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

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I. INTRODUCTION

The interlocutory appeal provision codified at 28 U.S.C. § 1292(d)(1) expressly permits parties to seek interlocutory review before the United States Court of Appeals for the Federal Circuit (Federal Circuit) from certain rulings of the Court of International Trade (CIT).[1] This provision on its face could provide a vehicle for reducing instances in which agency remands are necessary due to differences in views between the agency and the presiding CIT judge as to controlling questions of law about which there is not yet Federal Circuit precedent. In actuality, however, the use and effect of this provision has been limited. Congress enacted 28 U.S.C. § 1292(d) as part of the Federal Courts Improvement Act of 1982.[2] During the nearly thirty years in which the provision has been effective, the CIT appears to have certified

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1. 28 U.S.C. § 1292(d)(1) (2006).
2. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

only eleven interlocutory appeals under 28 U.S.C. § 1292(d)(1). Six of the cases involved appeals of trade remedies decisions; five involved customs matters. As discussed later in this Article, this number was further narrowed in that the Federal Circuit did not agree to hear interlocutory appeals in all cases where the CIT certified such appeals.[3]

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

II. STATUTORY PROVISION PERMITTING INTERLOCUTORY APPEALS: 28 U.S.C. § 1292(d)(1)

The statutory provision permitting interlocutory appeals of CIT rulings under certain circumstances reads as follows:

> When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved 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 the entry of such order.[4]

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

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3. To locate cases, the authors used online research services, as well as the respective courts' electronic search systems, to conduct database searches of CIT and Federal Circuit opinions. Because neither all CIT orders certifying interlocutory appeals nor all Federal Circuit orders are published, and because the courts' electronic databases are less comprehensive for earlier years, it is possible that there may be additional unreported interlocutory appeals. Nevertheless, it is significant that since 2000—when electronic database coverage is more likely to be complete—there are only three reported instances in which the CIT has certified an interlocutory appeal—or an average of less than one every three years.

4. 28 U.S.C. § 1292(d)(1).

5. *Id.* § 1292(d)(2).

6. *Id.* § 1292(c).

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

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

The first requirement is that the appeal must involve a "controlling question of law."[10] One CIT judge has cited this requirement as precluding the certification of an appeal on issues that involve mixed questions of fact and law.[11] Another judge stated that the "question of law" requirement ensures that interlocutory appeals involve issues that the Federal Circuit can decide quickly without having to study a record.[12] The same judge commented that for a question of law to be "controlling," it need not be dispositive, but should be one where resolution "could materially affect the outcome of the litigation."[13] Legal issues whose resolution is critical to whether a case can proceed have

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7. *Id.* § 1292(b).

8. 38 U.S.C. § 7292(b)(1) (2006).

9. *See* Washington Int'l Ins. Co. v. United States, 12 Ct. Int'l Trade 259 (1988) (mem.) (dissenting opinion notes a lack of explanation in the unpublished order issued by the other two judges in a three-judge panel certifying manner for interlocutory appeal, which the Federal Circuit subsequently heard). In several cases where the Federal Circuit has accepted an interlocutory appeal under 28 U.S.C. § 1292(d)(1), neither that court nor the CIT has provided an explanation as to why the matter is worthy of certification and interlocutory appeal. *See, e.g.*, Borlem S.A.—Empreendimentos Industriais v. United States, 913 F.2d 933, 936 (Fed. Cir. 1990) (concerning CIT authority to remand a matter to the International Trade Commission (ITC) for reconsideration based on changes in Department of Commerce (DOC) margins after ITC reached its determination); Chaparral Steel Co. v. United States, 901 F.2d 1097, 1100 (Fed. Cir. 1990) (concerning which imports were "subject to investigation" for purposes of cumulation in ITC antidumping investigation); Am. Lamb Co. v. United States, 785 F.2d 994, 996-97 (Fed. Cir. 1986) (concerning evidentiary standard ITC should use in making preliminary antidumping and countervailing duty determinations); Zenith Radio Corp. v. United States, 764 F.2d 1577, 1578-79 (Fed. Cir. 1985) (concerning denial of governmental claim of privilege in discovery); Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc., 753 F.2d 1033, 1034-35 (Fed. Cir. 1985) (concerning validity of a DOC regulation limiting the amount of direct costs that could be deducted from foreign market value).

10. 28 U.S.C. § 1291(d)(1).

11. Chung Ling Co. v. United States, 16 Ct. Int'l Trade 843, 844, 847 (1992).

12. United States v. UPS Customhouse Brokerage, Inc., 30 Ct. Int'l Trade 1612, 1618 (2006).

13. *Id.* at 1619 (internal quotation marks omitted).

been deemed "controlling."[14] The CIT has certified interlocutory appeals in some cases that raise constitutional claims and jurisdictional issues,[15] but denied certification in other such cases.[16]

The second requirement is that the issue be one where there is "a substantial ground for difference of opinion."[17] The reported cases provide little elaboration on this requirement. In some cases, it appears the CIT was persuaded by the fact that there were substantial differences of opinion between the parties to the litigation.[18] In other cases, the court emphasized that the litigant's disagreement with the court was an insufficient basis upon which to find a substantial difference in opinion.[19] In denying certification, several judges have emphasized that their rulings on the legal issues for which certification for an interlocutory appeal is sought do not conflict with prior CIT rulings.[20]

The third requirement is that the interlocutory appeal "may materially advance the ultimate termination of the litigation."[21] As with the second requirement, the court's criteria for determining whether such an appeal will materially advance the termination of the litigation is not entirely clear. Reasons cited in cases granting certification include that an appellate ruling may prove dispositive,[22] or may serve to "clarify[] the course of the proceedings . . . enabling the parties and the Court to

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14. *Id.* at 1613, 1620 (considering whether government may proceed with multiple penalty claims for United States Customs and Border Protection (CBP) misclassification when defendant claimed there was merely a single violation); USEC Inc. v. United States, 27 Ct. Int'l Trade 1925, 1925-26, 1928-29 (2003) (concerning DOC's decision not to apply tolling regulations to transactions involving enrichment of uranium feedstock).

15. Orleans Int'l, Inc. v. United States, 26 Ct. Int'l Trade 1016, 1016-17 (2002) (concerning whether the CIT lacked jurisdiction to consider a constitutional challenge to assessments applied to plaintiff's beef exports); Carnival Cruise Lines, Inc. v. United States, 20 Ct. Int'l Trade 704, 711-12 (1996) (concerning whether unconstitutional provisions of the Harbor Maintenance Tax are severable from constitutional provisions).

16. Totes-Isotoner Corp. v. United States, 580 F. Supp. 2d 1371, 1373-74 (Ct. Int'l Trade 2008) (claiming that the Harmonized Tariff Schedule of the United States is unconstitutionally discriminatory on the basis of gender by imposing different rates for men's and women's gloves); Consol. Fibers, Inc. v. United States, No. 06-00134, 2007 Ct. Int'l Trade LEXIS 194, at *1 (Ct. Int'l Trade Jan. 12, 2007) (concerning whether court had jurisdiction to consider action challenging ITC's refusal to institute reconsideration proceeding).

17. 28 U.S.C. § 1292(d)(1) (2006).

18. *See UPS Customhouse Brokerage*, 30 Ct. Int'l Trade at 1622; *USEC*, 27 Ct. Int'l Trade at 1928; Republic Steel Corp. v. United States, 6 Ct. Int'l Trade 153, 154 (1983).

19. *See Consol. Fibers*, No. 06-00134, 2007 Ct. Int'l Trade LEXIS 194, at *1-2.

20. *See* Volkswagen of Am., Inc. v. United States, 22 Ct. Int'l Trade 280, 284-85 (1998); Chung Ling Co. v. United States, 16 Ct. Int'l Trade 843, 850-51 (1992). *But cf. UPS Customhouse Brokerage*, 30 Ct. Int'l Trade at 1619-22 (emphasizing that their ruling is consistent with opinions by other CIT judges, but still finding the "substantial difference of opinion" requirement satisfied).

21. 28 U.S.C. § 1292(d)(1).

22. *UPS Customhouse Brokerage*, 30 Ct. Int'l Trade at 1620.

allocate resources efficiently."[23] On the other hand, several opinions denying certification have emphasized that the remaining proceedings necessary to reach a final order would not be extensive.[24]

Finally, even if the CIT certifies an interlocutory appeal upon finding all statutory requirements satisfied, the Federal Circuit still must determine whether or not it will entertain the appeal.[25] The Federal Circuit has indicated that "[s]uch a ruling is within this court's complete discretion."[26] In at least two instances, the Federal Circuit has declined to hear interlocutory appeals certified by the CIT.[27]

III. FEDERAL CIRCUIT PRECEDENT PERMITTING APPEALS OF SOME REMAND ORDERS

Under 28 U.S.C. § 1295, the Federal Circuit has exclusive jurisdiction over "a final decision" from several trial-level courts. These include the CIT,[28] the Court of Federal Claims,[29] and district courts with respect to patent law issues and certain claims against the United States.[30] Another statutory provision gives the Federal Circuit jurisdiction over decisions of the Court of Appeals for Veterans Claims insofar as they construe statutory or regulatory provisions.[31]

The Federal Circuit, in *Cabot Corp. v. United States*, held that orders directing an agency remand are not generally appealable final orders because they do not end the litigation on the merits and generally address the central issues in the case, rather than collateral issues.[32] Nevertheless, the Federal Circuit has applied some exceptions to this general rule. Under these exceptions, certain orders can be appealed as final orders notwithstanding that they direct remands or otherwise do not conclude the underlying administrative proceedings.

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23. *USEC*, 27 Ct. Int'l Trade at 1928-29.

24. Totes-Isotoner Corp. v. United States, 580 F. Supp. 2d 1371, 1380 (Ct. Int'l Trade 2008) (noting that the judgment would be final if plaintiff does not amend complaint); United States v. Dantzler Lumber & Exp. Co., 17 Ct. Int'l Trade 178, 180 (1993) (trial imminent); Nat'l Corn Growers Ass'n v. Baker, 9 Ct. Int'l Trade 571, 583 (1985) (noting that discovery had been completed and "the issues raised [did] not portend a protracted trial").

25. 28 U.S.C. § 1292(d)(1).

26. Orleans Int'l, Inc. v. United States, 49 F. App'x 892, 893 (Fed. Cir. 2002) (nonprecedential opinion).

27. United States v. UPS Customhouse Brokerage, Inc., 213 F. App'x 985, 986 (Fed. Cir. 2006) (nonprecedential opinion); Carnival Cruise Lines, Inc. v. United States, No. 466, 1996 U.S. App. LEXIS 18677, at *2 (Fed. Cir. July 1, 1996) (nonprecedential opinion).

28. 28 U.S.C. § 1295(a)(5).

29. *Id.* § 1295(a)(3).

30. *Id.* § 1295(a).

31. 38 U.S.C. § 7292 (2006).

32. 788 F.2d 1539, 1542-43 (Fed. Cir. 1986).

Six years after *Cabot*, in 1992, the Federal Circuit created a prominent exception to that rule in a case involving an appeal of an order rendered by the Court of Veterans Appeals (CVA). In *Travelstead v. Derwinski*, the government directly appealed the CVA's determination that the Veterans Administration (VA) used an incorrect legal standard when ascertaining whether the holder of a VA-guaranteed home loan who defaulted on the loan was entitled to a retroactive release of liability.[33] Based on its holding, the CVA had remanded the matter to the Board of Veterans Appeals to make a determination under the legal standard that the CVA had identified as correct.[34]

The Federal Circuit acknowledged that the CVA's order remanding the proceeding would not constitute an appealable final order under *Cabot*.[35] It stated, however, that intervening Supreme Court precedent militated against any per se rule precluding the appealability of remand orders.[36] Instead, the court opined that "remands are not all of the same nature. Some are final; some are not."[37] Moreover, the availability of an interlocutory appeal mechanism (which the government did not attempt to invoke in the case) did not affect whether a remand might be subject to appeal as a matter of right.[38] The court concluded that the remand order at issue was an appealable final order on the grounds that it reversed the decision of the VA, decided that the VA could not follow its own interpretation of the agency regulations, and terminated the action before the CVA.[39] It also expressed concern that the government might not be able to appeal any judgment issued after remand.[40]

The Federal Circuit has applied the *Travelstead* holding to other cases that involved a similar procedural background—CVA remand orders concerning individual claims or benefit proceedings before the agency now known as the Department of Veterans Affairs.[41] The Federal

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33. 978 F.2d 1244, 1246 (Fed. Cir. 1992).
34. *Id.*
35. *Id.* at 1247.
36. *Id.* at 1247-48 (citing Sullivan v. Finkelstein, 496 U.S. 617 (1990)).
37. *Id.* at 1249.
38. *Id.*
39. *Id.* at 1248.
40. *Id.* at 1249.
41. Adams v. Principi, 256 F.3d 1318, 1320-21 (Fed. Cir. 2001) (concerning an appeal by a veteran from a decision that the veteran was not entitled to disability compensation as a matter of law, notwithstanding remand of the matter to ascertain whether factual basis for compensation might exist); Dambach v. Gober, 223 F.3d 1376, 1379 (Fed. Cir. 2000) (concerning an appeal by a veteran from a decision rejecting his statutory claim to entitlement for disability compensation, notwithstanding remand of the matter to ascertain whether factual basis for compensation might exist); Jones v. West, 136 F.3d 1296, 1298-99 (Fed. Cir. 1998) (involving an appeal by a veteran's

Circuit has been disinclined, however, to extend the rationale of *Travelstead* to orders remanding matters to other agencies. For example, shortly after the *Travelstead* decision, the International Trade Commission (ITC) and the United States Department of Commerce (DOC) individually filed appeals of several different orders that they each contended improperly directed the agencies on remand to apply different statutory legal standards from those standards the respective agency had applied; the ITC and the DOC contended that each of these remand orders were consequently final orders appealable under *Travelstead*. The Federal Circuit dismissed each appeal for lack of jurisdiction in largely identical nonprecedential opinions, which distinguished *Travelstead* on two grounds. First, the Federal Circuit emphasized that the only litigants in *Travelstead* were the plaintiff and the government, while the parties in the DOC and ITC cases included the plaintiff, the government, and defendant-intervenors. The Federal Circuit reasoned that while the government might not have had any recourse if the plaintiff prevailed after remand in *Travelstead*, any administrative decision the ITC or the DOC would have made after remand could be appealed by the defendant-intervenors. The court dismissed as speculative the government's argument that defendant-intervenors might withdraw from an investigation, or decide to not pursue an appeal of a judgment affirming an adverse determination after remand. Second, the Federal Circuit observed that while the *Travelstead* remand order finally disposed of the litigation before the CVA, the CIT still had jurisdiction over the litigation before it and would review any agency remand results.[42]

Nevertheless, the Federal Circuit has declined to provide a per se ruling that remand orders issued by the CIT pertaining to the DOC and ITC antidumping and countervailing duty investigations are never appealable final orders. In *Viraj Group, Ltd. v. United States*,[43] the appellate court suggested that the requirements elicited in *Travelstead* were "arguably satisfied" when the CIT, after two remands, precluded the

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widow from a decision rejecting the widow's statutory interpretation of her underlying claim for benefit, notwithstanding remand of the matter for further factual development).

42. *See* Hosiden Corp. v. Advanced Display Mfrs. of Am., Nos. 93-1224, 93-1269, 1993 U.S. App. LEXIS 19060, at *10-16 (Fed. Cir. July 13, 1993) (nonprecedential opinion); Chr. Bjelland Seafoods A/S v. ITC, Nos. 93-1148, 93-1235, 1993 U.S. App. LEXIS 15507, at *10-16 (Fed. Cir. June 15, 1993) (nonprecedential opinion); Brother Indus. (USA), Inc. v. United States, Nos. 93-1010, 93-1085, 1993 U.S. App. LEXIS 15463, at *10-15 (Fed. Cir. June 15, 1993) (nonprecedential opinion); Suramerica de Aleaciones Laminadas, C.A. v. ITC, Nos. 93-1337, 93-1350, 1993 U.S. App. LEXIS 14879, at *11-17 (Fed. Cir. May 26, 1993) (nonprecedential opinion).

43. 343 F.3d 1371 (Fed. Cir. 2003).

DOC from using an unreliable methodology for computing exchange rates in an antidumping investigation, notwithstanding that the court also found that the DOC's methodology was consistent with the agency's regulations.[44] Nevertheless, the Federal Circuit found that the government had standing to challenge the decisions requiring remands as part of an appeal of the CIT's judgment upholding the agency result on third remand. It explained that, notwithstanding that the DOC determination on third remand was affirmed, "in substance, the government is truly the non-prevailing party in this case."[45] This was because the DOC used the exchange rate methodology mandated by the CIT only under protest.[46]

The Federal Circuit has also held that, as long as an antidumping or countervailing duty investigation was completed when the original complaint was filed in the CIT, a subsequent remand determination that reopens the case for further phases of the investigation does not change the finality and appealability of the CIT's ultimate decision affirming the agency. In *Co-Steel Raritan, Inc. v. ITC*,[47] the ITC reached a preliminary determination of negligible imports, which had the effect of terminating the investigation.[48] As allowed by statute, petitioners appealed to the CIT.[49] That court remanded the matter to the ITC with instructions to allow certain evidence into the record, and the consideration of that evidence led the ITC to reach an affirmative preliminary determination on remand.[50] The CIT then affirmed the ITC's preliminary affirmative remand determination.[51] Although the CIT's affirmance continued the investigation to a final phase and did not terminate the ITC's investigation as the originally appealed preliminary determination had, the Federal Circuit held it was an appealable decision because it ended the litigation concerning the preliminary determination.[52]

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44. *Id.* at 1376.

45. *Id.*

46. *Id.*; *see also* Thai I-Mei Frozen Foods Co. v. United States, 616 F.3d 1300, 1301 (Fed. Cir. 2010) (finding without discussion jurisdiction over government appeal of CIT judgment affirming the DOC determination on third remand, in which the DOC applied the statutory construction compelled by the CIT).

47. 357 F.3d 1294, 1303 (Fed. Cir. 2004).

48. *Id.* at 1300, 1303.

49. *Id.* at 1296; 19 U.S.C. § 1516a(a) (2006).

50. *Co-Steel Raritan*, 357 F.3d at 1296-97, 1302.

51. *Id.* at 1302.

52. *Id.* at 1296-97, 1303. The court distinguished *Jeannette Sheet Glass Corp. v. United States*, 803 F.2d 1576 (Fed. Cir. 1986), on the grounds that no entry of judgment had been entered in *Jeannette*. *Co-Steel Raritan*, 357 F.3d at 1308.

IV. CONSEQUENCES OF CURRENT APPROACH

As the previous discussion indicates, the availability of appellate review of CIT remand orders is highly circumscribed and the circumstances under which such reviews are available are both limited and, to some extent, difficult to ascertain. The criteria established under 28 U.S.C. § 1292(d)(1)—like those in the district court interlocutory provision at 28 U.S.C. § 1292(b) upon which § 1292(d)(1) was modeled—are intentionally difficult to satisfy.[53] The legislative history likewise confirms that permissive interlocutory appeals under § 1292(b) are discretionary, first with the lower court judge and ultimately with the appellate court.[54] Because the provision accords considerable discretion, both to the CIT in deciding whether to certify an appeal and to the Federal Circuit in deciding whether to hear one, its application has not been susceptible to any predictable test. In several respects, particularly with regard to the requirement that the issue be one where there is "a substantial difference of opinion," the courts have applied a range of discretion in applying the criteria. As a result, CIT judges have rarely granted requests for certification for interlocutory appeal. Moreover, in some of the unusual cases where a CIT judge has certified a matter for interlocutory appeal, the Federal Circuit has still exercised its discretion to not consider the appeal. Additionally, while there is Federal Circuit precedent suggesting that a trial court order remanding a matter to an agency may be appealable as of right as a final judgment in certain circumstances, the Federal Circuit has uniformly rejected attempts to treat CIT remand orders as final orders appealable as of right.[55] The court's disinclination to certify or entertain appeals of remand orders provides a significant disincentive for counsel to pursue such appeals.

The stringent application of standards for permitting appeals of remand orders has led to several instances where disagreements between the agencies and judges at the CIT persist over time without resolution,

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53. The wording of 28 U.S.C. § 1292(d) (2006) is adapted from that of 28 U.S.C. § 1292(b), a provision generally applicable to interlocutory orders issued by United States District Courts. S. REP. NO. 97-275, at 18 (1981). The legislative history of 28 U.S.C. § 1292(b) indicates that the provision originated from a proposal that the Administrative Office of the United States Courts developed. That proposal indicated that interlocutory appeals should be available only in "exceptional cases." S. REP. NO. 2434 (1958), *reprinted in* U.S.C.C.A.N. 5255, 5258-59 (1958); United States v. UPS Customhouse Brokerage, Inc., 30 Ct. Int'l Trade 1612, 1617-18 (2006).

54. S. REP. NO. 2434, *reprinted in* U.S.C.C.A.N. 5255, 5257; *see In re* Convertible Rowing Exerciser Patent Litig., 903 F.2d 822, 822 (Fed. Cir. 1990); Neb. Pub. Power Dist. v. United States, 74 Fed. Cl. 762, 763 (2006), *perm. app. granted*, 219 F. App'x 980 (Fed. Cir. 2007) (nonprecedential); Cummins v. EG & G Sealol, Inc., 697 F. Supp. 64, 67 (D.R.I. 1988).

55. *See supra* note 42 and accompanying text.

or with a delayed resolution. One of the most prominent instances of this occurred in the 1980s, when a number of CIT decisions—the first issued in 1984—rejected the evidentiary standard that the ITC used in ascertaining whether there was a "reasonable indication of material injury" in making preliminary antidumping and countervailing duty determinations.[56] While the ITC continued to register its disagreement with the evidentiary standards promulgated by the CIT, its initial request to certify the question for interlocutory review was denied by the CIT.[57] It was not until a subsequent request for interlocutory review was granted by another CIT judge, and then the Federal Circuit, that the Federal Circuit was able to review the issue, upholding the standard applied by the ITC.[58]

The experience of these 1980s cases involving preliminary determinations indicates that strict application of the standards for certifying remand orders for interlocutory appeal may be detrimental where disputes confined to legal interpretation recur. Likewise, use of the interlocutory appeal mechanism could be useful in situations where CIT judges disagree among themselves on controlling legal questions. In such cases, absent a ruling from the Federal Circuit, the agency will lack proper guidance as to how it should act in future cases.[59] It bears noting, however, that whether resolution of a question of law will likely aid an agency in its administration of a statute is not a consideration implicated by the language of 28 U.S.C. § 1292(d)(1).

Of course, even in cases that raise legal issues that can be expected to arise repeatedly, such as the standards for five-year reviews and the application of the statutory causation provision, the use of interlocutory appeals is not always essential for the agency to administer a statute. Indeed, the experience in several cases suggests that strict application of the standards for certifying remand orders for an interlocutory appeal may not always prove detrimental, even if it results in instances where

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56. Republic Steel Corp. v. United States, 8 Ct. Int'l Trade 29, 32 (1984); Jeannette Sheet Glass Corp. v. United States, 9 Ct. Int'l Trade 154, 160 (1985), *appeal dismissed*, 803 F.2d 1576 (Fed. Cir. 1986), *modified*, 654 F. Supp. 179 (Ct. Int'l Trade 1987); Am. Grape Growers Alliance v. United States, 9 Ct. Int'l Trade 396, 401-02 (1985).

57. Jeannette Sheet Glass Corp. v. United States, 9 Ct. Int'l Trade 306, 309 (1985).

58. Am. Lamb Co. v. United States, 785 F.2d 994, 996-97, 1004 (Fed. Cir. 1986).

59. There is at least one example where one CIT judge has invalidated a DOC policy, a second judge has upheld the policy, and there has been no opportunity by the Federal Circuit to resolve the matter. *Compare* SKF USA Inc. v. United States, 675 F. Supp. 2d 1264, 1285 (Ct. Int'l Trade 2009) (concluding that the DOC's policy of issuing liquidation instructions fifteen days after publication of final results of an administrative review contrary to law), *with* Mittal Steel Galati S.A. v. United States, 31 Ct. Int'l Trade 730, 738 (2007) (upholding the DOC policy although finding it "not without its flaws").

disputes on legal standards between an agency and the CIT may remain unresolved. Some legal disputes are triggered by specific fact patterns that do not recur.[60] In other instances, after further clarification from the court, the agency may be able to frame its future analyses in a manner that avoids conflict with CIT opinions, as occurred in the progression of cases addressing the meaning of the term "likely" in the sunset provisions of the statute.[61] While these cases were resolved without the need for a definitive resolution of the narrow legal issue, it is not always possible to come to an efficient resolution without Federal Circuit intervention.

A second recurring difficulty under current practice is that in several instances the agency perceives that what is framed as a remand order is effectively a reversal,[62] and compels the agency to reach a certain result on remand. There have been several CIT remands to the ITC fitting this pattern.[63] It is at best unclear whether the agency can appeal as a final order an order effectively compelling it to reach a specific

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60. *See* Fresh and Chilled Atlantic Salmon from Nor., Inv. Nos. 701-TA-302, 731-TA-454, USITC Pub. 2589 at 14, n.61 (Dec. 1992) (Final) (Remand) (use of "continuing effects" in injury analysis; remand determination sustained and not appealed; issue has not recurred); Certain Cold-Rolled Steel Prods. from Arg., Braz., China, Indon., Japan, Russ., Slovk., S. Afr., Taiwan, Thai., Turk., and Venez., Inv. Nos. 701-TA-393, 731-TA-829-40, USITC Pub. 3691 at 3-4 (May 2004) (Final) (Remand) (interpreting the term "internally transfer" in 19 U.S.C. § 1677(7)(C)(iv) (2006); remand determination sustained and not appealed; issue has not recurred).

61. Thus, in Certain Carbon Steel Products from Austl., Belg., Braz., Can., Fin., Fr., Ger., Japan, Kor., Mex., Neth., Pol., Rom., Spain, Swed., Taiwan, and U.K., Inv. Nos. AA-1921-197, 701-TA-231, 319-20, 322, 325-28, 340, 342, 348-50, 731-TA-573-76, 578, 582-87, 604, 607-08, 612, 614-18, USITC Pub. 3526 at 10, 12-14 (July 2002) (Review) (Remand), the ITC majority indicated it disagreed with the CIT concerning the construction of the term "likely" in 19 U.S.C. § 1675(c)(1). While certain ITC Commissioners and the CIT continue to dispute how to construe this term, the dispute has never proven to be outcome-dispositive in any five-year review. Moreover, most of the current Commissioners apply without protest the "likely" standard articulated by the CIT. *E.g.*, Preserved Mushrooms from Chile, China, India, and Indon., Inv. Nos. 731-TA-776-779, USITC Pub. 4135 at 15 (Apr. 2010) (Second Review).

62. The Federal Circuit has declined to rule on whether the CIT may expressly reverse an ITC or a DOC decision in an antidumping or countervailing duty matter pursuant to 19 U.S.C. § 1516a. Nippon Steel Corp. v. United States, 458 F.3d 1345, 1359 (Fed. Cir. 2006).

63. *See, e.g.*, Tapered Roller Bearings and Parts Thereof and Certain Housings Incorporating Tapered Rollers from Hung., Inv. No. 731-TA-341, USITC Pub. 2245 at 6 (Dec. 1989) (Final) (Remand) (concluding that remand order compelled negative determination on subject imports from Hungary); Certain Electrical Conductor Aluminum Redraw Rod from Venez., Inv. Nos. 731-TA-378, 701-TA-287, USITC Pub. 2860 at 5-7 (Feb. 1995) (Final) (concerning the legal standards that the CIT directed ITC to apply in remand, combined with the court's interpretation of evidence in directing remand, found compelled negative determination); Tin- and Chromium-Coated Steel Sheet from Japan, Inv. No. 731-TA-860, USITC Pub. 3751 at 6 (Dec. 2004) (Final) (Third Remand) (issuing a negative present injury determination at the direction of the CIT and determining that the court's instructions compelled a negative threat determination as well).

determination, either as a matter of law or because the CIT has found that the agency record contains no substantial evidence to support a contrary determination. As discussed above, there is language in the *Viraj* opinion indicating that the Federal Circuit perceives that such an order may be appealable as a final order,[64] although the authors are unaware of any instance in which this scenario has played out and the Federal Circuit has permitted appeal of a CIT remand order as a final order. Absent a mechanism for appeals, either as final orders or interlocutory orders, of orders effectively requiring it to reach a specific result in remand, the agency must take further steps before it can be in a position to appeal. First, it must conduct a remand proceeding to reach the result compelled by the CIT. The remand result must then be approved by the CIT before there may be any appeal to the Federal Circuit.

In such instances, the agency will typically have to defend two contrary determinations on appeal—the determination after the final remand that it perceives the CIT compelled it to reach, as well as its contrary prior determination(s).[65] Placing an agency in a position of defending on appeal—even if only nominally—a remand decision it made solely because it was directed to do so by a lower court would not appear to be an optimal use of either agency or judicial resources.

V. CONCLUSION

The interlocutory appeal provision at 28 U.S.C. § 1292(d)(1) has at most provided a limited vehicle for reducing the number of agency remands due to differences in views between the agency and the presiding CIT judge as to controlling questions of law about which there is not yet Federal Circuit precedent. The requirements for obtaining interlocutory review are intentionally stringent, and have therefore curbed discretionary review. Furthermore, the Federal Circuit has not

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64. Viraj Grp., Ltd. v. United States, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

65. *See Nippon Steel*, 458 F.3d at 1354; Co-Steel Raritan, Inc. v. ITC, 357 F.3d 1294, 1303-08 (Fed. Cir. 2004); Suramerica de Aleaciones Laminadas, C.A. v. United States, 44 F.3d 978, 983 (Fed. Cir. 1994). In such appeals, the ITC has typically focused on defending the determination(s) it reached prior to the final remand determination whose result was compelled by the Court of International Trade.

There are also other circumstances where the ITC may be defending two contrary sets of determinations to the Federal Circuit after the CIT affirms a remand determination. In these cases, the ITC typically reached a different determination on remand due to an intervening change in Commission membership. *E.g.*, Diamond Sawblades Mfrs. Coal. v. United States, 612 F.3d 1348, 1353-54 (Fed. Cir. 2010); Nippon Steel Corp. v. ITC, 494 F.3d 1371, 1376 (Fed. Cir. 2007); Altx, Inc. v. United States, 370 F.3d 1108, 1115 (Fed. Cir. 2004); Taiwan Semiconductor Indus. Ass'n v. ITC, 266 F.3d 1339, 1343 (Fed. Cir. 2001). In such appeals, the ITC has typically defended both its prior affirmative and negative determinations.

been receptive to attempts to entertain appeals of remand orders as a matter of right. As a result, there are several instances where disagreements between agencies and judges at the CIT have persisted over time without resolution, or with a delayed resolution.