the final determination is challenged in the CIT.

10. 808 F.2d at 825. In *Badger-Powhatan*, the Federal Circuit, *sua sponte*, dismissed the appeal of defendant-intervenor from a CIT order remanding the agency's calculation of the deposit rate established for estimated anti-dumping duties. *Id.* at 826. In the only explanation of its reasoning, the Court stated that "[t]he case lacks trial court 'finality', because the parties will still need to appear before the Court of International Trade if any of them challenges the

appellate review is available from a final order of the CIT, where that order affirms the agency's results on remand. The following section discusses the origins of the Federal Circuit's view of remand orders and, in particular, the problems faced by Commerce when it is unable to appeal remand orders that decide an important and far-reaching issue of law.

The Federal Circuit's authority to hear cases decided by the CIT is circumscribed by 28 U.S.C. § 1295(a)(5) which provides that:

> (a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction —
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> * * *
>
> (5) of an appeal from a *final decision* of the United States Court of International Trade.

In defining the term "final decision," the Supreme Court has stated: "A party may not take an appeal under this section until there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but to execute the judgment."[11] As a rationale, the Supreme Court has said that the

amended determination of the ITA." *Id.* at 825. Cited as authority for this proposition was 19 U.S.C. § 1516a(a)(2), which is the section of the statute providing the authority for a party to sue on an administrative determination of Commerce. *Id.*

Again, the Court seems to confuse the finality of the lower court's proceedings with the nature and conduct of the agency's proceedings. The mere fact that Commerce will issue another "determination" which is subject to challenge under 19 U.S.C. § 1516 subsequent to the court's order is irrelevant to whether the CIT's remand order is final. As will be discussed shortly, the CIT's remand order in *Badger-Powhatan* did not ask Commerce to report back to the Court on the results of the remand. Badger-Powhatan v. United States, 633 F. Supp. 1364, 1373 (Ct. Int'l Trade 1986). Thus, nothing was left for the CIT to accomplish and the case was at an end as far as the CIT was concerned.

Finally, the Federal Circuit also seems to be saying, as it did in *Jeannette*, that even a lower court order which affirms the remand results is not final. Rather, a new cause of action pursuant to 19 U.S.C. § 1516 must be brought in the CIT against Commerce's remand results. *Badger-Powhatan*, 808 F.2d at 825-26. Not only does this logic rob every party of the right to obtain appellate review of the initial court decision reversing Commerce's determination, but it is especially meaningless for the agency since it cannot sue itself.

11. Firestone Tire & Rubber Co. v. Rijard, 449 U.S. 368, 374 (1981)(quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978)). As with most rules, this one has been subject to frequent debate, numerous exceptions and no small amount of confusion. It is, however, well beyond the scope of this paper to review the jurisprudence surrounding the final judgment rule. The discussion of the Rule that takes place in this paper is intended solely to familiarize the reader with the unique issues faced by Commerce when the Federal Circuit adheres to a narrow view of the finality requirement and why discretionary appeals from "interlocutory" remand orders under 29 U.S.C. § 1292(d)(1) are crucial in the absence of the right to appeal "final" remand orders.

finality requirement preserves the independence and special role of the trial court, avoids the potential harassment and cost from a succession of separate appeals, and "serves the important purpose of promoting efficient judicial administration."[12]

In *Cabot*,[13] the Federal Circuit held that a corollary of the finality requirement "is that an order remanding a matter to an administrative agency for further findings and proceedings is not final."[14] In explaining its holding in *Cabot*, the Federal Circuit seemed to focus on the fact that the CIT had not simply overturned Commerce's practice of not countervailing domestic benefits that are "generally available."[15] Instead, the CIT remanded the case for "further investigation and redetermination consistent with the requirements set forth" by the Court, ordering Commerce to report its conclusions back to the Court within ninety days.[16] In the eyes of the Federal Circuit, such an order could not possibly be final for purposes of appeal. It declared:

> *Where, as here, the trial court remands to the administrative agency for additional findings, determination, and redetermination, the remand order is not appealable* even though the order resolves an important legal issue, such as the applicable standard for countervailability. This result comports with the policies underlying the finality rule and, in particular, avoids unnecessary piecemeal appellate review without precluding later appellate review of the legal issue or any other determination made on a complete administrative record.[17]

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12. *See Firestone*, 449 U.S. at 374.

13. 620 F. Supp. at 722.

14. *See also* 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*, 617 F. Supp. 150 (Ct. Int'l Trade 1986); *Jeannette Sheet*, 803 F.2d at 580; *Badger-Powhatan*, 808 F.2d at 825 ("We conclude as a matter of law that the trial court's remand order is not a final, appealable adjudication of this case.").

15. In evaluating whether a benefit is countervailable, Commerce has distinguised between export subsidies and domestic subsidies. Benefits which are contingent upon export are countervailable. Benefits which are not contingent upon export, but which are provided to "a specific enterprise or industry or group of enterprises or industries" provide countervailable benefits. *See* 19 U.S.C. § 1677(5) (1982). *See, e.g.*, Final Affirmative Countervailing Duty Determination; Certain Steel Products from Belgium, 47 Fed. Reg. 39,304, 39,328 (App. 4) (Sept. 9, 1982); Final Affirmative Countervailing Duty Determination; Prestressed Concrete Steel Wire Strand from France, 47 Fed. Reg. 47,031, 47,045 (App. 4) (Oct. 22, 1982).

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

17. *Id.* at 1543 [emphasis added].

Later decisions by the Federal Circuit in *Philipp Brothers*,[18] and *Badger-Powhatan*[19] have tended to ignore this aspect of the *Cabot* case. In both *Philipp Brothers* and *Badger-Powhatan*, the applicable remand orders did not require the agency to report back to the CIT.[20] Notwithstanding this distinction, the Federal Circuit denied the appeals in both of these cases for lack of jurisdiction, and cited the Federal Circuit's decision in *Cabot* as controlling authority.[21]

The better conclusion in instances such as *Philipp Brothers* and *Badger-Powhatan* is that the CIT has finished its review of the case. By remanding the case without any requirement that the agency report back to the Court, the CIT has expressed its opinion that its jurisdiction over the matter has ceased and that its order remanding the case is final for purposes of appeal.[22] In the words of the Supreme Court, a court order that remands an administrative determination without requiring that the agency report back to the court "ends the litigation on the merits and leaves nothing for the court to do but to execute the judgment."[23]

Another problem is that the Federal Circuit's view fails to distinguish remand orders that decide an important issue of law having broad application throughout the anti-dumping and countervailing duty statutes from remand orders that merely require the agency to further explain its decision[24] or develop additional evidence before the court

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18. *See Philipp Bros.*, 647 F. Supp. at 150.

19. *See Badger-Powhatan*, 808 F.2d at 823.

20. *See supra* note 14.

21. *See Philipp Bros.*, Appeal No. 86-1122 (Fed. Cir. 1986); *Badger-Powhatan*, 808 F.2d at 825.

22. It should be noted that "support" for this view of remand orders can be found in two Federal Circuit decisions. In Freeport Minerals Co. v. United States, 758 F.2d 629, 634 (Fed. Cir. 1985) and *Badger-Powhatan*, 808 F.2d at 825-26, the Federal Circuit held that an agency's remand results are the legal equivalent of a new final determination by the agency under either 19 U.S.C. § 1675 or 19 U.S.C. §§ 1671d or 1673d. In the *Badger-Powhatan* case, the Court also held that as a new determination, remand results could be challenged anew before the CIT pursuant to 19 U.S.C. § 1516a(a)(2). This view that court-ordered remands can, themselves, produce another determination which is subject to challenge before the CIT, implies that the remand order itself is "final" (as to the issues it decides) and thus appealable. No other explanation makes sense. It is inconceivable that a trial court could consider a matter, and later dispose of it in the sense that the same parties and essentially the same subject-matter are now the subject of an entirely new cause of action without the first court decision being final and appealable.

23. *See Firestone*, 449 U.S. at 374.

24. *See, e.g.*, Toho Titanium Co., v. United States, No. 87-27, slip op. at 16 (Ct. Int'l Trade 1987)(Judge DiCarlo remanded Commerce's determination so that Commerce could explain why Toho's sales in the home market during the period of investigation were at prices that would not permit the recovery of costs within a reasonable period of time.). *Id.*

can render a decision on the merits.[25] In rendering its decision in *Cabot*, the Federal Circuit emphatically stated that "[a] remand order is not appealable even though the order resolves an important legal issue such as the applicable standard for countervailability."[26]

By not making a distinction, the Federal Circuit has put Commerce in a very difficult position. Moreover, the Federal Circuit's view of the finality requirement causes needless litigation and the accompanying expenditure of judicial resources. Since the avoidance of needless litigation is a principal rationale for the finality requirement, this view of the finality requirement is self-defeating. Several examples may help to illustrate this point.

In *Cabot*, the CIT overturned one of the most important principles applied by Commerce in nearly every countervailing duty proceeding.[27] This principle provides that where benefits are generally available to all producers in a country, they are not countervailable subsidies.[28] By remanding the case for a new determination consistent with the court's opinion, the CIT necessarily placed a cloud over every other countervailing duty proceeding that applies the general availability test. Had Commerce been able immediately to appeal the CIT's decision, it could have established whether it should permanently adjust it methodology. Instead, Commerce was forced to conduct the court-ordered remand using one standard which it believed was incorrect, while it continued to apply the general availability test in every other proceeding.[29]

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25. *See, e.g.*, Atcor, Inc. v. United States, 658 F. Supp. 295 (Ct. Int'l Trade 1987) (Judge Carman declined to rule on the legality of an adjustment to United States price for the Indian Cash Compensatory Support scheme until Commerce, on remand, determined "the amount of taxes paid and rebated."). *Id.*

26. *See Cabot*, 788 F.2d at 1543. *See also Philipp Bros.*, 640 F. Supp. at 261 (court denied, as interlocutory, an appeal from a CIT remand order that rejected Commerce's decision to assess countervailing duties on an average rather than a company-specific basis); *Jeannette Sheet*, 803 F.2d at 1576 (court dismissed, as interlocutory, an appeal from a CIT remand order that overturned the ITC's "reasonable indication" standard used in preliminary determinations); *Badger-Powhatan*, 808 F.2d at 823 (court dismissed, as interlocutory, an appeal from a CIT remand order that overturned Commerce's decision to calculate a weighted-average dumping margin on all product categories found to be sold as less than fair value, instead of the less than fair value products which were also found by the ITC to be causing injury).

27. *Cabot Corp.*, 620 F. Supp. at 722.

28. Judge Carman rejected the "general availability" test and in its place established a test which addresses whether the benefits in question confer a "competitive advantage" on the producers receiving them. *Id.* at 734.

29. It should be noted that Commerce did not seek § 1292(d)(1) certification of the CIT's remand order in *Cabot*. Instead, it sought only to appeal as of right under 28 U.S.C. § 1291. Thus, the actual degree to which the agency was denied immediate appellate review is uncertain.

A similar situation currently exists with respect to the CIT's decision in *Zenith Electronic Corp. v. United States*.[30] In *Zenith*, the CIT held, *inter alia*, that Commerce may make an upward adjustment to United States prices under 19 U.S.C. § 1677a(d)(1)(C), for indirect taxes that have not been collected by the manufacturing country because of exportation, by only "the amount of tax that would have been assessed (or "passed-through") on the exported merchandise, had it been sold in the home market (rather than the amount of tax actually assessed on merchandise sold in the home market)."[31] The CIT remanded the case for redetermination consistent with its holding. Although the ruling portends a fundamental change in nearly every anti-dumping proceeding, the Federal Circuit's view, that remand orders are never final for purposes of appeal, forces Commerce to forego an immediate appeal. This also means that Commerce has to conduct a lengthy and expensive remand process without the benefit of appellate review. Furthermore, the CIT's remand and the Federal Circuit's view of finality have forced Commerce to "fly in the dark" in every other administrative proceeding that has "tax pass-through" as an issue.

For example, if Commerce were to change its methodology and perform tax pass-through in every case, it would run the enormous risk of being successfully sued in every case and also wasting the public's money, in the event the Federal Circuit ultimately reverses the CIT's decision in *Zenith*. If, on the other hand, Commerce refrains from immediately altering its methodology while it waits for the chance to appeal, it runs the risk of a remand in many anti-dumping proceedings. Obviously, such a result would add enormously to Commerce's administrative burden as well as clog the CIT and the Federal Circuit with countless lawsuits and thereby frustrate the purpose of the final judgment rule. Thus, primarily for this reason the Federal Circuit should adopt a more pragmatic conception of the final judgment rule. The Federal Circuit needs to view the rule in a way which emphasizes the unique problems that face Commerce when Commerce's methodology has been reversed in one case while the issue at bar is prevalent in literally hundreds of present and future cases.

The conception is not a unique one; the United States Supreme Court has spoken to this effect. In *Cohen v. Beneficial Industrial Loan Corp.*,[32] the Supreme Court gave strong support to the notion

30. 633 F. Supp. 1382 (Ct. Int'l Trade 1986).
31. *Id.* at 1389.
32. 337 U.S. 541, 546 (1949).

that appellate courts should interpret and apply the final judgment rule with a view towards the rule's practical effects.[33] Numerous cases coming after *Cohen* have endorsed this view, and some have even held that court orders remanding an administrative determination are final and thus are appealable, since the negative effects ensue from a failure to obtain immediate appellate review.[34]

Therefore, the Federal Circuit's current view of remand orders and their finality is flawed in two respects. First, the view suffers from a failure to distinguish remand orders that "end the case on the merits and leave nothing for the court to do but to execute the judgment" from remand orders that require the agency to report back to the court on the results of the remand. Secondly, the Federal Circuit's view fails to distinguish remand orders that decide important issues of always having broad application throughout the anti-dumping or countervailing duty laws from remand orders that merely require the agency to explain further its decision or develop additional evidence before the lower court can render a decision on the merits. *Any* remand order that does not require the agency to report back to the court is patently final and thus should be appealable as of right under 28 U.S.C. § 1291. With respect to orders that direct the agency to report back, only those that do not decide an important issue of law should be considered interlocutory. The failure to adopt a pragmatic view of the finality requirement frustrates the purpose behind the final judgment rule and unduly inhibits the ability of the agency to administer the substantive statutory scheme.

However, despite there being a need for pragmatism, Commerce has to still look ahead to the likelihood that the Federal Circuit's view of remand orders will not change. If this proves to be the case, the agency will increasingly have to rely upon discretionary appeals of remand orders under 28 U.S.C. § 1292(d)(1) for immediate appellate review of important CIT decisions.

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33. *See also* Paluso v. Mathews, 573 F.2d 4, 8 (10th Cir. 1978).

34. *See, e.g.*, Bender v. Clark, 744 F.2d 1424, 1427 (10th Cir. 1984)(Tenth Circuit accepted jurisdiction over lower court remand order that overturned the burden of proof standard applied by the agency even though it was not within the "collateral order" exception articulated by the Supreme Court in *Cohen* because "the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review."); Stone v. Heckler, 722 F.2d 464, 467-68 (9th Cir. 1983)(Ninth Circuit accepted jurisdiction under 28 U.S.C. § 1291 over order remanding determination back to Department of Health and Human Services because "[t]he district court's decision is adverse to the Secretary and, if wrong, would result in a totally wasted proceeding below, from which the Secretary may not be able to appeal.").

III. THE CASE FOR INTERLOCUTORY APPEAL OF CIT REMAND ORDERS THAT DECIDE AN IMPORTANT ISSUE OF LAW UNDER 28 U.S.C. § 1292(d)(1)

In 1958 Congress dramatically altered the pattern of appellate review when it passed the Interlocutory Appeals Act.[35] The Act, which, through primarily technical amendments in 1982, was made applicable to decisions by the CIT,[36] permits trial judges to certify for appeal *any* order (1) which involves a controlling question of law, and (2) for which substantial grounds exist for a difference of opinion, and (3) which an immediate appeal may materially advance the ultimate termination of the litigation.[37] Once the trial judge has certified an order in the case of court proceedings involving the anti-dumping or countervailing duty laws, a party has to apply to the Federal Circuit, for leave to appeal.[38]

It is uncertain as to how the Federal Circuit and the CIT will view future requests to obtain interlocutory appellate review of legally significant remand orders based upon certification under section

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35. Pub. L. No. 85-919. *See* 28 U.S.C. § 1292(b).

36. *See* 28 U.S.C. § 1292(d)(1), *supra* note 6. Section 1292 of Title 28, was amended by the Federal Courts Improvement Act of 1982 on April 2, 1982, with the addition of subsections (c) and (d). Pub. L. No. 97-164, Title I § 125(b), 96 Stat. 25. Subsection (d) of 28 U.S.C. § 1292 basically mirrors subsection (b) of the same title, except that it accounts for the particular procedural requirements applicable to appeals from decisions of the CIT. Section 1292(b) states that a district judge may certify an interlocutory appeal if, in its discretion, it believes that the interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (1984). Section 1292(d) retains the substantive requirements of subsection (b), but simply provides for the different procedural rules applicable to the CIT — specifically, that its appeals are to be heard before the Federal Circuit, as opposed to being heard before any other appellate court.

37. *Id.* Prior to 1958, 28 U.S.C. § 1292 only provided for interlocutory appeal in four limited instances: orders granting, continuing, modifying, refusing or dissolving injuctions; orders appointing receivers, refusing to wind up receiverships, or orders by receivers disposing of property; orders determining liability in admiralty; and orders determining liability in patent infringement suits before an accounting. *See* 28 U.S.C. §§ 1292(a)(1)-(4) (1982). These four situations, by now well-established, in which the courts of appeals have statutory jurisdiction to review interlocutory orders of the district courts have been said by the Supreme Court to "seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence." Baltimore Contractors v. Bodinger, 348 U.S. 176, 181 (1955).

38. FED. R. APP. P. 5. Under the Act, denial of appeal is within the discretion of the appellate court. In Luckenback Steamship Co. v. H. Muehlstein & Co., 280 F.2d 755 (2d Cir. 1960), the court of appeals dismissed an appeal certified under 28 U.S.C. § 1292(b) because the trial judge had expressly found the order final and appealable.

1291(d)(1). For example, in the period of approximately five years since the Federal Circuit's inception, the CIT has only certified three orders under section 1292(d)(1) that concerned anti-dumping or countervailing duty proceedings at the agency level.[39] Moreover, in the few decisions by the CIT and the Federal Circuit which have discussed this issue, the analysis has usually been very abbreviated.[40]

This author's opinion is that any order by the CIT which rejects a legal standard previously applied by Commerce and which remands the case for redetermination fits precisely within the three criteria of section 1292(d)(1). Therefore, this author aims to show that the legislative history behind the 1958 Act supports certification for interlocutory appeal of *any* remand order by the CIT that decides an important issue of law. Then he aims to analyze the few CIT and Federal Circuit decisions over the past five years that have touched on this topic in order to determine the degree to which, if any, the decisions support or oppose the certification of these types of orders. Finally, this author aims to demonstrate how the CIT and the Federal Circuit ought to apply the three criteria in section 1292(d)(1) in cases involving a request to certify a legally significant remand order for interlocutory appeal.

A. *The Legislative History Behind Section 1292(d)(1)*

The Interlocutory Appeals Act of 1958 was the brainchild of the 1952 Judicial Conference of the United States. The Act evolved from a debate among the federal circuits over the best way to alleviate the backlog of cases that had developed in the district courts.

One of the areas focused upon by the Conference was a relaxation of the rules regarding appeals from interlocutory orders.[41] The conferees were mindful of the fact that part of the problem faced by the district courts was simply the nature of modern litigation — cases were becoming more protracted and more expensive.[42] Procedural is-

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39. Silver Reed Am., Inc. v. United States, 581 F. Supp. 1290 (Ct. Int'l Trade 1984); Zenith Radio Corp. v. United States, 588 F. Supp. 1443 (Ct. Int'l Trade 1984), *rev'd*, 764 F.2d 1577 (Fed. Cir. 1985); American Lamb Co. v. United States, 611 F. Supp. 979 (Ct. Int'l Trade 1985).

40. Research going back to 1973, revealed no more than two dozen instances in which either the Federal Circuit or its predecessor, the Court of Customs and Patent Appeals, heard interlocutory appeals that had been certified by the lower court pursuant to the appropriate statutory provision. In every case, the court's analysis of the certification issue was extremely limited and of no appreciable help to this examination.

41. *Hearings on H.R. 6238 and H.R. 7260 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 85th Cong., 2d Sess., ser. 11, at 21 (1958)(hereinafter *Hearings*).

42. *Id.*

sues involving matters such as jurisdiction and discovery were increasingly dominating the expenses of the litigants and the time of the courts.[43] A letter from the Administrative Office of the United States Courts to the Speaker of the House of Representatives, which accompanied the transmmission of the Conference's proposal, most succinctly stated the dilemma:

> It has always been recognized that there are two competing considerations bearing upon appeals from interlocutory orders. On the one hand, too rigid a bar against such appeals from interlocutory orders may result in injustice by preventing, at an early stage, the final decision of an issue which might be determinative of the case, and burdening the parties with the expense of subsequent proceedings, perhaps prolonged, to no avail. On the other hand, too great freedom in taking appeals from orders of the district court prior to the final judgment, "piecemeal appeals," as they are called, may make for delay and increase the expense of the litigation.[44]

The conferees undertook to identify a mechanism that would permit immediate interlocutory review of important and controlling questions of law, without exacerbating the backlog of cases through more numerous and "piecemeal" appeals, and, eventually, settled upon language that mirrors the present text of section 1292(b). In framing the standard to govern certification by the lower courts, the conferees concluded that the right of appeal should be limited to

> extraordinary *cases in which extended and expensive proceedings probably can be avoided by immediate final decision of controlling questions encountered early in the action. The shortening of the period between commencement of an action and its ultimate termination, together with avoidance of unnecessary work and expense,* are the imperative considerations which impel the committee's recommendation for change in the existing law.[45]

This language, and, in particular, the requirement that an interlocutory appeal "materially advance the termination of litigation," confirms that the goal of the Act is to avoid unnecessary lower court

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43. *Id.*

44. S. REP. NO. 2434, 85th Cong., 2d Sess. (1958) (letter attached to Committee Report) *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS, at 5259.

45. *Hearings, supra* note 41, at 14 (report of Tenth Circuit Committee).

proceedings and needless outlays of time and money by litigants.[46] This language also suggests how the courts should apply the Act to CIT remand orders that decide an important and far-reaching question of law.

As discussed in this article and the previous one, a remand order by the CIT that overturns an important legal standard that Commerce has been using immediately casts a legal cloud over all administrative proceedings that involve the disputed legal standard. It creates an immediate and inevitable divergence of opinion between the agency and the court in numerous other proceedings, which, if not rectified through prompt appellate review, will foster additional lawsuits and court remands over the same issue. Moreover, some legally significant remands, such as the one in *Zenith*, require the agency to engage in protracted litigation costing tens of thousands of dollars.[47] In these instances, immediate appellate review is essential.

B. *Decisions by the Federal Circuit and the CIT Touching Upon Section 1292(d)(1)*

The relevant case law surrounding section 1292(d)(1) is ambivalent. As stated earlier, the Federal Circuit has only heard section 1292(d)(1) appeals from CIT anti-dumping or countervailing duty cases on three occasions. Fortunately for Commerce, in two of these cases, the orders at issue concerned remands that overturned important legal standards frequently applied by Commerce and the International Trade Commission[48] (ITC).

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46. S. REP. NO. 2434, 85th Cong., 2d Sess. at 2 (1958). Although the saving of expenses was one of the justifications given for the Act, its legislative history does not specifically address the proper result where the reversal of a lower court order would reduce the parties expenses but not advance the termination of the litigation. The requirement in the statute that interlocutory appeal "materially advance the ultimate termination of the litigation," suggests that certification should be denied in such instances. However, when this issue has been addressed by the CIT, it would appear that either condition is enough to justify appeal. *See* Kelly v. Secretary, United States Dept. of Labor, No. 86-18, slip op. (Ct. Int'l Trade 1986)("Interlocutory appeals are to be used only in those exceptional cases that are likely to require lengthy or expensive proceedings.").

47. 633 F. Supp. 1382 (Ct. Int'l Trade 1986).

48. The third case, Zenith Radio Corp. v. United States, 588 F. Supp. 1443 (Ct. Int'l Trade 1984), *rev'd.*, 764 F.2d 1577 (Fed. Cir. 1985), concerned an appeal by Commerce from an interlocutory order of the CIT rejecting the government's contention that it was not required to respond to discovery requests and an interrogatory of the appellee Zenith Radio because the information being sought was privileged. Although the Federal Circuit accepted jurisdiction without discussion, it seems apparent that the twin goals of the Act were served by this appeal. If the CIT's order were reversed on appeal, the Court could proceed much faster to decide the merits of the case and the Government would be spared the time and expense associated with discovery.

In the first case, *Silver Reed America, Inc. v. United States*,[49] the CIT certified a remand order that held as invalid a portion of Commerce's anti-dumping regulations, namely, the "ESP offset cap," contained in 19 C.F.R. § 353.15(c).[50] In the second case, *American Lamb Co. v. United States*,[51] the CIT certified its order overturning the ITC's "reasonable indication" standard in preliminary injury determination. The ITC had continued to use that standard, despite earlier decisions by the CIT to the contrary in *Republic Steel Corp. v. United States*,[52] and *Jeannette Sheet Glass Corp. v. United States*.[53]

Unfortunately, in both cases, the Federal Circuit accepted jurisdiction without discussing the merits of the section 1292(d)(1) issue. The Court's silence can most probably be attributed to an equivalent degree of silence on the part of the appellees in each case (*i.e.*, *Silver Reed Corp.* and *American Lamb Co.*). However, certain conclusions can be implied from the court's acceptance of the cases, since parties cannot by stipulation or waiver grant or deny federal subject matter jurisdiction.[54] A federal court either has jurisdiction over a particular action or it does not.[55]

By accepting jurisdiction over the interlocutory appeals in *Silver Reed* and *American Lamb*, the Federal Circuit implicitly concluded that remand orders which overturn legal standards applied by the administrative agency in nearly every anti-dumping or countervailing duty proceeding, meet the three criteria prescribed by 28 U.S.C. § 1292(d)(1). One presumes that, in particular, the Court felt that legally

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49. 581 F. Supp. at 1290.

50. The Court remanded to Commerce its final determination of sales at less than fair value in Portable Electric Typewriters from Japan, 45 Fed. Reg. 18,416 (Mar. 21, 1980), for a new determination of foreign market value that did not restrict the deduction of home market selling expenses in Japan to the amount of the selling expenses in the United States as prescribed by 19 C.F.R. § 353.15(c).

51. 611 F. Supp. 979 (Ct. Int'l Trade 1985).

52. 591 F. Supp. 640 (Ct. Int'l Trade 1984), *reh'g denied*, 16 Cust. B. & Dec. No. 14, at 55 (Ct. Int'l Trade 1985).

53. *Jeannette Sheet*, 607 F. Supp. at 123.

54. First Nat'l. Bank v. United States, 792 F.2d 954 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 948 (1987); Hohri v. United States, 586 F. Supp. 796 (D.D.C. 1984).

55. While it is by now well established that appellate courts may refuse to hear interlocutory appeals for any reason, *see* note 18 *supra*, their authority to seize jurisdiction of an appeal, including an interlocutory appeal, must be circumscribed by the relevant statute. *See, e.g., In Re* Cement Antitrust Lit'g., 673 F.2d 1020, 1026 (9th Cir. 1982)(Ninth Circuit engaged in two-step analysis of parallel interlocutory appeal provision applicable to federal district courts (i.e., 28 U.S.C. § 1292(b)): (i) whether district court properly applied the three criteria prescribed by the statute; and, (ii) whether, in the exercise of its statutory discretion, the Court wanted to accept jurisdiction of the appeal)).

significant remand orders, such as the CIT's rejection of the ESP offset cap in *Silver Reed*, involve "controlling questions of law," which, if not promptly appealed, will needlessly extend the duration of the immediate lower court proceeding. What one cannot be certain of is the extent to which the Federal Circuit considered the effect of the CIT's remand order on other administrative proceedings involving the same issue. If the Federal Circuit had ignored this aspect, or if it had simply rejected the notion that it is being fully consistent with the purpose behind section 1292(d)(1) to examine the effect immediate appellate review has on present *and* future court dockets, then one can by no means be certain that the court approves, in principle, of interlocutory review of all legally significant remand orders overturning an administrative agency standard. Indeed, several decisions from the CIT has raised precisely this same question.

In both *Kelly v. Secretary, United States Department of Labor*,[56] and *National Corn Growers Assoc. v. Baker*,[57] the CIT denied requests from the defendant agencies to certify adverse rulings for interlocutory appeal. These cases, which did not involve the anti-dumping or countervailing duty statutes, appear to base their conclusions, in part, upon a narrow view of section 1292.

Kelly concerned a denial by the Department of Labor of a petition for eligiblity to apply for trade adjustment assistance. Workers affected by the determination, other than the original petitioners, filed a court action challenging the denial. The Department defended, arguing, *inter alia*, that plaintiffs' action was barred by the applicable statute of limitations.[58] Consistent with prior court decisions and established agency practice, the Department argued that the publication of the Federal Register notice announcing its decision marked the beginning of the running of the statute of limitations and that plaintiffs' action was tardy as measured against this period.[59] The CIT rejected the Department's defense primarily because the pertinent Federal Register notice had been published late and because plaintiffs were proceeding *pro se*.[60] More importantly, in a separate opinion, the court appeared to disregard the effect its ruling would have on other administrative proceedings at the Department of Labor.[61] At one point the court stated: "In this case, no trial is called for, and the court is unable

56. Slip op. 86-18 (Ct. Int'l Trade 1986).
57. Slip op. 85-119 (Ct. Int'l Trade 1985).
58. *See* 19 U.S.C. § 2273 (1979).
59. Slip op. 85-132 (Ct. Int'l Trade 1985).
60. *Id.*
61. *See* slip op. 86-18, *supra* note 56.

to conclude from defendant's conclusory statement that compliance with the remand order will require anything but ordinary administrative steps of a not particularly burdensome nature."[62]

Only one thing is apparent from this brief review of the relevant case law. Despite the five-year history of the "partnership" between the Federal Circuit and the CIT, no uniform analysis of when the Federal Circuit and the CIT, no uniform analysis of when it is proper to certify a remand order for interlocutory appeal has yet emerged. Cases that should address the issue do not, and the ones that do tend to hide behind key terms and conclusory statements. While there is reason for Commerce to be optimistic about the availability of section 1292(d)(1) certification, the following important questions still remain. (1) Will the CIT and the Federal Circuit take into consideration the effect of a particular remand order on other judicial and administrative proceedings? (2) Are the CIT and Federal Circuit willing to permit interlocutory appeals from remand orders, which, if reversed, would significantly reduce the expenses of the agency but not advance the termination of the litigation?[63]

C. *How the Three Criteria Prescribed by Section 1292(d)(1) Ought to be Applied to Remand Orders that Overturn Legal Standards Widely Applied by the Administrative Agency*

1. Controlling Question of Law

Inasmuch as the fundamental purpose of section 1292(d)(1) (and its counterpart 1292(b)) is the avoidance of unnecessary trial court proceedings, the criterion that an order raise a "controlling question of law" seems, to require at a minimum, that reversal on appeal have an immediate effect on the course of litigation and, in some instances, save the resources either of the court or of the litigants.[64] In other words, if reversal of the order will not have any appreciable impact

62. *Id.* at 59. In *National Corn Growers*, Judge Aquilino also seemed to ignore the potential effect his denial of Treasury's sovereign immunity defense would have on other agency proceedings that would take place prior to an appeal as of right when he stated: "[T]he defendants fail to show how such an appeal would materially advance termination of the litigation in view of the discovery already conducted, combined with a request for trial in early December 1985 . . . ." slip op. 85-119, *supra* note 57.

63. *See supra* note 44 and accompanying text.

64. "An order involves a controlling question of law if, on appeal, a determination that the decision contained error would lead to reversal." Dorward v. Consolidated Rail Corp., 505 F. Supp. 58, 59 (E.D. Penn. 1980) (citing Katz v. Carte Blanche Corp., 496 F.2d 747 (3rd Cir. 1974)).

on the course of the lower court proceedings, the order is not controlling.[65]

As stated repeatedly throughout this article, immediate appellate review of CIT remand orders that overturn a legal standard that has been consistently and frequently applied by Commerce will conserve the resources of the judiciary litigants, no matter what the outcome. If interlocutory appeal results in reversal, then the agency presumably[66] saves the time and expense of conducting a remand. Furthermore, the agency's methodology remains intact and less susceptible to court challenge in subsequent administrative proceedings. However, if appeal results in affirmance of the CIT's order, then the agency has to perform the remand, but at least it will know that it must change its methodology for all cases in which the issue arises. Also, the appellate decision then eliminates the problems caused by the divergence of opinion between the court and the agency.

2. Substantial Ground for Difference of Opinion

Courts have rarely discussed the requirement that there be substantial ground for a difference of opinion on the disputed issue. The history of the Interlocutory Appeals Act of 1958 indicates that this requirement was intended to bar frivolous and dilatory appeals.[67] Most of the discussion that has taken place over this issue has centered around the "law of the circuit" doctrine. In other words, while some district courts will refuse to certify an order for interlocutory appeal if the issue is settled within the particular circuit, others look to the debate *among* the circuits.[68] Since the Federal Circuit has exclusive jurisdiction over decisions by the CIT and anti-dumping and countervailing duty cases rarely arise, if ever, before any trial court other than the CIT, the practical application of this criterion to legally significant remand orders is extremely limited. Perhaps this explains why

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65. Numerous cases have implied from this language a law versus fact distinction which precludes matters within the sound discretion of the lower court from being certified. *See, e.g.*, City of Burbank v. General Electric Co., 329 F.2d 825 (9th Cir. 1964)(refusal to strike portion of a pleading). Some cases have even elevated this principle to a fourth criterion which rejects certification if the likelihood of reversal on appeal is deemed minimal. *See, e.g.*, USACO Coal Co. v. Carbomin Energy, Inc., 550 F. Supp. 19 (W.D. Ky. 1982).

66. Whether the lower court proceedings should be stayed, and under what circumstances, is discussed in the following paper.

67. *Hearings*, *supra* note 41, at 14.

68. For example, in one famous case, Berger v. United States, 170 F. Supp. 795 (S.D.N.Y. 1959), the district judge refused to certify a question governed by clear precedent in the Second Circuit, even though five other circuits were to the contrary.

Judge Aquilino's discussion of this criterion in the *National Corn Growers* case was so abbreviated. In denying the agency's motion to dismiss the complaint and its request to certify the order for interlocutory appeal, the Court simply stated: "Here, defendants' papers do not convince this court that the motion to dismiss raises issues of such potential for disagreement that an immediate appeal is warranted."[69]

In any event, the district courts, including the CIT, should not establish too high a threshold for this criterion. For one thing, the appellate court, not the trial judge, is in the best position to evaluate such things as changes in opinion on the court of appeals or the pendency of other cases presenting the same issue. Moreover, if the appellate court is not inclined to reconsider the issue, little time will be lost in denying leave to appeal. Therefore, the standard applied by the CIT should merely be that there be the belief that a reasonable appellate court judge could vote for reversal of the challenged order.

3. Material Advancement of the Termination of the Litigation

The most important criterion in section 1292(d)(1) is the requirement that immediate appeal "may materially advance the ultimate termination of the litigation." Advancing the termination of litigation, thereby positively affecting the district courts' backlog of cases, was the primary reason for making an exception to the final judgment rule. Now, interlocutory appeals from remand orders reversing important legal standards applied by Commerce advance this goal.[70]

In sum, remand orders by the CIT that decide important and far-reaching questions of law fit exactly within the criteria established by section 1292(d)(1). Thus certification of these types of orders will conserve the resources of the judiciary, and of litigants, and facilitate a smoother administration of the anti-dumping and countervailing duty laws.

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69. *See National Corn*, slip op. 85-119, at 49.

70. From the "material advancement of the litigation" requirement has grown a line of cases which have essentially grafted a forth criterion on to § 1292. These cases extrapolate from the need to shorten the length of litgation a requirement that the lower court proceeding be exceptionally complex or otherwise extraordinary. *See, e.g.*, *National Corn*, slip op. 85-119, at 49, quoting from Milbert v. Bison Laboratories, 260 F.2d 431, 433 (3d Cir. 1958); *Kelly*, slip op. 86-18, at 59. A review of these cases, however, reveals a dearth of analysis from which a manageable standard separating ordinary from exceptional litigation can be derived. In short, the "exceptional case" requirement is generally used as a label to justify a conclusion reached on other grounds.

IV. CONCLUSION

Recent decisions by the Federal Circuit on the finality of remand orders for purposes of appeal under 28 U.S.C. § 1291 threaten to preclude Commerce from ever being able to appeal, as of right, certain important decisions by the CIT. As a result of these decisions, it now appears that every order by the CIT which remands an administrative determination back to Commerce is interlocutory and not final.

This article has attacked this view held by the Federal Circuit on several grounds. First, the Federal Circuit fails to distinguish between remand orders that require the agency to report back to the court on the results of the remand, and those that do not. Second, it fails to distinguish between remand orders that require the agency to explain further its decision or develop additional evidence before the lower court can render a decision on the merits, and remand orders that decide important issues of law having broad application throughout the anti-dumping or countervailing duty laws. *Any* remand order that does not require the agency to report back to the court is patently final and thus appealable as of right under section 1291. With respect to orders that direct the agency to report back, only those that do not decide an important issue of law should be considered interlocutory.

Lastly, if the Federal Circuit continues to adopt a narrow view of the final judgment rule, this author predicts greater reliance by Commerce on "discretionary appeals" of remand orders under 28 U.S.C. § 1292(d)(1). Remand orders that decide important and far-reaching issues of law are perfectly suited for interlocutory appeal under section 1292(d)(1). As discussed in section II of this paper, orders which overturn a legal standard that has been consistently and frequently applied by Commerce immediately cast a legal cloud over all present and future administrative proceedings that involve the disputed issue. These orders create an immediate and inevitable divergence of opinion between the agency and the court in numerous other proceedings, which, if not rectified through prompt appellate review, will foster additional lawsuits and court remands over the same issue. Moreover, some legally significant remands require the agency to engage in protracted litigation costing thousands of dollars. In these instances, immediate appellate review under 28 U.S.C. § 1292(d)(1) is essential, if the CIT and the Federal Circuit were to avoid needless litigation involving the affected administrative proceedings and if the agency were to be spared the tremendous time and expense associated with remand proceedings that the Federal Circuit may eventually reverse on appeal anyway.