Agency Remands Before the United States Court of International Trade: Objectives and Obstacles

Julie C. Mendoza*
R. Will Planert†

I. THE *CHENERY* DOCTRINE 465
II. JUDGE FRIENDLY'S ARTICLE 468
III. TYPE I REVERSALS—INADEQUATE REASONS 470
IV. TYPE II—UNSUSTAINABLE REASONS 475
V. TYPE III—INSUFFICIENT OR ERRONEOUS FINDINGS 483
VI. CONCLUSION 489

* Julie Mendoza has been featured by both *Chambers USA: America's Leading Lawyers for Business* (2005) and *Chambers Global: The World's Leading Lawyers for Business* (2006 and 2007) as a leading lawyer practicing in the area of international trade law. She has defended a broad range of clients in major cases under U.S. import relief law and in U.S. customs matters. As counsel to foreign manufacturers, she has advised foreign governments on a variety of bilateral and multilateral trade negotiations including the Uruguay Round, negotiations related to the World Trade Organization's (WTO) Agreement on Safeguards, bilateral subsidies agreements, framework agreements on trade and investment, and the negotiation of Voluntary Restraint Arrangements on steel. She has an active practice in the area of WTO dispute resolution and has argued on behalf of clients before the WTO panels and the WTO Appellate Body. She also advises clients involved in North American Free Trade Agreement (NAFTA) dispute settlement proceedings and has argued on behalf of clients before NAFTA panels. She is frequently invited to speak at conferences and seminars sponsored by the WTO Secretariat in member countries on topics of international trade practices and remedies. Ms. Mendoza received her J.D. from the University of Chicago and her B.A. from Tufts University (Harvard University/Universidad Nacional Autonoma de Mexico). She is also fluent in Spanish and has worked extensively in Latin America on a wide variety of trade matters.

† R. Will Planert is of counsel in the International Trade Department at Troutman Sanders LLP. Prior to joining Troutman Sanders, Mr. Planert practiced international trade law for fourteen years at Kaye Scholer, LLP. Mr. Planert concentrates on representing multilateral and foreign-based corporations in a wide variety of international trade disputes, including antidumping and countervailing duty investigations, section 201 (safeguards) cases, anticircumvention investigations, and various export control matters. He appears regularly before the United States Department of Commerce, the United States International Trade Commission, and the United States Bureau of Customs and Border Protection. He is also experienced in complex litigation before the United States Court of International Trade and the United States Court of Appeals for the Federal Circuit, and before NAFTA binational dispute settlement panels. Mr. Planert also counsels domestic and foreign clients on customs compliance issues, NAFTA origin issues, country of origin marking requirements, and quotas.

In a seminal article in the *Duke Law Journal*, Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit addressed the legal principles underlying the use of remands in the judicial review of agency decisions and orders.[1] Published in 1969, Judge Friendly's article came at an important juncture in the development of judicial review of administrative law. Just over twenty-five years had passed since the landmark decision of the Supreme Court of the United States in *Securities Exchange Commission v. Chenery Corp.* had established the rule that an agency's decision may be upheld only on the grounds that the agency was operating within its given powers.[2] Judge Friendly also wrote at a time when the field of administrative law was exploding in the wake of the Great Society legislation and the increasing role of federal agencies in the fields of environmental protection and economic regulation.

Judge Friendly's article surveyed the then-growing area of remands in the judicial review of administrative decisions and orders with the goal of "discovering a bright shaft of light that would furnish a sure guide to decision in every case."[3] Judge Friendly ultimately settled for the more modest goal of identifying three distinct principles of judicial review that would cause the reversal of administrative decisions, which had emerged from the rubric of *Chenery* and its progeny. While all three could involve remand to the agency, Judge Friendly concluded that the nature of the underlying legal error differed in each case.[4]

This Article will examine the three types of reversals requiring remand to the agency identified by Judge Friendly and consider their utility in analyzing reversals and remands by the United States Court of International Trade in its review of the Title VII determinations of the United States Department of Commerce (Commerce) and the United States International Trade Commission (ITC). We argue that Judge Friendly's categorization of remand orders provides a helpful framework for understanding both the basis for reversal and the nature and scope of the response required of the agency on remand. We suggest that this framework, if consistently understood and applied by both the Court of International Trade and the various agencies, could help to reduce the number of multiple remands and improve the overall quality of agency decision making.

---

1. Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199 (1969).
2. 318 U.S. 80, 95 (1943) (*Chenery I*).
3. Friendly, *supra* note 1, at 199.
4. *Id.* at 206.

I. THE *CHENERY* DOCTRINE

The *Chenery* case involved a review of a Securities and Exchange Commission (SEC) order under the Public Utility Holding Company Act of 1935. The Federal Water Service Corporation underwent reorganization pursuant to that Act, and the proposed reorganization plan called for nearly all of the equity in the new company to go to the preferred shareholders of the old company. During the period in which the reorganization plans were pending before the SEC, insiders who had controlled the old company (officers and managers who also owned significant common stock in the old company) purchased additional shares of the preferred stock on the over-the-counter market, at prices substantially below the book value of the new common stock, which was to be converted under the reorganization plan.[5] The SEC refused to approve the proposed reorganization plan as long as the preferred stock acquired by the insiders was to share in parity with the other preferred stock.[6] The SEC concluded that the managers were under a "duty of fair dealing not to trade in the securities of the corporation" while the proposed reorganization plan was pending before the SEC.[7] Therefore, the SEC ordered the reorganization plan to be amended to provide that preferred shares purchased by management would be surrendered at cost plus four percent interest.[8] Then the SEC approved the plan as amended.[9]

On appeal to the Supreme Court, Justice Frankfurter concluded that the SEC's order rested on an erroneous reading of existing principles of equity and thus reversed.[10] The SEC had argued before the Court that even if existing Court precedent did not justify its action, there were sound policy reasons for its order because of the "strategic position" enjoyed by management in controlling reorganizations under the Act.[11] The SEC argued further that it "'has dealt extensively with corporate reorganizations, both under the Act, and other statutes entrusted to it,' and 'has, in addition, exhaustively studied protective and reorganization committees,' and that the situation was therefore 'peculiarly within the Commission's special administrative competence.'"[12]

The Court concluded that the order must be reversed.

---

5. *Chenery I*, 318 U.S. at 84.
6. *Id.* at 82-83.
7. *Id.* at 85.
8. *Id.*
9. *Id.*
10. *Id.* at 88, 90, 95.
11. *Id.* at 90.
12. *Id.* (citations omitted in original).

> Since the decision of the Commission was explicitly based upon the applicability of principles of equity announced by courts, its validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.[13]

The Court agreed that under the statute the SEC had broad powers to take appropriate action to prevent "abuses" in the reorganization process that were "found to be detrimental to the public interest."[14] Yet, the Court concluded, this was not the basis on which the agency appeared to have reached its decision:

> But the difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action was based. The Commission did not rely upon "its special administrative competence"; it formulated no judgment upon the requirements of the "public interest or the interest of investors or consumers" in the situation before it.
>
> . . . .
>
> Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different.
>
> . . . .
>
> It is not for us to determine independently what is "detrimental to the public interest or the interest of investors or consumers" or "fair or equitable" within the meaning of §§ 7 and 11 of the Public Utility Holding Company Act of 1935. The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding.[15]

As a result, the Court ordered the case remanded to the SEC for further proceedings "not inconsistent" with the Court's opinion.[16]

As Judge Friendly dryly observed in his review of the *Chenery* case, the plaintiffs "on reading these opinions, must have wondered whether

---

13. *Id.* at 87.
14. *Id.* at 92.
15. *Id.* at 92, 94.
16. *Id.* at 95. Justices Black, Reed, and Murphy dissented. *Id.* They argued that the majority erred in supposing that "the Commission's rule is not fully based on Commission experience." *Id.* at 98. Furthermore, they argued, a remand under these circumstances served little purpose: "Of course, the Commission can now change the form of its decision to comply with the Court order. The Court can require the Commission to use more words; but it seems difficult to imagine how more words or different words could further illuminate its purpose or its determination." *Id.* at 99.

the game had been worth the candle."[17] Not surprisingly, on remand the SEC did exactly what was predicted and reached the same result, only this time based ostensibly upon a "thorough reexamination of the problem in light of the purposes and standards of the Holding Company Act," and stated that in reaching its decision it had "drawn heavily upon its accumulated experience in dealing with utility reorganizations."[18]

The Court's affirmance of these remand results drew a stinging dissent from Justice Jackson. According to the dissent, the Court's approval of the identical agency order on the grounds that it was the product of the agency's expertise and experience in applying the applicable statute "makes judicial review of administrative orders a hopeless formality for the litigant, even where granted to him by Congress. It reduces the judicial process in such cases to a mere feint."[19] Justice Jackson sought to draw a sharp distinction between agency fact finding, for which its expertise was relevant, and the determination of the correct rule of law, which was the province of the courts:

> I suggest that administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding.[20]

Justice Jackson concluded that in the absence of an identifiable "rule of law" that prohibited the type of transactions engaged in by the corporate managers, the Court's affirmance of the SEC's order amounted to the sanctioning of "administrative authoritarianism, [the] power to decide without law."[21]

---

17. Friendly, *supra* note 1, at 203.

18. SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 199 (1947). The focus of this Article is not the wisdom of the *Chenery* doctrine, because this principle is settled law and remains binding on the Court of International Trade. Nevertheless, whereas here the Court's opinion provided an unmistakable roadmap to the agency for reaching the result it clearly desired, it seems fair to ask whether the results of such a remand really represent the objective application of agency expertise and a "fresh look" at the issue or are merely an exercise in papering the record to support a predetermined outcome.

19. *Id.* at 210.

20. *Id.* at 215.

21. *Id.* at 216. Justice Jackson's concerns are directed more at the issue of the agency rule making versus adjudication, rather than to the role of remand and thus again fall outside the scope of this Article.

II. JUDGE FRIENDLY'S ARTICLE

Writing twenty-five years after *Chenery*, Judge Friendly's article used as a jumping-off point an apparent contradiction between *Chenery* and the 1966 decision of the Supreme Court in the *Penn-Central Merger & N & W Inclusion Cases*, in which the Supreme Court affirmed a decision of a three-judge district court panel (that had included Judge Friendly) in upholding an order by the Interstate Commerce Commission (ICC) in connection with the merger of the Pennsylvania and New York Central Railroads.[22] The issue was the price that the Norfolk & Western Railroad would be required to pay for several smaller rail lines included in the merger.[23] The district court upheld the ICC's determination of the appropriate price even though it concluded that one of the calculations used by the ICC in arriving at the price "made extraordinarily little sense."[24] Norfolk & Western argued that *Chenery* required a remand for the ICC to revise its calculations to exclude the formula found to be unreasonable by the district court.[25] The district court found that the other formulas used by the ICC were reasonable and adequately supported the final order.[26] Thus, the district court declined to remand to the agency for what it regarded as an "exercise in futility."[27] In affirming the district court, the Supreme Court rejected the applicability of *Chenery* in a footnote, stating that Norfolk & Western "attempts to extend the principle of that case far beyond its limits."[28]

Judge Friendly's article addressed the question of exactly what the "principle" of *Chenery* really is, and sought to explain *why* the Court concluded that the *Chenery* principle did not require a remand in the *Penn-Central Merger & N & W Inclusion Cases*: "Was the Court simply warning against over enthusiasm about *Chenery* or was it back tracking? Or, was it perhaps saying that this was not a true *Chenery* situation at all?"[29] The answer for Judge Friendly was the latter—that the *Penn-Central Cases* were not "true" *Chenery* situations. In reaching that conclusion, Judge Friendly defined what he regarded as three different types or "bases" of judicial reversal of agency decisions, which he characterized as closely related but distinct.

---

22. 389 U.S. 486, 518, 527 (1968).
23. *Id.* at 494.
24. Friendly, *supra* note 1, at 204.
25. *Id.*
26. *Id.*
27. *Id.* at 205.
28. *Penn Cent. Merger*, 389 U.S. at 518-19 n.10.
29. Friendly, *supra* note 1, at 201.

Judge Friendly describes this first principle of review leading to reversal to be based on an *inadequate explanation of reasons*, which he characterizes as "[t]he proposition that a reviewing court may reverse and remand if an agency has not adequately explained the reasons for its conclusions."[30] It follows that on remand, the agency's task is relatively open-ended: to explain the legal and factual basis for the conclusion it reached. Implicit in such a reversal is skepticism by the court as to whether certain facts or legal consequences in fact received proper consideration, leading to, in Judge Friendly's words, a "Do you really mean it?" question from the court.[31]

A second type of reversal is a reversal because of *unsustainable reasons*. Judge Friendly termed reversals of this type as "true *Chenery*" reversals, which reflect a conclusion by the court that the agency's decision cannot be affirmed on the grounds relied upon by the agency.[32] It thus includes both decisions in which the court finds that the agency has misconstrued the governing law as well as cases in which the agency has misapplied the law to the facts and circumstances of the particular case.[33]

The third type of reversal described by Judge Friendly is the reversal due to *inadequate or erroneous findings*. This type of reversal entails a conclusion by the court that the agency below has either made an erroneous factual finding or has failed to make sufficient findings as to a material fact. As Judge Friendly succinctly puts it, these cases are where "[the agency] may have been right both on the law and the facts but had made no adequate findings to demonstrate this."[34]

---

30. *Id.* at 206.
31. *Id.* at 207-08.
32. *Id.* at 205.
33. *Id.* at 209.
34. *Id.* at 218. Remands based on the standard of review of "substantial evidence" or "otherwise in accordance with law" must also be viewed in the context of *Chevron*. Chevron U.S.A., Inc v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). A holding that the agency's decision is not in accordance with law because the agency has interpreted a statutory provision in a way that is contrary to the specific intent of Congress under step I of *Chevron normally* would *not* require deference or a remand since it involves an error of law. Judicial judgment then can "do service for an administrative judgment." Friendly, *supra* note 1, at 210. In such a case, "there must be reversal and usually a direction rather than a discretionary remand." *Id.* at 223. But a reversal under step II of *Chevron*—because the agency's interpretation was not "reasonable"—could be either an "inadequate explanation" (Type I) reversal or Type II reversal, depending upon whether the court regards the flaw in the agency's interpretation to be a failure to have given a reasoned explanation for its interpretation or whether the court finds that the explanation given is clear, but not reasonable. Similarly, a reversal of an agency finding as "unsupported by substantial evidence" can actually be any one of all three types: it may be that the court finds the agency has not adequately explained what evidence in the record it relied upon, or how it regarded that evidence to support the conclusion reached. This would be a Type I reversal.

Judge Friendly goes on to discuss each of these grounds of reversal, with an eye towards their "applicability and utility as tools of judicial discretion."[35] Judge Friendly's focus in his article is primarily on whether and when it is appropriate for the court to *order* a remand in each of these types of cases and when a remand is unnecessary and the agency's decision may be affirmed, even where the court perceives a degree of error in the agency's decision making or fact finding.[36] In this Article, we adopt Judge Friendly's classifications, but seek to employ them to a rather different end. In the discussion that follows, we will consider whether distinguishing among these three closely related grounds of reversal is helpful in understanding the nature of the agency's task on remand. Put another way, while Judge Friendly was concerned primarily with whether a remand to the agency was really necessary, our concern is with what the appropriate response of the agency is to a remand when it is ordered. This Article and its authors are also concerned with the diminishing returns and demands on resources occasioned by multiple remands.

III. TYPE I REVERSALS—INADEQUATE REASONS

Reversal and remand due to inadequate reasons are common at the Court of International Trade in Title VII cases.[37] In *International Imaging Materials v. United States*, the Court of International Trade remanded a negative injury determination by the ITC involving imports of thermal transfer ribbons.[38] The ITC had found that so-called "jumbo rolls" (unslit master rolls that had been inked and coated) and finished fax machine thermal transfer ribbons (which had been slit and packed) were part of a

---

Alternatively, the court might find that the record discloses clearly the evidence relied upon by the agency but finds the agency's analysis of that evidence and the conclusion reached to be unsupportable as a matter of law. This would be a Type II reversal. Finally, a court might find that the agency's decision rests on inadequate or erroneous findings of fact, which would be a Type III reversal.

35. *Id.* at 206.

36. The Court in *Chenery I* was also concerned with judicial intrusion resulting in a reversal of the agency without remand: "[A] judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80, 88 (1943). For a less sanguine view of administrative discretion, see Adam Cox, *Commemorating Twenty-Five Years of Judge Richard A. Posner*, 74 U. CHI. L. REV. 1671 (2007).

37. The discussion of cases in this Article is intentionally selective; we have limited our focus to cases that we believe helpfully illustrate the usefulness of Judge Friendly's classifications. There has been no attempt to be exhaustive, however, and many other cases could be usefully analyzed under these principles.

38. 28 I.T.R.D. 1166, 1167, 1177 (Ct. Int'l Trade 2006).

single domestic like product.[39] The ITC had reached its conclusion by applying its familiar six-factor test for determining like products.[40] The domestic industry argued that the ITC was required to instead have applied its semifinished product analysis, which applied a different set of criteria and likely would have led to the conclusion that finished fax thermal transfer ribbons were not part of the same like product as jumbo rolls.[41]

The court rejected the plaintiffs' arguments that the ITC was *required* to have applied the semifinished product analysis, either as a matter of binding precedent or as an established agency practice.[42] The court nevertheless reversed the ITC's determination because it found that the agency had failed to adequately explain its decision to apply the six-factor like product test rather than the semifinished product analysis.[43] Although the ITC argued that it had discretion to use either test, because both were aimed at determining whether there is a "clear dividing line"[44] between products, and claimed that it was entitled to deference in determining which test was most appropriate in a given case, the court concluded that the ITC had provided only a conclusory statement that the six-factor test was more appropriate than the semifinished analysis.[45] The court found the lack of a clear statement of the ITC's reasoning meant that the decision lacked a "reviewable, reasoned basis," and thus remanded to the agency to provide an explanation of why the six-factor test was preferable to the semifinished product analysis.[46]

International Imaging Materials usefully illustrates the crucial difference between an "inadequate explanation" reversal and an "unsustainable reasons" reversal (what Judge Friendly terms a "true" *Chenery* circumstance). Suppose that the ITC in this case had applied the semifinished product analysis, and using that analysis, had found fax machine thermal transfer ribbons and jumbo rolls to be a single like product. If, on review, the court concluded that the finding of a single like product under the semifinished product analysis was not supported by substantial evidence, *Chenery* would have dictated reversal and remand to the agency even if the court believed that the ITC's finding of a single like product could have been affirmed under the six-factor test.

---

39. *Id.* at 1168.
40. *Id.*
41. *Id.*
42. *Id.* at 1170.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

In such a case, the ITC presumably would have had the option on remand of finding a single like product using the six-factor test, assuming the ITC could adequately explain why that test was more appropriate.[47]

Similarly, in *Thai I-Mei Frozen Foods, Co. v. United States*, the court remanded a decision to Commerce not because it had concluded that the decision was incorrect, but simply because the agency had failed to provide an adequate explanation of its reasoning.[48] Commerce had calculated profit for constructed value for the plaintiff in accordance with the third clause of section 773(e)(2)(A) of the Tariff Act of 1930, as amended (which permits profit to be based on "any other reasonable method").[49] Commerce elected to calculate the profit rate based on third country sales made by two other producers, but excluded sales not in the normal course of trade—i.e., below-cost sales.[50] Commerce explained its decision to exclude the below cost sales on the ground that "including only the sales made in the ordinary course of trade is consistent with the Department's preferred methodology for calculating profit."[51] The court noted that unlike clause (2), clause (3) of section 773(e)(2)(A) did not require exclusion of below-cost sales, and that the preamble to Commerce's regulations had stated the agency would follow a case-by-case approach in determining whether to exclude below-cost sales when proceeding under clause (3).[52] In view of this, the court found Commerce's conclusory explanation to be insufficient, and remanded the case to Commerce to provide a "reasoned explanation" for its decision to exclude below-cost sales or else revise its profit calculation to include those sales.[53] The court rejected several other justifications offered by Commerce on appeal for excluding the below-cost sales from the profit calculation as *post hoc* justifications not relied on by the agency, additionally citing *Chenery II* for the proposition that a "reviewing court, in dealing with a determination or judgment which an administrative

47. On remand, the ITC adhered to its decision to use the six-factor test. The ITC explained that it considered this test as more appropriate when considering whether to expand the like product to include an additional domestic like product that was outside the scope of the merchandise subject to investigation, and that it used the semifinished product analysis in cases in which the semifinished and the finished product were both within the scope. Int'l Trade Comm'n Determination on Remand, Int'l Imaging Materials v. United States, No. 04-00215 (Ct. Int'l Trade Apr. 24, 2006).

48. 477 F. Supp. 2d 1332, 1358 (Ct. Int'l Trade 2007).

49. *Id.* at 1356.

50. *Id.* at 1340-41.

51. *Id.* at 1357.

52. *Id.*

53. *Id.*

agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."[54]

The invocation of *Chenery*, while certainly correct as to the proposition for which it was offered (that the court can only review an agency decision based on the reasons actually relied on by the agency), should not be allowed to obscure the important distinction Judge Friendly sought to draw between "inadequate reasons" reversals, and "true" *Chenery* reversals. Unlike *Thai I-Mei*, in *Chenery*, the Court did not find the basis for the SEC's original decision to have been inadequately explained. Rather, the Court found the SEC's reasoning to have been clear, but wrong as a matter of law. As discussed *infra*, trouble can ensue where Commerce or the ITC appears to believe it has been reversed for failure to have adequately explained its decision, but instead, the court's reversal was premised on the conclusion that the decision was simply wrong, or in Judge Friendly's terms, based upon "unsustainable" rationale.[55]

Ta Chen Stainless Steel Pipe v. United States is another "inadequate explanation of reasons" case in which the Court of International Trade expressly invoked *Chenery* in ordering a remand to Commerce.[56] Commerce had determined that the plaintiff was related to two U.S. companies that resold the subject merchandise in the United States.[57] The plaintiffs had argued before Commerce that both companies could not be treated as related under the pre-Uruguay Round Agreements Act version of the statute because they were not parties "by whom or for whose account the merchandise is imported into the United States," which, they contended, was a threshold requirement that had to be satisfied before Commerce could apply the substantive statutory criteria of relatedness to those companies.[58] Commerce failed to address this argument entirely in its final review results, but did offer several arguments in response in its papers at the court.[59]

---

54. *Id.* (quoting SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 196 (1947).

55. On remand, Commerce adhered to its original calculation of constructed value profit, this time offering as its explanation a statutory interpretation that there was a congressional preference for excluding sales outside the normal course of trade from the profit calculation. The Court of International Trade reversed Commerce again, this time on Type II, or "true" *Chenery* basis, finding that Commerce's profit calculation was not reasonable under the statute. *See* Thai I-Mei Frozen Foods Co. v. United States, No. 05-00197, slip op. (Ct. Int'l Trade Aug. 26, 2008). Commerce's second remand determination is due December 24, 2008.

56. 25 Ct. Int'l Trade 989, 998 (2001).

57. *Id.* at 990.

58. *Id.* at 999.

59. *Id.* at 993-94 n.4.

Citing *Chenery*, the court held that Commerce's "post hoc rationalizations" in its briefs could not support the agency decision and remanded the case to Commerce to address plaintiffs' statutory argument.[60] Remand was necessary in this case to allow the agency to make the policy judgments inherent in construing and applying an ambiguous statutory provision.[61] The court concluded that the agency's expertise and policy making were particularly relevant because the agency would need to interpret the phrase "for whose account the merchandise is imported" in light of the need to base the U.S. price on sales to unrelated purchasers and calculate dumping margins as accurately as possible.[62]

The court did not stop there. It noted in a lengthy footnote that it found the arguments advanced by Commerce in its brief to be "circular and uninformative."[63] The court described as "inverted" Commerce's argument that the two companies could be considered to be importers within the meaning of the statute because they satisfied the substantive criteria of relatedness.[64] Rather, the court concluded that the proper analysis required Commerce to first determine if the companies were "importers" within the meaning of the statute and then determine if they were related.[65] The court also concluded that Commerce's briefs had failed to adequately address a prior determination that was directly on point.[66] This discussion should have served as notice that although the reversal was based on the Type I "inadequate explanation of reasons" rationale, should the agency come back on remand with that result but now supported with the reasons advanced by counsel in its briefs, Commerce would then be vulnerable to a Type II true *Chenery* reversal. The court's discussion strongly indicated it would find those reasons to be "unsustainable."[67]

---

60. *Id.* at 993-94.
61. *Id.* at 994.
62. *Id.*
63. *Id.* at 994 n.4.
64. *Id.*
65. *Id.* at 994.
66. *Id.*
67. *Id.* at 999. On remand, Commerce heeded the court's warning. Commerce found, and the court affirmed, that the two companies were properly considered within the statutory definition of importer—parties "by whom or for whose account merchandise is imported"—because they had replaced another company, TCI, as Ta Chen's distributor in the United States and because the majority of Ta Chen's sales were imported for their account. Ta Chen Stainless Steel Pipe, Ltd. v. United States, 25 Ct. Int'l Trade 1349, 1349-50 (2001). This determination was supported by record evidence including the purchase of TCI's inventory, the fact that over eighty percent of Ta Chen's sales were to the two companies and the fact that Ta Chen was the exclusive supplier for both companies. *Id.* at 1350.

The court in *Ta Chen* also remanded as to a second issue. Commerce had based its substantive analysis of relatedness solely on nonequity ownership factors. The court held that while the statute did not preclude the consideration of nonequity factors, Commerce had a well-established practice of not finding parties to be related under the pre-Uruguay Round Agreements Act statute in the absence of equity ownership. The court remanded this issue to Commerce for a "reasoned explanation" of this apparent change in policy. The court emphasized that to be sustained on review, departures from previous agency policy must be "clearly articulated" and supported by "reasoned explanation." This was necessary, the court explained, to ensure that such a departure reflects a deliberate change in agency policy rather than simply the failure to adhere to it.[68] This concern illustrates the "think it over" or "do you really mean it?" function of remands for inadequate explanation of reasons.[69]

IV. TYPE II—UNSUSTAINABLE REASONS

The Court of International Trade, as well as the United States Court of Appeals for the Federal Circuit, have both demonstrated a willingness to reverse Commerce and ITC on the basis that their decisions are based on "unsustainable reasons." As noted above, this type of reversal may reflect the court's conclusion that the agency has misconstrued the statute, regulations, other applicable law, or that Commerce has failed to correctly apply the law to the facts in the record. This type of reversal implicates most directly the question of the degree of deference owed to the agency, either under *Chevron* as to matters of statutory interpretation or to issues of methodology and analysis that arguably fall within the purview of agency "discretion" or expertise.[70] Unlike Type I remands, which require the agency to merely articulate the reasons relied on in reaching its decision, here the agency is expected either to (1) develop different legal and/or factual grounds for its decision or (2) reach a different decision. Significantly, we have observed from the case law that what begins as a Type I case on the first remand evolves into a Type II case by the time of the second, or subsequent, remand.

---

68. *Ta Chen*, 25 Ct. Int'l Trade at 998.

69. On remand, Commerce conceded that the use of nonequity indicia of affiliation was indeed a change in agency policy and provided what the court regarded were adequate reasons to justify the change. *Ta Chen*, 25 C.I.T. at 1350.

70. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

USEC, Inc. v. United States (*USEC I*)[71] is a good example of a Type II remand. Commerce had determined that the purchase of so-called "separative work units" for the enrichment of uranium from enrichers in France constituted a sale of subject merchandise in an antidumping investigation of low-enriched uranium from France.[72] U.S. domestic utility companies who operated nuclear power plants entered into contracts with the French enrichment companies in which the utilities provided unenriched "feed" uranium to the enrichers who processed the uranium into low-enriched uranium that was then exported to the United States.[73] Under the terms of the separative work unit contracts, the utilities retained title in the feed uranium up until the time the enricher delivered the low-enriched uranium, at which time the utility took title to the low-enriched uranium and its title to the feed uranium was extinguished.[74] Because feed uranium is fungible, there was no requirement that the specific feed uranium provided by a customer be used to produce the low-enriched uranium for that customer.[75] The utility paid the enricher only for the separative work units, which is a measurement of the time and energy required to separate a given quantity of feed uranium into low-enriched uranium of a specified purity.[76] The utility then imported the low-enriched uranium, processed it into fuel rods, and consumed it as fuel for its nuclear reactors, all without there ever being a downstream sale of the low-enriched uranium in the United States after importation.[77]

The respondents (enrichers) had argued that these separative work unit contracts involved the sale of a service—enrichment of a customer's uranium feedstock—and thus could not be considered a sale of subject merchandise that could be subject to antidumping duties.[78] The enrichers argued that under Commerce's regulation on tolling and Commerce's precedents in applying that regulation, the foreign enrichers should be considered toll processors and the U.S. utilities should be treated as the "producers" of the low-enriched uranium.[79] This would have had the consequence of effectively excluding low-enriched uranium sold under

---

71. 259 F. Supp. 2d 1310 (Ct. Int'l Trade 2003), *aff'd in part and rev'd in part sub nom.* Eurodif S.A. v. United States, 411 F.3d 1355 (Fed. Cir.), *reh'g granted*, 423 F.3d 1275 (Fed. Cir. 2005).

72. *Id.* at 1316.

73. *Id.* at 1315.

74. *Id.*

75. *Id.*

76. *Id.* at 1314.

77. *Id.* at 1314, 1316.

78. *Id.* at 1312-13, 1315.

79. *Id.* at 1316.

separative work unit contracts from the antidumping order because there were no downstream sales of the utility-producers for Commerce to analyze.[80] Commerce had rejected this position and had distinguished its previous decisions under the tolling regulations on the grounds that

> (1) the enrichment process [was] the "most significant manufacturing operation involved in the production of LEU [low-enriched uranium] and that it is the enricher who creates the "essential character" of LEU"; (2) the enrichers fully [controlled] the enrichment process, including the "level of usage of feedstock provided by the utility company . . ."; and (3) U.S. utility companies [did] not maintain production facilities for the enrichment of uranium.[81]

For these reasons, Commerce concluded that the contracts for the sale of separative work units were the "functional equivalent" of a sale of low-enriched uranium and that the provision of uranium feedstock by the utility was payment in kind that covered a portion of the total sale price for the low-enriched uranium.[82]

On appeal, a three-judge panel of the Court of International Trade reversed.[83] The court first analyzed the contractual provisions of separative work unit contracts.[84] The court concluded that under the separative work unit contracts the enrichers obtained the right to use and possess the feedstock and assumed the risk of loss and damage, but that there was no evidence that they ever obtained ownership in either the feedstock or the finished low-enriched uranium.[85] The court further concluded that the feedstock did not at any point become an asset on the books of the enrichers.[86] Next, the court reviewed in detail Commerce's tolling regulation and each of the significant Commerce precedents in applying that regulation.[87] The court concluded if the text of the tolling regulation and Commerce's past practice in applying that regulation were applied to the facts of record "the SWU [separative work unit] contracts would be treated as contracts for the performance of services, and the enrichers would be treated as tollers and the utilities as the producers of LEU."[88]

---

80. *Id.* at 1322.
81. *Id.* at 1316 (quoting Low Enriched Uranium from France, 66 Fed. Reg. 65,884-85 (Dep't of Commerce Dec. 21, 2001)).
82. *Id.* at 1316, 1322.
83. *Id.* at 1313, 1331.
84. *Id.* at 1314-15.
85. *Id.* at 1323.
86. *Id.*
87. *Id.* at 1317-26.
88. *Id.* at 1323.

The court then went on to examine each of three reasons, enumerated above, that Commerce had offered for distinguishing the low-enriched uranium case from its previous determinations involving tolling and concluded that all three were unpersuasive.[89] Finally, the court addressed Commerce's conclusion that the "overall arrangement" under the separative work unit contracts was an arrangement for the purchase and sale of goods.[90] The court concluded that "the contractual provisions, without more, do not support Commerce's interpretation that the provision of feed uranium is substantively a payment in kind."[91] The court noted that Commerce's decision not to apply the tolling regulation represented a departure from the agency's prior practice that was embodied in a regulation having the force of law and held that such a departure would "require[] a more persuasive explanation than provided in the agency's determinations."[92]

In short, the opinion of the Court of International Trade demonstrated that the court fully understood the reasons behind the agency's decision to find the enrichers were the "producers" of the low-enriched uranium sold pursuant to separative work unit contracts but found those reasons to be unsustainable:

> In summary, Commerce's determination that enrichers are producers and not tollers is against the weight of the evidence on the record and inconsistent with both the agency's regulations and its prior decisions involving tolling services. *Commerce's reasons for distinguishing the instant case, and consequently for declining to apply the tolling regulation, are not persuasive*. Thus, Commerce's decision to treat these contracts as contracts for sales of a good is neither supported by substantial evidence nor in accordance with law.[93]

The agency's task on remand thus was not merely to clarify the reasoning that led to its original decision or to offer additional argument in support of the reasoning that had formed the basis for its original decision. Rather, Commerce's task was to either develop different reasons that would support its original conclusion or revise its decision by treating the utilities, not the enrichers, as the producers of the low-enriched uranium sold under separative work unit contracts.[94]

---

89. *Id.* at 1323-24.
90. *Id.* at 1324.
91. *Id.* at 1322.
92. *Id.* at 1326.
93. *Id.* (emphasis added).
94. Moreover, and unlike the opinion in *Chenery I*, here the court was not providing the agency with a road map for developing a legally sustainable rationale for the original result. To

The court also remanded two other issues to Commerce. Commerce had concluded that in determining which companies counted as U.S. "producers" of low-enriched uranium for determining domestic industry support for the antidumping petition and to which the tolling regulation was inapplicable.[95] As to this issue, however, the court's opinion is clear that it was ordering a Type I (inadequate explanation of reasons) remand.[96] The court agreed with Commerce's statement that the purpose of the tolling regulation was the accurate calculation of margins and that the regulation did not arise in connection with the industry support determination.[97] The court held, however, that "it is unclear from Commerce's explanation why the definition of 'producer,' a term that is not statutorily defined, should differ between one subsection of the statute and another."[98] The court noted the general rule that words appearing in multiple sections of a statute are presumed to have the same meaning and held that Commerce had not provided an adequate explanation to rebut this presumption. [99] Thus, the court's opinion on the industry support issue was clearly a Type I remand.[100] Finally, the court reversed Commerce's finding that the countervailing duty law applied to the separative work unit contracts.[101] The court noted that Commerce's conclusion had been based entirely on its conclusion that the separative work unit contracts were the "functional equivalent" of a contract for the sale of goods.[102] Having already determined that this conclusion was not sustainable, the court remanded the countervailing duty issue as well.[103]

On remand, Commerce reached the same result as in its original determination on all three issues.[104] The court affirmed Commerce's remand results as to the industry support and countervailing duty issues,

---

the contrary, the entire tenor of the court's opinion suggests that the court had serious doubts whether there was any legally sustainable basis for that result. *Id.* at 1331.

95. *Id.* at 1328.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. The court stated that "as the Court is remanding the Department's determination for reconsideration of its decision not to apply the tolling regulation, Commerce also will have the opportunity to reconsider the effect of the tolling regulation on its industry support determination." *Id.* Taken in isolation, this statement might suggest that Commerce's task on remand would be the same as to both issues—to "reconsider" its original determination and provide further explanation. In fact, however, as discussed above, the agency's task on remand differed significantly between these two issues. *Id.*

101. *Id.* at 1329.

102. *Id.*

103. *Id.* The countervailing duty remand was thus a Type II remand—Commerce's decision could not be sustained based on the reasons given.

104. USEC v. United States (*USEC II*), 281 F. Supp. 2d 1334, 1339 (Ct. Int'l Trade 2003).

but again reversed Commerce's finding that the enrichers were the "producers" of the merchandise for purposes of the antidumping law.[105] A review of the court's opinion reveals that Commerce's success on remand as to each of these issues was closely related to the degree to which it recognized, and/or responded appropriately, to the type of remand that had been ordered.

In again concluding that the enrichers were the producers of the merchandise, Commerce relied heavily on the conclusion that under the terms of the contracts, the enrichers owned the low-enriched uranium and transferred title to the low-enriched uranium to the utilities upon delivery.[106] Consequently, Commerce concluded that the delivery of the low-enriched uranium resulted in the transfer of title and ownership for consideration to the enrichers and thus, a "sale" of the low-enriched uranium to the utilities.[107] The court had, however, expressly rejected the conclusion that the contracts vested the enrichers with title to either the feedstock or the low-enriched uranium in *USEC I*.[108] The court reaffirmed this holding in *USEC II*.[109] Similarly, Commerce concluded on remand that the separative work unit contracts were fundamentally equivalent to contracts for the sale of low-enriched uranium because the utility was not only "buying" enrichment services but also "obtaining" low-enriched uranium.[110] Again, the court noted that it had already reversed Commerce's conclusion that separative work unit contracts were the functional equivalent for contracts for the sale of goods.[111]

On the issue of the applicability of the tolling regulation, however, Commerce did offer at least partially different reasoning. Commerce argued that the tolling regulation contemplated that the tollee would sell the finished merchandise to a party in the United States.[112] Commerce concluded that the regulation was thus directed toward determining which sale would be used to calculate the U.S. price and did not contemplate a situation where defining the tollee (the utility companies) to be the producer resulted in a situation in which the antidumping law would not apply to the transaction at all.[113] Thus, Commerce concluded,

---

105. *Id.* at 1342, 1345-46, 1350.
106. *Id.* at 1339.
107. *Id.*
108. USEC, Inc. v. United States (*USEC I*), 259 F. Supp. 2d 1310, 1323 (Ct. Int'l Trade 2003).
109. *USEC II*, 281 F. Supp. 2d at 1340.
110. *Id.*
111. *Id.*
112. *Id.* at 1343.
113. *Id.*

applying the tolling regulation in this manner would "defeat the purpose" of the regulation and the antidumping law as a whole, and Commerce should be permitted to instead base its determination of who is the producer of the low-enriched uranium based on the "totality of the circumstances."[114] Commerce also argued, however, as it had previously, that the separative work unit contracts could be distinguished from its previous tolling decisions because enrichers performed essentially the entire production process and that the utilities did not engage in any production operations.[115]

The court again rejected Commerce's attempt to distinguish its previous tolling decisions and found the new argument based on the "purpose" of the regulation to be unpersuasive.[116] The court concluded that although the utilities consumed the low-enriched uranium, rather than selling it, this did not render the tolling regulation inapplicable.[117]

As noted above, Commerce's remand results on the other two issues fared much better. On the question of whether the tolling regulation should be applied to define "producer" for purposes of the industry support determination (which was a Type I remand), Commerce explained that for purposes of the industry support determination, it was important that the producer have a "stake" in the domestic industry and that Commerce interpreted this to mean that to be a "producer" for purposes of this provision, a party must actually engage in production of the subject merchandise within the United States.[118] Utilities did not qualify. The court concluded that "[i]n explaining why it applies the tolling regulation in establishing export or constructed export price, but not in the industry support determination, Commerce has articulated reasons that are consistent with the purposes of the two sections of the statute."[119] The court also agreed with Commerce's conclusion that in this case the utilities stood to benefit from, rather than be injured by, the availability of lower-priced low-enriched uranium or enrichment services

---

114. *Id.*

115. *Id.* at 1342.

116. *Id.* at 1343.

117. *Id.* at 1345. Rather than order another remand at that point, the Court of International Trade instead certified the matter for interlocutory appeal to the Federal Circuit. The Federal Circuit affirmed the Court of International Trade, but on different grounds. Holding that the separative work unit contracts were contracts for the sale of services, the Federal Circuit ruled that they could not be subject to antidumping duties on that basis alone, and declined to reach the issue of the tolling regulation. That decision was appealed before the Supreme Court. *See* Eurodif S.A. v. United States, 411 F.3d 1355, 1365 (Fed. Cir.), *reh'g granted*, 423 F.3d 1275 (Fed. Cir. 2005), *rev'd*, 129 S. Ct. 878 (2009).

118. *USEC II*, 281 F. Supp. 2d at 1345.

119. *Id.* at 1346.

provided by foreign producers.[120] Therefore, the court concluded that "Commerce's application of different definitions of 'producer' in these two contexts is reasonable and therefore in accordance with law."[121]

The court also affirmed Commerce's finding that separative work unit transactions were covered by the countervailing duty statute.[122] In contrast to the identity of the "producer" issue (which was a Type II remand), here, Commerce no longer attempted to argue that the separative work unit contracts were essentially contracts for the sale of goods. Instead, Commerce presented an entirely new rational for its holding that was based on the plain meaning of the applicable countervailing duty law provisions. Commerce found that the language of the countervailing duty statute expressly provided that it was applicable where merchandise was imported and a countervailable subsidy had been provided with respect to the manufacture, production, or export of the merchandise.[123] Based on this statutory language, Commerce concluded that the countervailing duty law covered low-enriched uranium that was sold under separative work unit contracts.[124] After reviewing dictionary definitions of the critical statutory terms, the court found Commerce's "plain meaning" analysis of the applicable countervailing duty provisions to be reasonable.[125]

In short, as this discussion of the *USEC* cases demonstrates, where Commerce correctly understood the type of reversal and remand ordered by the court and produced remand results that were responsive to that understanding: Commerce was generally affirmed. Commerce correctly interpreted the court's decision on the industry support issue as a Type I remand and was able to provide on remand a cogent explanation of why Commerce regarded it appropriate to interpret the term "producer" differently in the two distinct statutory provisions at issue. Similarly, Commerce correctly interpreted the court's remand on the countervailing duty issue as a Type II remand. Rather than attempt to further explain or clarify its original reasoning—that the separative work unit contracts in substance provided for the sale of a good—Commerce instead developed an entirely different rationale for finding that the countervailing duty law was applicable, one that did not depend upon characterizing the

---

120. *Id.*
121. *Id.*
122. *Id.* at 1348.
123. *Id.* at 1347.
124. *Id.*
125. *Id.* at 1347-48. The Federal Circuit, however, disagreed, and reversed the Court of International Trade, also applying what it considered to be the plain meaning of the applicable statutory provisions. *See* Eurodif S.A. v. United States, 411 F.3d 1355, 1364-65 (Fed. Cir. 2005).

separative work unit contracts as providing for the sale of goods or finding that the enrichers took title to the feedstock or the low-enriched uranium. However, on the issue of the identity of the producer, which was also a Type II remand, Commerce largely reiterated and elaborated on its original reasons for finding the enrichers to be the producers. The court however fully understood those reasons the first time and had found them unsustainable. Not surprisingly, it found those reasons no more persuasive on remand.[126]

V. TYPE III—INSUFFICIENT OR ERRONEOUS FINDINGS

In this type of reversal, the court reverses because the agency has relied upon findings that the court regards as either erroneous or else insufficient to support the conclusion reached by the agency. As characterized by Judge Friendly, the crucial difference between a Type II "true *Chenery*" case and a Type III case is that, in the former, the agency may have "been wrong on the law, here it may have been right both on the law and on the facts but had made no findings adequate to demonstrate this."[127]

In *Bratsk Aluminum Smelter v. United States*,[128] the Federal Circuit reversed the ITC for failing to have made what it regarded as adequate findings regarding the impact of nonsubject imports in antidumping injury investigation.[129] The ITC had determined that subject imports of silicon metal had caused material injury to the domestic industry.[130] The ITC had concluded that the subject imports had significant volume effects and price effects and had adversely impacted the domestic silicon metal industry.[131] The ITC acknowledged that nonsubject imports had also been priced below the domestic like product and that the domestic industry had lost market share to both subject and nonsubject imports.[132] Nevertheless, the ITC had concluded that "regardless of the impact of nonsubject imports," the subject imports had depressed prices and had a material adverse impact on the domestic industry.[133] The respondents had argued before the ITC that the Federal Circuit's previous decision in *Gerald Metals v. United States*[134] required the ITC to make a specific

126. *Eurodif*, 411 F.3d at 1355.
127. Friendly, *supra* note 1, at 218.
128. 444 F.3d 1369 (Fed. Cir. 2006).
129. *Id.* at 1376.
130. *Id.* at 1371.
131. *Id.* at 1372.
132. *Id.*
133. *Id.*
134. 132 F.3d 716, 721 (Fed. Cir. 1997).

determination as to whether nonsubject imports would replace subject imports, if the subject imports were excluded from the market.[135] The ITC disagreed and characterized *Gerald Metals* as factually distinguishable.[136]

On review before the Federal Circuit,[137] the court reversed the ITC and held that the ITC was required to have made a specific determination with respect to whether nonsubject imports would have replaced subject imports.[138] At points in the opinion, the court appears to characterize the ITC's error as one of inadequate explanation, stating that "*Gerald Metals* thus requires the Commission to explain why—notwithstanding the presence and significance of the non-subject imports—it concluded that the subject imports caused material injury to the domestic industry [and that] the Commission did not sufficiently explain its decision" with regard to causation.[139] Yet as the dissent makes clear, the ITC had in fact explained its reasoning fairly cogently.[140] The ITC had noted that subject imports had underpriced the domestic-like product by higher margins and had increased more rapidly and gained more market share than nonsubject imports had.[141] The ITC specifically noted that in the first year in which the domestic industry experienced operating losses and had closed factories, nonsubject imports had declined while subject imports had increased.[142] Based on that data, the ITC concluded "the fact that nonsubject imports may have contributed to the domestic industry's continued deterioration toward the end of the period, along with subject imports, does not negate our finding that subject imports themselves had a material adverse impact on the domestic industry."[143]

On balance, it seems clear that what the majority was really saying was not that the reasons for the ITC's causation determination were unclear; rather, under the particular circumstances of *Bratsk* and other

---

135. *Bratsk*, 444 F.3d at 1372.

136. *Id.*

137. On review at the Court of International Trade, there was virtually no discussion of the issue of the ability of nonsubject imports to have replaced subject imports. While plaintiffs argued that the volume of nonsubject imports "dwarfed" the volume of subject imports during the previous three years, the court affirmed the ITC's decision and did not address the issue further, merely finding that subject import volume had increased and that it was reasonable for the ITC to conclude that the increase of volume over the period of investigation was significant. Bratsk Aluminum Smelter v. United States, No. 03-00200, slip op. at *10, *14, *15 (Ct. Int'l Trade June 22, 2004).

138. *Bratsk*, 444 F.3d at 1376.

139. *Id.* at 1375.

140. *Id.* at 1376, 1379.

141. *Id.* at 1377.

142. *Id.*

143. *Id.* at 1378.

cases involving commodity products and significant volumes of nonsubject imports, *Gerald Metals* required the ITC to make specific findings—findings that go beyond the normal causation analysis—as to whether elimination of subject imports would in fact benefit the domestic industry and not merely nonsubject imports:

> Thus under *Gerald Metals*, the increase in volume of subject imports priced below domestic products and the decline in the domestic market share are not in and of themselves sufficient to establish causation. *Gerald Metals* did not, of course, establish a per se rule barring a finding of causation where the product is a commodity product and there are fairly traded imports priced below the domestic product. However, under *Gerald Metals*, the Commission is required to make a specific causation determination and in that connection to directly address whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers.[144]

The court went on to explain that "[t]he obligation under *Gerald Metals* is triggered whenever the antidumping investigation is centered on a commodity product, and price competitive non-subject imports are a significant factor in the market."[145] Thus, the court in *Bratsk* sought not more explanation of the ITC's original reasoning, but rather, a specific finding on the issue of import replacement.[146] Certainly, this is how *Bratsk* has been interpreted by the ITC. On remand and in subsequent cases decided since *Bratsk*, the ITC has employed what it terms the "replacement benefit test" to make a specific determination of whether nonsubject imports would replace subject imports without benefiting the domestic industry.[147]

---

144. *Id.* at 1374-75.

145. *Id.* at 1375.

146. *Id.* at 1376. Interestingly, in *Bratsk*, the Federal Circuit does not mention *Chevron* nor does it discuss the specific statutory basis for an import replacement analysis. The decision in *Gerald Metals* is no more enlightening. Note the discussion *infra* regarding findings compelled by the record.

147. Bratsk Aluminum Smelter v. United States, 533 F. Supp. 2d 1348, 1350 (Ct. Int'l Trade 2008); *see also* Coated Free Sheet Paper from China, Indonesia, and Korea, Inv. Nos. 701-TA-444-446 (Final), USITC Pub. 3965 (Dec. 2007); Certain Lightweight Thermal Paper from China, Germany, and Korea, Inv. Nos. 701-TA-451 and 731-TA-1126-1128 (Preliminary), USITC Pub. 3964 (Nov. 2007); Steel Wire Garment Hangers from China, Inv. No. 731-TA-1123 (Preliminary), USITC Pub. 3951 (Oct. 2007).

A recent decision by the Court of Appeals for the Federal Circuit appears to have significantly narrowed and clarified nature of the findings required by *Bratsk*. In *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 869, 876, 877, 879 (Fed. Cir. 2008), the Federal Circuit vacated and remanded the ITC's application of its post-*Bratsk* replacement benefit test in a remand determination involving imports of steel wire rod from Trinidad and Tobago. The court held that *Bratsk* required only that the ITC consider the hypothetical question of whether nonsubject imports would have replaced subject imports *during the period of investigation* (which

Another case involving inadequate and/or erroneous factual findings is *Allied Pacific Food (Dalian) Co. v. United States*.[148] In an antidumping case involving frozen and canned warm-water shrimp from China, the court reversed and remanded several aspects of Commerce's determination of the appropriate surrogate value for raw shrimp.[149] Commerce had based the surrogate value on a calculation derived from a published financial statement of a seafood producer in India that was provided by the petitioner.[150] The plaintiffs, Chinese shrimp producers who were respondents below, challenged Commerce's use of that information in preference to three different datasets on shrimp prices that had been proffered by the respondents during the investigation: (1) price data collected by the Seafood Exporters Association of India (SEAI), (2) price data published by the Indian Aquaculture Certification Council (ACC), and (3) ranged data drawn from the public versions of antidumping responses submitted by respondents in the companion antidumping investigation on shrimp from India.[151]

The plaintiffs had three major objections to the use of the financial statement data: (1) that this information did not permit Commerce to distinguish between shrimp of different count-sizes (which was a significant factor in determining the price of shrimp); (2) that the financial statement data appeared to include results for sales of other types of seafood in addition to shrimp; and (3) that the financial statement data covered not only raw, but also semiprocessed shrimp.[152] All of these factors, the plaintiffs argued, made the financial statement data selected by Commerce a less reliable source of surrogate value than the data they provided from SEAI, from the ACC, or from the public responses of the Indian respondents, all of which were limited to raw shrimp and provided count-size specific prices.[153]

The court agreed, finding that despite respondents having raised the issue, Commerce had failed to make findings based on evidence in the record that the financial statement data was confined to purchases of raw, head-on, shell-on shrimp.[154] Rather, the court concluded that Commerce

---

the court characterized as an element of "but for" causation) and that the ITC was not required to make a finding about the "benefit" or effectiveness of relief that would result from the order that might be issued.

148. 435 F. Supp. 2d 1295 (Ct. Int'l Trade 2006).
149. *Id.* at 1296-97.
150. *Id.* at 1297.
151. *Id.* at 1306-07.
152. *Id.* at 1303.
153. *Id.* at 1303-04.
154. *Id.* at 1309-10.

had only determined that the company in question was a major producer of shrimp, and based on that fact, had assumed that the financial statement information was for raw shrimp.[155]

> Commerce, however, never cited to any record evidence to substantiate [the petitioner's] assertion that the Nekkanti financial statement data reflected only purchases of "in-scope" shrimp. Rather than addressing plaintiffs' objections that the Nekkanti data included seafood other than shrimp, Commerce invoked its broad discretion to choose the best available information and pointed to alleged deficiencies in the other data submissions.[156]

The court went on to review in detail the evidence on the record and concluded that Commerce had likewise failed to make findings that the financial data did not cover sales of semiprocessed, as distinct from raw, shrimp.[157]

In addition to these specific findings, the court also concluded that Commerce had "failed to explain adequately" why the financial statement data was superior to the data offered by the plaintiffs, even under Commerce's own stated criteria.[158] Despite the court's reference to the lack of an "adequate" explanation, however, the court's analysis reveals that the court in fact found that Commerce had failed to make adequate findings as to which dataset was preferable because it had not conducted a consistent, *comparative* analysis of the competing datasets under the criteria Commerce had identified.[159]

> Commerce discredited the various forms of surrogate value information that plaintiffs submitted, identifying what it considered to be deficiencies, without explaining adequately how the Nekkanti financial statement data that petitioner submitted, and Commerce accepted for use, were superior to these alternative sets of data according to the Department's own criteria.[160]

In addition, the court rejected certain specific justifications offered by Commerce in rejecting the alternative datasets. For example, the court found that Commerce had discredited the data provided by SEAI on the ground that they were "representative" but had failed to "clearly state a finding as to whether the SEAI data reflect actual market prices of unprocessed shrimp."[161] Similarly, Commerce had argued that the SEAI

---

155. *Id.*
156. *Id.* at 1310-11.
157. *Id.* at 1312.
158. *Id.* at 1314-15.
159. *Id.* at 1314.
160. *Id.*
161. *Id.* at 1319.

data did not cover certain count sizes used by the respondents.[162] The court found that this explanation "rings hollow" in view of the fact that Commerce's chosen surrogate value data contained no count size specific data.[163] With respect to the ACC data, the Court noted that Commerce had rejected this dataset on the ground that it suffered from "conflict of interest" compared to "publicly available" data but had made no specific findings whether the ACC data was in fact publicly available, nor had it made any other findings supporting the conclusion that the ACC had a conflict of interest.[164] Finally, the court found that Commerce's rejection of the public ranged data of the Indian respondents, merely because they were ranged, was flawed:

> The Department's reasoning for rejecting the ranged Devi/Nekkanti data is flawed. The Department's explanation points to no record facts from which a reasonable mind could conclude that the Devi/Nekkanti data are less accurate than the Nekkanti financial statement data for purposes of use as a surrogate value. Commerce recognized that "the value of the shrimp input is the most important factor of production" and reasoned that because the shrimp input is so important, any deviation in the ranged value from the actual value would produce a less accurate surrogate value. However, the fact that Commerce did not know the precise original values represented by the ranged data does not support a conclusion that the surrogate values derived from inherently flawed Nekkanti financial statement data are superior to the surrogate values based on the ranged Devi/Nekkanti data.[165]

This latter point is arguably more in the nature of a Type II (unsustainable reasons) remand rather than a true Type III ruling. And in truth, the nature of the issues underlying many Commerce appeals often do not lend themselves to a clear distinction between unsupportable reasons and inadequate findings. Commerce's decisions on points of antidumping methodology often involve choosing among alternative methodologies and/or data and the question of whether those choices are reviewed as "reasons" or "findings" can become an exercise in semantics. The important point, however, is that notwithstanding various references to the agency's failure to "explain" certain aspects of its reasoning, the court's decision in *Allied Pacific* clearly called for the agency on remand to do more than simply clarify the original reasons for its selection of the financial statement data as the appropriate source of the surrogate value. Rather, Commerce's task on remand was to make findings, based on

---

162. *Id.*
163. *Id.*
164. *Id.* at 1320-21.
165. *Id.* at 1322 (citations omitted).

evidence in the record, on each of the points raised by the court, and where the court has clearly indicated that certain findings (or "reasons") appear unsustainable on the record, Commerce is to either develop different ones that are supported in the record or to revise its choice of surrogate value.[166]

In *Allied Pacific*, Commerce seemed to have misunderstood the nature of the remand until the oral argument on the remand results. Commerce once again had selected the financial statement data as the source of the surrogate value for the remand results.[167] Then, Commerce requested a voluntary remand to reconsider its determination based on the court's pointed observation during oral argument that it had already rejected as inadequate Commerce's stated reason for declining to use the public, ranged data of the Indian respondents.[168]

VI. CONCLUSION

We note in concluding this Article that Judge Friendly recognized that there were cases "where the agency has simply failed to make a finding that the record compelled."[169] In such cases, he concluded that it was appropriate for the court not to reverse or remand but simply to decide the case based on that inescapable finding whether or not it had been fully articulated by the agency: "I perceive no reason why the court should not make, or regard as made, a finding that the agency could not lawfully have refused."[170] As we see it, proper judicial review also requires a court to be equally vigilant when the agency refuses to make a finding lawfully compelled by the record. An important first step to achieve the proper balance between the agency process and judicial review is for the agency to examine fully the type of remand ordered and make best efforts to comply. This Article is an effort to advance that goal.

---

166. *Id.* at 1322-23.

167. Allied Pac. Food (Dalian) Co. v. United States, No. 05-00056, slip op. at *7 (Ct. Int'l Trade Dec. 22, 2008).

168. *Id.* at *2-3, *52.

169. Friendly, *supra* note 1, at 224.

170. *Id.*