Remands Are a Consequence of Administrative Law, So Why Are We All So Frustrated?

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I. INTRODUCTION AND SUMMARY

Mention the word "remand" in a room of trade practitioners and let the fun begin. No matter who you represent—petitioners, respondents, or government agencies—a remand means more time and resources on an issue or on multiple issues that typically have already been extensively argued, and multiple remands in the same case simply magnify those resource issues. Although remands are an integral part of administrative law practice, which obviously includes trade remedies law, they can frustrate all parties. These multilayered frustrations have many asking whether the remand process can be "fixed."

A quick survey of recent judicial conference agendas from the United States Court of International Trade and the United States Court of Appeals for the Federal Circuit reveals that the remand process with its twists and turns is not a new topic. It would be remiss of me not to mention a few of these prior articles and commend them to your attention because the structure of the remand process with its inherent problems has not changed. Specifically, prior panelists have addressed the parameters of the courts' authority in issuing remand instructions to the agencies,[1] discussed whether the agencies can explain their

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1. Remarks at the International Trade Breakout Session "Remands with Instructions: How Far Can the Courts Go?" at the Federal Judicial Conference: A National Court of Appeals—At Three Decades (May 17, 2012).

disagreements with the court's decisions in their remand determinations,[2] and comprehensively examined the various types of agency remand determinations.[3]

Compellingly, this past October, *The Brooklyn Journal of International Law* published an article coauthored by Judge Restani and Ira Bloom entitled *The* Nippon *Quagmire: Article III Courts and Finality of United States Court of International Trade Decisions*, which examines different reasons behind the remand "quagmire."[4] That article, discussed further below, tackles finality and collateral issues that cause delay in the process.[5]

After struggling with this topic for several months and discussing it with colleagues, I have reached the same conclusion as many before me: there are no easy or simple fixes that might solve the remand dilemma. Although some identify multiple remands in a case as the source of most frustration (implying that the remands all involve the same issue), this is most often not the case. As Judge Restani and Bloom recognize, the United States Department of Commerce's (Commerce) remand proceedings can involve complex tasks.[6] In cases involving a variety of challenges to a final determination or final results, there may be a number of sequential remands because the first remand determination may have a consequential effect on another issue.[7] In any event, it should not be surprising that I do not agree that the problem rests solely with the agencies and that the solution is for the agencies to "surrender" before an issue is fully and properly vetted. However, if there were a way for parties to place controlling issues before the appellate court for quick resolution, that may solve some of the trade bar's frustrations, but I am not sure what changes, if any, would be needed to accomplish such a feat. There are, however, certain modest suggestions that might assist some cases to proceed more efficiently through the process.

Before examining a few ideas that may or may not solve some of our universal frustrations, this Article will briefly discuss the statute and seminal case law discussing remands.

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2. John D. McInerney, *Is It Improper for Commerce To Explain Its Disagreement with Remand Orders in Its Remand Redeterminations?*, 17 TUL. J. INT'L & COMP. L. 491, 492 (2009).

3. Julie C. Mendoza & R. Will Planert, *Agency Remands Before the United States Court of International Trade: Objectives and Obstacles*, 17 TUL. J. INT'L & COMP. L. 463, 464 (2009).

4. Jane Restani & Ira Bloom, *The Nippon Quagmire: Article III Courts and Finality of United States Court of International Trade Decisions*, 39 BROOK. J. INT'L L. 1005 (2014).

5. *Id.* at 1005, 1013.

6. *Id.* at 1007.

7. *Id.* at 1025.

II. LAW

19 U.S.C. § 1516a(c)(3) (2012), which is embedded in the *Judicial Review* section of the statute, provides:

> *Remand for final disposition*. If the final disposition of an action brought under this section is not in harmony with the published determination by the Secretary, the administering authority, or the Commission, the matter shall be remanded to the Secretary, the administering authority, or the Commission, as appropriate, for disposition consistent with the final disposition of the court.

As with most statutory language, although this provision appears innocuous, it has spawned debate through the years concerning the parameters of remands, including the hot-button issue of whether an outright reversal is precluded.[8]

Remands can be voluntary or court-generated. A voluntary remand occurs when an agency moves the court during litigation to give the proceeding back to the agency for further administrative action.[9] Court-generated remands obviously are a result of litigation and come in many shapes and sizes. Although the various dimensions of court-generated remands are impossible to capture fully in a single article, significant legal issues and important as well as picayune factual issues are fair game.[10]

A. Voluntary Remands

The Federal Circuit in *SKF USA, Inc. v. United States* identified three types of remands generally requested by an agency.[11] The first is the situation involving "intervening events outside of the agency's control."[12] The second is the situation where "even in the absence of intervening events, the agency may request a remand without confessing error."[13] And the third is the situation where the agency "believes that its

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8. The term "remand" implies that additional agency consideration is warranted, but Judge Restani and Bloom counter in their article that at a certain point, depending upon the issue and the agency involved, a remand can, in fact, effectively be a reversal of the agency decision. *Id.* at 1008.

9. SKF USA, Inc. v. United States, 254 F.3d 1022, 1028–29 (Fed. Cir. 2001).

10. *See, e.g.*, GPX Int'l Tire Corp. v. United States, 645 F. Supp. 2d 1231, 1251 (Ct. Int'l Trade 2009) (following remand, the court determined that Commerce could not apply the countervailing duty law to non-market-economy countries); Blue Field (Sichuan) Food Indus. Co. v. United States, 949 F. Supp. 2d 1311, 1334 (Ct. Int'l Trade 2013) (remanding to reconsider surrogate value for, among other things, cow manure).

11. 254 F.3d. at 1028.

12. *Id.*

13. *Id.*

original decision was incorrect on the merits and wishes to change the result."[14]

The first situation is relatively straightforward. When events outside of the agency's control, i.e., a new legal decision is handed down or a new law is passed, "[a] remand is generally required [where] the intervening event may [impact] the validity of the agency action."[15] There is a long-standing "tradition of allowing agencies to reconsider their actions where events pending appeal draw their decision in question."[16]

The second situation, where no intervening events have taken place, gives the court more discretion in deciding whether to grant the agency's remand request.[17] Typically, the agency will give some reason for requesting the remand, such as the desire to reconsider its previous decision or to further consider the governing statute at issue.[18] There are some rare instances where courts have denied such requests on the ground that the agency at issue was acting in bad faith[19] and others where the court has denied a motion having nothing to do with bad faith.[20] "[I]f the agency's concern is substantial and legitimate, a remand is usually appropriate."[21]

Third, the agency may request a remand because it believes the original decision is incorrect on the merits and wishes to change the

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14. *Id.*

15. *Id.*; Corus Staal BV v. United States, 593 F. Supp. 2d 1373, 1389 (Ct. Int'l Trade 2008) (granting Commerce's voluntary remand so that the agency could reconsider its duty absorption inquiry in light of the Federal Circuit's decision in *Agro Dutch Industries Ltd. v. United States*, 508 F.3d 1024 (Fed. Cir. 2007)); China First Pencil Co. v. United States, 721 F. Supp. 2d 1369, 1373 (Ct. Int'l Trade 2010) ("Defendant concedes that a remand on the issue of the wage rate is appropriate. Less than two weeks after Rongxin completed briefing . . . and shortly before the government filed a response to the China First Plaintiffs' . . . motion, the [Federal Circuit] ruled in Dorbest Ltd. v. United States, 604 F.3d 1368 (Fed. Cir. 2010), . . . that Commerce's method for valuing labor based on its regression analysis was contrary to law.").

16. *SKF USA, Inc.*, 254 F.3d. at 1028-29 (quoting Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993)).

17. *Id.* at 1029.

18. Diamond Sawblades Mfrs. Coal. v. United States, No. 06-00248, slip op. 13-130, at 3 (Ct. Int'l Trade Oct. 11, 2013) (voluntary remand granted to recalculate a respondent's indirect selling expenses); Union Steel Mfg. Co. v. United States, No. 10-00106, slip op. 12-67, at 47 (Ct. Int'l Trade May 25, 2012) ("Defendant having requested a voluntary remand as to the challenged decision, the court will order Commerce to reconsider its determination of the date of sale for HYSCO's U.S. sales made through HYSCO USA.").

19. *E.g.*, *SKF USA, Inc.*, 254 F.3d. at 1029.

20. *E.g.*, Defendant's Partial Consent Motion for Voluntary Remand, Toys "R" Us, Inc. v. United States, No. 07-00115 (Ct. Int'l Trade Nov. 21, 2007) Doc. 23; Order, *Toys "R" Us*, No. 07-00115 (Dec. 13, 2007) Doc. 27 (denying Commerce's request for voluntary remand to reconsider its decision where it inadvertently omitted analysis of certain record information).

21. *SKF USA, Inc.*, 254 F.3d. at 1029.

result.[22] In such a situation, remand is considered appropriate to correct "simple errors, such as clerical errors, transcription errors, or erroneous calculations."[23] The analysis becomes more complex when it is "associated with a change in agency policy or interpretation."[24] When the policy change involves an issue as to whether a controlling statute requires a different result to the one the agency reached, i.e., "a step one *Chevron* issue," then the court may (but is not bound to) grant the agency's request.[25] On the other hand, "[w]here there is no step one *Chevron* issue," absent a finding of bad faith the courts are required to grant the agency's remand request.[26] The court has determined that to not grant such a remand request would be antithetical to *Chevron U.S.A., Inc. v. Natural Resources Defense Council* because it would essentially "freeze an administrative interpretation of a statute."[27] This is because *Chevron*, in the court's words, "assumes and approves the ability of administrative agencies to change their interpretation."[28] Simply stated, the court is required to grant a remand where the agency's new interpretation of a statute is entitled to *Chevron* deference.[29]

The vehicle for an agency to request a voluntary remand may be either the filing of a separate motion requesting the remand or simply incorporating the request into the agency's court brief.

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22. Am. Tubular Prods. L.L.C. v. United States, No. 13-00029, slip op. 14-116, at 16-17 (Ct. Int'l Trade Sept. 26, 2014) ("The law permits voluntary remand when the agency 'believes that its original decision is incorrect on the merits and it wishes to change the result.' That is certainly the case here. Given alleged flaws in the Indonesian values, and given the agency's desire to reconsider its choice, the court remands the high- and low-carbon steel billet surrogates to Commerce to reconsider whether they are the best available information on the record compared to other carbon steel billet surrogate data." (citation omitted) (quoting *SKF USA, Inc.*, 254 F.3d at 1029)); *see* Tianjin Wanhua Co. v. United States, 925 F. Supp. 2d 1377, 1377 (Ct. Int'l Trade 2013) (granting Commerce's request for voluntary remand to recalculate separate rates because the mandatories' rates were judicially invalidated in a separate, nonconsolidated case).

23. *SKF USA, Inc.*, 254 F.3d at 1029; Far E. New Century Corp. v. United States, 867 F. Supp. 2d 1309, 1311 (Ct. Int'l Trade 2012) ("[The court granted voluntary remand finding that,] [i]n effect, Commerce and FENC are in agreement about an alleged ministerial error made in the calculation of the G&A ratio. Commerce stated its intent to revise the G&A ratio based on updated data it received from FENC. . . . FENC challenges that the revised data was not ultimately implemented, and Commerce admits that it 'may not have used the corrected normal value . . . in its calculation of the final weighted-average dumping margin.'" (citation omitted)).

24. *SKF USA, Inc.*, 254 F.3d. at 1029.

25. *Id.*

26. *Id.* at 1029-30.

27. *Id.* at 1030 (quoting Micron Tech., Inc. v. United States, 243 F.3d 1301, 1312 (Fed. Cir. 2001)).

28. *Id.* (quoting *Micron Tech., Inc.*, 243 F.3d at 1312).

29. *Id.*

B. Court Remands

Court-generated remands issued pursuant to 19 U.S.C. § 1516a(c)(3) are so varied that discussing them in detail is outside the scope of—and too ambitious a task for—this Article. Such remands can involve a single factual or legal issue or can be multilayered and encompass both facts and law.

Generally, court-generated administrative remands have been recognized as arising in three scenarios characterized by the agency's legal error.[30] The first is remands to the agency for further explanation of its rationale.[31] The second is remands issued because the court holds that the agency determination cannot be sustained on the grounds relied upon by the agency.[32] The third arises where the agency has made either erroneous factual findings or has failed to make sufficient findings with respect to an issue before it.[33] Remands applying the trade remedies standard of review, i.e., "unsupported by substantial evidence on the record, or otherwise not in accordance with law," may arise under any of the three scenarios.[34]

It is when responding to court-generated remands and not when issuing voluntary remand determinations that agencies may include the *Viraj Group, Ltd. v. United States* "under protest" language.[35] While this may seem obvious to many, the reason the issue arose in *Viraj* was that it apparently caused some confusion at the appellate court. In *Viraj*, the Federal Circuit initially had difficulty reconciling the government's standing to appeal the court's decision notwithstanding the fact that

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30. *See* Mendoza & Planert, *supra* note 3, at 464 (referencing Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 206).

31. *Id.* at 469.

32. *Id.*

33. *Id.*

34. 19 U.S.C. § 1516a(b)(1)(B)(i) (2012); *see* Xiamen Int'l Trade & Indus. Co. v. United States, 953 F. Supp. 2d 1307, 1327-28 (Ct. Int'l Trade 2013) (remanding several of Commerce's decisions). By way of example, the court held that Commerce improperly rejected as unreliable a Wikipedia entry that a party had submitted. *Id.* at 1314. Further, the court held that Commerce failed to "explain why a surrogate value for slaked lime was the best available information regarding that input." *Id.* The court, in rejecting the data used to calculate the value of mushroom spawn, held that "Commerce erred by not explaining why the GTA data was the best available information for valuing mushroom spawn," despite the flaws Commerce found with the other data sets on the record. *Id.* at 1316.

35. Viraj Grp., Ltd. v. United States, 343 F.3d 1371, 1376 (Fed. Cir. 2003) ("Even though technically the prevailing party under the Court of International Trade's final decision (*Viraj IV*), the government prevailed only because it acquiesced and abandoned its original position, which it had zealously advocated, and adopted under protest a contrary position forced upon it by the court.").

Commerce had issued remand determinations that were not consistent with its original final determination in response to multiple court-generated remands.[36] The Federal Circuit ultimately agreed with the government that it had standing because "the general rule is that decisions by a court remanding a matter to an agency are nonfinal and not appealable to a reviewing court."[37] The appellate court's diversion resulted in the agencies' decade-old practice of including "under protest" or similar language in remand determinations as a reminder to the appellate court that the government does have standing to appeal notwithstanding the fact that it has issued a remand determination (or multiple remand determinations) acquiescing and abandoning its original position.[38]

III. DISCUSSION

The knowledge that remands are an integral part of administrative law does not lessen the frustration of the trade bench and bar in dealing with them. Perhaps the maxim that "where you stand depends upon where you sit" is appropriate in discussing whether there are any practical ways to fix the remand process. I qualify this with "perhaps" because, for the most part, my view of the frustrations experienced by the bench and private bar are speculative or based upon comments not for attribution.

Suffice it to say that the consumption of additional time and resources to arrive at a final result appears to be the point of major frustration for all. Discussed below are a few suggestions or thoughts about how the process as a whole might be altered as well as minor suggestions that may assist everyone in achieving quicker resolution of remanded cases.

In the *Brooklyn Journal of International Law*, Judge Restani and coauthor Professor Ira Bloom opine that cases fall into a time-consuming loop because the Federal Circuit has historically rejected the

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36. *Id.* at 1375 ("[T]his appeal comes to us in a strange posture: The government has appealed from the court's decision *affirming* the government agency's determination; in other words, the *winner* has appealed because its determination was affirmed by the trial court only on the basis of reasoning with which it disagrees.").

37. *Id.* at 1375-76 (citing Cabot Corp. v. United States, 788 F.2d 1539, 1542 (Fed. Cir. 1986)).

38. Anecdotally, through the years, various practitioners have expressed opinions about the "under protest" language with some arguing that absent the protest language appearing in an agency remand determination, the government is precluded from noting an appeal. Although agencies now appear to use this language routinely, failure to do so should not preclude a proper appeal. Indeed, the statute and the courts' rules do not impose such a limitation on the government's ability to appeal.

government's attempts to appeal remand orders to Commerce that effectively dispose of a case.[39] Judge Restani and Bloom rely upon two appellate decisions involving remands to effectuate a reversal,[40] *Badger-Powhatan v. United States* and *Cabot Corp. v. United States*.[41] In both cases, the former involving amendment of an antidumping duty order after the International Trade Commission revised its injury determination and the latter involving the standard applied by Commerce when it determined that certain programs did not constitute bounties or grants under the pre-Uruguay Round Agreements Act subsidies law, the Federal Circuit held that the remand orders were not "final" decisions under 28 U.S.C. § 1295(a)(5) and, thus, it did not have jurisdiction.[42] The article posits that if the remand orders to Commerce in those two cases were not considered to be final judgments, it is unlikely that any remand order from the court to Commerce could be.[43]

However, in *Badger-Powhatan*, the appellate court left open the possibility that such an appeal could be certified pursuant to the statutory exception to the final judgment rule located in 28 U.S.C. § 1292(d)(1).[44] Of course, by the time the decision was issued, the ten-day limitation in the statute surely had passed, but, as discussed below, the use of § 1292(d)(1) for remands involving controlling questions of law certainly remains an avenue that practitioners can pursue.

In *Cabot*, the Federal Circuit specifically noted that the government did *not* seek certification under the statutory exception provided by § 1292(d)(1).[45] To the contrary, the government requested that the court "consider a 'practical rather than a technical' construction of the remand

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39. Restani & Bloom, *supra* note 4, at 1012-13.

40. "Substantive remands" are those which direct Commerce to reconsider or explain its final results, while "remands to effectuate a reversal" require publication of a totally different result. *Id.* at 1013, 1008.

41. *Id.* at 1013; 808 F.2d 823 (Fed. Cir. 1986); 788 F.2d 1539 (Fed. Cir. 1986).

42. Restani & Bloom, *supra* note 4, at 1013.

43. *Id.* In *Cabot*, the Federal Circuit agreed that "the order resolves an important legal issue such as the applicable standard for countervailability" yet held that the court had remanded the issue to the agency for additional findings. 788 F.2d at 1543.

44. *Badger*, 808 F.2d at 826. 28 U.S.C. § 1292(d)(1) (2012) provides:

> When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved 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 an appeal to be taken from such order, if application is made to that Court within ten days after entry of such order.

45. 788 F.2d at 1543.

order . . . arguing that the order is final and appealable because it finally determines the controlling issue in the case."[46] The Federal Circuit found that the cases the government relied upon "misse[d] the mark"[47] because one involved appeal from a writ of mandamus in which full relief had been provided by the district court with no remand issued and the other involved application of 28 U.S.C. § 1291.[48]

I can only assume that the "practical" reasons underlying the government's action in *Cabot* in 1986 mirrored or were the precursors to what Judge Restani and Bloom refer to as the "finality problem."[49] As described in their article, too often, when "the agency is faced with complying with a 'non-final' remand,"[50] the court, the agency, and the parties are held hostage for an extended period while the case bounces back and forth between the agency and the court.[51] As all practitioners know, "[t]he remand results in a new draft determination, comments thereon, and then a 'final' remand determination."[52] Parties typically are able to submit comments on the remand determination to the court, and sometimes a hearing on the remand determination is held; all of this activity occurs before the court affirms Commerce's remand determination, and it is only at that point in time that the case typically is appealable to the Federal Circuit. The court obviously will not affirm a determination it perceives as not in compliance with its remand order,[53] leaving the agency in the delicate position in certain cases of complying with the order even though it strongly disagrees with the court's decision.[54] If the remand determination is deficient in some respect, it is not affirmed and the process begins again with another remand issued by the court.[55]

Is resort to § 1292(d)(1) a practical solution to the multiremand issue that many view as plaguing the trade bench and bar? Certainly, if there is a controlling issue of law present in an action, the losing party could request certification from the court after the first remand in an effort to shorten time for all parties. Although the statute requires an

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46. *Id.* at 1544. The Federal Circuit also held that the request failed to meet the nonstatutory exception to the final judgment rule, i.e., the "collateral order" exception. *Id.*

47. *Id.*

48. *Id.* at 1543. Indeed, because of the writ of mandamus, a different provision of § 1292 controlled, i.e., § 1292(a)(1).

49. Restani & Bloom, *supra* note 4, at 1012-13.

50. *Id.* at 1014.

51. *Id.* at 1014-15.

52. *Id.* at 1014.

53. *Id.* at 1015.

54. *Id.*

55. *Id.* at 1014-15.

immediate reaction, i.e., the filing must be made within ten days of the court's order, unless expedited appeal is requested, that case seemingly lines up with other pending appellate cases to be briefed and heard in due course.[56]

The Federal Circuit is parsimonious in accepting interlocutory appeals pursuant to § 1292(d)(1). Research has revealed only a handful of trade remedies cases in the last thirty years in which interlocutory jurisdiction has been accepted.[57] Perhaps that parsimony is driven by the failure of the parties, including the government, to request interlocutory certification.[58] Of course, there is nothing to ensure that requesting and receiving interlocutory status at the Federal Circuit will be a time saver. Such appeals, unless they involve an injunction or mandamus, once approved by the court, are docketed in the normal course and heard as such.[59] Consequently, rather than receiving a quick answer from the appeals court, that answer could take up to a year to be revealed. Obviously, resolution of the controlling question of law in a case by the Federal Circuit should result in swifter resolution of the case as a whole, but there will be those cases in which the resolution of that controlling legal issue is only the first step to resolving a multitude of issues still remaining in the case.[60] Perhaps only cases involving a discrete number of issues, all of which are easily disposed of by the Federal Circuit's decision, will be shortened by resort to the interlocutory process.

Although the initial appeal to the Federal Circuit in *GPX International Tire Corp. v. United States* was made under § 1295 and did

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56. 28 U.S.C. § 1292(d)(1) (2012).

57. Eurodif v. United States, 89 F. App'x 236 (Fed. Cir. 2004) (originating from Commerce); Chaparral Steel v. United States, 901 F.2d 1097, 1100 (Fed. Cir. 1990) (originating from ITC); Borlem S.A. v. United States, 913 F.2d 933, 936 (Fed. Cir. 1990) (originating from ITC); Borlem S.A. v. United States, Nos. M262, M263, M264, 1989 WL 149997 (Fed. Cir. Oct. 26, 1989) (consolidating cases originating from ITC); Am. Lamb Co. v. United States, 785 F.2d 994, 997 (Fed. Cir. 1986) (originating from ITC); Zenith Radio Corp. v. United States, 764 F.2d 1577, 1578 (Fed. Cir. 1985) (originating from Commerce); Consumer Prods. Div., SCM Corp. v. United States, 753 F.2d 1033, 1035 (Fed. Cir. 1985) (originating from Commerce).

58. *Cf.* Windtower Trade Coal. v. United States, 741 F.3d 89, 95 (Fed. Cir 2014) (denying jurisdiction under 28 U.S.C. § 1292(d)(1)) (originating from Commerce); Jeannette Sheet Glass Corp. v. United States, 803 F.2d 1576, 1578 (Fed. Cir. 1986) (noting the denial of jurisdiction under 28 U.S.C. § 1292(d)(1)) (originating from ITC).

59. *See* Appellant's Reply Brief in Support of Emergency Motion for Stay Pending Appeal, or in the Alternative, Motion for a Temporary Restraining Order/Preliminary Injunction at 1-2, Diamond Sawblades Mfrs. Coal. v. U.S. Dep't of Commerce, No. 2014-1367 (Fed. Cir. Mar. 20, 2014); Order, *Diamond Sawblades*, No. 2014-1367 (May 22, 2014) (dismissing the plaintiff's interlocutory appeal requesting that Commerce and the ITC stop conducting a sunset review).

60. GPX Int'l Tire Corp. v. United States, 666 F.3d 732 (Fed. Cir. 2011) (appeal from GPX Int'l Tire Corp. v. United States, 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009)).

not involve a § 1292 interlocutory appeal, that extraordinary case illustrates this point.[61] Although there is no doubt that *GPX* and its progeny will be written about and debated for years to come, for this Article's purposes, in a case involving congressional action and multiple court actions, once the controlling issue concerning application of the countervailing duty law to non-market-economy countries was resolved by the Federal Circuit in favor of the government, there were still issues relating to the subsidy case to be resolved by the court.[62] Consequently, the action was remanded to the court for further action. Had this case been certified for interlocutory appeal on the controlling legal issue of applying the countervailing duty law to non-market-economy countries, it is hard to envision how the time frame would have been any different given the other outstanding subsidy issues that remained to be resolved by the court.

From *GPX*, it might be easy to posit that the court should resolve all issues before certifying the case for interlocutory appeal so that when the Federal Circuit issues its decision there is no need for remand to the court to address the remaining collateral issues. The parameters of how that would work in multi-issue cases are not clear because such a system seemingly would require at least one remand prior to resort to the Federal Circuit.[63] So would there be any real time savings if this were in fact the case?

Given the fact that the Court of International Trade is a specialized court, perhaps § 1292(d)(1) of the statute needs to be amended to permit automatic jurisdiction over interlocutory appeals to the Federal Circuit of controlling legal issues certified by the Court of International Trade rather than leaving the discretion with the appellate court.[64] Because of the automatic nature of the proposal, arguably such an appeal should not be noted until after at least one remand to provide the government an opportunity to further explain its position and for parties to air their comments, which may resolve the issue without resort to the appellate

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61. The Federal Circuit recently affirmed the CIT's judgment that the legislation enacted in 2012 did not offend the due process and ex post facto clauses of the Constitution. GPX Int'l Tire Corp. v. United States, No. 2014-1188, 2015 WL 1087846 (Fed. Cir. Mar. 13, 2015).

62. *See* GPX Int'l Tire Corp. v. United States, 942 F. Supp. 2d 1343 (Ct. Int'l Trade 2013) (affirming Commerce's countervailing duty remand determination).

63. The agency should be provided at least one opportunity on remand to provide further explanation to the court before resort to interlocutory appeal is made. Perhaps that explanation will resolve the court's issue and appeal will not be necessary.

64. As the Federal Circuit has itself explained, § 1295 jurisdiction is not discretionary, yet § 1292(d)(1) provides a statutory exception to the appellate court's jurisdiction that does rely upon the exercise of its discretion. Badger-Powhatan v. United States, 808 F.2d 823, 826 (Fed. Cir. 1986).

court. To really fix the timing dilemma, any such amendment should also include a truncated time for briefing followed by a prompt hearing. The hope would be that the Federal Circuit would issue a decision shortly thereafter.

Such an amendment would be for naught, however, if the parties to the original court proceeding and the court itself fail to act with due regard to timing. These days, extensions are prevalent and everyone understands why that is the case. No matter what side of a case you are on, resources are at a premium. With many more administrative proceedings initiated by Commerce in fiscal year 2014 than previous years, the opportunity for litigation increased dramatically. In addition to the agencies themselves, our small trade remedies bar and limited number of government lawyers and judges alike are all feeling the pressure of the increased caseload.

The timing of remands creates a host of issues, particularly if there is a significant delay between the issuance of the original administrative determination and the court-generated remand. The cause of the delay, whether because parties, including the government, request extensions of time, because the court is slow in issuing the remand, or because one issue in the case is before the appellate court while the others are stayed, does not really matter—the delay itself can create problems. Sometimes Commerce loses key personnel most familiar with a case,[65] or for those personnel remaining, long waiting periods mean that the issues have faded in their minds as other cases and issues become more pressing.[66] Not surprisingly, the agencies' resources result in immediate attention being given to the most pressing issues.[67] The longer the court waits to issue a remand, the further removed the agency personnel become from the original issues in the case.[68] By extension, Commerce must invest more time and resources into bringing personnel back up to speed on cases once the case does finally reach remand.[69]

The passage of time harms the court as well. As a consequence of the annual nature of Commerce's administrative reviews, one judge may have multiple cases involving separate administrative reviews of the same order at various stages in litigation. Indeed, it may well be the case that litigation over a subsequent review finishes before the litigation of a prior review. Because of the different records developed by the parties in

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65. McInerney, *supra* note 2, at 493.
66. *Id.*
67. *Id.*
68. *See id.* at 494-95.
69. *See id.*

the reviews, information may be elicited in one review that was not on the record of the other review and, thus, was not before the agency. In *Essar v. United States*, the court had before it consecutive administrative reviews of hot-rolled carbon steel flat products from India and was handling remands in each.[70] In one review, Essar failed to respond to Commerce's questions, concerning whether it benefitted from a certain industrial policy, to the best of its ability and the company received an adverse facts available rate. However, in the other review, evidence came to light during remand that the company did not benefit from the subsidy program.[71] Although the government argued that it did not have to consider the evidence from one review in the context of the other because that evidence was not on the record, the court disagreed and required Commerce to place the document on the record of the prior review and consider it. In its holding, the court quoted from a Federal Circuit case: "'[D]eference is not owed to a determination that is based on data that the agency [knows to be] incorrect. The law does not require, nor would it make sense to require, reliance on data which might lead to an erroneous result.'"[72] The Federal Circuit agreed with the government, however, and held that the "trial court's order usurps agency power, undermines Commerce's ability to administer the statute entrusted to it, contradicts important principles of finality, and discourages compliance."[73] The back-to-back nature of the reviews and the pending remands in both created the situation but it could just as easily arise in situations where reviews divided by multiple years are before the same judge and remand proceedings in both are being conducted. Timing is but a piece of the finality puzzle.[74]

Certain practices that parties currently engage in also lengthen the process. Notably, as recognized by the Federal Circuit in *Essar*, in only a limited number of cases will the agency be required to reopen the record on remand.[75] The agency, of course, remains free to exercise its discretion in other cases and may open the record as it deems necessary to effectuate a remand.[76] In cases in which the record has not been

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70. Essar Steel Ltd. v. United States, 721 F. Supp. 2d 1285, 1287 (Ct. Int'l Trade 2010).

71. *Id.* at 1300.

72. *Id.* at 1300-01 (quoting Borlem S.A. v. United States, 913 F.2d 933, 937 (Fed. Cir. 1990)).

73. Essar Steel Ltd. v. United States, 678 F.3d 1268, 1278 (Fed. Cir. 2012).

74. Restani & Bloom, *supra* note 4, at 1018 (positing that *Essar* seemed to indicate that the Federal Circuit was "moving in a direction of valuing efficiency and finality by limiting the CIT's discretion to order re-opening of the agency record").

75. 678 F.3d at 1277-78.

76. *Id.*

reopened for additional facts to be submitted, parties should not be attempting to file new facts. The administrative diversion of resources to reject such unnecessary filings is unfortunate.

Similarly, I do not understand the filing of administrative comments on remand in situations in which the agency has done what the court has directed and yet a party exhorts us to take the *exact* action that the court already indicated we could not take. Perhaps those parties feel compelled to renew their losing argument, fearing that it might be waived if not raised, but I would submit that at that point in time, such an argument is preserved for appeal because it was made in their original brief to the court—but it did not prevail.[77] If that is the concern, maybe those parties simply could state that they are renewing their argument solely for the purpose of appeal with the understanding that Commerce will not be expending resources (and perhaps trying the court's patience), justifying its original rationale.[78]

The agencies do an incredible job assimilating so much data in limited periods of time with so many active cases, yet there is also room for improvement. One such area would be in limiting the necessity for voluntary remands.

Finally, the court should continue to be mindful of the standard of review. The term "accuracy" is used frequently by the courts these days. Although certainly everyone can agree that the agencies' calculations should be as accurate as possible and based upon the relevant record such that it can be said to be true that "accuracy is a goal when determining dumping margins,"[79] the Federal Circuit has recognized that such a "statement is properly understood as expressing a goal within the confines of the statutes, not in derogation of the statutory provision."[80] Administrative proceedings are but snapshots of time, and both the agencies and the court are limited by the record developed during the proceeding. No matter how tempted the court is by the thought that it

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77. Obviously, however, a party must comment upon the actual issues addressed by Commerce in the remand or it runs the risk of failing to administratively exhaust the issue. "In litigation contesting antidumping determinations, the exhaustion requirement applies to a situation such as that existing in this case, in which the Department invited a party to submit comments on draft remand results." Carpenter Tech. Corp. v. United States, 774 F. Supp. 2d 1343, 1349 (Ct. Int'l Trade 2011).

78. This is true as well with parties who cannot seem to file submissions or motions to extend the filing of those submissions within the agencies' specified time periods. Too many administrative resources are expended dealing with untimely filed submissions that would be better spent on the substantive issues in a proceeding.

79. Viraj Grp., Ltd. v. United States, 343 F.3d 1371, 1377 (Fed. Cir. 2003) (citing Viraj Grp., Ltd. v. United States, 25 Ct. Int'l Trade 1017, 1022 (2001)).

80. *Id.*

would have selected a different option, it should always be mindful that the agencies are entitled to a great deal of deference, and it should resist the urge to substitute its judgment for the agencies' judgment.

IV. CONCLUSION

Remands are a fundamental aspect of administrative law and are beset with the same problems as any other administrative proceeding. There may be no realistic way to "fix" the overall remand process, but case by case the bench and the bar working together should be able to reduce the expenditure of time and other resources.