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2017 International Trade Law Decisions Of The Federal Circuit

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2017 INTERNATIONAL TRADE LAW DECISIONS OF THE FEDERAL CIRCUIT

KEVIN J. FANDL*

TABLE OF CONTENTS

Introduction.....	1330
I. Classification.....	1330
A. <i>Schlumberger Technology Corp. v. United States</i>	1331
B. <i>The Container Store v. United States</i>	1332
C. <i>Chemtall, Inc. v. United States</i>	1334
II. Antidumping and Countervailing Duty Cases.....	1335
A. <i>Mid Continent Nail Corp. v. United States</i>	1336
B. <i>American Tubular Products v. United States</i>	1339
C. <i>Changzhou Hawd Flooring v. United States</i>	1340
D. <i>Meridian Products, LLC v. United States</i>	1341
E. <i>Boomerang Tube, LLC v. United States</i>	1343
F. <i>Suntec Industries Co. v. United States</i>	1344
G. <i>United States v. American Home Assurance Co.</i>	1345
H. <i>Maverick Tube Corp. v. United States</i>	1347
I. <i>Maverick Tube Corp. v. Toscelik Profil ve Sac</i> <i>Endustrisi A.S.</i>	1348
J. <i>Apex Frozen Foods Private Ltd. v. United States</i>	1350
K. <i>Diamond Sawblades Manufacturers Coalition v.</i> <i>United States</i>	1351
Conclusion.....	1353

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INTRODUCTION

The 2017 term of the U.S. Court of Appeals for the Federal Circuit included fourteen precedential appeals from the Court of International Trade (CIT). Many of these cases turned on the same issues analyzed in Federal Circuit cases in prior years, such as when a company can escape the presumption that if it operates in China it must be part of a non-market economy (NME), or how to properly determine the value of goods in order to assess a dumping margin. A few standout cases this term include the *Mid Continent Nail Corp. v. United States*¹ case, which addressed the extent to which a foreign exporter must be provided notice of a rule change that might affect it; the *Changzhou Hawd Flooring Co. v. United States*² case, which examined whether the U.S. Department of Commerce (“Commerce”) is permitted to depart from the statutory “expected method” for valuing goods; and *The Container Store v. United States*³ case, which provided clarity on the definition of unit furniture for classification purposes.⁴

Part I outlines the cases addressing the classification of goods, which includes much narrower, case-specific findings. Part II summarizes dumping-related matters and administrative reviews of antidumping orders, which were addressed in the vast majority of cases this year.

I. CLASSIFICATION

All goods imported into the United States must be identified so that the proper duties, if any, may be applied.⁵ This process is known as classification and is conducted by the U.S. Customs and Border Protection (CBP), a subsection of the U.S. Department of Homeland Security.⁶ CBP relies on the U.S. Harmonized Tariff Schedule (HTSUS), a schedule identifying nearly every possible type of imported product, to conduct its classifications.⁷ An importer typically provides CBP with its own classification; however, if CBP disagrees, then CBP will reclassify the good and charge the importer the

1. 846 F.3d 1364 (Fed. Cir. 2017).

2. 848 F.3d 1006 (Fed. Cir. 2017).

3. 864 F.3d 1326 (Fed. Cir. 2017).

4. *The Container Store*, 864 F.3d at 1333; *Changzhou Hawd Flooring Co.*, 848 F.3d at 1013; *Mid Continent Nail Corp.*, 846 F.3d at 1372–73.

5. 19 U.S.C. § 1304(a) (2012).

6. § 1516.

7. § 3004(c)(1).

appropriate duties.⁸ If CBP disagrees, it will reclassify the good and charge the importer the appropriate duty rate.⁹ The importer is permitted to protest those reclassifications.¹⁰

A. Schlumberger Technology Corp. v. United States

In *Schlumberger Technology Corp.*,¹¹ the Federal Circuit addressed an appeal from the CIT regarding the classification of imports from China. In its opinion, the CIT rejected Commerce's classification of Schlumberger Technology's imported bauxite proppants as other "ceramic wares."¹² The Federal Circuit affirmed the CIT's decision in favor of the importer, Schlumberger.¹³

The subject goods are used in oil-well servicing and are used to "prevent[] fractures in rock formations from closing."¹⁴ CBP classified the bauxite proppants under HTSUS subheading 6909.19.50, "Ceramic wares for laboratory, chemical, or other technical uses; ceramic troughs, tubs and similar receptacles of a kind used in agriculture; ceramic pots, jars and similar articles of a kind used for the conveyance or packing of goods: Other: Other."¹⁵ This classification resulted in a tariff of four percent on the imported goods.¹⁶

Schlumberger contested the classification and argued that the bauxite should be classified under HTSUS subheading 2606.00.0060, "Aluminum ores and concentrates: Bauxite, calcined: Other," which allows the materials to enter the United States duty free.¹⁷ CBP denied the protest to reclassify the bauxite, and consequently, Schlumberger petitioned the CIT for redress.¹⁸ The CIT found no reason for CBP to classify the bauxite as anything other than bauxite as defined in HTSUS subheading 2606 and granted Schlumberger summary judgment.¹⁹

On appeal, the Federal Circuit reviews summary judgment decisions by the CIT de novo.²⁰ To classify merchandise, the Federal Circuit

8. §§ 1484(a)(1)(B), 1500(b).

9. § 1514(a).

10. § 1514.

11. 845 F.3d 1158 (Fed. Cir. 2017).

12. *Id.* at 1161, 1162; *Schlumberger Tech. Corp. v. United States*, 91 F. Supp. 3d 1304, 1324 (Ct. Int'l Trade 2015), *aff'd*, 845 F.3d 1158 (Fed. Cir. 2017).

13. *Schlumberger Tech. Corp.*, 845 F.3d at 1168.

14. *Id.* at 1161.

15. *Id.* at 1161–62.

16. *Id.* at 1161.

17. *Id.* at 1162.

18. *Id.*

19. *Id.*

20. *Id.*

applies a two-part test, considering first what the relevant term within the classification provision means and second assesses whether the good falls within that classification.²¹

The HTSUS governs the classification of all imported goods, and, within the HTSUS, there are a number of General Rules of Interpretation (“GRI”) that provide guidance on the classification process.²² GRI-1 provides that the HTSUS headings and chapter or section notes are controlling in determining “whether the product at issue is classifiable under the heading.”²³ In addition, “[a]bsent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same.”²⁴

In this case, the Government argued that the bauxite fell within the definition of ceramics because, in the creation of the bauxite proppants, the proppants go through a granulation and shaping process much like ceramics do when being fired in a kiln.²⁵ However, the Federal Circuit concluded that the common definition of “shaping” does not include the sieving process through which the proppants go.²⁶ Additionally, the examples in the notes section to the ceramics heading include flower pots, fittings for doors and windows, and other items that seem distinct from the bauxite proppants.²⁷ On the contrary, the Federal Circuit found that the proppants fit neatly into the heading proposed by Schlumberger.²⁸

B. The Container Store v. United States

In *The Container Store*, the Federal Circuit addressed the proper description of elfa® top tracks and hanging standards, imported by The Container Store.²⁹ The imported goods were classified by CBP under HTSUS heading 8302.41.60 as base metal mountings and fittings suitable for buildings.³⁰ The Container Store filed a protest and argued that the goods should be classified instead under HTSUS heading

21. *Id.* (citing *Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016)).

22. *Id.* at 1163.

23. *Id.*

24. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citation omitted).

25. *Schlumberger Tech. Corp.*, 845 F.3d at 1161, 1164–65.

26. *Id.* at 1165.

27. *Id.* at 1166.

28. *Id.* at 1166–67.

29. *The Container Store v. United States*, 864 F.3d 1326, 1327 (Fed. Cir. 2017).

30. *Id.* at 1328.

9403.90.80 as parts of furniture.³¹ CBP denied the protests, The Container Store appealed, and the CIT upheld CBP's classification.³²

The HTSUS includes general categories of merchandise, as well as particularized subcategories of merchandise in its headings and subheadings.³³ The GRI for the HTSUS say that CBP is to apply the categories in "numerical order, and if a particular rule resolves the classification issue, there is no need to examine subsequent rules."³⁴

This case addressed the question of whether the top tracks and hanging standards, which form the base components for the expandable elfa® system, constituted "mountings and fittings suitable for furniture" under subheading 8302.42.30, or other "parts of furniture" under subheading 9403.90.80.³⁵ The latter includes unit furniture, which consists of different elements that fit together to form a larger system.³⁶ The Container Store contended that the components of the elfa® system are unit furniture and should be classified under subheading 9403.90.80.³⁷

The Federal Circuit agreed with The Container Store and found that the top tracks and hanging standards were not furniture in and of themselves, but rather the "indispensable structural framework for the elfa® modular storage unit."³⁸ These component parts were not covered by heading 8203 and did not fit into the description of goods listed in that subheading's explanatory note.³⁹ Accordingly, the Federal Circuit found that the goods were improperly classified and thus reversed and remanded the case to the CIT.⁴⁰

31. *Id.*

32. *Id.* at 1328–29; *see* *The Container Store v. United States*, 145 F. Supp. 3d 1331, 1348 (Ct. Int'l Trade 2016), *rev'd*, 864 F.3d 1326 (Fed. Cir. 2017).

33. *The Container Store*, 864 F.3d at 1329 (citing *Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013)).

34. *Id.* at 1329 (citing *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)).

35. *Id.* at 1330.

36. *Id.* at 1330 (citing *StoreWALL, LLC v. United States*, 644 F.3d 1358, 1361 (Fed. Cir. 2011)) (classifying a similar organizing and storage system as "unit furniture" under heading 9403).

37. *Id.* at 1330.

38. *Id.* at 1330–31.

39. *Id.* at 1332 ("Explanatory Note 83.02 does not exclude from heading 8302 any mounting or fitting 'essential' to an article, but instead excludes only those mountings and fittings that 'form[] an essential part of the structure of the article.'").

40. *Id.* at 1333.

C. Chemtall, Inc. v. United States

In *Chemtall, Inc. v. United States*,⁴¹ the Federal Circuit addressed the proper classification of imported acrylamide tertiary butyl sulfonic acid (ATBS).⁴² The importer challenged the CBP's classification of the imported good, claiming ATBS was an amide or a derivative or salt of an amide.⁴³ The Federal Circuit focused its analysis on the chemical make-up of ATBS and concluded that ATBS is not an amide. Therefore, it is subject to a 6.5% duty rate rather than the 3.7% rate applied to Acrylamide.⁴⁴

The central element of dispute in *Chemtall* turns on the meaning of the term "derivative" under HTSUS 2924, which applies to both acyclic amides and their derivatives.⁴⁵ While the Government argued that the term should refer to compounds that are related in structure, Chemtall argued that it should refer to compounds that are chemically derived from another compound.⁴⁶ The CIT found that the common meaning of the word "derivative" aligned with the Government's narrower definition.⁴⁷ Chemtall cited to two organic chemistry textbooks to support its interpretation, but the CIT concluded that Chemtall had mischaracterized the explanations found in those textbooks.⁴⁸ Additionally, both parties relied upon the inconsistent explanatory notes to subheading 2924.19.80.00 of the HTSUS, and the CIT did not find the explanatory notes helpful in this instance.⁴⁹ Ultimately, the Federal Circuit affirmed the CIT's decision and similarly found that the evidence supported the Government's position that ATBS should be classified as an amide and should be subject to the higher duty category.⁵⁰

41. 878 F.3d 1012 (Fed. Cir. 2017).

42. *Id.* at 1015.

43. *Id.* An amide is a nitrogen atom that is limited to having only hydrogen, alkyl, or aryl groups bonded to it. *Id.* at 1016. Because ATBS contains sulfonic acid—a compound that does not fit within the aforementioned atoms or compounds—the issue was whether ATBS could be classified as an amide, or whether it was a derivative of such. *Id.* at 1022.

44. *Id.* at 1017.

45. *Id.* at 1019. The Federal Circuit spent considerable time addressing the chemical components that make up ATBS. *Id.* at 1015–17.

46. *Id.*

47. *Id.*

48. *Id.* at 1020–21 (finding that the textbooks cited do not support Chemtall's positions because they "suggest that amides have only hydrogen or hydrocarbyls . . . bonded to the nitrogen of the amide functional group").

49. *Id.* at 1022, 1024–25.

50. *Id.* at 1026–27.

II. ANTIDUMPING AND COUNTERVAILING DUTY CASES

Dumping occurs when a foreign exporter purposefully sell goods in the United States at a lower price than the domestic market such that the importer gains a market share and domestic sellers are harmed.⁵¹ Domestic firms injured as a result of dumping may petition Commerce to investigate and levy antidumping duties on the foreign exporters.⁵² These duties are calculated by comparing the normal price for the goods sold on the foreign home market and the export price for those same goods.⁵³ If the margin between those prices is more than de minimis, Commerce will use that difference as the dumping margin.⁵⁴ Targeted dumping is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time.⁵⁵

To determine whether an exporter is in fact dumping in the United States, Commerce must first establish whether the goods are being sold in the United States at less than fair value. To do so, Commerce must determine which prices to use for comparison by applying one of three methodologies:

- (1) Average-to-transaction (“A-T”), in which Commerce compares the weighted average of the normal values to the export (or constructed export prices) of individual transactions.
- (2) Average-to-average (“A-A”), in which Commerce compares the weighted average of the normal values to the weighted average of the export prices (or constructed export prices).
- (3) Transaction-to-transaction (“T-T”), in which Commerce compares the normal value of an individual transaction to the export price (or constructed export price) of an individual transaction.⁵⁶

In general, Commerce will apply the average-to-average methodology unless a particular case requires an exception.⁵⁷ One such exception to this general rule is a case in which “there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time” and Commerce explains why these differences cannot be taken into account

51. 19 U.S.C. § 1673 (2012); *see also* Kevin J. Fandl, *2016 International Trade Law Decisions of the Federal Circuit*, 67 AM. U. L. REV. 1381, 1382–84 (2018).

52. § 1673a.

53. *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013).

54. *Id.* at 1103, 1108.

55. 19 U.S.C. § 1677f-1(d)(1)(B)(i); *see also* *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1369 (Fed. Cir. 2017) (explaining targeted dumping).

56. *Apex Frozen Foods*, 862 F.3d at 1340–41 (citing *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013)); *see also* 19 U.S.C. § 1677f-1(d)(1)(A)–(B) (2012).

57. 19 C.F.R. § 351.414(c)(1) (2012).

using the average-to-average methodology.⁵⁸ This exception is meant to address concerns over “targeted dumping.”⁵⁹

The third methodology is specifically used for cases of alleged targeted dumping.⁶⁰ However, to use that methodology, Commerce must first find a pattern indicative of targeted dumping, and then justify its decision not to apply one of the first two methods.⁶¹ The use of the third method, often in combination with a controversial practice called “zeroing,”⁶² was limited by a regulation called the Limiting Regulation. The Limiting Regulation stated that when it applies the third methodology, Commerce can only include sales considered to be targeted dumping.⁶³

In 2008, Commerce eliminated the Limiting Regulation, which had been a part of the Uruguay Round Agreements Act.⁶⁴ This regulatory withdrawal was conducted without following the required notice-and-comment process because Commerce asserted an exception for “good cause.”⁶⁵

The International Trade Administration (ITA) conducts a second investigation to determine whether the domestic industry in the United States is materially threatened by the import of the subject goods into the United States.⁶⁶ If the ITA concludes that U.S. industry is materially threatened and Commerce identifies a difference in home and export market prices, Commerce issues a final determination establishing the applicable dumping margins.⁶⁷ These determinations can be challenged by affected parties.⁶⁸

A. Mid Continent Nail Corp. v. United States

In *Mid Continent Nail Corp.*, the Federal Circuit considered Mid Continent Nail’s challenge to the alleged targeted dumping of another

58. 19 U.S.C. § 1677f-1(d)(1)(B) (2012).

59. *Apex Frozen Foods*, 862 F.3d at 1341; *see also* *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1376, 1376 n.8 (2017).

60. *See* § 1677f-1(d)(B)(i); *Mid Continent Nail Corp.*, 846 F.3d at 1369.

61. *Mid Continent Nail Corp.*, 846 F.3d at 1369.

62. *Id.* at 1369–70 (quoting *Union Steel v. United States*, 713 F.3d 1101, 1104 (Fed. Cir. 2013)). Zeroing refers to the practice in which “negative dumping margins (i.e., margins of sales of merchandise sold at nondumped prices) are given a value of zero and only positive dumping margins (i.e., margins for sales of merchandise sold at dumped prices) are aggregated.” *Id.*

63. *Mid Continent Nail Corp.*, 846 F.3d at 1370 (citing 19 C.F.R. § 351.414(f)(2) (2008)).

64. *Id.* at 1370 (citing *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, Interim Final Rule, 73 Fed. Reg. 74,930, 74,931 (Dec. 10, 2008)).

65. *Id.*

66. 19 U.S.C. § 1673 (2)(A)–(B).

67. *Id.*

68. *Union Steel*, 713 F.3d at 1103.

nail importer, Precision Fasteners, in light of Commerce's noncompliance with the Administrative Procedure Act (APA).⁶⁹ In 2011, Commerce applied its third methodology to evaluate potentially dumping⁷⁰ by Precision Fasteners, a defendant in *Mid Continent Nail Corp.*, which imports of steel nails from the United Arab Emirates (UAE); Commerce ultimately found a dumping margin of 2.51%.⁷¹

The CIT assessed the alleged dumping by reviewing all sales—not only targeted dumping sales.⁷² Precision argued to the CIT that Commerce violated the APA by failing to follow the notice-and-comment procedures when rescinding the Limiting Regulation.⁷³ It further contended that, had Commerce applied the Limiting Regulation and only considered the sales by Precision that would qualify as targeted dumping, Commerce still could not justify the use of the average-to-transaction methodology because Commerce had previously determined that less than one percent of Precision's imports constituted dumping.⁷⁴ The CIT agreed that Commerce violated its duties under the APA and remanded the decision back to Commerce to reassess Precision's dumping margin utilizing the Limiting Regulation.⁷⁵

After correctly applying the Limiting Regulation, Commerce found Precision's dumping to be de minimis and applied a duty rate of zero percent.⁷⁶ Mid Continent Nail again challenged Commerce's finding, arguing that Commerce misapplied the Limiting Regulation.⁷⁷ The CIT affirmed the decision by Commerce on remand.⁷⁸ Mid Continent Nail

69. *Mid Continent Nail Corp.*, 846 F.3d at 1368–70.

70. See *supra* notes 61–63 and accompanying text.

71. *Mid Continent Nail Corp.*, 846 F.3d at 1368–71. In 2011, Mid Continent Nail filed a petition with Commerce alleging that certain steel nail imports from the UAE resulted in targeted dumping. *Id.* at 1368. When Commerce opened an investigation into the matter, it determined that Precision was a “mandatory respondent[], i.e., an importer whose dumping rate would be individually determined in the course of the investigation.” *Id.* at 1368–69. Mid Continent Nail argued that the Limiting Regulation was properly withdrawn, resulting in a dumping margin that meant that Precision engaged in targeted dumping, while Precision contended that Commerce was required to apply the Limiting Regulation because its 2008 withdrawal notice was ineffective. *Id.* at 1369–71.

72. *Mid Continent Nail Corp. v. United States*, 999 F. Supp. 2d 1307, 1318–19 (Ct. Int'l Trade 2014), *aff'd*, 864 F.3d 1364 (Fed. Cir. 2014).

73. *Id.* at 1319–20.

74. *Id.* at 1320.

75. *Id.* at 1321, 1330.

76. *Mid Continent Nail Corp. v. United States*, 113 F. Supp. 3d 1318, 1324 (Ct. Int'l Trade 2015), *aff'd*, 846 F.3d 1364 (Fed. Cir. 2017).

77. *Id.* at 1326.

78. *Id.* at 1327.

appealed to the Federal Circuit, which affirmed the decision of the CIT.⁷⁹

In the appeal, Mid Continent argued that Commerce's Request for Comment and Proposed Methodology on the Limiting Regulation satisfied the notice-and-comment requirement.⁸⁰ The Request for Comment and the Request for Proposed Methodology were issued in 2007 and 2008, respectively.⁸¹ The Request for Comment was Commerce's attempt to solicit feedback on the best method to determine the existence of targeted dumping, admitting that it had little experience with this process.⁸² That request was not published as a notice of proposed rulemaking.⁸³ In the Request for Proposed Methodology, Commerce acknowledged the responses received, proposed a methodology, and sought additional comments.⁸⁴ The Federal Circuit acknowledged both of these notices as merely requests for comments on which methodology to choose, not notices that would suggest Commerce's intent to withdraw the Limiting Regulation.⁸⁵

A final rule must be the "logical outgrowth" of a proposed rulemaking.⁸⁶ Further, a notice of proposed rulemaking must be closely connected to the final rule and may not create a rule that would not have been reasonably anticipated by the public.⁸⁷ In *Mid Continent Nail Corp.*, the Federal Circuit found that the notices issued by Commerce were not notices of withdrawal, and, thus, the withdrawal of the Limiting Regulation was not the logical outgrowth of those notices.⁸⁸

Because the Federal Circuit affirmed the decision of the CIT Precision maintained its zero duty rate. Therefore, applying the withdrawn regulation to this case, Precision had not engaged in targeted dumping.⁸⁹

79. *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1368 (Fed. Cir. 2017).

80. *Id.* at 1372–73.

81. Proposed Methodology for Identifying and Analyzing Target Dumping in Antidumping Investigations; Request for Comment, 73 Fed. Reg. 26,371 (May 9, 2008); Targeted Dumping in Antidumping Investigations; Request for Comment, 72 Fed. Reg. 60,651 (Oct. 25, 2007).

82. 72 Fed. Reg. 60,651 (Oct. 25, 2007).

83. *Id.*

84. 73 Fed. Reg. 26,371 (May 9, 2008).

85. *Mid Continent Nail Corp.*, 846 F.3d at 1375–76.

86. *Id.* at 1373; *see also Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973).

87. *Mid Continent Nail Corp.*, 846 F.3d at 1373.

88. *Id.* at 1370, 1372.

89. *Id.* at 1385.

B. American Tubular Products v. United States

In *American Tubular Products v. United States*,⁹⁰ the Federal Circuit addressed average surrogate values of oil country tubular goods (OCTG) exported from China, a non-market economy (NME).⁹¹ Within its antidumping inquiry, Commerce asked one of the producers selected as a mandatory respondent, Jiangsu Cheng Steel Tube Share Co. (“Chengde”), American Tubular’s Chinese exporter, whether it produced goods using carbon steel or alloy steel, the former being lower cost.⁹²

When assessing the fair market value of an export from an NME, Commerce utilizes the value from a surrogate market economy.⁹³ Chengde initially told Commerce that it utilized alloy steel in its production; however, it later corrected that statement to say that it utilized carbon steel and, at Commerce’s request, provided sample mill certificates reflecting the use of carbon steel.⁹⁴ Commerce accepted the sample mill certificates as evidence that Chengde indeed used carbon steel in sixteen of nineteen sales and applied the value of carbon steel from Indonesia, Chengde’s appointed surrogate country, to those sales.⁹⁵ However, Commerce chose to classify all remaining sales as based upon alloy steel since the producer did not provide evidence suggesting that the producer had exclusively used carbon steel in producing the OCTGs.⁹⁶ For the remaining portions of alloy steel, Commerce “used a *simple average* of the surrogate values for carbon and alloy steel . . . [and] recalculated Chengde’s weighted average dumping margin as 137.62%.”⁹⁷

90. 847 F.3d 1354 (Fed. Cir. 2017).

91. *Id.* at 1356, 1359–60; 19 U.S.C. § 1677(18)(A) (2012) (defining a non-market economy as one that “does not operate on market principles of cost or pricing structures” such that pricing does not reflect the “fair value of the merchandise”).

92. 847 F.3d at 1356–57.

93. *Id.* at 1356 (citing Certain Oil Country Tubular Goods from the People’s Republic of China: Preliminary Results of the First Antidumping Duty Administrative Review, Rescission in Part and Intent to Rescind in Part, 77 Fed. Reg. 34,013, 34,015 (June 8, 2012)). When Commerce “conducts an administrative review of imports from an NME country,” the imports should be “valued in a surrogate market economy . . . country or countries considered to be appropriate” by Commerce. 77 Fed. Reg. 34,015. The surrogate market economy country or countries should be “at a level of economic development comparable to that of the NME country,” and should be “significant producers of comparable merchandise.” *Id.*

94. *Am. Tubular Prods.*, 847 F.3d at 1357. The sample mill certificates “contained information on the chemical composition of the sampled OCTG, which constituted a portion, but not all, of OCTG sold in sixteen of nineteen sales made by Chengde during the period of review.” *Id.*

95. *Id.* at 1356–57.

96. *Id.* at 1357–58.

97. *Id.* at 1358.

The CIT held that Commerce was reasonable in its decision to use an average surrogate value of carbon steel and alloy steel and its conclusion that Chengde used the more expensive steel input in its production process; the Federal Circuit agreed.⁹⁸ Commerce also found evidence that the producer had other contracts in which it utilized alloy steel.⁹⁹ And, because the producer did not provide complete details about its sales to prove the exclusive use of carbon steel, Commerce was free to make a reasonable decision as to how to calculate the average surrogate value of the alloy steel.¹⁰⁰

C. Changzhou Hawd Flooring v. United States

In *Changzhou Hawd Flooring*, the Federal Circuit considered whether Commerce could depart from the statutory “expected method” applied to firms investigated individually in a dumping investigation and instead could apply the “separate rate” method without justification.¹⁰¹ The appellants, Chinese manufacturers of multilayered hardwood flooring, asserted their right to be excluded from a China-wide antidumping duty rate applied to firms based upon the firms’ connection to the Chinese government.¹⁰² The appellants contended that they should be treated as independent of the Chinese government.¹⁰³ Commerce chose not to investigate the appellants but applied a separate rate for them that, while “not specified numerically,” was more than de minimis.¹⁰⁴ The CIT supported Commerce’s conclusion, but the Federal Circuit vacated and remanded the case.¹⁰⁵

Commerce initiated its investigation into Chinese exporters of multilayered, hardwood flooring in 2010, ultimately selecting three mandatory respondents for further investigation.¹⁰⁶ As an NME, Commerce presumes that Chinese firms are state-controlled; however,

98. *Id.* at 1359–60.

99. *Id.* at 1360 (discussing evidence on the producer’s website, which showed “that it sold OCTG made of alloy under two contracts during the period of review”).

100. *Id.*

101. *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1008 (Fed. Cir. 2017).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*; *Changzhou Hawd Flooring Co. v. United States*, 77 F. Supp. 3d 1351, 1354 (Ct. Int’l Trade 2015), *vacated*, 848 F.3d 1006 (Fed. Cir. 2017).

106. *See Changzhou Hawd Flooring Co. v. United States*, 44 F. Supp. 3d 1376, 1389 n.31, 1390 (Ct. Int’l Trade 2015), *vacated*, 848 F.3d 1006 (Fed. Cir. 2017) (explaining that while Commerce received multiple voluntary respondent requests in its investigation, they ultimately denied all voluntary requests and selected three respondents, including Changzhou Hawd Flooring Company).

this presumption is rebuttable.¹⁰⁷ In this case, Commerce assigned a *de minimis* duty rate to the three mandatory respondents and a China-wide duty rate of 25.62%.¹⁰⁸ In total, seventy-four firms established their independence from the state.¹⁰⁹ Commerce applied a separate rate to these firms, averaging the *de minimis* rate and the China-wide rate for a final duty rate of 6.41%.¹¹⁰

This methodology, known as the “expected method” of determining a dumping margin, was established in the Uruguay Round Agreements Act as part of the multilateral trade negotiations under the umbrella of the General Agreement on Tariffs and Trade.¹¹¹ It requires Commerce to “weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available.”¹¹² Only if Commerce finds that this method would not reasonably reflect dumping margins can another method be applied.¹¹³

In this case, Commerce selected three firms as representative of the Chinese market.¹¹⁴ And, even though those three firms did not constitute the majority of exports for these flooring products, the Federal Circuit held that Commerce was not permitted to deviate from the expected rate methodology unless it found substantial evidence that a separate rate was necessary, which Commerce did not do here.¹¹⁵ Accordingly, the Federal Circuit vacated the CIT’s decision and remanded the case for further analysis regarding the separate rate determination.¹¹⁶

D. Meridian Products, LLC v. United States

The dispute in *Meridian Products*¹¹⁷ began in 2012, when Meridian

107. See *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1370 (Fed. Cir. 2012).

108. *Changzhou Hawd Flooring Co.*, 848 F.3d at 1009 (explaining that as part of its investigation of multilayered wood flooring from China, Commerce chose the three largest exporters by volume as representatives of the market, therefore making them mandatory respondents).

109. *Id.*

110. *Id.*

111. Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (1994) (codified as amended at 19 U.S.C. §§ 3501–3624 (2012)); see also Uruguay Round Agreements Act, Statement of Administrative Action, H.R. NO. 103-316, at 873 (1994).

112. H.R. Doc. No. 103-316, at 873.

113. *Id.*

114. *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1009 (Fed. Cir. 2017).

115. *Id.* at 1012–13.

116. *Id.* at 1013.

117. 851 F.3d 1375 (Fed. Cir. 2017).

Products requested a “scope ruling” from Commerce to exclude certain aluminum trim kit packages (“trim kits”) from the scope of an antidumping order on aluminum extrusions from China.¹¹⁸ Commerce initially found that the trim kits fell within the order and, after a series of appeals and remands, the CIT concluded under protest that they fell outside the scope of the order.¹¹⁹ The Government appealed the CIT’s decision and the Federal Circuit reversed.¹²⁰

Antidumping orders are often broad and cover such a range of goods that the orders may unintentionally capture certain related goods under the order.¹²¹ Accordingly, Commerce is permitted by statute to issue scope rulings that define whether certain goods fall within a published order.¹²²

Scope rulings are performed upon request of an interested party.¹²³ A scope ruling considers three elements that determine whether a product is subject to an order.¹²⁴ First, Commerce considers the text of the order itself to assess its defined scope.¹²⁵ Second, Commerce consults descriptions of the product in other sources.¹²⁶ And finally, Commerce weighs other factors that compare the specific product to the product outlined in the order.¹²⁷ Once Commerce makes this evaluation, courts give substantial deference to its expert interpretation of its own antidumping orders.¹²⁸

In *Meridian*, Commerce determined that the merchandise in question fell within the scope of the order, which *Meridian* challenged.¹²⁹ The CIT disagreed and encouraged Commerce to reevaluate its position, finding that “[c]ontext renders unreasonable Commerce’s reading of the exclusionary language of the scope.”¹³⁰ However, the Federal Circuit found that the CIT interpreted the

118. *Id.* at 1378.

119. *Meridian Prods. v. United States*, 145 F. Supp. 3d 1329, 1331 (Ct. Int’l Trade 2016), *rev’d*, 851 F.3d 1375 (Fed. Cir. 2017).

120. *Meridian Prods.*, 851 F.3d at 1385.

121. See 19 C.F.R. § 351.225(a) (2005) (stating that issues regarding the scope of an antidumping or countervailing duty order can arise because the descriptions of a merchandise contained within the orders “must be written in general terms”).

122. 19 U.S.C. § 1516a(a)(2)(B)(vi) (2012).

123. *Meridian Prods.*, 851 F.3d at 1379.

124. *Id.* at 1381.

125. *Id.*

126. *Id.*

127. *Id.*

128. *King Supply Co. v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012).

129. *Meridian Prods.*, 851 F.3d at 1378.

130. *Meridian Prods. v. United States*, 77 F. Supp. 3d 1307, 1316 (Ct. Int’l Trade 2015), *rev’d*, 851 F.3d 1375 (Fed. Cir. 2017).

procedure to analyze scope rulings too narrowly, taking away from the broad discretion afforded Commerce in such interpretations.¹³¹ The Federal Circuit reversed the CIT's decision and ordered the CIT to reinstate Commerce's original conclusion because, in the Federal Circuit's opinion, Commerce reasonably interpreted the order and the order's exclusions to include Meridian's products.¹³²

E. Boomerang Tube LLC v. United States

*Boomerang Tube LLC v. United States*¹³³ involved a dispute over the determination of normal value to set a dumping margin for Saudi exporters of OCTG products.¹³⁴ Commerce issued a preliminary antidumping order on OCTG products originating in Saudi Arabia, as well as other countries, and sought input from Duferco, the largest of fourteen known Saudi OCTG exporters and the sole mandatory respondent.¹³⁵ Commerce sought data to determine the arms-length sales price to calculate the "normal value" of the exported products.¹³⁶ After determining that Duferco had no arms-length domestic sales, Commerce followed the constructed value approach by using profit figures from Saudi Steel Pipes Company.¹³⁷ Boomerang, a Missouri-based OCTG seller, objected to the use of Saudi Steel data because Boomerang argued it was more similar to a pipeline producer rather than an OCTG producer.¹³⁸ Alternatively, Duferco suggested using the financial statement of an unaffiliated buyer or an affiliated Colombian distributor.¹³⁹ Ultimately, Commerce decided to use the Colombian sales to determine the normal value.¹⁴⁰

Boomerang further argued that Commerce failed to collapse the affiliated Colombian distributor costs into the sales data, thereby giving Duferco and other Saudi exporters a de minimis dumping margin that resulted in Commerce terminating the dumping investigation.¹⁴¹ Duferco countered by arguing that Boomerang failed to exhaust its

131. *Meridian Prods.*, 851 F.3d at 1382–84.

132. *Id.* at 1384–85.

133. 856 F.3d 908 (Fed. Cir. 2017).

134. *Id.* at 910–11.

135. *Id.* at 909–10.

136. *Id.* at 910.

137. See 19 U.S.C. § 1677b(e)(2)(B)(iii) (2012) (explaining the constructed value process); *Boomerang Tube*, 856 F.3d at 910.

138. *Boomerang Tube*, 856 F.3d at 910.

139. *Id.* at 910–11.

140. *Id.* at 911.

141. *Id.* at 909–12.

administrative remedies during the preliminary investigation.¹⁴² The CIT agreed with Boomerang's argument and held that Boomerang did not have to raise these objections during the investigation because Commerce gave no indication of its plans to rely on the Colombian data.¹⁴³

On appeal, the Federal Circuit disagreed with the CIT's findings and held that it was evident Commerce might rely on the Colombian data, and that Boomerang had an opportunity to object but failed to do so.¹⁴⁴ Accordingly, the Federal Circuit concluded the CIT should have dismissed Boomerang's appeal because Boomerang had not exhausted its administrative remedies.¹⁴⁵ Since the CIT's failure to dismiss Boomerang's appeal constituted an abuse of discretion, the Federal Circuit vacated the CIT's decision and remanded the matter.¹⁴⁶

F. *Suntec Industries Co. v. United States*

The Federal Circuit in *Suntec Industries Co. v. United States*¹⁴⁷ addressed notice obligations of domestic entities to foreign entities during an administrative review.¹⁴⁸ Suntec, a Chinese exporter, was subject to a 2008 antidumping order covering certain steel nails from China.¹⁴⁹ Mid Continent Nail Corporation, a domestic entity, requested that Commerce conduct its third administrative review of the 2008 antidumping order; however, Mid Continent violated its regulatory service obligation by failing to notify Suntec, which was named in the antidumping order and in Mid Continent's request, of the review.¹⁵⁰ Because of this violation and Suntec's "lapse in its relationship with the counsel who had been its representative for years in the steel-nail proceedings," Suntec became aware of the order only after (or shortly before) it had been finalized.¹⁵¹ Suntec complained

142. *Id.* at 911.

143. *Id.* at 911–12.

144. *Id.* at 913.

145. *Id.*

146. *Id.*

147. 857 F.3d 1363 (Fed. Cir. 2017).

148. *Id.* at 1364.

149. *Id.* at 1365.

150. *Id.* at 1364, 1365.

151. *Id.* at 1364. *See generally* Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 Fed. Reg. 33,977 (June 16, 2008) (explaining Commerce's preliminary determination that certain Chinese steel nail importers were engaging in dumping, and Commerce's final determination subjecting Suntec, among other companies, to a duty rate of 21.24% and suspending all liquidation of subject merchandise).

to the CIT that Mid Continent's failure to notify it of the investigation should merit the setting aside of the order with respect to Suntec.¹⁵² The CIT disagreed, concluding that the publication of the initial investigation in the Federal Register provided sufficient notice.¹⁵³ The Federal Circuit agreed.¹⁵⁴

Suntec, which had been assigned a separate duty rate of 21.24% during the first two administrative reviews, was subjected to the all-China rate of 118.04% because it did not participate in the third administrative review.¹⁵⁵ Suntec contended that Mid Continent's service failure prejudiced Suntec's opportunity to participate in the third review.¹⁵⁶ However, the Federal Circuit found that while this failure may excuse Suntec from the investigation, Commerce's publication in the Federal Register of its intent to investigate was sufficient to put Suntec on notice, especially because Suntec was named in the antidumping order and had participated in the first two administrative reviews.¹⁵⁷

G. United States v. American Home Assurance Co.

In *United States v. American Home Assurance Co.*,¹⁵⁸ a surety, American Home Assurance Company ("AHAC"), provided bonds to three separate importers of crawfish tail meat and preserved mushrooms from China.¹⁵⁹ The bonds required AHAC to pay any duty, tax, or charge resulting from the covered activities up to the face amount of the bonds.¹⁶⁰ CBP liquidated the importers' entries of these goods and assessed antidumping duties, but the importers failed to pay the duties.¹⁶¹ Accordingly, AHAC, as the surety, became obligated to pay.¹⁶² CBP notified AHAC of its intent to charge interest for non-payment on the bonds, but AHAC still failed to pay.¹⁶³ Ultimately, the Government sued AHAC at the CIT for the monies due and for

152. *Suntec Indus.*, 857 F.3d at 1364–65.

153. *Id.* at 1365.

154. *Id.*

155. *Id.* at 1365–66.

156. *Id.* at 1366.

157. *See id.* at 1366, 1369–72 (concluding that the default rule that notices published in the Federal Register constitute effective notice as a matter of law extends to foreign importers); *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 76 Fed. Reg. 61,076, 61,078, 61,082 (Oct. 3, 2011).

158. 857 F.3d 1329 (Fed. Cir. 2017).

159. *Id.* at 1332.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

equitable and statutory prejudgment interest.¹⁶⁴

The central issue in this case was whether the CIT could award CBP both statutory and equitable prejudgment interest or whether that would, as AHAC argued, over-compensate the Government.¹⁶⁵ Statutory prejudgment interest is set at six percent and is charged monthly beginning thirty days after liquidation.¹⁶⁶ The CIT may also award equitable interest “to compensate for the loss of use of money” prior to judgment.¹⁶⁷ The amount of equitable interest is determined using common law principles.¹⁶⁸ Here, CBP argued that it should be able to charge both types of prejudgment interest, while AHAC argued that this would overcompensate the Government.¹⁶⁹ Here, in its judgment on the pleadings, the CIT disagreed and denied the Government’s request for both forms of prejudgment interest.¹⁷⁰

The Federal Circuit explained that equitable remedies generally are unavailable when statutory remedies are available and would suffice.¹⁷¹ However, the Trade Facilitation and Trade Enforcement Act of 2015 expressly permits the charging of both types of prejudgment interest.¹⁷² The Act states that “[e]quitable interest under common law and interest under . . . 19 U.S.C. [§] 580 [may be] awarded by a court against a surety under its bond for late payment of antidumping duties.”¹⁷³ Thus, the Federal Circuit found that the CIT did not abuse its discretion in declining to award both types of prejudgment interest.¹⁷⁴

The next question the Federal Circuit addressed is whether the CIT is

164. *Id.*

165. *Id.* at 1332–33.

166. *See* 19 U.S.C. § 580 (2012) (“Upon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of [six] per centum a year, from the time when said bonds became due.”); *Am. Home Assurance Co.*, 857 F.3d at 1335.

167. *See Am. Home Assurance Co.*, 857 F.3d at 1333 (citing *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1367 (Fed. Cir. 2005)).

168. *See id.* at 1333 (explaining that a judge may consider “the degree of wrongdoing on the part of the defendant, the availability of alternative investment opportunities to the plaintiff, whether the plaintiff delayed bringing the action, and other fundamental considerations of fairness” in deciding whether to award equitable prejudgment interest).

169. *Id.* at 1332–33.

170. *Id.*

171. *Id.* at 1333.

172. *See* Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 605(c)(2), 130 Stat. 122, 187–88 (to be codified at 19 U.S.C. § 4401); *Am. Home Assurance Co.*, 857 F.3d at 1334.

173. § 605(c)(2)(C).

174. *Am. Home Assurance Co.*, 857 F.3d at 1334.

obligated to direct CBP to charge both types of prejudgment interest.¹⁷⁵ To this question, the Federal Circuit concluded that the CIT has the discretion to decide whether it wishes to authorize the award of both equitable and statutory prejudgment interest or whether only statutory will be permitted.¹⁷⁶ The Federal Circuit upheld the decision of the CIT only to authorize the award of equitable interest.¹⁷⁷

H. *Maverick Tube Corp. v. United States*

In *Maverick Tube Corp. v. United States*,¹⁷⁸ an exporter objected to Commerce's use of an adverse-facts-available (AFA) rate in a countervailing duty investigation after the exporter failed to comply with an information request from Commerce that it considered too burdensome.¹⁷⁹ Upon beginning its investigation into allegations that the Government of Turkey was providing countervailing duty subsidies for producers of OCTGs, Commerce selected Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. and Borusan Istikbal Ticaret (collectively, "Borusan") as mandatory respondents.¹⁸⁰ Commerce sent Borusan a questionnaire inquiring about Borusan's use of hot-rolled steel in its production of OCTG.¹⁸¹ Borusan responded that while it had three factories during the period of investigation, only one of those factories produced subject OCTG.¹⁸² Borusan proceeded to provide the data for the one factory, but "noted that it had difficulty compiling that information" because the process was "burdensome," would take its staff over two weeks to complete, and would require Borusan to print over 300 pages.¹⁸³ Further, Borusan failed to provide data on the other two locations, arguing that requiring that data "would impose great burdens . . . for no purpose."¹⁸⁴ When Commerce pressed Borusan for data on the other two locations, Borusan failed to comply, citing its

175. *Id.*

176. *Id.*

177. *Id.* ("We conclude that the Trade Court retains broad discretion to apply nonstatutory prejudgment interest according to traditional equitable principles, which is exactly what it did in this case.")

178. 857 F.3d 1353 (Fed. Cir. 2017) [hereinafter *Maverick Tube I*].

179. *Id.* at 1355–56; *see also* 19 U.S.C. § 1677e(b) (2012) (providing that Commerce may employ an inference adverse to a party's interests if that party has failed to comply with a request for information).

180. *Maverick Tube I*, 857 F.3d at 1355. The Federal Circuit treated both companies as a single respondent. *See id.*

181. *Id.*

182. *Id.*

183. *Id.* at 1355–56.

184. *Id.* at 1356.

difficulties in collecting data on the first location.¹⁸⁵ In response, Borusan attempted to explain its burdens to Commerce by invoking 19 U.S.C. § 1677m(c)(1).¹⁸⁶ Nonetheless, Commerce ultimately issued Borusan an AFA duty rate, which Borusan challenged at the CIT.¹⁸⁷

The Federal Circuit agreed with the Government, finding that Borusan failed to comply with Commerce's request for information or provide a reasonable justification for why it could not provide that information:

If [Commerce] . . . finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce], [then Commerce] . . . may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.¹⁸⁸

The Federal Circuit explained that Commerce lacks subpoena power and thus must use the threat of AFA to incentivize a response from respondents.¹⁸⁹ Commerce cannot force a respondent to provide information that it needs to calculate values used in dumping and subsidy investigations. Thus, its power to disincentivize non-responses with the use of AFA findings, which are generally less favorable to the respondent, serves as a viable means to encourage participation in its investigation.

I. *Maverick Tube Corp. v. Toscelik Profil ve Sac Endustrisi A.S.*

Commerce's antidumping investigation into Turkish OCTGs was back before the Federal Circuit approximately one month later.¹⁹⁰ In *Maverick Tube Corp. v. Toscelik Profil ve Sac Endustrisi A.S.*,¹⁹¹ the Federal Circuit addressed duty drawbacks and their effects on dumping margin calculations.¹⁹² A duty drawback occurs when an exporter subject to

185. *Id.*

186. *Id.*

[I]f an interested party notifies Commerce promptly after receiving a request that it is "unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms," then Commerce "shall consider the ability of the interested party" and "may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party."

Id. (quoting 19 U.S.C. § 1677m(c)(1) (2012)).

187. *Id.* at 1356–57.

188. *See id.* at 1360 (quoting 19 U.S.C. § 1677e(b)).

189. *Id.* at 1360 (citing *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012)).

190. *Maverick Tube Corp. v. Toscelik Profil ve Sac Endustrisi A.S.*, 861 F.3d 1269, 1271 (Fed. Cir. 2017) [hereinafter *Maverick Tube II*].

191. 861 F.3d 1269 (Fed. Cir. 2017).

192. *Id.* at 1271.

an antidumping order in the United States receives a refund from previously paid import duties for foreign components provided the exporter exports the finished product.¹⁹³ When that finished product is exported to the United States, the exporter can use that duty drawback to reduce its dumping margin by raising its export price by the amount of the duty drawback.¹⁹⁴

The appellant, Çayirova, operated in Turkey, which allows for a refund of import duties paid on inputs used in finished goods for exports as well as for imports of similar goods as those used in finished goods for export.¹⁹⁵ Çayirova's goods that were subject to the antidumping order and exported to the United States did not contain imported components that garnered a duty refund from the government of Turkey; however, Çayirova imported similar inputs—not used in the finished goods at issue here—for which they did receive duty refunds.¹⁹⁶ Çayirova contended that Commerce should use those refunds to offset its dumping margin by raising its export price.¹⁹⁷

Commerce countered that point, asserting that, because Çayirova did not use any of the inputs for which the Government of Turkey provided a refund of duties, Çayirova was not entitled to a duty drawback adjustment.¹⁹⁸ Commerce's interpretation of the applicable statute was that an exporter is only entitled to a duty drawback adjustment when the duties refunded were on inputs used to manufacture the finished

193. *Id.*

When calculating the dumping margin,

if a foreign country would normally impose an import duty on an input used to manufacture the subject merchandise, but offers a rebate or exemption from the duty if the input is exported to the United States, then Commerce will increase [the export price] to account for the rebated or unpaid import duty (the “duty drawback”).

. . . “The purpose of the duty drawback adjustment is to account for the fact that the producers remain subject to the import duty when they sell the subject merchandise domestically, which increases home market sales prices and thereby increases [the normal value].”

Id. (quoting *Saha Thai Steel Pipe (Public) Co. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011)).

194. See 19 U.S.C. § 1677a(c)(1)(B) (2012) (providing that the export price “shall be . . . increased by . . . the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States”).

195. *Maverick Tube II*, 861 F.3d at 1271–72.

196. *Id.* at 1272.

197. *Id.*

198. *Id.*

products exported to the United States under the antidumping order.¹⁹⁹ In response, Çayırova argued that the statute was unambiguous and did not allow Commerce to impose its own “threshold test.”²⁰⁰

The Federal Circuit analyzed Commerce’s interpretation using *Chevron’s*²⁰¹ two-step analysis. First, the court asked whether Congress unambiguously spoke about the specific issue in the statute.²⁰² The Federal Circuit concluded that, while the statute was unambiguous for other issues, Congress did not address this specific issue, and thus, Commerce had discretion to apply its own interpretation.²⁰³ Second, the Federal Circuit assessed whether Commerce’s interpretation was reasonable, providing great discretion to Commerce.²⁰⁴ Here, the Federal Circuit found that Commerce’s interpretation was reasonable, and that it made sense to exclude refunds on inputs that were not used in manufacturing the product exported to the United States.²⁰⁵ Thus, the Federal Circuit affirmed the CIT’s findings.²⁰⁶

J. Apex Frozen Foods Private Ltd. v. United States

In *Apex Frozen Foods Private Ltd. v. United States*,²⁰⁷ the Federal Circuit addressed a challenge to Commerce’s methodology to calculate antidumping duties on the export of “certain frozen warmwater shrimp from India.”²⁰⁸ On appeal, the CIT upheld Commerce’s methodology of applying the average-to-transaction and zeroing approaches to calculate the dumping margin.²⁰⁹

199. *Id.* (citing 19 U.S.C. § 1677a(c)(1)(B)).

200. *Id.* at 1272–73 (articulating Commerce’s threshold test as prohibiting a duty drawback adjustment “when the exempted goods could not be used as inputs to produce the subject merchandise”); *see also* *Saha Thai Steel Pipe (Public) Co. v. United States*, 635 F.3d 1335, 1340 (Fed. Cir. 2011) (quoting 19 U.S.C. § 1677a(c)(1)(B) (2012)) (addressing whether “Commerce may only increase [the export value] when import duties are ‘imposed by the country of exportation’ and then later rebated” rather than when the import duties “have not been collected” to begin with).

201. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

202. *Maverick Tube II*, 861 F.3d at 1273–74 (citing *Chevron*, 467 U.S. at 842–43).

203. *Id.*

204. *Id.* at 1274.

205. *Id.*

206. *Id.*

207. 862 F.3d 1337 (Fed. Cir. 2017).

208. *Id.* at 1340. Apex Frozen Foods, a non-mandatory respondent, challenged the results of Commerce’s eighth administrative review of the antidumping order on the Indian warmwater shrimp. *Id.*

209. *Apex Frozen Foods Private Ltd. v. United States*, 144 F. Supp. 3d 1308 (Ct. Int’l Trade 2016), *aff’d*, 862 F.3d 1337 (Fed. Cir. 2017); *Apex Frozen Foods*, 862 F.3d at 1340;

In *Apex Frozen Foods*, Commerce found a pattern of export prices that differed significantly among purchasers, regions, or periods of time.²¹⁰ With this finding, Commerce applied the exception and used the average-to-transaction approach to assess targeted dumping.²¹¹ Apex, among others, argued that Commerce did not reasonably justify the use of this method over the average-to-average method.²¹² Analyzing Commerce's action under *Chevron*, the Federal Circuit found the applicable statute ambiguous and concluded that Commerce's application of the meaningful difference test was a reasonable explanation for its use of the average-to-transaction methodology.²¹³ In sum, the Federal Circuit upheld the CIT's decision, finding Commerce's application of the average-to-transaction methodology in this case reasonable.²¹⁴

K. Diamond Sawblades Manufacturers Coalition v. United States

In *Diamond Sawblades Manufacturers Coalition v. United States*,²¹⁵ the Federal Circuit examined an antidumping order on Chinese exporters of diamond sawblades.²¹⁶ Because China is considered an NME, Commerce "begins with a rebuttable presumption that all companies within the country are subject to government control" and thus their home-market pricing data cannot be relied upon to establish a home market price.²¹⁷ Here, the subject exporter, Advanced Tech and Materials Company ("ATM"), established an absence of government control and was afforded a separate rate of 2.50%, compared to the country-wide rate of 82.12% on the subject goods.²¹⁸ Diamond Sawblades Manufacturers Coalition, on behalf of the domestic industry in the United States, challenged Commerce's separate rate determination.²¹⁹ After hearing the case, the CIT remanded to Commerce so it could explain how it

see also supra notes 56–63 and accompanying text (explaining the three dumping calculations that Commerce employs).

210. 862 F.3d at 1342–43.

211. *Id.* at 1341, 1343.

212. *Id.* at 1344.

213. *Id.* at 1348.

214. *Id.* at 1351.

215. 866 F.3d 1304 (Fed. Cir. 2017).

216. *Id.* at 1307.

217. *Id.* (quoting Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 71 Fed. Reg. 29,303, 29,307 (May 22, 2006)); *see also supra* note 91 (defining a non-market economy).

218. *Diamond Sawblades Mfrs. Coal.*, 866 F.3d at 1306–07.

219. *Id.* at 1307.

established the separate rate.²²⁰ On remand, Commerce once again concluded that ATM “was entitled to the separate rate of 2.50%.”²²¹ On second appeal, CIT once again concluded that Commerce “failed to consider important aspects of the problem.”²²² In the second remand, Commerce switched its position and concluded that ATM had failed to rebut the presumption of government control.²²³

In Commerce’s final determination, it found that ATM lacked independent management because four of its senior officials on the board and the other five board members were nominated by the China Iron & Steel Research Institute, which is wholly-owned by the State-Owned Assets Supervision and Administration Commissions of the State Council of China.²²⁴ ATM was subjected to the then China-wide rate of 164.09%.²²⁵ However, given that ATM fully cooperated with the investigation during the first administrative review, and that ATM was subjected to the China-wide rate, Commerce decided to update the China-wide rate by averaging the no longer applicable ATM separate duty rate of 0.15% and the China-wide rate, yielding a new China-wide rate of 82.12%.²²⁶ On appeal, the CIT upheld Commerce’s recalculation.²²⁷

ATM argued that its cooperation during the first administrative review should qualify it for a separate rate.²²⁸ It contended the application of the China-wide rate to entities that cooperate creates a disincentive for cooperation.²²⁹ The Federal Circuit disagreed and held that the China-wide rate would always include the rebuttable presumption that an entity is not state-controlled; however, failure to rebut that presumption would subject an entity to the China-wide rate.²³⁰ The Federal Circuit noted that “the fact of cooperation may help an entity in a NME country seek a reduction of the country-wide rate, as it did here, but it does not,

220. *Id.* at 1308 (citing *Advanced Tech. & Materials Co. v. United States*, 885 F. Supp. 2d 1343, 1348–49 (Ct. Int’l Trade 2012)).

221. *Id.* (citing *Advanced Tech.*, 885 F. Supp. 2d at 1348–49).

222. *Id.*

223. *Id.* (citing *Advanced Tech. & Materials Co. v. United States*, 938 F. Supp. 2d 1342, 1345 (Ct. Int’l Trade 2013), *aff’d*, 581 F. App’x 900 (Fed. Cir. 2014)).

224. *Id.*

225. *Id.*

226. *Id.* at 1309.

227. *Id.* (citing *Diamond Sawblades Mfrs. Coal. v. United States*, No. 13-00078, 2015 WL 5603898, at *1 (Ct. Int’l Trade Sept. 23, 2015)).

228. *Id.* at 1310. ATM cited to 19 U.S.C. § 1677e(b) for the proposition that Commerce may only find an AFA when a party has failed to comply with Commerce’s requests for information. *Id.* (citing 19 U.S.C. § 1677e(b)(1) (2012)); *see also supra* note 179 and accompanying text.

229. *Diamond Sawblades Mfrs. Coal.*, 866 F.3d at 1310.

230. *Id.* at 1310–11.

without more, save it from that rate.”²³¹

CONCLUSION

The effect of an antidumping duty or a classification that bears a higher tariff rate can have dramatic economic effects on foreign exporters to the United States.²³² One extensive firm-level study of Chinese exporters found that antidumping duties imposed by the United States resulted in a twelve percent decline in labor productivity in those targeted Chinese firms.²³³ Additionally, a 2006 study by a Department of Justice antitrust attorney on the effects of antidumping duties on the levels of foreign imports to the United States reported, despite a lack of evidence, a 0.9% decline in imports because of those duties.²³⁴

Recent trends show that China remains the most investigated exporter for potential dumping and immediate goods, usually related to the steel industry, which tends to be the sector most frequently challenging those dumping orders.²³⁵ It is also worth noting that antidumping and countervailing duty cases have been more frequently combined, rather than filed as separate cases as was practice in the past,²³⁶ as seen in *Maverick Tube II*.²³⁷ More activity in the steel sector and with China can be expected, especially as U.S. protectionism increases and trade tensions continue to grow.²³⁸

231. *Id.* at 1315.

232. WILLIAM W. NYE, WHAT IS THE EFFECT OF U.S. ANTIDUMPING DUTIES ON IMPORTS? SOME EVIDENCE FROM THE SUNSET REVIEW PROCESS 6–7 (2006).

233. Piyush Chandra & Cheryl Long, *Anti-dumping Duties and Their Impact on Exporters: Firm Level Evidence from China*, 51 WORLD DEV. 169, 174 (2013).

234. NYE, *supra* note 232, at 15–16.

235. See Michael D. Wright, *A Critique of the Public Choice Theory Case for Privatization: Rhetoric and Reality*, 25 OTTAWA L. REV. 1, 4 n.7 (explaining that immediate goods and services include “desks, laundry services, [and] highway maintenance”); Jim Zarroli, *China Churns Out Half the World’s Steel, and Other Steelmakers Feel Pinched*, NPR (Mar. 8, 2018, 5:11 AM), <https://www.npr.org/2018/03/08/591637097/china-churns-out-half-the-worlds-steel-and-other-steelmakers-feel-pinched> (explaining that China is a global leader in the steel industry and has often been accused by other countries of “dumping steel at artificially low prices”).

236. See, e.g., Elliot J. Feldman & John J. Burke, *Testing the Limits of Trade Law Rationality: The GPX Case and Subsidies in Non-Market Economies*, 62 AM. U. L. REV. 787, 788 (2013) (discussing the GPX cases, which are a group of cases involving an American importer of off-the-road tires from China).

237. *Maverick Tube II*, 861 F.3d 1269, 1271 (Fed. Cir. 2017); see *supra* Section II.I.

238. Zarroli, *supra* note 235 (elaborating on concerns about President Trump’s newly imposed tariffs on steel and aluminum).