

Is It Improper for Commerce To Explain Its Disagreement with Remand Orders in Its Remand Redeterminations?

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I. INTRODUCTION

For twenty-five years, the Import Administration treated remands from the United States Court of International Trade as administrative proceedings conducted pursuant to the court's orders. In other words, the Department of Commerce (Commerce) viewed the original administrative proceeding as "back in its court" and assumed that, provided Commerce followed the court's orders, Commerce was free (in fact required) to explain its position, just as in the original determination.¹ This included any disagreement with the determination that the court's remand order required Commerce to make. Under this practice, Commerce routinely explained its disagreement with the decision remanding the original determination. The International Trade Commission (ITC) took the same approach, with individual commis-

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1. See, e.g., *Timken Co. v. United States*, 699 F. Supp. 300 (Ct. Int'l Trade 1988); *Greater Boston TV Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

sioners often giving dissenting views that included explanations of their disagreement with orders of remand.²

II. THE CURRENT STATE OF REMAND ORDERS

In 2006, the Court of International Trade 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 Commerce's statement of disagreement per se, describing the statement as "contumacious."³ In several instances (explained below), judges struck explanations of Commerce's disagreement from remand determinations.⁴ The court did not appear to disagree with Commerce's practice of stating that it disagreed with remand orders to clarify its position for appeal, a practice that the United States Court of Appeals for the Federal Circuit explicitly has recognized.⁵

The court did not explain the reason for its change in practice. Rather, the decisions in question simply treated Commerce'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 (answers to questions posed by the court) than administrative determinations and, therefore, to view Commerce's explanations of disagreement as essentially additional briefs that Commerce lacks authority to file.⁶

Commerce traditionally has included explanations of its disagreement with remand orders in remand determinations for several reasons. First, as already noted, Commerce views remand determinations as administrative determinations, for which it is required to provide rational explanations. Where Commerce does not agree with remand orders, it considers an explanation of its disagreement to be an

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

3. *SKF v. United States*, 452 F. Supp. 2d 1335, 1339 (Ct. Int'l Trade 2006).

4. See, e.g., *Hontex Enters., Inc. v. United States*, 425 F. Supp. 2d 1315 (Ct. Int'l Trade 2006); *SKF*, 452 F. Supp. 2d at 1335.

5. See *Viraj Group 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.").

6. See, e.g., *SKF*, 452 F. Supp. 2d at 1339 ("[Commerce] may not reargue its position before this court without first filing an appropriate motion for rehearing."); *id.* at 1342 ("Defendant is attempting to reargue its prior position rather than to simply preserve the issue for appeal.").

integral part of the explanation for the determination. These explanations inform the parties and the public whether Commerce has changed its position regarding the issue or whether it is considering pursuing an appeal, and gives the reasons for its disagreement with the court.

Second, Commerce 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 Commerce. If remand determinations were pleadings, they would be the product of the Department of Justice.

Third, there are important practical considerations. The determination on remand is made by Commerce personnel most familiar with the 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 Commerce. Of course, it would be possible to preserve Commerce's reasoning in an internal memo, but such a memo would not be authoritative and would not be as effective a means of notifying the public of Commerce's position. Finally, as a practical matter, given Commerce's limited resources, work that is not essential and for which there is no deadline tends not to get done.

Fourth, failing to at least make note of its disagreement with the court's remand order could compromise Commerce's ability to appeal.⁷ And, having stated its disagreement, it would be odd, to say the least, for Commerce not to provide an explanation. For all these reasons, it is appropriate for Commerce to explain its views to the parties and to the public in the remand determination itself. The three Court of International Trade decisions in question follow.

A. *Vertex International, Inc. v. United States (March 2006)*

Vertex concerned Commerce's determination that the scope of the antidumping order on hand trucks from China covered "garden carts."⁸ Central to Commerce's determination was a finding that garden carts included a "projecting edge or edges, or toe plate, [which] slide[] under a

7. See *Viraj*, 343 F.3d at 1376.

8. *Vertex Int'l, Inc. v. United States*, No. 05-00272, 2006 WL 160295, slip op. at *1, 3 (Ct. Int'l Trade Jan. 19, 2006).

load for purposes of lifting and/or moving the load.”⁹ In its scope determination, Commerce 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 Court of International Trade rejected Commerce’s conclusion, finding that “the garden cart was not designed to, and cannot, slide under a load.”¹⁰ The court also cited several additional factors weighing against the inclusion of garden carts, such as the limited carrying capacity of garden carts and their lack of a central frame member to stabilize the load.¹¹ Accordingly, the court directed Commerce to issue a new determination excluding garden carts from the scope of the order, giving it eleven days to do so.¹²

On remand, Commerce discovered that the domestic interested parties had not been properly served with the summons and complaint in the Court of International Trade 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.”¹³ This explanation informed the public how Commerce would approach future scope issues under the order.

9. See Notice of Antidumping Duty Order: Hand Trucks and Certain Parts Thereof from the People’s Republic of China, 69 Fed. Reg. 70,122 (Dec. 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.

10. *Vertex*, 2006 WL 160295, at *5.

11. *Id.* at *6.

12. The court’s directions to Commerce 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.” *Id.*

13. Final Results of Redetermination Pursuant to Court Remand, February 16, 2006. After agreeing that garden carts are outside of the scope of the antidumping 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

The court affirmed Commerce's exclusion of the garden carts, but struck Commerce's additional explanation as inconsistent with the remand order, explaining that the order "did not permit [Commerce] to reinvestigate or reconsider this matter."¹⁴

The court 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."¹⁵

Given that the court's only explicit direction to Commerce was to "issue a determination excluding Vertex's garden carts from the Order,"¹⁶ 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 Commerce had excluded garden carts, based exactly on the court's reasoning, but then explained why it did not agree with the court's analysis.¹⁷ 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

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.

14. *Vertex Int'l, Inc. v. United States*, No. 05-00272, 2006 WL 587661, slip op. at *1 (Ct. Int'l Trade Mar. 8, 2006).

15. *Id.* 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. *Id.*

16. *Vertex*, 2006 WL 160295, at *6.

17. 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."

matter, this would preclude any explanations of disagreement with the remand order.¹⁸

B. Hontex Enterprises, Inc. v. United States (April 2006)

Hontex involved an administrative review of an antidumping order on crawfish tail meat from China.¹⁹ 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. Wei" in the operation of both companies.²⁰

The court found Commerce's evidence of affiliation to be insufficient and remanded the proceeding, providing 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.²¹

In its remand determination, Commerce found that NNL and HFTC5 were not affiliated and determined an individual rate for NNL.²² 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.²³

The court found that Commerce's additional comments were not in accordance with its instructions and, accordingly, struck them from the

18. Some support exists for the proposition that all actions not explicitly authorized by remand orders are prohibited. *E.g.*, *Dorbest Ltd. v. United States*, 547 F. Supp. 2d 1321 (Ct. Int'l Trade 2008). On remand in *Dorbest*, a party pointed out a clerical error that Commerce made in the original determination. *Id.* at 1348. Commerce declined to make the correction on the grounds that it was outside the scope of the remand. *Id.* The Court of International Trade upheld Commerce's decision. *Id.* *Dorbest*, however, involves an action by Commerce that changes the result of the remand determination. This may be distinguished from expressions of disagreement that do not change the result of the remand.

Other case law suggests that administrative agencies have broad discretion upon remand. "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 Ct. Int'l Trade 419, 422 (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. Chenery Corp.*, 332 U.S. 194, 201 (1947) ("After the remand was made, therefore, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress.").

19. 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 Fed. Reg. 20,948 (Apr. 19, 2000).

20. *Hontex Enters., Inc. v. United States*, 387 F. Supp. 2d 1353, 1355 (Ct. Int'l Trade 2005).

21. *Id.* at 1361.

22. *Hontex Enters., Inc. v. United States*, 425 F. Supp. 2d 1315, 1319 (Ct. Int'l Trade 2006).

23. *Id.*

remand determination.²⁴ The court did not explain its reasoning in detail, but quoted the following passage from the decision in *Fuyao Glass Industrial Group v. United States*:²⁵ “Neither of the[se] choices on remand permit Commerce to affect to adopt the court’s conclusions . . . without actually doing so.”²⁶

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 regardless), 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.²⁷ 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.

C. *SKF USA Inc. v. United States (September 2006)*

SKF USA Inc. v. United States arose from the final results of an administrative review of an antidumping order on ball bearings from various countries.²⁸ 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.²⁹

The court found that Sarma had: (1) offered information during a verification and (2) had both the willingness and ability to provide the

24. *Id.*

25. *Fuyao Glass Indus. Group Co. v. United States*, No. 02-00282, 2006 WL 345004, at *2 (Ct. Int’l Trade Feb. 15, 2006).

26. *Hontex Enters.*, 425 F. Supp. 2d at 1319 (citing *Fuyao*, 2006 WL 345004, at *2) (alterations in original).

27. *Id.*

28. *See* Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and Singapore: Final Results of Antidumping Duty Administrative Reviews, 68 Fed. Reg. 35,623 (June 16, 2003).

29. *Id.*

necessary backup documentation.³⁰ 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 recalculate plaintiffs' margin using plaintiffs' own information.³¹

On remand, Commerce conducted a second verification, permitting Sarma to provide additional documentation and recalculated SKF's margin accordingly.³² In addition, Commerce respectfully explained its disagreement with the court's decision.³³ Specifically, Commerce 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.³⁴

The court upheld the remand results, but struck Commerce's explanation of its disagreement with the court on the basis that its "attempts to improperly reargue issues already decided by this court, misstates the court's prior opinion, misconstrues its holding, and mischaracterizes the evidence before the court."³⁵ 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.

D. PAM, S.p.A. 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:

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

30. SKF USA Inc. v. United States, 391 F. Supp. 2d 1327, 1332-33 (Ct. Int'l Trade 2005).

31. *Id.* at 1337.

32. SKF USA Inc. v. United States, 452 F. Supp. 2d 1335 (Ct. Int'l Trade 2006).

33. *Id.* at 1338-39.

34. *Id.* at 1343.

35. *Id.* at 1336.

objection, except to refer Commerce to the prior opinion, which discusses this issue in depth.³⁶

III. THE DECISIONS COLLECTIVELY

These decisions do not present a clear picture. The court evidently agrees that Commerce may state the simple fact of 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 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 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.

IV. WHAT IS A REMAND DETERMINATION?

Whether the Court of International Trade 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 Commerce'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 the 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.”³⁷ Title 19 U.S.C. § 1516a(c)(3), provides: “If the final disposition of an action brought

36. *PAM, S.p.A. v. United States*, No. 04-00082, 2008 WL 2673857, slip op. at *4 n.7 (Ct. Int'l Trade July 9, 2008).

37. 28 U.S.C. § 2643(c)(1) (2006).

under this section is not in harmony with the published determination of [Commerce or the ITC] the matter shall be remanded to [Commerce or the ITC] for disposition consistent with the final disposition of the court.”³⁸

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 lend 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, Commerce keeps records of remand proceedings in the same manner as for other administrative proceedings.³⁹ Similarly, Commerce considers the requirement to place *ex parte* memoranda on the record to apply to remand proceedings. Finally, Commerce has always conducted remands without any participation from the Department of Justice. If remands were considered to be court proceedings, Commerce would be required to include Justice Department lawyers at every step.

While the statute may not resolve the issue outright, both the Court of International Trade and the Federal Circuit treat redeterminations on remand as essentially like the original determinations.⁴⁰ The Federal Circuit has described the determination being appealed as Commerce’s final determination, as modified by the remand determination.⁴¹

38. 19 U.S.C. § 1516a(c)(3) (2006).

39. 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 [Commerce 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
- (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

40. The Federal Circuit has stated that the Court of International Trade is “free, within reasonable limits, to set the parameters of the remand.” *Trent Tube Div. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 814 (Fed. Cir. 1992). Moreover, the courts have reviewed remand determinations by previously nonparticipating ITC commissioners on the same basis as “original” determinations. See *USX Corp. v. United States*, 698 F. Supp. 234 (Ct. Int’l Trade 1988). Thus, newly participating ITC commissioners appear to be free to reach entirely new determinations or adopt parts of the ITC’s original determination or dissenting views.

41. See, e.g., *LTV Steel Co. 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 Gen. Ltd. v. United States*, 88 F.3d 1034, 1036 (Fed. Cir. 1996).

Similarly, the Court of International Trade has recognized that “Commerce’s own remand determination, as a matter of law, replaces Commerce’s original, final determination.”⁴² The standard of review applied by both the Court of International Trade and the Federal Circuit to remand determinations is the same as the standard of review applied to original determinations by Commerce,⁴³ as is their disposition of the two types of administrative determination.⁴⁴

The Federal Circuit’s decision in *Freeport Minerals Co. v. United States* also supports the view that Commerce’s redeterminations on remand are administrative determinations like any other. *Freeport Minerals* involved a remand that changed Commerce’s final determination.⁴⁵ The issue was whether the result on remand created a new cause of action, in addition to the right to challenge the original determination.

42. *Decca Hospitality Furnishings, LLC v. United States*, 427 F. Supp. 2d 1249, 1255 (Ct. Int’l Trade 2006); *see also* *Shakeproof Assembly Components Div. of Ill. Tool Works v. United States*, 412 F. Supp. 2d 1330, 1337-38 (Ct. Int’l Trade 2005).

43. 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 Ltd.*, 115 F.3d 965, 972 (Fed. Cir. 1997). 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, 1293-94 (Ct. Int’l Trade 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’” (quoting 19 U.S.C. § 1516(a)(b)(1)(B)(i) (1999)). 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*, 452 F. Supp. 2d 1335, 1336 (Ct. Int’l Trade 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*, No. 05-00404, 2006 WL 2457626, slip op. at *2 (Ct. Int’l Trade Aug. 25, 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*, No. 03-00806, 2005 WL 2886229, slip op. at *1 (Ct. Int’l Trade Nov. 2, 2005).

44. *See, e.g., Decca Hospitality Furnishings*, 427 F. Supp. 2d at 1250; *Hontex Enters., Inc. 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., Inc. v. United States*, No. 02-00124, 2005 WL 1421132, slip op. at *1 (Ct. Int’l Trade June 14, 2005).

45. *Freeport Minerals Co. v. United States*, 758 F.2d 629 (Fed. Cir. 1985).

The Federal Circuit held that a party to the proceeding could, indeed, challenge the remand results anew.⁴⁶ 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.

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 v. United States*, the Federal Circuit not only cited explanations by the ITC of its disagreement with a remand order from the Court of International Trade, but it also quoted the ITC's dissenting statements at some length in its opinion.⁴⁷

In *Mittal Steel Point Lisas Ltd. v. United States*, the Federal Circuit's most recent case dealing with an agency remand, it held that the ITC had "too rigidly" interpreted the court's remand instructions and its decision in *Bratsk Aluminum Smelter v. United States*.⁴⁸ The Federal Circuit recognized that the ITC had "proceed[ed] with scrupulous attention to the terms of [the Court of International Trade's] remand instructions," yet it vacated and remanded the ITC's remand determination indicating that "[t]he problem may stem from a lack of sufficient clarity in our prior opinion, which we hope has been rectified in this one."⁴⁹ 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 led us to an affirmative determination."⁵⁰ 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*.⁵¹

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.⁵² 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

46. *Id.* at 636.

47. *Nippon Steel v. United States*, 458 F.3d 1345 (Fed. Cir. 2006); *see also* SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) (taking a broad view of an agency's role in performing redeterminations on remand).

48. *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 876 (Fed. Cir. 2008).

49. *Id.* at 879.

50. *Id.* at 870-71.

51. *Id.* at 871.

52. *Id.*

to say so.”⁵³ Significantly, the court stated that it “has no independent authority to tell the Commission how to do its job.”⁵⁴ 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 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.

V. 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 Commerce. First, of course, Commerce must always follow the court’s orders to the letter, regardless of how strongly it may disagree. The *only* remedy for decisions with which Commerce disagrees is to appeal. Second, if there is any ambiguity concerning Commerce 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, when the court orders Commerce to change its determination on remand, Commerce may clarify its position for any appeal by stating its disagreement with the remand order. Fourth, Commerce 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

53. *Id.* at 875.

54. *Id.* at 873.

careful to make remand instructions as explicit as possible, while 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 it to take, but which the court has not ordered Commerce 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 Commerce 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.