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Adjudicating International Trade Cases at the U.S. Commerce Department: Endless Remand or Balanced Resolve?, 39 J. Marshall L. Rev. 59 (2005)

Elizabeth C. Seastrum

Matthew D. Walden

ADJUDICATING INTERNATIONAL TRADE CASES AT THE U.S. COMMERCE DEPARTMENT: ENDLESS REMAND OR BALANCED RESOLVE?

ELIZABETH C. SEASTRUM* & MATTHEW D. WALDEN*

I. INTRODUCTION

The increasing complexity of antidumping and countervailing duty ("AD/CVD") litigation involving determinations by the U.S. Commerce Department, coupled with the deferential standard of review which Congress and the courts have mandated for review of such determinations, seem to have resulted in ever-increasing — and increasingly frustrating — numbers of remands from the court to the agency. Although this article does not attempt to present any statistical analysis as to whether this perception is correct, it does address some of the basic issues presented by the "endless remand" conundrum. What is a remand? When must a court remand to the agency? When can the agency request a remand? Why is remand necessary or important? Are there circumstances in which a court need not remand to the agency? Why are there so many remands in AD/CVD litigation and why do they take so long? When can the agency appeal a court remand? Before these questions can be discussed, however, we must first briefly address the standard of review — a well-known but, too easily ignored, requirement of law that has an appreciable effect on the number of remands.

II. THE STANDARD OF REVIEW: THE ELEPHANT IN THE ROOM

Any discussion of remands in AD/CVD litigation must occur against the backdrop of the standard of review applied by the courts in these cases. As discussed below, some of the reasons for the quantity of remands in trade litigation can be traced directly to the deference given Commerce. This includes the requirement that courts must not engage in fact-finding, but instead, must remand to the agency for that purpose. Courts must also remand to the agency if its legal or methodological interpretations are inadequate. In other words, the standard of review precludes courts from

* Ms. Seastrum is a former senior counsel for litigation at the U.S. Department of Commerce, Office of the Chief Counsel for Import Administration. This article represents the personal views of the author, and not necessarily the views of the Department of Commerce.

* Mr. Walden is an attorney with the U.S. Department of Commerce, Office of the Chief Counsel for Import Administration. This article represents the personal views of the author, and not necessarily the views of the Department of Commerce.

stepping into the agency's shoes and doing its work for it. Thus, to divorce the topic of remands from the standard of review would be to discuss the symptoms without considering the cause.[1]

A. Issues of Law

The Court of Appeals for the Federal Circuit has described Commerce as the "master" of the antidumping and countervailing duty law[2] and, therefore, accords "substantial deference to Commerce's statutory interpretation."[3] This deference is consistent with the two-prong test adopted by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*:[4]

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[5]

The Supreme Court further explained that a reviewing court must give deference to a reasonable interpretation adopted by an agency when Congress has left a gap in the statute.[6] When assessing whether an agency's statutory interpretation is reasonable, a court must uphold the agency's interpretation even if it is not "the only reasonable construction or the one that the court would adopt had the question initially arisen in a judicial proceeding."[7]

Recently, in *United States v. Mead Corp.*,[8] the Supreme Court elaborated on the factors it considers when determining whether to afford *Chevron* deference to an agency's statutory interpretation: "It is fair to

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1. Of course, underlying the concept of standard of review — by the judicial branch of the executive branch — is the more fundamental concept of our federal government's separation of powers. *See, e.g.*, THE FEDERALIST No. 51, at 268 (James Madison)(George W. Carey & James McClellan eds., 2001)(explaining the intentional partition of powers among the branches of government as essential to the preservation of liberty, and recognizing that each branch "should have a will of its own" and have "as little agency as possible in the appointment of the members of the others").

2. Torrington Co. v. United States, 68 F.3d 1347, 1351 (Fed. Cir. 1995). *See also* 19 U.S.C. § 1516a(b) (2005) (providing the standards of review that the judiciary should employ when reviewing any finding, conclusion or determination of Commerce in a countervailing duty or antidumping proceeding).

3. Fujitsu Gen. Ltd. v. United States, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

4. 467 U.S. 837 (1984).

5. *Id.* at 842-43 (footnotes omitted).

6. *Id.* at 843-44.

7. Krupp Stahl A.G. v. United States, 17 Ct. Int'l Trade 450, 455 (1993) (citing American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986)).

8. 533 U.S. 218 (2001).

assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[9]

In *Pesquera Mares Australes Ltda v. United States*,[10] the Federal Circuit addressed *Mead*, and determined that Commerce's procedures may "be fairly characterized as 'relatively formal administrative procedures' that adjudicate parties' rights."[11] The court held that the Department's statutory interpretations enunciated in an administrative determination "are entitled to judicial deference under *Chevron*."[12] Indeed, it is because of "Commerce's special expertise," that the courts have "accord[ed] substantial deference to its construction of pertinent statutes."[13] Similarly, in applying *Mead*, the Federal Circuit has held that Commerce's regulations adopted after notice-and-comment rulemaking are entitled to maximum deference.[14]

B. Issues of Fact

The factual determinations of the Department must be upheld unless they are not "supported by substantial evidence on the record."[15] The requirement that a determination be supported by substantial evidence does not mean that a determination must be supported by the weight of the evidence. Instead, "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[16] "This standard of review accords deference to an agency's conclusions."[17] The Supreme Court has reaffirmed that under the substantial evidence standard "[a] court reviewing an agency's adjudicative action should accept the *agency's* factual finding if those findings are supported by substantial evidence on the record as a whole . . . . The court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence."[18]A court may not

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9. *Id.* at 230 (footnote and citations omitted).

10. 266 F.3d 1372 (Fed. Cir. 2001).

11. *Id.* at 1381 (quoting *Mead*, 533 U.S. at 230).

12. *Id.* at 1382. *See also* Slater Steels Corp. v. United States, 297 F. Supp. 2d 1362, 1364 (Ct. Int'l Trade 2003) (relying on *Chevron* to articulate the statutory interpretation the court should take in anti-dumping cases); China Nat'l Mach. Imp. & Exp. Corp. v. United States, 264 F. Supp. 2d 1229, 1237 (Ct. Int'l Trade 2003) (stating that a court must uphold an agency's construction of a statute if it is reasonable and deference is to be afforded to Commerce in its statutory interpretations).

13. Micron Tech., Inc. v. United States, 117 F.3d 1386, 1394 (Fed. Cir. 1997).

14. Koyo Seiko Co. v. United States, 258 F.3d 1340, 1347 (Fed. Cir. 2001).

15. 19 U.S.C. § 1516a(b)(1)(B)(i) (2005).

16. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). *See also* Zenith Elec. Corp. v. United States, 77 F.3d 426, 430 (Fed. Cir. 1996) (defining "substantial evidence"); Ceramica Regiomontana, S.A. v. United States, 10 Ct. Int'l Trade 399, 404-05 (1986) (noting that the court will not impose its own views if there is substantial evidence), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

17. Mitsubishi Materials Corp. v. United States, 17 Ct. Int'l Trade 301, 303-05 (1993).

18. Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992) (citation omitted) (emphasis in original).

reweigh the record evidence by substituting its judgment for that of the investigating authority.[19] Moreover, the possibility of drawing two inconsistent conclusions from the record evidence does not prevent a finding of fact by the Department from being supported by substantial evidence.[20] "It is not the court's function to decide that it would have made another decision on the basis of the evidence."[21] While a court must take "into account the entire record" when determining whether the Department's factual findings are supported by substantial evidence,[22] this does not mean that the court may supplant the agency's findings with those of its own.[23] Rather, the Supreme Court stated that the requirement to examine "the whole record" was not meant to negate the expertise and experience of the agency charged with administering the law in a specialized field of knowledge.[24]

III. REMANDS DURING AD/CVD LITIGATION: AN INEFFICIENT PROCESS OR A VITAL ASPECT OF JUDICIAL REVIEW?

Just as the standard of review constrains a court when reviewing an agency determination, it also has repercussions on the relief granted when a court finds that a determination is not supported by substantial evidence or is not in accordance with law. The questions of when a court must remand to the agency, when the agency may request a remand, when the court may dispense with the remand requirement, and why there are so many remands in AD/CVD litigation are all interrelated. First, though, we must ask: what is a remand?

A. What is a Remand?

Remand literally means "to send back."[25] In the context of AD/CVD litigation, a remand occurs when the court sends a matter back to the Department for further proceedings. Usually, a remand by the court includes the instruction that the Department take action consistent with the court's

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19. Metallverken Nederland B.V. v. United States, 13 Ct. Int'l Trade 1013, 1017 (1989). *See also* Shandong Huarong Gen'l Corp. v. United States, 25 Ct. Int'l Trade 834, 834 (2001) (emphasizing the point that under the substantial evidence standard a court may not substitute its judgment for that of the Department). The court held that while the evidence on the record in that case was "not overwhelming," it did amount to "more than a 'mere scintilla.'" *Id.* at 842. The court, therefore, affirmed the Department's determination. *Id.* at 850.

20. Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 619-20 (1966).

21. *Mitsubishi*, 17 Ct. Int'l Trade at 304 (citing Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 936 (Fed. Cir. 1984)).

22. Atl. Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984).

23. Nippon Steel Corp. v. Int'l Trade Comm'n, 345 F.3d 1379, 1381-82 (Fed. Cir. 2003).

24. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). The Federal Circuit has stated that "this court accords deference to the determinations of the agency that turn on complex economic and accounting inquiries." Fujitsu Gen. Ltd. v. United States, 88 F.3d 1034, 1044 (Fed. Cir. 1996).

25. BLACK'S LAW DICTIONARY 1293 (6th ed. 1990). It is also common parlance to refer to Commerce's redetermination as a "remand," even though technically it is a redetermination in response to the court's remand.

opinion.[26] The Department will then make its redetermination, usually allowing the parties to comment on a draft redetermination in the process. As will be described below, a court generally is required to remand a case to an agency when the court determines that the agency's decision is not in accordance with law or is unsupported by substantial evidence. Only in the rarest of circumstances may the court dispense with the remand requirement and fashion its own final outcome in the case.

B. When Must a Court Remand to the Agency?

1. Actions not in accordance with law

When reviewing a Commerce determination, the court will hold unlawful any determination "not in accordance with law."[27] Generally, the "not in accordance with law" provision covers such matters as the agency's statutory interpretations and choice of methodology. Thus, when the court finds the agency's determination to be "not in accordance with law," remand is appropriate so that the agency may reach a new determination or develop a new methodology, applying the law as interpreted by the court.

Some good examples of these types of cases are those in which the courts have reviewed the Department's analysis of whether the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies. As a major — and perennially controversial — issue under the countervailing duty law, heavy litigation has resulted in these privatization cases bouncing back and forth among Commerce, the CIT, the Federal Circuit, and even Congress for the past decade. There have also been separate governmental challenges before the World Trade Organization ("WTO"). For example, in *Saarstahl AG v. United States*,[28] the CIT ruled that privatization at arm's length and fair market value extinguished any competitive benefit from prior allocated subsidies, thereby reversing Commerce's "gamma" methodology, which provided for partial extinguishment according to a formula. The Federal Circuit reversed the CIT, affirming the gamma methodology.[29] Congress then stepped in to pass a statute that, in effect, reversed the CIT's ruling of automatic extinguishment, but left unclear what methodology should apply.[30] The Federal Circuit interpreted the new statute in *Delverde SrL v. United States*, and ultimately invalidated Commerce's gamma methodology.[31] As a result of this ruling, and as well to implement an adverse WTO report, Commerce devised the "same person" methodology — which engendered further litigation. That methodology was eventually rejected by the CIT, the Federal

26. *See, e.g.*, China Nat'l Mach. Imp. & Exp. Corp. v. United States, 264 F. Supp. 2d 1229, 1243 (Ct. Int'l Trade 2003) (remanding case to adequately explain its determinations).

27. 19 U.S.C. § 1516a(b)(1)(B)(i) (2005).

28. 18 Ct. Int'l Trade 525 (1994).

29. Saarstahl AG v. United States, 78 F.3d 1539, 1544-45 (Fed. Cir. 1996).

30. 19 U.S.C. § 1677(5)(F) (2000).

31. 202 F.3d 1360, 1367 (Fed. Cir. 2000).

Circuit, and the WTO.[32]

Commerce has since crafted a new methodology. In such a long and tortuous history, spanning different countries and products, the court has ordered and the agency has requested, countless remands in the many CVD cases to implement these various methodological changes.

2. Actions unsupported by substantial evidence

When reviewing the factual aspects of a Commerce determination, the court will hold unlawful an action that is "unsupported by substantial evidence on the record."[33] In such a case, however, the court may not reach its own factual findings. Rather, it must remand the matter to the agency for reevaluation in light of the court's opinion. As the Supreme Court has stated, "[i]f the record before the agency does not support the agency action . . ., the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."[34] Thus, the court "is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."[35] Rather, it must return jurisdiction to the agency.[36]

Given the highly technical and fact-intensive nature of trade remedy cases, the requirement that the court remand a determination that it finds to be unsupported by substantial evidence is of special importance. Indeed, the Federal Circuit recently reaffirmed this rule in *Nippon Steel Corp. v. International Trade Commission*.[37] In *Nippon*, the CIT reviewed a material injury finding by the International Trade Commission ("ITC") and reversed the ITC, directing the agency to find no material injury. On appeal, the ITC alleged that the CIT exceeded its authority by making determinations on the credibility of record evidence before the ITC and by engaging in other fact-finding functions.[38] The Federal Circuit agreed, stating that the essence of the disagreement between the ITC and the CIT was the proper weight to accord certain record documents and the extent to which they undercut

32. *See* Allegheny Ludlum Corp. v. United States, 182 F. Supp. 2d 1357 (Ct. Int'l Trade 2002), *aff'd*, 367 F.3d 1339 (Fed. Cir. 2004) (striking down the "same person" methodology as contrary to the intent of 19 U.S.C. §§ 1677(c), (d), and (e)).

33. 19 U.S.C. § 1516a(b)(1)(B)(i) (2005).

34. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

35. *Id.*

36. The Supreme Court spoke again of the necessity of remand recently in *Immigration and Naturalization Serv. v. Ventura*, 537 U.S. 12 (2002). In *Ventura*, the court of appeals, looking at the same record evidence as the agency, found that this evidence compelled the court to reach the opposite factual conclusion from the agency. *Id.* at 15. Thus, the court determined that a remand to the agency was not appropriate. *Id.* The Supreme Court reversed the court of appeals, reminding it that "[g]enerally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *Id.* at 16. In reaching its own conclusion based on the record evidence, the court of appeals "seriously disregarded the agency's legally-mandated role." *Id.* at 17.

37. 345 F.3d 1379 (Fed. Cir. 2003).

38. *Id.* at 1380.

certain testimony.[39] The Federal Circuit stated that it was irrelevant "whether the Commission or the Court of International Trade did better at drawing the most reasonable inferences" from the record evidence:

> Under the statute, only the Commission may find the facts and determine causation and ultimately material injury — subject, of course, to Court of International Trade review under the substantial-evidence standard. The Court of International Trade, despite its very fine opinions and analysis, went beyond its statutorily-assigned role to "review." Despite its express dissatisfaction with the fact-finding underlying the Commission's remand decision, the Court of International Trade abused its discretion by not returning the case to the Commission for further consideration.[40]

The Federal Circuit went on to hold that, to the extent the CIT engaged in re-finding the facts, it exceeded its authority and should have instead remanded the case again to the ITC for further proceedings.[41]

In addition to determinations unsupported by substantial evidence, there may be occasions when the court finds that the agency failed to provide the court with the basis for its determination. In such a case, when the court simply cannot evaluate the agency's action on the basis of the administrative record, the court must remand to the agency for additional explanation or investigation.[42] The CIT has long applied this rule, stating that because the court does not sit as finder of fact, the "failure of the [Department] to provide the court with the basis of its determination precludes the court from fulfilling its statutory obligation on review."[43] Therefore, the CIT will remand to Commerce so the agency can provide the necessary explanation.[44]

C. When Can the Agency Request a Remand?

The foregoing discussion described the circumstances in which a court must remand a case to the agency. Implicit in that discussion was the fact that the agency normally defends its determination as supported by substantial evidence and in accordance with law. There are, however, circumstances in which the agency may voluntarily request a remand. In *SKF USA, Inc. v. United States*,[45] the Federal Circuit described the "taxonomy" of remands, or the myriad of positions the agency might take

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39. *Id.* at 1381.

40. *Id.*

41. *Id.* at 1381-1382. It is worth noting that the CIT already remanded once to the ITC. Thus, the result of the Federal Circuit's decision was a second remand. It is also worth noting that the unusual two-tier nature of judicial review — at both the CIT and Federal Circuit — of AD and CVD cases can result in additional remands, as in this case.

42. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

43. Industrial Fasteners Group, Am. Imp. Ass'n v. United States, 2 Ct. Int'l Trade 181, 190 (1981).

44. *Id.* At the same time, a rule of reason prevails: if the agency's path is reasonably discernible, it may be affirmed, even if its determination is of less than ideal clarity. *See* Ceramica Regiomontana, S.A. v. United States, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (affirming the Court of International Trade based on reasonable discernability despite questionable clarity).

45. 254 F.3d 1022 (Fed. Cir. 2001).

before the court. Three of these positions involve voluntary requests for remand by the agency.[46]

First, the agency may seek a remand because of intervening events outside of its control, such as a new legal decision or new legislation.[47] In such a case, remand is required "if the intervening event may affect the validity of the agency action."[48]

Second, the agency may request remand (without confessing error) to reconsider its previous position.[49] For example, the agency may wish to further consider the governing statute, the procedures that were followed, or the relationship of the agency decision to the agency's other policies.[50] In such a situation, the reviewing court has discretion over whether to grant the request for remand.[51] The court may refuse the agency's request if it is frivolous, but may grant the request if the agency's concern is "substantial and legitimate."[52]

Third, the agency may request a remand if it believes its original decision is incorrect on the merits and wants to change the result.[53] Under this scenario, remand is appropriate if the agency simply wishes to correct clerical or similar errors.[54] However, the question is closer if the basis for the remand request is to change an agency policy or interpretation.[55] If there is a *Chevron* step one issue — "that is, an issue as to whether the agency is

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46. The other two possible agency positions are the more familiar ones. First is the typical situation where the agency defends its decision on the grounds articulated in the decision. *Id.* at 1028. The court then reviews this decision in accordance with the standard of review. *Id.* Second, the agency might seek to defend its decision on the basis of grounds not previously asserted by the agency. *Id.* In this situation, the court normally will not consider the agency's newly developed rationale, but will instead affirm or reverse on the basis of the agency's original grounds. *Id.* (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

47. *SKF*, 254 F.3d at 1028-1029. See also this article's discussion of the privatization cases, *supra* section III(B)(1).

48. *SKF*, 254 F.3d at 1028-1029. If the remand concerns an issue of agency-wide application, then remands in all other cases before the court, in which the issue was raised, may also be necessary.

49. *SKF*, 254 F.3d at 1029. *See also* Elkem Metals Co. v. United States, 2004 Ct. Int'l Trade LEXIS 35, *8 (2004) (granting agency's remand request so that it could give "full and fair consideration" to issue).

50. *SKF*, 254 F.3d at 1029.

51. *Id.*

52. *Id. But see* Corus Staal BV v. United States, 259 F. Supp. 2d 1253 (Ct. Int'l Trade 2003), where Commerce requested a remand to "reconsider its decision" regarding whether certain sales were properly classified as export price or constructed export price transactions. *Id.* at 1257. The Court explained that because of "concerns for finality," the "agency must state its reasons for requesting remand" and "the court must be apprised of the reason for the remand request, whether it be on account of error or merely a change in policy." *Id.* Here, Commerce did not provide "any reason, policy or otherwise, for requesting a remand. . . . This is insufficient to support a voluntary remand." *Id. See also* Pohang Iron & Steel Co. v. United States, 24 Ct. Int'l Trade 566 (2000) (denying remand request made by domestic petitioners, not agency, in a pre-*SKF* case).

53. *SKF*, 254 F.3d at 1029.

54. *Id.*

55. *Id.*

either compelled or forbidden by the governing statute to reach a different result" – the court has "considerable discretion" in deciding whether to grant the remand request. It can either decide the statutory issue or remand the case.[56] On the other hand, if there is no *Chevron* step one issue, remand is required (absent unusual circumstances bordering on agency bad faith).[57] In such a situation, a remand not only preserves the agency's authority to formulate policy but also to fill the gaps in the governing statute.[58] The Federal Circuit also noted that an agency's discretion to reconsider the wisdom of its policies is preserved when an agency action is appealed.[59]

D. Why is Remand Necessary or Important?

The reasons supporting the remand requirement are compelling regardless of whether the court reverses the agency's decision as not in accordance with law or unsupported by substantial evidence, or the agency voluntarily requests a remand. In fact, the reasons why remands are necessary or important in AD/CVD litigation (and, in fact, in all litigation involving review of federal agency actions) are inextricably linked to the reasons behind the deferential standard of review afforded the agencies in such litigation. These reasons, described below, go to the heart of the constitutional separation of powers and functions between the executive and judicial branches. Thus, even when it seems that further remand accomplishes nothing other than further delay, important considerations nevertheless counsel in favor of returning jurisdiction to the agency.[60]

1. Congress entrusts the agency to administer the law

The most fundamental rationale for the remand rule is that Congress has entrusted the various federal agencies with the administration of their respective statutes. In the AD/CVD context, the CIT has recognized that "Congress entrusted Commerce with discretion to administer the international trade laws . . . ."[61] Thus, a remand to Commerce preserves the Department's authority to "exercise the discretion granted it by Congress."[62] In this respect, a remand to the agency effectuates Congress's intent that the agency remain responsible for administering the statute.

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56. *Id.*

57. *Id.* at 1029-1030. *But see Corus Staal*, 259 F. Supp. 2d at 1257 (explaining that decision reconsideration is insufficient to support a voluntary remand).

58. *SKF*, 254 F.3d at 1030.

59. *Id.* This is what happened in *SKF*. The Federal Circuit found that the particular statutory definition was ambiguous; thus, Commerce could change its interpretation, and remand was appropriate. *Id.* at 1029-1030.

60. *See* Micron Tech., Inc. v. United States, 23 Ct. Int'l Trade 380, 382 (1999) (recognizing that while "additional delay will result from a further remand" and sympathizing with one party's "frustration," "the proper course of action" was to remand to Commerce for it to "rectify its error in an expedited fashion").

61. Citrosuco Paulista, S.A. v. United States, 12 Ct. Int'l Trade 1196, 1206 (1988). *See also* 19 U.S.C. § 1677(1) (2005) (defining "administering authority" as "the Secretary of Commerce").

62. Bethlehem Steel Corp. v. United States, 2001 Ct. Int'l Trade 93, 907-08 (2001).

By entrusting Commerce with administration of the AD/CVD laws, Congress also entrusted Commerce with the choices between competing policies that accompany the administration of the laws. Therefore, the remand requirement ensures that Commerce, not the courts, makes the policy choices inherent in administering the AD/CVD laws.[63] The Supreme Court in *Chevron* said it best when it stated, "[T]he responsibilities for assessing the wisdom of such policy [issues] and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'"[64]

2. Remand permits the agency to apply its expertise

Closely related to the idea that remand preserves the agency's responsibility to administer the law is the idea that remand permits the agency to apply its technical expertise to the subject at hand. According to the Supreme Court, the notion that "[t]he agency can bring its expertise to bear upon the matter" is one of the considerations "that classically supports the law's ordinary remand requirement."[65] Thus, in the context of AD/CVD proceedings, the courts have regularly recognized that deference to agency expertise suggests the proper action is to remand back to the agency.[66] As the Federal Circuit has recognized, "[a]ntidumping and countervailing duty determinations involve complex economic and accounting decisions of a technical nature, for which agencies possess far greater expertise than courts."[67]

Of course, the term "agency expertise" refers to both expertise over factual issues and to application of the law to the facts — which is often called Commerce's "methodology." The reviewing court has the final say on purely legal (*i.e.*, *Chevron* step one) questions. The court also has the final say on whether the agency's factual findings are supported by substantial evidence. Thus, in the typical remand situation, the CIT may find a particular statutory interpretation by Commerce incorrect as a matter of law or a particular decision unsupported by substantial evidence. In light of Commerce's expertise, the CIT should then give the agency the "first opportunity" to apply a new methodology or to reconsider the facts.[68]

63. *See* Ta Chen Stainless Steel Pipe v. United States, 25 Ct. Int'l Trade 989, 994 (2001) (recognizing that remand was necessary "to allow the agency to make the policy judgments inherent in construing and applying an ambiguous statutory provision").

64. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 866 (1984) (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)).

65. Immigration & Naturalization Serv. v. Ventura, 537 U.S. 12, 17 (2002).

66. *See, e.g.*, *Bethlehem*, 2001 Ct. Int'l Trade 93 at 907 (stating that remand will allow Commerce to apply its expertise to the record).

67. Fujitsu Gen., Ltd. v. United States, 88 F.3d 1034, 1039 (Fed. Cir. 1996).

68. *See* Aimcor v. United States, 154 F.3d 1375, 1380 (Fed. Cir. 1998) (concluding that CIT erred in imposing methodology on Commerce in an "untested setting and that Commerce should be given the first opportunity to determine the appropriate method to apply in this area of its expertise").

3. The court's role is to review

The two considerations supporting the remand requirement above have focused on the agency's role in AD/CVD proceedings. The court's role, an equally important consideration, is to "review" the agency's determination on the basis of the administrative record while applying the appropriate standard of review.[69] Thus, the remand requirement ensures that the court does not venture beyond its role as reviewer.

In the recent *Nippon* case, the Federal Circuit reiterated this very point. In finding that the CIT exceeded its authority by re-finding the facts relating to material injury, the Federal Circuit stated that the court, "despite its very fine opinions and analysis, went beyond its statutorily-assigned role to '*review*.'"[70] By confining the court's role to that of reviewer, the remand requirement ensures that courts are not bogged down with the time-consuming task of finding the facts in every AD/CVD case. Rather, the courts can focus their energies on the legal issues and determinations that are within their special area of expertise.

4. Remand facilitates development of the administrative record for review

Because the court's role is to "review" the agency's determination, it necessarily follows that there must be something there for the court to review. That something is the administrative record. The remand requirement facilitates the court's review function by providing a mechanism by which the agency can further develop the administrative record and analyze the relevant problem.[71] Additional development of the administrative record is especially important in cases where the agency is found to have failed to consider an important issue[72] or failed to provide interested parties with meaningful opportunity to participate.[73] In some instances, a remand directing the agency to further consider an issue can ultimately "obviate entirely the need for further judicial review."[74]

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69. *See* 19 U.S.C. § 1516a(a) (2000) (specifying the administrative actions subject to review in AD/CVD proceedings); *Id.* § 1516a(b) (defining the standards of review and composition of the administrative record).

70. Nippon Steel Corp. v. Int'l Trade Comm'n, 345 F.3d 1379, 1381 (Fed. Cir. 2003) (emphasis added).

71. *See* Immigration & Naturalization Serv. v. Ventura, 537 U.S. 12, 17 (2002) (noting that "every consideration that classically supports the law's ordinary remand requirement" is present in this case so that on remand "[t]he agency . . . can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides").

72. *See* Allegheny Ludlum Corp. v. United States, 24 Ct. Int'l Trade 452, 477-80 (2000) (remanding because Commerce failed to consider certain record evidence).

73. *See* Bethlehem Steel Corp. v. United States, 25 Ct. Int'l Trade 519, 531 (2001) (remanding because Commerce did not provide opportunity for comment on suspension agreement).

74. Bethlehem Steel Corp. v. United States, 2001 Ct. Int'l Trade 93, 907-08 (2001). *See also* China Steel Corp. v. United States, 306 F. Supp. 2d 1291, 1295 n.6 (Ct. Int'l Trade 2004) (reviewing Commerce's remand redetermination and deciding, with respect to one issue, that "[b]ecause both parties concede that this issue has been resolved on remand, the Court declines to address it here").

E. Are There Circumstances in Which a Court Need Not Remand to the Agency?

Generally, the court must remand to the agency when an agency decision is not in accordance with law or is unsupported by substantial evidence. There are, however, rare situations where the usual considerations supporting the remand requirement are not present and a remand is not required.

For example, remand is not required when the contemplated agency action on remand would not involve any exercise of agency discretion or expertise. Thus, the Federal Circuit has found that the CIT is not required to remand a case when the agency action "would be a simple ministerial act."[75] The Court of Appeals has explained that

> "[i]n determining whether and how [the remand requirement] is to be applied, . . . its purpose must always be kept in mind: it is designed to [e]nsure that the reviewing court does not intrude impermissibly on the authority of the administrative agency by itself taking action that implicates the agency's expertise and discretion."[76]

Similarly, remand may not be required when the issues in a case do not involve agency findings or interpretations pursuant to the statute it administers, but rather involve general legal principles outside the agency's normal field of expertise. In *NEC Corp. v. Department of Commerce*, the CIT reviewed the Department's interpretation of a sales contract to determine whether the supercomputer sold pursuant to that contract fell within the scope of an antidumping duty order.[77] According to the CIT, the Department's interpretations involved general contract law principles, not AD/CVD law principles, and were developed for purposes of litigation.[78] Therefore, the CIT afforded Commerce no deference and found its determination not in accordance with law.[79] It stated that because "[t]he issues involved in this case are purely legal," remand was not necessary, and it therefore ordered Commerce to exclude the supercomputer at issue from the scope of the antidumping order.[80]

As demonstrated by these examples, the few exceptions to the normal remand requirement only apply when the policy considerations behind the normal rule are absent or do not make sense in the context of the case at hand. The exceptions serve to expedite dispute resolution when remand would be unnecessary. As will be described below, however, general concern about the inherent delay in remand is an insufficient basis for

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75. Int'l Light Metals v. United States, 279 F.3d 999, 1003 (Fed. Cir. 2002).

76. *Id.* at 1003. *See also* Pohang Iron & Steel Co. v. United States, 24 Ct. Int'l Trade 566, 571 (2000) (denying remand request of domestic parties because "it would serve no purpose in this case").

77. 23 Ct. Int'l Trade 727 (1999).

78. *Id.* at 729-30.

79. *Id.* at 731-36. In deciding not to give deference to the agency, the CIT explained that this case involved "unusual circumstances." *Id.* at 731.

80. *Id.* at 735. The CIT stated that remand would be a "'mere formality.'" *Id.* (quoting NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416, 431 (1947)).

dispensing with the remand requirement.

F. Why Are There So Many Remands in AD/CVD Litigation and Why Do They Take So Long?

This question has been partially answered. The quantity of remands in AD/CVD litigation is directly related to the deferential standard of review in these cases and the general remand requirement in administrative law articulated by the Supreme Court and all lower courts. There are compelling policy reasons in favor of the remand requirement and few exceptions to its application.

Other factors are also responsible for the quantity of remands and the lengthiness of AD/CVD litigation. Challenges to the Department's determinations often involve numerous issues. For example, the recent case *AL Tech Specialty Steel Corp. v. United States*, a challenge to Commerce's final determination in a countervailing duty investigation, involved ten issues.[81] During the case's first phase, the CIT upheld the Department on three issues and remanded on the remaining seven issues.[82]

Another factor to consider is that the Department usually issues a draft redetermination pursuant to a court remand. This allows for procedures similar to those followed in the original proceeding so that all the parties have an opportunity to comment on the draft redetermination before the Department issues its final redetermination.[83] This allows for development of a full record on the remanded issues for the court to review and increases the likelihood that calculation and other errors may be brought to the agency's attention and corrected before the matter returns to the court for review. After the final redetermination, the parties then file their comments on the redetermination with the court whereupon Commerce replies.[84]

Often, however, Commerce's redetermination does not end the matter. The CIT might find that the Department's redetermination is not in accordance with law or is unsupported by substantial evidence. The same remand requirement applies here as applied in the original proceeding. Therefore, a second (and sometimes third) redetermination will result.[85]

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81. 366 F. Supp. 2d 1236 (Ct. Int'l Trade 2004).

82. *See* AL Tech Specialty Steep Corp. v. United States, 26 I.T.R.D. (BNA) 2402 (Ct. Int'l Trade 2004)(providing the underlying procedural history of *AL Tech*).

83. *See, e.g.*, Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States, 276 F. Supp. 2d 1371, 1373 (Ct. Int'l Trade 2003) (noting Commerce "duly complied" with order by issuing draft redetermination results); Laclede Steel Co. v. United States, 24 Ct. Int'l Trade 1293, 1295 (2000) (noting Commerce addressed parties' concerns in final Remand Determination, issuing a draft remand, and providing an opportunity for parties to comment).

84. *See, e.g.*, China Steel Corp. v. United States, 264 F. Supp. 2d 1339, 1372 (Ct. Int'l Trade 2003) (concluding that parties have fifteen days to submit comments on remand determination); Rhodia, Inc. v. United States, 185 F. Supp. 2d 1343, 1358 (Ct. Int'l Trade 2001) (granting parties thirty days to submit comments on remand determination).

85. *See, e.g.*, Hynix Semiconductor, Inc. v. United States, 318 F. Supp. 2d 1314, 1315 (Ct. Int'l Trade 2004) (reviewing Commerce's second redetermination pursuant to remand); Koenig & Bauer-Albert AG v. United States, 24 Ct. Int'l Trade 157 (2000) (reviewing Commerce's second redetermination pursuant to remand).

Adding further complexity to the situation is the possibility that Commerce may, over time, experience personnel attrition. In this situation, when an extended period of time passes between the agency's final determination and the court's decision, those within Commerce who worked on the original determination may have left the Department, thereby leaving the responsibility for the remand redeterminations with those who are unfamiliar with the specifics of the case. Additionally, it occasionally happens on remand that a new issue arises and must be addressed because of a methodological change. It is also possible that, upon remand, Commerce may not be able to effectuate the court's remand instructions without additional factual information. The Department may then request additional time to reach its redetermination as it collects the additional information from the respondent or petitioner.[86]

In cases involving multiple remands and redeterminations, frustration and delay are inevitable. But concern about delay is generally not a basis for dispensing with the remand requirement. In *Micron Technology, Inc. v. United States*, the CIT reviewed the Department's redetermination pursuant to a prior remand.[87] The court found that "Commerce ignored the court's remand instruction" in its original opinion.[88] In fact, the CIT stated that "Commerce's decision on remand has wasted the Court's time as well as that of the litigants."[89] In light of a party's request for no further remands, the CIT recognized that "additional delay will result from a further remand."[90] Nevertheless, the court remanded to Commerce again, stating that "the proper course of action is to have the agency rectify its error in an expedited fashion."[91] Similarly, in *Royal Thai Government v. United States*, the CIT recognized "the inefficiency and delay that result when final judicial review is postponed until after the agency accomplishes on remand that which it should have accomplished in the period prescribed for the administrative review."[92] Nevertheless, the court ordered a remand.[93]

There are some ways to minimize delay. For example, in *Micron* the CIT ordered Commerce to conduct the remand redetermination on an expedited basis.[94] This may only be done in the occasional case, however, given the limits of the agency's resources. Additionally, if the court's original remand order is unclear, a motion for clarification by the government may be appropriate and resource-efficient. This option is preferred to an agency executing the order based on its interpretation of what the court intended, only to discover, when the court rules on the

86. *See, e.g.*, Carpenter Tech. Corp. v. United States, 344 F. Supp. 2d 750, 755 (Ct. Int'l Trade 2004) (extending the time period in which Commerce can carry out the remand).

87. 23 Ct. Int'l Trade 380, 380 (1999).

88. *Id.* at 381.

89. *Id.* at 382.

90. *Id.*

91. *Id.*

92. 17 Ct. Int'l Trade 534, 539 (1993).

93. *Id.* at 539-40.

94. *Micron*, 23 Ct. Int'l Trade at 382.

redetermination, that the agency misunderstood the order and another remand is needed. A further matter recently contributing to agency delay is the issuance of a number of court decisions using business proprietary information ("BPI").[95] These decisions seem to be slow to reach Commerce analysts. At the same time, the public version of the court decision is slow to appear on the court's very useful, and usually speedy, website.[96] Since Commerce normally explains its reasoning and determination in a public Issues and Decision Memorandum, the need to rely on BPI in a court decision should be rare.

G. When Can the Agency Appeal a Court Remand Order?

A final word should be said about the appealability of court remand orders and an agency's response to such an order. Generally, an order remanding a case to an agency is not final and, therefore, cannot be appealed.[97] There are, however, exceptions to this rule. If the court's remand order requires the agency to perform only a "mechanical or other ministerial task that required no exercise of judgment or discretion," that order will be considered appealable.[98] For example, if the remand is ordered solely to allow the agency to correct clerical errors, but not to perform additional substantive functions, the order is "final" for purposes of appeal.[99]

Sometimes it may not be clear to the agency how it is supposed to proceed in the face of a court order. In such cases, the agency may file a Motion for Reconsideration or Motion for Clarification. For example, in *Royal Thai Government v. United States*, the government filed a request for clarification of the CIT's order so as to determine whether that order constituted a final, appealable order.[100]

Because a remand order is not final, the agency might be faced with a situation in which it must adopt a new position, under protest, in its redetermination in order to ensure appellate review. This was the situation in

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95. *See generally* James Toupin, *United States Court of Appeals For The Federal Circuit Tenth Anniversary Committee Issue: International Trade Decisions of The United States Court of Appeals For The Federal Circuit During 1991*, 41 AM. U. L. REV. 983, 1012-14 (1992) (discussing the history of business proprietary information used in anti-dumping and countervailing duty administrative procedures).

96. Website of The United States Court of International Trade, http://www.cit.uscourts.gov (last visited Oct. 19, 2005).

97. *See, e.g.*, Cabot Corp. v. United States, 788 F.2d 1539, 1543 (Fed. Cir. 1986) (concluding that remand order was "not a final appealable order. Where, as here, the trial court remands to the administrative agency for additional findings, determination, and redetermination, the remand order is not appealable even though the order resolves an important legal issue . . . ."); Save Domestic Oil, Inc. v. United States, 24 Ct. Int'l Trade 1345, 1346 (2000), *appeal dismissed* 18 Fed. Appx. 819 (Fed. Cir. 2001) (stating that administrative remand orders are "not final and immediately appealable").

98. Koyo Seiko Co., Ltd. v. United States, 95 F.3d 1094, 1096-1097 (Fed. Cir. 1996) (internal quotations omitted) (citing Crowder v. Sullivan, 897 F.2d 252, 252 (7th Cir. 1990)).

99. *Id.* at 1097.

100. Royal Thai Government v. United States, 341 F. Supp. 2d 1315 (Ct. Int'l Trade 2004).

Viraj Group, Ltd. v. United States.[101] In that case, after three remands, Commerce acquiesced under protest in its third redetermination and was affirmed by the CIT. The United States then appealed the CIT's affirmance of this redetermination. The Federal Circuit was thus faced with the question of whether the government had standing to appeal a case in which it technically was the prevailing party.[102] The Federal Circuit stated that "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."[103] The United States was "truly the non-prevailing party" and to hold otherwise, according to the court, "would exalt form over substance."[104] The government therefore had standing. If the agency adopts a new position on remand, but fails to register its objections, it risks losing its standing to appeal.

IV. CONCLUSION

Life without remands in AD/CVD litigation would be a professional life in which neither the court nor the trade bar would be doing its job. The original fact-finder and decision-maker will inevitably make some factual/technical mistakes or, even if it is perfect in this aspect of its job, confront issues where views strongly conflict. Since the court's original powers in this regard are limited by Congress and judicial precedent, remands inevitably result for the agency to correct its original determinations. This is not to say that mitigation of the "endless remand" problem is impossible; indeed, we have suggested some areas of improvement above. However, the separation of powers between the agency and the reviewing court, as well as the standard of review based on the agency's record, preclude an easy "fix" to the remand "problem." Counsel must continue to apprise its clients of this fact of litigating life in this area of the law. The best protection against being caught in the remand wheel is for practitioners to present their case thoroughly, accurately, and vigorously before the agency in the first place. This increases the likelihood of the agency "getting it right" with regard to counsel's client and ultimately decreases the likelihood of lengthy litigation.

101. 343 F.3d 1371 (Fed. Cir. 2003).
102. *Id.* at 1375.
103. *Id.* at 1376.
104. *Id.*