Slip Op. 22-45

UNITED STATES COURT OF INTERNATIONAL TRADE

DALIAN MEISEN WOODWORKING CO., LTD., Plaintiff, and CABINETS TO GO, LLC, and THE ANCIENTREE CABINET CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and AMERICAN KITCHEN CABINET ALLIANCE, Defendant-Intervenor.	Before: Richard K. Eaton, Judge Court No. 20-00110 **PUBLIC VERSION**

OPINION AND ORDER

[Final Determination is remanded.]

Dated: May 12, 2022

Stephen W. Brophy, Husch Blackwell, LLP, of Washington, D.C., for Plaintiff Dalian Meisen Woodworking Co., Ltd. With him on the brief was *Jeffrey S. Neeley*.

Alexandra H. Salzman, deKieffer & Horgan, PLLC, of Washington, D.C., for Plaintiff-Intervenor The Ancientree Cabinet Co., Ltd. With her on the brief were *Gregory S. Menegaz* and *J. Kevin Horgan*.

Mark R. Ludwikowski, Clark Hill PLC, of Washington, D.C., for Plaintiff-Intervenor Cabinets to Go, LLC. With him on the brief were *Courtney Gayle Taylor*, *R. Kevin Williams*, *William Sjoberg*.

Ioana Cristei, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant the United States. With her on the brief were *Bryan M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of Counsel on the brief was *Elio Gonzalez*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Christopher T. Cloutier, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor American Kitchen Cabinet Alliance. With him on the brief was *Luke A. Meisner*.

Eaton, Judge: This case involves the U.S. Department of Commerce's ("Commerce" or the "Department") affirmative final determination in the countervailing duty investigation of wooden cabinets and vanities from the People's Republic of China ("China"). *See Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China*, 85 Fed. Reg. 11,962 (Dep't Commerce Feb. 28, 2020) ("Final Determination") and accompanying Issues and Decision Mem. (Feb. 21, 2020) ("Final IDM"), PR 846.

Plaintiff Dalian Meisen Woodworking Co., Ltd. ("Meisen") and Plaintiff-Intervenor The Ancientree Cabinet Co., Ltd. ("Ancientree") are producers and exporters of subject merchandise and were mandatory respondents in the investigation. Plaintiff-Intervenor Cabinets to Go, LLC is a U.S. importer of the subject wooden cabinets and vanities. Meisen, Ancientree, and Cabinets to Go ("Plaintiffs") have each filed a motion for judgment on the agency record. *See* Meisen's Mem. Supp. Mot. J. Agency R., ECF Nos. 38-1 (conf.) and 39-1 (public) ("Meisen Br."); Meisen's Reply, ECF Nos. 45 (conf.) and 46 (public); Ancientree's Mem. Supp. Mot. J. Agency R., ECF No. 42 ("Ancientree Br."); Ancientree's Reply, ECF No. 47; Cabinets to Go, LLC's Mem. Supp. Mot. J. Agency R., ECF No. 40 ("CTG Br.").

By their respective motions, Plaintiffs challenge Commerce's finding, based on adverse facts available, that Meisen and Ancientree each received a benefit under China's Export Buyer's Credit Program. Plaintiffs contend that this finding lacks the support of substantial evidence and

is otherwise not in accordance with law. Plaintiffs thus ask the court to direct Commerce to exclude the subsidy rate, determined for the program, from the calculation of Meisen's and Ancientree's individual countervailing duty rates, and the "all-others" rate.[1] *See* Meisen Br. at 8-17; Ancientree Br. at 6-17; CTG Br. at 3-6.

Additionally, Meisen argues that Commerce erred when selecting different benchmarks to measure the "benefit" that Meisen and Ancientree each received under the "plywood for less-than-adequate-remuneration" program.[2] According to Meisen, the company and Ancientree purchased identical plywood, so Commerce should have used data under the same Harmonized Tariff Schedule ("HTS") subheading for both companies. *See* Meisen Br. at 14.

The United States ("Defendant") on behalf of Commerce and Defendant-Intervenor the American Kitchen Cabinet Alliance oppose the motions. *See* Def.'s Resp. Opp'n Pls.' Mots. J. Agency R., ECF No. 43 ("Def.'s Resp."); Def.-Int.'s Resp. Opp'n Meisen's Mot. J. Agency R., ECF No. 44.

Jurisdiction is found under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2018).

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[1] The countervailing duty rates calculated for Meisen, Ancientree, and a third mandatory respondent, Rizhao Foremost Woodwork Manufacturing Co., Ltd., which is not a party in this action, formed the basis of the "all-others" rate, under 19 U.S.C. § 1671d(c)(5) (2018). U.S. importer Cabinets to Go alleges that its Chinese suppliers are subject to the "all-others" rate. *See* CTG Br. at 3.

[2] Commerce's regulations provide that "a benefit exists to the extent that . . . goods or services are provided for less than adequate remuneration." 19 C.F.R. § 351.511(a)(1) (2019). Commerce measures the amount of the benefit by comparing a respondent's reported costs for the good or service with a benchmark, *i.e.*, a market-determined price "that could have constituted adequate remuneration." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1368 (Fed. Cir. 2014); *see also* 19 C.F.R. § 351.511(a)(2) (defining adequate remuneration).

For the reasons stated in this Opinion and Order, the court remands Commerce's calculation of Meisen's and Ancientree's individual countervailing duty rates and directs the Department to either (1) find a practical solution to verify the non-use information on the record, such as the reopening of the record to issue supplemental questionnaires to respondents and their U.S. customers (*see infra* note 9); or (2) recalculate the countervailing duty rates for Meisen and Ancientree to exclude the subsidy rate for the Export Buyer's Credit Program, and recalculate the all-others rate accordingly. The Department's plywood benchmarking determination for Meisen is sustained.

BACKGROUND

In response to a petition filed by Defendant-Intervenor the American Kitchen Cabinet Alliance, Commerce initiated an investigation of thirty-six programs by which the Chinese government allegedly provided countervailable subsidies to the wooden cabinet industry in China. *See Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China*, 84 Fed. Reg. 12,581 (Dep't Commerce Apr. 2, 2019) (initiation notice). The period of investigation was January 1, 2018, through December 31, 2018. *See Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China*, 84 Fed. Reg. 39,798, 39,798 (Dep't Commerce Aug. 12, 2019) ("Preliminary Determination") and accompanying Decision Mem. (Aug. 5, 2019) ("PDM"), PR 623. Among the programs investigated were (1) the Export Buyer's Credit Program, and (2) a program under which China allegedly provided plywood to producers for less-than-adequate remuneration. Both programs are at issue in this appeal of the Final Determination.

I. The Export Buyer's Credit Program

The Export Buyer's Credit Program is a state-subsidized loan program, administered by China's state-owned Export Import Bank. *See Clearon Corp. v. United States*, 44 CIT __, __, 474 F. Supp. 3d 1339, 1343 (2020) (citation omitted). Under the program, the Chinese government provides credit at preferential rates to foreign purchasers of goods exported by Chinese companies. *See id.* at __, 474 F. Supp. 3d at 1343.

As with other cases involving the Export Buyer's Credit Program that have come before this Court, the record in this case shows that Commerce sent initial and supplemental questionnaires to China, asking for information that, according to Commerce, would allow it to understand the operation of the program. *See id.* at __, 474 F. Supp. 3d at 1350-51 & nn.10-12 (collecting cases). Among the specific pieces of information sought by Commerce were the identities of any third-party banks involved in the disbursement of buyer's credits through the program, and copies of internal guidelines believed to have revised certain aspects of the Export Buyer's Credit Program in 2013.[3] *See* Final IDM at 26.

As in prior cases, here, China provided some, but not all, of the operational information that Commerce requested. For example, China failed to provide "a list of all partner/correspondent banks involved in the disbursement of funds under the [Export Buyer's Credit] program." *See* Final IDM at 26. Instead, China responded that the requested information was "not applicable" because the program was not used by respondents or their U.S. customers. *See* PDM at 17; Final IDM at 26.

[3] For example, Commerce asked for "translated copies of the laws and regulations pertaining to the [Export Buyer's Credit Program]; a description of the agencies and types of records maintained for administration of the program; a description of the program and the application process; program eligibility criteria; and program usage data." Final IDM at 26.

With respect to the program revisions, China responded that the information was internal to the Export Import Bank, not public, and not available for release, and further that it could not compel the Export Import Bank to give the information to Commerce.[4] China further responded that it "had confirmed that 'none of the U.S. customers of the mandatory respondents has been provided with loans under this program,'" and, thus, answers to Commerce's questions were "not required." *See* Final IDM at 26.

For their part, in response to Commerce's questionnaires, Meisen and Ancientree stated that they did not benefit from the Export Buyer's Credit Program. In support of this claim, they placed on the record declarations by their respective U.S. customers stating that "[Meisen's U.S. customer] has not financed any purchases from [Meisen] through the use of the export buyer's credit program, directly or indirectly from the Import-Export Bank of China . . . [and] has never, directly or indirectly, used the Import-Export Bank of China (i.e. Buyer's Credit program) in any way."). *See, e.g.*, Meisen's Sec. III Quest. Resp. (July 11, 2019) Ex. 14, PR 500.

After the Preliminary Determination was issued, Commerce conducted verification in China at the offices of Meisen and Ancientree. Though it verified the "non-use" of some of the subsidy programs under investigation, Commerce did not attempt to verify the respondents' claims that they did not receive a benefit under the Export Buyer's Credit Program. *See, e.g.*, Ancientree Verification Rep. (Jan. 7, 2020) at 9, PR 808. Instead, Commerce stated that it was "unable to verify in a meaningful manner what little information there is on the record indicating non-use . . . with the exporters, U.S. customers, or at the China [Export Import] Bank itself, given the refusal

[4] The court need not credit China's claim that the Export Import Bank is separate from the Chinese government to reach its conclusions.

of [China] to provide the 2013 revision and a complete list of correspondent/partner/intermediate banks." Final IDM at 34.

Based on this claimed inability to verify non-use, Commerce concluded that there were "gaps" in the record because "necessary" information was missing that would permit it to verify the claims of non-use by the respondents' U.S. customers:

> In short, because [China] failed to provide Commerce with information necessary to identify a paper trail of . . . direct or indirect export credits from the China Ex-Im Bank, we would not know what to look for behind each loan in attempting to identify which loan was provided by the China Ex-Im Bank via a correspondent bank under the [Export Buyer's Credit] program. This necessary information is missing from the record *because such disbursement information is only known by the originating bank, the China Ex-Im Bank*,[5] which is a government-controlled bank. Without cooperation from the China Ex-Im Bank and/or [China], we cannot know the banks that could have disbursed export buyer's credits to the company respondents' customers. Therefore, there are gaps in the record because [China] refused to provide the requisite disbursement information.

Final IDM at 34 (footnote omitted). Accordingly, Commerce found that because China "withheld necessary information that was requested of it and significantly impeded [the] proceeding," it "must rely on facts otherwise available . . . pursuant to [§ 1677e(a)(1), (2)(A) and (C)]." Final IDM at 36.

Additionally, Commerce concluded that "an adverse inference [was] warranted in the application of facts available, pursuant to [§ 1677e(b)], because [China] did not act to the best of its ability in providing the necessary information to Commerce." Final IDM at 36. Thus, Commerce found that "under [the Export Buyer's Credit] program [China] bestowed a financial

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[5] It is fair to wonder if this statement can possibly be true. Surely, the China Export Import Bank does not make a loan to a U.S. purchaser of Chinese goods without the purchaser completing some paperwork demonstrating that it has or will purchase qualifying merchandise. Thus, the U.S. purchasers would be another source of the needed disbursement information.

contribution and provided a benefit to Ancientree . . . and Meisen within the meaning of" the countervailing duty statute. *See* Final IDM at 36.

As an adverse facts available rate for the Export Buyer's Credit Program, Commerce selected "10.54 percent *ad valorem*, the highest rate determined for a similar program" in a separate proceeding involving China. *See* Final IDM at 37-38; *see also* 19 U.S.C. § 1677e(d).

II. Program for the Provision of Plywood for Less-Than-Adequate Remuneration

In addition to the Export Buyer's Credit Program, Commerce investigated a program by which it claims China allegedly supplied plywood—an input in the production of the subject wooden cabinets and vanities—to producers for less-than-adequate remuneration. By way of questionnaires, the Department sought benchmarking information from Meisen and Ancientree to measure the benefit received by the respondents under this program.

In Meisen's benchmark submission, the company identified the HTS subheading that it believed applied to the plywood that it purchased during the period of investigation—HTS subheading 4412.**33**[6]—and supplied data from the United Nations Comtrade Database ("U.N.

[6] The HTS or Harmonized System is an "international product nomenclature developed by the World Customs Organization." World Customs Organization, http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx (last visited May 2, 2022). The parties' briefs do not identify the version of the HTS on which they relied when answering Commerce's questionnaires. The 2017 version of subheading 4412.33 is a basket provision ("Other") that covers plywood "with at least one outer ply of non-coniferous wood" of certain tree species, *i.e.*, alder, ash, beech, birch, cherry, chestnut, elm, eucalyptus, hickory, horse chestnut, lime, maple, oak, plane tree, poplar and aspen, robinia, tulipwood or walnut. *See* HS Nomenclature 2017 Edition, World Customs Organization, http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2017-edition/hs-nomenclature-2017-edition.as px (click on link 0944-2017E under Section IX, Chapter 44 for Wood and articles of Wood; wood charcoal) (last visited May 2, 2022); *see also* Meisen Benchmark Submission (July 18, 2019) attach. 1, PR 571-576, CR 336-337.

Comtrade")[7] for that subheading. *See* Final IDM at 58-59 (Meisen provided "data from UN Comtrade for use in the valuation of plywood using *the HTS code applicable to the plywood purchased by . . . Meisen* which has a face and back of birch."). The data consisted of 2018 weighted-average monthly global export prices for Port of Dayaowan, China for HTS subheading 4412.33. *See* Meisen Benchmark Submission (July 18, 2019) attach. 1, PR 571-576, CR 336-337.

In Ancientree's benchmarking submission, the company identified HTS subheading 4412.**32**,[8] as well as HTS subheading 4412.33, as provisions that could possibly describe the plywood it used in making the subject wooden cabinets and vanities. *See* Ancientree Benchmark Submission (July 18, 2019), PR 588-590. Ultimately, however, it categorized its purchases under HTS subheading 4412.**32**. *See* Ancientree Suppl. Quest. Resp. at 3; *see also* Final IDM at 59.

Thus, both Meisen and Ancientree identified HTS subheading 4412.33 as a possible source of benchmarking information, but in the end, Ancientree stated that its period of investigation purchases of plywood should be categorized under subheading 4412.32.

In the Preliminary Determination, Commerce valued plywood using U.N. Comtrade data for the HTS subheading identified by each respondent in its benchmarking submission as applicable to its plywood purchases—4412.33 for Meisen, and 4412.32 for Ancientree—to

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[7] U.N. Comtrade "is a repository of official international trade statistics and relevant analytical tables" that is available for free online. *See* U.N. COMTRADE DATABASE, https://comtrade.un.org/ (last visited May 2, 2022).

[8] Subheading 4412.32, like subheading 4412.33, was a basket provision ("Other") that covered plywood "with at least one outer ply of non-coniferous wood." Unlike subheading 4412.33, however, 4412.32 did not list any particular species of wood that were covered by the subheading. *See* HS Nomenclature 2012 Edition, World Customs Organization, http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hsnomenclature_previous_editions/hs_nomenclature_table_2012.aspx (click on link 0944-2012E under Section IX, Chapter 44 for Wood and articles of Wood; wood charcoal) (last visited May 2, 2022); *see also* Ancientree Suppl. Quest. Resp. (July 22, 2019) at 3, PR 599, CR 345-353.

determine the amount of the benefit each respondent received on its plywood purchases under the program.

Despite Commerce's use of the HTS subheading that Meisen itself had identified as applicable to its plywood purchases, Meisen argued in its case brief, submitted after the Preliminary Determination, that Commerce erred by using different HTS subheadings for Ancientree and Meisen because the two companies purchased the same type of plywood. *See* Final IDM at 58 (citing Meisen's Case Brief (Jan. 21, 2020) at 2-3, PR 821).

In the Final Determination, Commerce rejected this argument, stating that the respondents are in the best position to know the characteristics of the plywood that each had purchased during the period of investigation, so it was reasonable for the Department to rely on the HTS subheadings identified by each respondent in its benchmarking submission. *See* Final IDM at 59.

Plaintiffs timely appealed Commerce's rulings to this Court.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

LEGAL FRAMEWORK

Under the countervailing duty statute, if Commerce determines that a foreign government or public entity "is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States," a duty will be imposed in an amount equal to

the net countervailable subsidy. *See* 19 U.S.C. § 1671(a). A subsidy is countervailable when (1) a foreign government provides a financial contribution (2) to a specific industry, and (3) a recipient within the industry receives a benefit as a result of that contribution. *See id.* § 1677(5).

With respect to the benefit element, where the subsidy is a government loan program, a "benefit" is conferred "if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." *Id.* § 1677(5)(E)(ii); *see also* 19 C.F.R. § 351.505(a) (2019) (same).

Where the subsidy is goods or services, Commerce's regulations provide that "a benefit exists to the extent that such goods or services are provided for less than adequate remuneration." 19 C.F.R. § 351.511(a). Commerce measures the adequacy of remuneration by comparing a respondent's reported costs for the good or service with a benchmark, *i.e.*, a market-determined price "that could have constituted adequate remuneration." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1368 (Fed. Cir. 2014); *see also* 19 C.F.R. § 351.511(a)(2) (defining adequate remuneration).

If, during the investigation or review of a countervailing duty order, Commerce determines that (a) "necessary information is not available on the record" or (b) "an interested party or any other person . . . withholds information that has been requested by [Commerce]," "fails to provide such information by the deadlines . . . or in the form and manner requested," "significantly impedes a proceeding," or "provides such information but the information cannot be verified," Commerce must use "facts otherwise available." 19 U.S.C. § 1677e(a). Where requested information is not made available on the record, regardless of the reason for the respondent's failure to provide it, the statute requires Commerce to use facts otherwise available to replace the missing information in

order to complete the record. *See id.*; *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) ("[T]he mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination.").

Where Commerce determines that the use of facts available is warranted, it may apply adverse inferences to those facts only if it makes the requisite additional finding that that party has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1). When considering if a respondent has failed to cooperate to the best of its ability, the Department must perform two tasks:

> First, it must make an objective showing that a reasonable and responsible [respondent] would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. . . . Second, Commerce must then make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Nippon Steel, 337 F.3d at 1382-83 (citation omitted).

Generally, only after Commerce has determined that there is information missing, creating a gap in the record, is it permitted to apply an adverse inference when selecting from among the facts otherwise available. *See Nippon Steel*, 337 F.3d at 1381. The application of adverse facts available is, then, in most cases a two-step process. *See id.* ("The statute has two distinct parts respectively addressing two distinct circumstances under which Commerce has received less than the full and complete facts needed to make a determination."). "The focus of subsection (a) is respondent's *failure to provide information*. The reason for the failure is of no moment." *Id.*

The application of an adverse inference depends on an assessment of a respondent's behavior. *See id.* ("As a separate matter, subsection (b) permits Commerce to 'use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available,' only if Commerce makes the separate determination that the respondent 'has failed to cooperate by not acting to the best of its ability to comply.' The focus of subsection (b) is respondent's *failure to cooperate to the best of its ability,* not its failure to provide requested information." (alteration in original)). Importantly, the use of facts available generally requires a finding of missing information. The application of an adverse inference is based on a respondent's efforts to comply with Commerce's requests for information. The purpose of the application of adverse facts available is to encourage respondents to comply with Commerce's requests. *See Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1224, 1239-40 (2021) (discussing use of adverse facts available as an "inducement" for compliance).

In a countervailing duty investigation, "Commerce often requires information from the foreign government allegedly providing the subsidy." *Fine Furniture*, 748 F.3d at 1369-70 (citation omitted). Where the foreign government fails to provide requested information, its behavior may result in the application of an adverse inference to a respondent's missing information. *See id.* at 1371. Under such circumstances, the Federal Circuit has upheld the use of adverse facts available even where it may adversely impact a cooperating party, *e.g.*, respondents that have cooperated with Commerce's requests for information. *See id.* at 1371-73 (citing *KYD, Inc. v. United States*, 607 F.3d 760 (Fed. Cir. 2010)). This Court and the Federal Circuit have stated, though, that "Commerce should seek to avoid such impact if relevant information exists elsewhere on the record." *Archer Daniels Midland Co. v. United States*, 37 CIT 760, 769, 917 F. Supp. 2d 1331, 1342 (2013) (citation omitted); *see also Fine Furniture*, 748 F.3d at 1372

(emphasis added) (upholding the application of adverse facts available where Commerce did "not apply adverse inferences *to substitute for any information that was actually submitted by the cooperating respondents*.").

DISCUSSION

I. Substantial Evidence Does Not Support Commerce's Facts Otherwise Available Finding with Respect to the Export Buyer's Credit Program

Plaintiffs argue that Commerce erred in its application of adverse facts available to find that Meisen and Ancientree used and received benefits under the Export Buyer's Credit Program. *See* Meisen Br. at 5; Ancientree Br. at 6. For Plaintiffs, there were no relevant facts missing from the record with respect to any alleged benefit: "Meisen . . . provided evidence that it and its customers did not receive a financial contribution or benefit under the Export Buyer's Credit Program, including uncontroverted declarations from its [U.S.] customers that they did not finance any purchases from Meisen through the program." Meisen Br. at 5; Ancientree Br. at 8 (similar argument with respect to Ancientree).

For its part, Defendant argues that "Commerce determined that the government of China did not cooperate to the best of its ability by failing to provide information requested, and as a result, Commerce was unable to verify claims of the mandatory respondents' non-use of the Export Buyer's Credit Program." Def.'s Resp. at 5-6. In particular, Defendant maintains: "Without information about the potential involvement of third-party banks and a full understanding of the administrative measures governing the program, Commerce cannot identify the correct issues, or verify use of the program." Def.'s Resp. at 6. Thus, for Defendant, Commerce "reasonably determined that information was missing from the record because of the government of China's

failure to cooperate to the best of its ability," and "appropriately relied on adverse facts available." Def.'s Resp. at 6.

The court finds that substantial evidence does not support Commerce's finding under § 1677e(a) that the use of "facts otherwise available" was required because necessary information was missing from the record. Here, both respondents certified that their customers did not take advantage of the program and supported this certification with declarations. The declarations placed on the record by Meisen and Ancientree show that their U.S. customers did not use the program to finance their purchases (*i.e.*, there can be no "benefit" received under the program by Meisen or Ancientree), and there is no record evidence to the contrary. Commerce, however, disregarded the non-use statements, not by failure to verify them or even attempting to verify them, but instead by finding that it would have been unreasonably burdensome to attempt to verify them without information that China withheld, *i.e.*, operational information about the role of third-party banks in disbursing credits and revisions to the program in 2013.

As this Court has found in prior cases with similar records, it is difficult to see how missing operational information about the program is "necessary" or relevant in the face of Plaintiffs' non-use evidence. *See, e.g.*, *Guizhou Tyre Co. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1261, 1270 (2018) (remanding to Commerce, noting that although "information as to the functioning of the Program was missing, this finding was rendered immaterial by responses from both Guizhou and [China] as to the Program's use. This defect proves fatal to Commerce's imposition of [adverse facts available]"); *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 399 F. Supp. 3d 1346, 1353 (2019) (remanding, noting that "Commerce has failed to demonstrate why the 2013 [Export Buyer's Credit Program] rule change [allegedly impacting the functioning of the program] is relevant to verifying claims of non-use, and how that constitutes a 'gap' in the record"); *Guizhou*

Tyre Co. v. United States, 43 CIT __, __, 415 F. Supp. 3d 1402, 1405 (2019) (sustaining Commerce's conclusion that "Plaintiffs did not use the [Export Buyer's Credit Program] based on the record evidence"); *see also, e.g.*, *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 389 F. Supp. 3d 1315, 1329 (2019) (remanding, noting that "the Department's decision to apply [adverse facts available] as to the Export Buyer's Credit Program based on an alleged lack of cooperation was unlawful because Commerce demonstrated no gap in the record, the respondents submitted evidence of non-use of the Program, and the Department's findings of unverifiability of necessary information [were] unsupported by record evidence"); *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1335, 1343 (2019) (remanding, noting that "[t]here is evidence in the record that squarely detracts from Commerce's inference that Plaintiffs used and benefited from the [Export Buyer's Credit Program]. Commerce may not simply declare that the evidence cannot be verified and therefore, a gap exists. That is not how it works. Commerce must attempt verification *in order to conclude* that a gap exists related to that inquiry"); *Guizhou Tyre Co. v. United States*, 44 CIT, __, __, 447 F. Supp. 3d 1373, 1376 (2020) (sustaining Commerce's conclusion "that the factual record in this case indicates that there was no use of the [Export Buyer's Credit Program] by Guizhou").

Where there is a gap in the record, the Federal Circuit has held that Commerce must use facts otherwise available. *See Fine Furniture*, 748 F.3d at 1370. The Court has not, however, sanctioned the substitution of "facts otherwise available" for relevant evidence that was placed on the record by the cooperative respondents. *Id.* at 1371; *Archer Daniels*, 37 CIT at 767, 917 F. Supp. 2d at 1342. Indeed, under § 1677e(a) the use of facts otherwise available is a method by which Commerce shall fill gaps in the record. It does not authorize the creation of gaps to be filled with information of Commerce's choosing. Yet, it appears that Commerce disagrees. Here, as in other

cases, to justify the substitution of relevant evidence placed on the record by cooperating respondents with facts available, Commerce has constructed an argument that is difficult to credit—*i.e.*, that operational information was withheld by China and therefore there are gaps regarding the use of the program. The problem with this argument is that the withheld information is (at best) only indirectly related to alleged actual use of the program by Meisen's and Ancientree's U.S. customers. Moreover, Commerce's argument that the operational information is necessary to verify the accuracy of the non-use information because without it, verification is unreasonably burdensome using its typical procedure, rings hollow when Commerce fails to even try.

Despite this Court's repeated rejection of Commerce's interpretation of § 1677e(a) to require the use of facts otherwise available even when relevant evidence on the record exists, here the Department again found that the program conferred a benefit on cooperative respondents Meisen and Ancientree, even though there is evidence of non-use of the program by their customers on the record.[9] Thus, here, as this Court has done in prior cases, the court holds that

[9] As noted in prior cases, Commerce has never appealed this Court's rejection of the Department's facts otherwise available determination in the context of the Export Buyer's Credit Program. *See Clearon*, 44 CIT at __, 474 F. Supp. 3d at 1353 n.13 ("It is worth noting that, despite Commerce's respectful protest, the United States elected not to file an appeal in any of the aforementioned cases."). Nonetheless, there are signs that Commerce is reconsidering its procedure for verifying claims of non-use of the program. *See, e.g.*, *Certain Mobile Access Equipment and Subassemblies Thereof From the People's Republic of China*, 86 Fed. Reg. 57,809 (Dep't Commerce Oct. 19, 2021) and accompanying Issues and Decision Mem. (Oct. 12, 2021) at 49-50 ("[C]onsidering court precedent, Commerce developed supplemental questionnaires issued to mandatory respondents and their U.S. customers requesting additional information regarding its financing activities to probe claims of non-use for the Export Buyer's Credit program."); *see also Risen Energy Co. v. United States*, 46 CIT __, Slip Op. 22-44 at 5 (May 12, 2022) (granting voluntary remand so that "the Government may attempt to verify the customer certifications of non-use," and directing that "[i]f the Government decides to remove the [Export Buyer's Credit Program] from its subsidy calculation under protest but does not intend to appeal, it must explain on remand why the Court should not provide some form of equitable relief, such as the immediate

Commerce's finding that necessary information is missing from the record, such that there is a gap in the factual record that requires the use of "facts otherwise available" under § 1677e(a) is contrary to the statute and lacks the support of substantial evidence.

Because Commerce's use of facts otherwise available to find that Meisen's and Ancientree's U.S. customers used the Export Buyer's Credit Program was unlawful, the first step of the two-step process has not been satisfied, and the Department's adverse facts available finding that Meisen and Ancientree benefitted from the program cannot be sustained. Thus, the inclusion of an adverse facts available rate for the program when calculating individual countervailing duty rates for Meisen and Ancientree is not supported by substantial evidence and is otherwise not in accordance with law. On remand, Commerce shall either (1) find a practical solution to verify the non-use information on the record, such as the reopening of the record to issue supplemental questionnaires to respondents and their U.S. customers (*see supra* note 9); or (2) recalculate the countervailing duty rates for Meisen and Ancientree to exclude the subsidy rate for the Export Buyer's Credit Program, and recalculate the all-others rate accordingly.

II. Substantial Evidence Supports Commerce's Plywood Benchmarking Determination

As noted, Commerce valued plywood using U.N. Comtrade data for the HTS subheading identified by each respondent in its benchmarking submission as applicable to its plywood purchases—4412.33 for Meisen, and 4412.32 for Ancientree—to determine the amount of the benefit each respondent received on its plywood purchases under the "plywood for less-than-adequate-remuneration" program. Plaintiff Meisen argues that substantial evidence does not

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return of deposits, or an injunction of the continued inclusion of the program with no attempt at verification that results in the temporary collection of funds that ultimately are not owed.").

support Commerce's decision "to use a different benchmark for Meisen than it used for [Ancientree] to measure the benefits received under the plywood for less than adequate remuneration program." Meisen Br. at 6. In particular, Meisen contends that "[t]he record evidence demonstrated that [Meisen and Ancientree] used the same type of plywood and Commerce failed to provide sufficient reasons for treating similar situations differently." Meisen Br. at 6.

For its part, Defendant asserts that Commerce explained its reasons for choosing the HTS subheadings it used for Meisen and Ancientree. With respect to Meisen, Commerce "used HTS [sub]heading 4412.**33** . . . because it was the [sub]heading Meisen reported to Commerce as applicable to [its] plywood purchases." Def.'s Resp. at 6. Defendant maintains its reliance on the HTS subheading reported by Meisen was reasonable because Meisen "was in the best position to determine the HTS classification describing its input." Def.'s Resp. at 6.

Commerce further found, with respect to the type of plywood purchased by Ancientree, that the company "categorized its purchases under HTS subheading 4412.32." Final IDM at 59. Thus, Commerce found it "appropriate to use HTS subheading 4412.**32** to measure the adequacy of remuneration for Ancientree's plywood purchases." Final IDM 59-60.

The court sustains Commerce's plywood benchmarking determination for Meisen because the Department's use of the HTS subheading Meisen identified for its own purchases of plywood to measure the benefit it received is supported by substantial evidence. Meisen does not dispute that it identified only subheading 4412.**33** as applicable to its plywood purchases. Nor does it dispute that Ancientree identified subheading 4412.**32** as applicable to its plywood purchases. Rather, Meisen argues that "Commerce cannot simply accept the classifications suggested by the parties without considering their accuracy." Meisen Br. at 15. Meisen neither cites any authority for this assertion, nor does it suggest a method of "considering the accuracy" of the classifications.

It only states that Meisen was not "aware that Commerce has ever [accepted proposed classifications] before." Meisen Br. at 15.

There is nothing unreasonable about Commerce trusting the certified responses of the mandatory respondents as to the proper classification of the inputs they used to produce subject merchandise. Again, the court notes that Meisen does not argue that the HTS subheading it identified, and Commerce used, is inaccurate, but only that identical subheadings should have applied to Ancientree's plywood because, for Meisen, the purchases reported by the two companies were "identical." The record, however, fails to support Meisen's claim. A review of the companies' questionnaire responses as to the type of plywood each used does, indeed, show that both companies coded their input as "type 3" ("Not bamboo and not tropical, with at least one outer ply of non-coniferous wood"), but the responses are not identical. The narrative responses of Meisen described its purchases as having "a face and back ply of birch" and "a poplar core," while Ancientree reported that it purchased different products.[10] *See* Meisen Suppl. Quest. Resp. (July 22, 2019) at 2 & Ex. 3, PR 601. Maybe there was an overlap among the products purchased by the two companies, but substantial evidence does not show that the two companies reported purchases of identical plywood products.

Although Meisen argues that Commerce has failed to explain adequately its selection of HTS subheadings for Meisen and Ancientree, the record indicates otherwise. *See, e.g.*, Meisen's Prelim. Calc. Mem. (Aug. 5, 2018) at 3 n.5, PR 643, CR 375-376; Ancientree Prelim. Calc. Mem. (Aug. 5, 2018) at 4 n.27, PR 668, CR 377-378. Commerce used the HTS subheading each

[10] Ancientree reported purchasing pine plywood, poplar plywood, and birch plywood. *See* Ancientree Suppl. Quest. Resp. at 1-3.

respondent certified that used to make its product. Nothing more is needed. Accordingly, Commerce's benchmarking determination and selection of HTS subheadings are sustained.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that Commerce's plywood benchmarking determination and selection of HTS subheadings are sustained; it is further

ORDERED that Commerce shall submit a redetermination upon remand that complies in all respects with this Opinion and Order; it is further

ORDERED that, on remand, Commerce shall either (1) find a practical solution to verify the non-use information on the record, such as the reopening of the record to issue supplemental questionnaires to respondents and their U.S. customers; or (2) recalculate the countervailing duty rates for Meisen and Ancientree to exclude the subsidy rate for the Export Buyer's Credit Program, and recalculate the all-others rate accordingly; and it is further

ORDERED that Commerce's remand results shall be due ninety (90) days following the date of this opinion; any comments to the remand results shall be due thirty (30) days following the filing of the remand results; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments.

/s/ Richard K. Eaton
Judge

Dated: May 12, 2022
New York, New York