IS IT IMPROPER FOR COMMERCE TO EXPLAIN ITS DISAGREEMENT WITH REMAND ORDERS IN ITS REMAND REDETERMINATIONS? *

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For 25 years, the Import Administration treated remands from the Court of International Trade as administrative proceedings, conducted pursuant to the Court's orders. In other words, the Department viewed the original administrative proceeding as "back in its court" and assumed that, provided that the Department followed the Court's orders, it was free (in fact, required) to explain its position, just as in the original determination.[2] This included any disagreement with the determination that the Court's remand order required the Department to make. Under this practice, the Department routinely explained its disagreement with the decision remanding the original determination. The International Trade Commission took the same approach, with individual commissioners often giving dissenting views that included explanations of their disagreement with the order of remand.[3]

In 2006, the CIT suddenly took exception to this long-established practice. Some of the judges found explanations by Commerce of its disagreement with remand orders to be contrary to those orders, and one judge took issue with the Department's statement of disagreement, *per se*, describing the statement as "contumacious.[4]" In several instances (explained below), Judges struck explanations of the Department's disagreement from

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[2] *See, e.g.*, *Timken v. United States*, 699 F. Supp. 300 (CIT 1988), *Greater Boston TV v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

[3] *See, e.g.*, *Nippon Steel Corp. v. United States*, 458 F. 3d 1345 (Fed. Cir. 2006).

[4] *SKF v. United States*, CIT Slip Op. 06 -133 (Sept. 1, 2006) at p. 7.

remand determinations.[5] The Court does not appear to disagree with Commerce's practice of stating that it disagrees with remand orders to clarify its position for appeal, a practice that the Federal Circuit explicitly has recognized.[6]

The Court did not explain the reason for its change in practice. Rather, the decisions in question simply treated the Department's traditional practice as improper, *per se.* It therefore is impossible to say precisely what the Court's view is about statements of disagreement with remand orders. It appears, however, that at least some Judges have come to view remand determinations as more like court pleadings (say, answers to questions posed by the Court) than administrative determinations and, therefore, to view the Department's explanations of disagreement as essentially additional briefs that Commerce lacks authority to file.[7]

Commerce traditionally has included explanations of its disagreement with remand orders in remand determinations for three reasons. First, as already noted, Commerce views remand determinations as administrative determinations, for which it is required to provide rational explanations. Where the Department did not agree with remand orders, it considered an explanation of its disagreement to be an integral part of the explanation for its determination. These explanations informed the parties and the public whether the Department had changed its position regarding the issue or whether it was considering pursuing an appeal, and gave the reasons for its disagreement.

Second, the Department is only able to explain its disagreement with a remand order in its redetermination on remand. Commerce speaks authoritatively, as the Commerce Department, only through regulations and formal administrative determinations. Any explanation that the Government may provide to the Court in a later pleading is not an authoritative pronouncement by the Department. Moreover, the determination on remand is made by the Department personnel most familiar with the

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[5] *See, e.g.*, *Hontex Enterprises v. United States*, 425 F. Supp. 2d 1315 (CIT 2006); *SKF v. United States*, 452 F. Supp. 2d 1335 (CIT 2006).

[6] *See: Viraj Group v. United States*, 343 F. 3d 1371, 1376 (Fed. Cir. 2003), in which the Federal Circuit stated that ""Even thought 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."

[7] *See, e.g., SKF v. United States*, Slip Op. 06 -133 (CIT Sept. 1, 2006) at p. 7 " . . . [Commerce] may not reqargue its position before this court without first filing an appropriate motion for rehearing . . . " and at p. 13: " . . . Defendant is attempting to reargue its prior position rather than to simply preserve the issue for appeal."

facts and issues in the proceeding at the time that they have been grappling with those issues. By the time an appeal is taken, those facts and issues may have faded in the minds of those who were involved, and those persons are likely to be absorbed with other issues or may have left the Department. Of course, it would be possible to preserve the Department's reasoning in an internal memo, but such a memo would not be authoritative. As a practical matter, however, given the Department's limited resources, work that is not essential and for which there is no deadline tends not to get done. Also, internal memoranda are not as effective a means of notifying the public of the Department's position. Finally, if remand determinations were pleadings, they would be the product of the Department of Justice.

Third, failing to at least make note of its disagreement with the Court's remand order could compromise the Department's ability to appeal.[8] And, having stated its disagreement, it would be odd, to say the least, for the Department not to provide an explanation. For all these reasons, it is appropriate for the Department to explain its views to the parties and to the public in the remand determination itself. The three CIT decisions in question are as follows.

Vertex v. United States (March 2006)

Vertex concerned Commerce's determination that the scope of the AD order on hand trucks from China covered "garden carts." Central to the Department's determination was a finding that garden carts included a "projecting edge or edges, or toe plate, [which] slide under a load for purposes of lifting and/or moving the load."[9] In its scope determination, the Department found that garden carts were included in the scope of the order on hand trucks in part because they included such a toe plate.

The CIT rejected Commerce's conclusion, finding that "the garden cart was not designed to, and cannot, slide under a load." The Court also cited several additional factors weighing against the inclusion of garden carts, such as the limited carrying

[8] *See: Viraj Group v. United States*, 343 F. 3d 1371, 1376 (Fed. Cir. 2003).

[9] *See: Notice of Antidumping Duty Order: And Trucks and Certain Parts Thereof from the Peoples Republic of China*, 69 FR 70122 (December 2, 2004). The exact language of the scope description gave the characteristics of a hand truck as: "consisting of a vertically disposed frame having a handle or more than one handle at or near the upper section of the vertical frame, at least two wheels at or near the lower section of the vertical frame, and a horizontal projecting edge or edges, or toe plate, perpendicular or angled to the vertical frame, at or near the lower section of the vertical frame."

capacity of garden carts and their lack of a central frame member to stabilize the load.[10] Accordingly, the Court directed Commerce to issue a new determination excluding garden carts from the scope of the order, giving it 11 days to do so.[11]

On remand, Commerce discovered that the domestic interested parties had not been properly served with the summons and complaint in the CIT action. Accordingly, the Government requested and received two extensions of time to permit the domestic parties to comment upon the redetermination on remand. Commerce then agreed with the Court that the toe plate would not (at least readily) slide under a load, and excluded garden carts from the scope of the order. In addition, Commerce stated that it did not agree with the additional factors cited by the Court, because "the scope does not require that the projecting edge be able to bear a certain load . . . [or contain] a stabilizing object or a central frame."[12] This informed the public how Commerce would approach future scope issues under the order.

The Court affirmed the Department's exclusion of the garden carts, but struck the Department's additional explanation as inconsistent with the remand order, explaining

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[10] *Vertex v. United States*, 2006 Ct. Intl. Trade LEXIS 10, 11 (Jan. 19, 2006).

[11] The Court's directions to the Department were as follows:

> For the foregoing reasons, Commerce erred when it did not follow the unambiguous language of the Antidumping Duty Order which required that a product slide under a load to lift or move it. Upon remand Commerce shall issue a determination excluding Vertex's garden carts from the order.

[12] Final Results of Redetermination Pursuant to Court Remand, February 16, 2006. After agreeing that garden carts are outside of the scope of the AD order on hand trucks, the remand determination states :

> However we respectfully disagree with the Court's use of other criteria for determining that the load plate was not a toe plate or projecting edge that would slide under a load. The Department is bound by the limiting criteria of the scope. Since the scope does not require that the projecting edge be able to bear a certain load, this is not a defining characteristic of what is within the scope of the order on hand trucks. Also, the absence of a stabilizing object or a central frame member in a hand truck is not a defining characteristic in the scope. Furthermore, the scope does not require that the toe plate be beveled in order for it to be able to slide under a load.

that the order "did not permit the Department to reinvestigate or reconsider this matter."[13] The Court's found that Commerce failed to adhere closely to the Court's order of remand and stated that such failures "may result in sanctions in unfortunate cases."[14]

Given that the Court's only explicit direction to Commerce was to "issue a determination excluding Vertex's garden carts from the order," the Court's conclusion would seem to embody a very strict construction of the remand order (that every action not explicitly authorized is prohibited) and a very broad reading of what constitutes "reconsideration" of the scope issue by Commerce. Commerce reversed its original scope determination, as ordered. Whether the additional explanation constituted reconsideration of the scope issue contrary to the Court's order would seem to be debatable, at least.

Perhaps the Court's perspective about this was the result of the two requests for extensions of time to file the remand. These, however, were the result of wanting to give the petitioning parties an opportunity to comment. It is possible, although not certain, that the Court would not have objected if the Department had excluded garden carts, based exactly on the Court's reasoning, but then explained why it did not agree with the Court's analysis.[15] But the line between explanations of disagreements and reconsideration is not clear. If the Court routinely applied the rule that all actions by Commerce not explicitly authorized in remand orders are prohibited, this could be construed to prohibit any explanations not strictly necessary to reach the result ordered by the Court. As a practical matter, this would preclude any explanations of disagreement with the remand order.[16]

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[13] *Vertex v. United States*, 2006 Ct. Intl. Trade LEXIS 35 (March. 8, 2006).

[14] *Vertex International. v. United States*, Slip. Op. 06 - 35, (Judgment of March 8, 2006). At the hearing that same day, the Court made very clear that it considered Commerce to have violated the remand order by "reconsidering" the matter when it had only been ordered to exclude the garden carts. See *Vertex v. United States*, transcript of March 8, 2006, conference.

[15] In the March 8, 2006 conference in *Vertex*, Chief Judge Restani observed that the Federal Circuit had approved complying with remand orders under protest to preserve the right of appeal, but noted that "there's a way to do this . . ." (p. 6).

[16] Some support for the proposition that all actions not explicitly authorized by remand orders are prohibited can be found in a line of cases that includes *Dorbest et al. v. United States*, 547 F. Supp. 2d 1321 (CIT 2008). On remand in *Dorbest*, a party pointed out a clerical error that Commerce had made in the original determination. Commerce declined to make the correction on the grounds that it was outside the scope of the remand. The CIT upheld Commerce's decision. *Dorbest*, however, involves an action by Commerce that changes the result of the remand determination. This may be distinguished from expressions of

***Hontex Enterprises* v. United States (April 2006)**

Hontex involved an administrative review of an AD order on crawfish tail meat from China.[17] In that determination, Commerce found that two Chinese producers (NNL and HFTC5) were affiliated and assigned HFTC5's China-wide rate to NNL. The finding of affiliation was based primarily on the role of a certain Mr. We in the operation of both companies.

The Court found Commerce's evidence of affiliation to be insufficient and remanded the proceeding, giving the Department two options: (1) find that the two companies were not affiliated and determine a separate rate for NNL; or (2) reopen the record to collect evidence that the two companies were affiliated.[18]

In its remand determination, Commerce found that NNL and HFTC5 were not affiliated and determined an individual rate for NNL. Commerce also stated that this finding applied only to the administrative determination at issue, and gave a detailed explanation of its reasons for believing that the two companies were, in fact, affiliated.

The Court found that Commerce's additional comments were not accordance with its instructions and, accordingly, struck them from the remand determination. The Court did not explain its reasoning in detail, but quoted the following passage from the decision in *Fuyao Glass:*[19] "Neither of the[] choices on remand permit Commerce to affect to

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disagreement that do not change the result of the remand.

Other case law suggests that administrative agencies have broad discretion upon remand. This is because, "when a Court remands for reconsideration it avoids resolving the ultimate question in derogation of the agency's statutory duty." *USX Corp. v. United States*, 11 CIT 419, 422 (Ct. Int'l Trade 1987). As such, the agency must then "consider the matter anew" and "in the light of its statutory mandate." Id. at 423; *see also*, *SEC v. Cheney Corp.*, 332 U.S. 194, 201 (1947) (finding that "[a]fter the remand was made, therefore, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress.").

[17] *Freshwater Crawfish Tail Meat from the People's Republic of China: Final Results of Administrative Antidumping Duty and New Shipper Reviews, and Final Rescission of New Shipper Review*, 65 FR 20948 (April 19, 2000).

[18] *Hontex Enterprises v. United States*, 387 F. Supp. 2d 1353, 1360-61 (CIT 2005).

[19] *Fuyao Glass Indus. Group Co. v. United States*, 2003 Ct. Intl. Trade LEXIS 171 (Jan. 19, 2005) ("Fuyao I"), 2006 Ct. Intl. Trade LEXIS 29 (Jan. 25, 2005) ("Fuyao II"), 2006 Ct. Intl.

adopt the Court's conclusions . . . without actually doing so."[20]

In fact, Commerce did follow the Court's instructions, reversing its earlier determination that the two companies were not affiliated, and calculating a separate dumping margin for NNL. The additional statements simply explained that this conclusion applied only to the determination before the Court (which is all the Court had jurisdiction over in any case), explained Commerce's disagreement with the Court, gave a clear signal to the parties in the proceeding that it intended to take this issue up again in the next administrative review of the order, and preserved the Government's right to appeal.

Again in this case, it is not clear that the Court objected to Commerce explaining its disagreement with the remand order, as such. The heart of the Court's complaint appeared to be its perception that Commerce had not followed its directions. As interpreted by the Court, however, those directions apparently would have limited Commerce's actions on remand only to those actions explicitly authorized, which would have precluded Commerce from explaining its disagreement with the remand order.

***SKF v. United States* (September 2006)**

SKF arose from the final results of an administrative review of an AD order on ball-bearings from various countries.[21] In that review, Commerce found that one of the respondents, SKF France, passed the verification, but that one of SKF's subsidiaries, Sarma, failed verification for failing to provide sufficient documentation to prove that it had correctly reported all of its sales.

The Court found that Sarma had: (1) offered information during a verification; and (2) had both the willingness and ability to provide the necessary backup documentation. The Court remanded the proceeding to Commerce with instructions to "reopen the record in this case and provide Plaintiffs the opportunity to supply supporting information and re-calculate Plaintiffs' margin using Plaintiffs' own information."[22]

Trade LEXIS 21 (Feb. 15, 2006) ("Fuyao III").

[20] *Hontex Enterprises v. United States*, 425 F. Supp. 2d 1315 (CIT April 3, 2006), citing *Fuyao III*.

[21] *See: Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and Singapore; Final Results of Antidumping Duty Administrative Reviews, 68 FR 35623 (June 16, 2003).*

[22] *SKF v. United States*, CIT Slip Op. 05-104 (August 24, 2005).

On remand, the Department conducted a second verification, permitting Sarma to provide additional documentation and recalculated SKF's margin accordingly. In addition, Commerce respectfully explained its disagreement with the Court's decision. Specifically, the Department explained its view that SKF's claimed offers of information at the original verification were not sufficient for a successful verification, so that they did not establish a willingness or ability to cooperate.

The Court upheld the remand results, but struck the Department's explanation of its disagreement with the Court on the basis that it "attempted to improperly reargue issues already decided by [the] Court, misstates the Court's prior opinion, misconstrues its holding, and mischaracterizes the evidence before the Court."[23] Thus, in contrast to the *Vertex* and *Hontex* decisions, the Court specifically objected to Commerce explaining its disagreement with the remand order. The Court may have considered statements of disagreement to be acceptable if they were in accord with the Court's reading of the record and the decision. It is hard to imagine when all of those conditions might be satisfied at the same time.

***PAM, S.P.S. v. United States* (July 2008)**

The Court does not appear to be unanimous in the view that it is improper for Commerce to explain its reasons for disagreeing with remand orders in its redeterminations. In one recent decision, the Court noted that "On remand, Commerce maintained its disagreement with the Court's determination that Commerce had not adequately corroborated the 45.49% dumping margin in the Final Results. . . . However, Commerce did not [adequately explain its position]. Because Commerce did not present any reasoning for its position, the Court cannot evaluate the validity of the objection, except to refer Commerce to the prior opinion, which discusses the issue in depth. . . ."[24]

The Decisions Collectively

These decisions do not present a clear picture. The Court evidently agrees that Commerce may state its disagreement with remand orders in redeterminations on remand, in order to clarify its position for appeal. On the other hand, some decisions seem to disapprove of Commerce explaining its disagreement, although only *SKF* does so directly. *Vertex* and *Hontex* come close by adopting interpretations of the remand orders that would have made it very difficult for Commerce to explain its disagreement

[23] *SKF v. United States*, 453 F. Supp. 2d 1335 (CIT 2006).

[24] *PAM, SPA v. United States*, 2008 Ct. Intl. Trade LEXIS 73 (July 9, 2008).

consistent with those orders. The Court's objection in *SKF* to Commerce's explanation on the ground that it misconstrues, misstates, and mischaracterizes the Court's findings is also troublesome. Where Commerce disagrees with the Court, the Court normally will find Commerce's explanation of its disagreement to be unsatisfactory. Thus, if Commerce's explanations of disagreement must be satisfactory to the Court, Commerce normally will be precluded from giving any such explanations. Other factors cloud the picture. All three decisions are concerned with ensuring that Commerce follows the remand instructions exactly – a point that Commerce certainly does not dispute.

What is a Remand Determination?

Whether the CIT lawfully may prevent Commerce from explaining its disagreement with remand orders in redeterminations on remand may depend on the nature of remand determinations. To the extent that remand determinations are administrative determinations like the Department's original determinations, it would seem that the Court's ability to censor these explanations would be limited. To the extent that remands are more akin to pleadings, the Court presumably would have greater latitude to dictate their content.

Title 28 U.S.C. 2643(c)(1) authorizes the Court of International Trade to order:

> any . . . form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.

Title 19 U.S.C. § 1516a(c)(3), provides that:

> If the final disposition of an action brought under this section is not in harmony with the published determination of . . . [the Department or the ITC] the matter shall be remanded to . . . [the Department or the ITC] . . . for disposition consistent with the final disposition of the Court.

Neither provision offers much guidance concerning the precise nature of a remand. On one hand, the proceeding is remanded to the agency, which recovers jurisdiction over the matter. That jurisdiction, however, is plainly limited – the agency's actions must be consistent with the Court's order.

The related statutory provisions that might shed contextual support for one position or the other are suggestive, but not conclusive. For example, there is no separate statutory provision governing the administrative records of remand determinations. Accordingly, the Department keeps records of remand proceedings in the same manner as for other administrative proceedings. [25] Similarly, the Department considers the requirement to place *ex parte* memoranda on the record to apply to remand proceedings. Both positions support the view that remands are administrative proceedings.

While the statue may not resolve the issue outright, both the CIT and the Federal Circuit treat redeterminations on remand as essentially like the original determinations.[26] The Federal Circuit has described the determination being appealed as Commerce's final determination, as modified by the remand determination.[27] Similarly, the CIT has recognized that "Commerce's own remand determination, as a matter of law, replaces Commerce's original, final determination.[28] The standard of review applied by both the CIT and the Federal Circuit to remand determinations is the same as the standard of

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[25] The record is defined by 19 U.S.C. § 1516a(b)(2), which provides that the record shall consist of:

> (I) a copy of all information presented to or obtained by . . . [the Department or the ITC] during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept . . . and
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> (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

[26] The Federal Circuit has stated that the Court of International Trade is "free, within reasonable limits, to set the parameters of the remand." *See Trent Tube Div. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 811 (Fed. Cir, 1992). Moreover, the Courts have reviewed remand determinations by previously non-participating ITC Commissioners on the same basis as "original" determinations. *See USX Corp v. United States*, 698 F. Supp. 234 (CIT 1988). Thus, newly participating ITC Commissioners appear to be free to reach entirely new determinations or adopt parts of the Commission's original determination or dissenting views.

[27] *See, e.g., LTV Steel Co., Inc. v. United States*, 174 F.3d 1359, 1361 (Fed. Cir. 1999); British Steel PLC v. United States, 127 F.3d 1471, 1473 (Fed. Cir. 1997); *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1036 (Fed. Cir. 1996).

[28] *Decca hospitality Furnishings, LLC v. United States*, 427 F. Supp. 2d 1249, 1256 (CIT 2006). See also: *Shakeproof Assembly Components Div. of Illinois Tool Works v. United States*, 4`12 F. Supp. 2d 1330, 1337-38 (CIT 2005).

review applied to original determinations by the Department,[29] as is their disposition of the two types of administrative determination. [30]

The Federal Circuit's decision in *Freeport Minerals*[31] also supports the view that Commerce's redeterminations on remand are administrative determinations like any others. *Freeport Minerals* involved a remand that changed Commerce's final determination. The issue was whether the result on remand created a new cause of action, in addition to the right to challenge the original determination. The Federal Circuit held that a party to the proceeding could, indeed, challenge the remand results anew. Because a redetermination on remand creates a new cause of action, like any other administrative determination, it would follow that Commerce should explain its reason for making that determination, as with any other determination.

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[29] In *Aimcor v. United States*, 141 F.3d 1098, 1108 (Fed. Cir. 1998), the Federal Circuit stated; "We review a decision of the Court of International Trade affirming or reversing the final results of an administrative review de novo. See *Torrington Co. v. United States*, 82 F.3d 1039, 1044 (Fed. Cir.1996). In so doing, we "apply anew" the Court of International Trade's statutorily-mandated standard of review. See id.; *NSK*, 115 F.3d at 972. We uphold Commerce's final results unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(I) (1994). In *Hynix Semiconductor Inc. v. United States*, 425 F. Supp. 2d 1287, 1293-1294 (2006), the Court stated: "The Court must sustain any determination, finding, or conclusion made by Commerce in the Final Determination and the Remand Results unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." With regard to its recalculation of SKF's margin, *Commerce's Remand Redetermination is found to be supported by substantial evidence and in accordance with law* because Commerce properly supported its finding after conducting a re-verification of SKF's facilities in France. In *SKF USA Inc. v. United States*, 2006 Ct. Intl. Trade LEXIS 141, 1-2 (2006), the Court found that "Commerce's Remand Redetermination is found to be supported by substantial evidence and in accordance with law because Commerce properly supported its finding after conducting a re-verification of SKF's facilities in France." In *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 2006 Ct. Intl. Trade LEXIS 132 (2006), the Court stated that it "must sustain any determination, finding, or conclusion made by Commerce in the Remand Results unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" See also: *Wuhan Bee Healthy Co. v. United States*, 2005 Ct. Intl. Trade LEXIS 153, 1-3 (2005).

[30] *See, e.g.*: *Decca Hospitality Furnishings, LLC v. United States*, 427 F. Supp. 2d 1249, 1250 (Ct. Int'l Trade 2006); *Hontex Enters. v. United States*, 425 F. Supp. 2d 1315 (Ct. Int'l Trade 2006); *Globe Metallurgical, Inc. v. United States*, 403 F. Supp. 2d 1305 (Ct. Int'l Trade 2005); *Am. Int'l Chem., Inc. v. United States*, 387 F. Supp. 2d 1258 (Ct. Int'l Trade 2005); *Alloy Piping Prods. v. United States*, 2005 Ct. Intl. Trade LEXIS 72 (Ct. Int'l Trade 2005).

[31] *Freeport Minerals Co. v. United States*, 758 F.2d 629, 634 (Fed. Cir. 1985).

The Federal Circuit appears to share Commerce's view that it is acceptable for agencies to explain their disagreement with remand orders in remand redeterminations. In *Nippon Steel*, the Federal Circuit not only cited explanations by the ITC of its disagreement with a remand order from the CIT, it quoted the ITC's dissenting statements at some length in its opinion.[32]

In *Mittal Steel*, its most recent case dealing with an agency remand,[33] the Federal Circuit held that the International Trade Commission had "too rigidly" interpreted the Court's remand instructions and its decision in *Bratsk*.[34] The Federal Circuit recognized that the ITC had "proceed[ed] with scrupulous attention to the terms of [the CIT's] remand instructions," yet it vacated and remanded the ITC's remand determination indicating that "the problem may stem from a lack of sufficient clarity in our prior opinion, which we hope has been rectified in this one." The ITC in its remand determination considered the statutorily-mandated threat factors and the statutorily-mandated present material injury factors and concluded that "each would have lead us to an affirmative determination." Despite this finding, the ITC determined that it could not issue an affirmative determination because of the appellate Court's remand instructions relating to *Bratsk*.

On appeal, the ITC argued that, even though it considered the Federal Circuit's remand instructions to be an incorrect interpretation of the antidumping statute, its negative determination should be upheld because it complied with those remand instructions. The Federal Circuit found the ITC's detailed explanation instructive, stating at one point "[i]f we were wrong in our assumption as to what the Commission's finding would be . . . it was the Commission's prerogative to say so." Significantly, the Court stated that it "has no independent authority to tell the Commission how to do its job." In remanding the case to the ITC, the Federal Circuit provided clarification of *Bratsk*, relying upon the ITC's explanation as to why its statutory and factual findings which should have resulted in an affirmative injury determination were divorced from the negative determination it felt compelled to provide. This certainly does not suggest that the Federal Circuit thought it was improper for the ITC to explain its disagreement with

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[32] *Nippon Steel v. United States*, 458 F. 3d 1345 (Fed. Cir. 2006). *See also: Securities and Exchange Commission v. Chenery Corp*. 332 U.S. 194, 202 (1947) which takes a broad view of an agency's role in performing redeterminations on remand.

Cheeryal Steel Point Lisas Lmtd. v. United States, Case No. 2007-1552 (Sept. 18, 2008).

[34] *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006). In Bratsk, the Federal Circuit held that the ITC must consider whether non-subject imports would replace subject imports in its causation analysis for material injury.

remand orders in its redeterminations on remand. While there does not appear to be any definitive authority concerning the nature of remands, the evidence that the author was able to discover with (admittedly) a limited amount of research supports Commerce's traditional view that they are administrative determinations (albeit conducted within limitations imposed by the Court). Determinations upon remand are made by Commerce, are conducted pursuant to the same rules that govern other administrative proceedings, and create independent causes of action. Thus, it is appropriate for Commerce to explain its determinations, including any disagreement it may have with the remand order.

Suggestions for Future Remands

Given the level of concern expressed by the Court in the 2006 cases, I have used the following guidelines in advising the Department. First, of course, Commerce must always follow the Court's orders to the letter, regardless of how strongly it may disagree. The Department's *only* remedy for decisions with which it disagrees is to appeal. Second, if there is any ambiguity concerning the Department's obligations under a remand order, Commerce should resolve that ambiguity either by adopting the strictest plausible interpretation of the order or by promptly asking the Department of Justice to file a motion for clarification. Third, where the Court orders Commerce to change its determination on remand, the Department may clarify its position for any appeal by stating its disagreement with the remand order. Fourth, the Department may continue to explain its opposition to remand orders with which it disagrees (provided that the Court has not ordered it not to do so), but should be respectful in doing so.

As far as the Court's handling of remands is concerned, my experience suggests that it would be helpful if the Court were more careful to make remand instructions as explicit as possible, keeping in mind the distinction between what the Court believes Commerce ought to do and what the Court is willing to order Commerce to do. Commerce will carefully protect its right to appeal. If Commerce takes an action that the Court would like the Department to take, but which the Court has not ordered it to take, there may be no case or controversy to support an appeal. If Commerce follows an order with which it openly disagrees, its right to appeal is clear (particularly if Commerce explains its disagreement).

It would be particularly helpful if the Court would avoid following long, complex opinions with orders to Commerce to make a redetermination on remand "not inconsistent with this decision." Upon careful consideration, what such orders actually compel the Department to do is often uncertain. Finally, where Commerce explains its disagreement with the Court's order of remand, the better approach for the Court would be, not to strike any passages that the Court may find offensive, but, if the Court chooses, to explain why such statements are mistaken, misguided, or misinformed.

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