

United States Court of Appeals for the Federal Circuit

**XI'AN METALS & MINERALS IMPORT & EXPORT
CO., LTD.,**
Plaintiff

**SHANXI PIONEER HARDWARE INDUSTRIAL CO.,
LTD., BUILDING MATERIAL DISTRIBUTORS,
INC.,**
Plaintiffs-Appellants

v.

**UNITED STATES, MID CONTINENT STEEL &
WIRE, INC.,**
Defendants-Appellees

2021-2205, 2021-2227

Appeals from the United States Court of International
Trade in Nos. 1:20-cv-00103-LMG, 1:20-cv-00111-LMG,
1:20-cv-00116-LMG, Senior Judge Leo M. Gordon.

Decided: September 23, 2022

JOSEPH DIEDRICH, Husch Blackwell LLP, Madison, WI,
argued for all plaintiffs-appellants. Plaintiff-appellant
Shanxi Pioneer Hardware Industrial Co., Ltd. also repre-
sented by JEFFREY S. NEELEY, STEPHEN W. BROPHY, Wash-
ington, DC.

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LIZBETH ROBIN LEVINSON, Fox Rothschild LLP, Washington, DC, for plaintiff-appellant Building Material Distributors, Inc. Also represented by BRITTNEY RENEE POWELL, RONALD MARK WISLA.

ROBERT R. KIEPURA, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by SOSUN BAE, BRIAN M. BOYNTON, PATRICIA M. MCCARTHY; AYAT MUJAIS, International Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce, Washington, DC.

ADAM H. GORDON, The Bristol Group PLLC, Washington, DC, argued for defendant-appellee Mid Continent Steel & Wire, Inc. Also represented by LAUREN FRAID, JENNIFER MICHELE SMITH.

Before MOORE, *Chief Judge*, NEWMAN and STOLL, *Circuit Judges*.

STOLL, *Circuit Judge*.

Shanxi Pioneer Hardware Industrial Co., Ltd. (Pioneer) and Building Material Distributors, Inc. (BMD) appeal the decision of the United States Court of International Trade affirming the United States Department of Commerce's final results in the tenth administrative review of the antidumping order on certain steel nails from the People's Republic of China. Based on its finding that Pioneer did not cooperate to the best of its ability with Commerce's request for information, Commerce applied adverse facts available against Pioneer and assigned an antidumping margin of 118.04 percent to Pioneer. We affirm the Court of International Trade's judgment based on its conclusion that Commerce's decision to apply adverse facts available was supported by substantial evidence.

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BACKGROUND

Commerce protects domestic producers from unfair trade practices, such as dumping, by investigating whether imported merchandise is being sold in the United States at less than fair value and imposing antidumping duties on subject merchandise to level the playing field. 19 U.S.C. § 1673. To determine the fair value of merchandise from non-market economies, such as China, Commerce constructs a respondent-specific per unit “normal value” representing the cost of production of the merchandise. Commerce uses this normal value to determine whether the merchandise is being dumped. If so, Commerce calculates a dumping margin and a corresponding duty assessment rate for that respondent and issues an antidumping duty order. At the request of interested parties, Commerce reviews and reassesses its antidumping duty orders annually after the initial investigation. § 1675(a).

This story begins in 2008. Mid Continent Steel & Wire, Inc. (Mid Continent) petitioned Commerce to investigate the importation and sale of certain steel nails from China. During this initial investigation, Commerce determined that the subject merchandise was being dumped and issued an antidumping duty order. Notice of Antidumping Duty Order: Certain Steel Nails From the People’s Republic of China, 73 Fed. Reg. 44961 (Aug. 1, 2008). Because Commerce has designated China as a non-market economy, Commerce applies a rebuttable presumption that all Chinese producers are subject to government control and therefore should be assigned a country-wide dumping margin. Commerce selects a number of producers or importers for individual examination to determine this country-wide dumping margin and other margins. Pioneer—a Chinese producer and importer/exporter of steel nails (the subject merchandise)—applied for and received a separate rate in this initial antidumping investigation. In other words, Pioneer demonstrated that it was independent of government control and should be assessed a rate different from the

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country-wide rate. Commerce did not select Pioneer for individual examination. Commerce set the country-wide margin for China at 118.04 percent. *Id.* at 44965.

In 2013, Commerce published the results of its third administrative review of the antidumping order, covering merchandise entries that occurred between August 1, 2010, and July 31, 2011. Commerce announced its intention to

require that [a respondent in the third administrative review] and *all other future respondents* for this case report all FOPs [factors of production] data on a CONNUM-specific basis using all product characteristics in subsequent reviews, as documentation and data collection requirements should now be fully understood by [the particular respondent] and all other respondents.

Certain Steel Nails From the People's Republic of China; Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review, A-570-909, ARP 10-11, at 36-40 (Dep't of Com. Mar. 5, 2013) (*2010-2011 Final IDM*) (emphasis added); *see also* Certain Steel Nails From the People's Republic of China; Final Results of Third Antidumping Duty Administrative Review; 2010-2011, 78 Fed. Reg. 16651 (Mar. 18, 2013).

“CONNUM” is a contraction of the term ‘control number,’ and is Commerce jargon for a unique product.” *Xi'an Metals & Mins. Imp. & Exp. Co. v. United States*, 520 F. Supp. 3d 1314 (Ct. Int'l Trade June 9, 2021) (*CIT Op.*). A particular CONNUM roughly corresponds to a particular product defined “in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding.” *Id.* Commerce defines CONNUMs by identifying “key physical characteristics of the subject merchandise” that are “commercially meaningful” in the United States marketplace and “have an impact on costs of production.” Gov't Br. 7. CONNUM-specific data allows Commerce to perform comparisons of its constructed normal values to

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export prices on as precise a basis as possible. *CIT Op.*, 520 F. Supp. 3d. at 1322; Gov't Br. 7–8. Commerce has required reporting factors of production (FOPs) on a CONNUM-specific basis using similar language in various antidumping proceedings for over a decade.

In 2018, Commerce initiated the administrative review underlying this appeal, the tenth administrative review of the antidumping order covering the period of August 1, 2017, to July 31, 2018. Commerce selected three mandatory respondents, including Pioneer, for examination from among the companies that requested to be considered separate rate companies. Certain Steel Nails from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017–2018, 84 Fed. Reg. 55906 (Oct. 18, 2019) (*2017–2018 Preliminary Results*). This marked the first time that Pioneer was selected as a mandatory respondent in the course of this antidumping proceeding and was therefore the first time that Pioneer had an individual obligation to cooperate with Commerce's investigation, including responding to Commerce's questionnaires designed to obtain information necessary to calculate dumping margins.

Commerce issued questionnaires to the mandatory respondents, requesting FOP data for the subject merchandise using “actual quantities consumed . . . on a CONNUM-specific basis.” J.A. 279. The questionnaire stated that a respondent could alternatively provide FOP data using a different allocation methodology if the respondent provided a “detailed explanation of all efforts undertaken to report the actual quantity . . . on a CONNUM-specific basis,” how the estimated FOP consumption was derived, and “why the methodology[] selected is the best way to accurately demonstrate an accurate consumption amount.” *Id.* Pioneer responded to the questionnaire, representing that it had “reported the factors of production (FOPs) using actual



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