

UNITED STATES COURT OF INTERNATIONAL TRADE

DORBEST LTD., et al.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Before: Pogue, Chief Judge
Consol. Court No. 05-00003

OPINION

[Commerce's remand determination affirmed.]

Decided: August 3, 2011

Mowry & Grimson PLLC (Kristin H. Mowry, Jeffrey S. Grimson, Jill A. Cramer, Susan E. Lehman, and Sarah M. Wyss) for Plaintiffs Dorbest Limited et al.;

King & Spalding LLP (Joseph W. Dorn, Stephen A. Jones, Jeffrey M. Telep, J. Michael Taylor, Daniel L. Schneiderman, and Ashley C. Parrish) for Defendant-Intervenors American Furniture Manufacturers Committee for Legal Trade, et al.;

Tony West, Assistant Attorney General; Jeanne E. Davidson, Director, Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Stephen C. Tosini, Carrie A. Dunsmore, and Brian A. Mizoguchi); Rachael E. Wenthold, Senior Attorney, Of Counsel, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for the United States Department of Commerce; and

Trade Pacific PLLC (Robert G. Gosselink) on behalf of Defendant-Intervenors Dongguan Lung Dong/Dong He, et al.

Pogue, Chief Judge: This matter concerns the selection of "surrogate" countries as a source for data with which to

calculate the labor wage rate in an antidumping investigation involving wooden bedroom furniture from China, a non-market economy ("NME"). The case now returns to the court after the Department of Commerce's ("Commerce") redetermination, Final Results of Redetermination Pursuant to Remand, (Apr. 27, 2011) ("2011 Redetermination"), following a partial remand order in Dorbest Ltd. v. United States, __ CIT __, 755 F. Supp. 2d 1291 (CIT 2011) ("Dorbest V").¹

Plaintiff/Respondent, Dorbest Ltd. ("Dorbest"), seeks review of Commerce's data choices in the 2011 Redetermination. Dorbest claims that Commerce's methodology for selecting the endpoint or "bookend" countries, which form the range of countries available for consideration as a data source, was contrary to established agency precedent and unsupported by substantial evidence, and that Commerce should have used absolute numerical differences in per-capita Gross National Income ("GNI") for the identification of "bookend" countries. Dorbest Comments on Fifth Remand Redetermination 2-4, (May 18, 2011) ("Dorbest Comments"). Dorbest further asserts that Commerce's inclusion of Equatorial Guinea in the initial list of countries available for consideration, and

¹ Dorbest V was a review of Commerce's prior 2010 remand determination. Final Results of Redetermination Pursuant to Remand, (Nov. 10, 2010) ("2010 Redetermination"). There is substantial history in this matter. See Dorbest V, 755 F. Supp. 2d at 1294-97. Familiarity with that history, and the court's prior opinions, is presumed.

Commerce's determination that Guinea was a significant producer of the subject merchandise, are unsupported by substantial evidence.² Id. at 5.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006). After a brief review of the agency's methodology and the applicable standard of review, the court will explain why it concludes that Commerce's methodology for selecting its initial bookend countries, as adopted in the 2011 Redetermination, is reasonable in the context here, and supported by a reasonable reading of the record evidence. The court also concludes that Dorbest has waived its other arguments. Commerce's final redetermination pursuant to remand is therefore affirmed.

² Dorbest also challenges Commerce's 2011 redetermination on the grounds that this court made a factual error in Dorbest V. Dorbest Comments 3. Citing the court's use of 2002 per-capita GNI for China as supplied by Petitioners and apparently downloaded during the court's review of the 2010 remand determination - rather than the 2002 data available at the time of the original investigation - Dorbest notes that the data used by Commerce resulted in an upper bookend country that was above China's GNI and that Commerce should therefore not have recalculated the surrogate wage rate using different bookend countries. Dorbest Comments 6-7. However, Commerce was correct in reading Dorbest V as expressing the court's concern with the overall imbalance in Commerce's data set, an imbalance which remained uncorrected even when using the 2002 data available at the time of the original investigation. See 2011 Redetermination 15. The court recognizes that China's per-capita GNI, using data available at the time of the original investigation, was USD 940, rather than the 1100 USD supplied by Petitioners and cited by the court in Dorbest V. The court also notes, however, that Dorbest did not object to the Petitioner's data in the proceeding leading to Dorbest V. See Dorbest Comments on 2010 Remand, Dec. 2, 2010, ECF No. 452, ("Dorbest 2010 Comments").

BACKGROUND

When determining surrogate labor rates, Commerce is required by statute to use data from countries that are both "economically comparable" to the nonmarket economy at issue, and "significant producers" of comparable merchandise. 19 U.S.C. § 1677b(c)(4); Dorbest Ltd. v. United States, 604 F.3d 1363, 1372-73 (Fed. Cir. 2010)("Dorbest IV").

In its 2010 Redetermination, following the Court of Appeals for the Federal Circuit's ("Federal Circuit" or "CAFC") invalidation of the regulation which previously governed surrogate labor rate calculation, Commerce created a new methodology to calculate surrogate labor rates. 2010 Redetermination 1-2. Under this new methodology, to select economically comparable countries, Commerce first chose a pair of countries to act as endpoint or "bookend" countries. In making this "bookend" selection, Commerce turned to the surrogate country memorandum from the original 2003 investigation and chose the two countries listed therein that had the highest and lowest GNI.³ Id. at 12-13. Commerce then identified the countries with GNIs in the range between the GNI of the two bookend countries,

³ Commerce asserted in the 2010 Redetermination that it placed the most emphasis on GNI as an indicator of economic comparability. 2010 Redetermination 12. It used the surrogate country memorandum as a starting point because it had already been created (albeit not for surrogate labor rate calculation) and contained a list of countries which were deemed economically comparable to China. See id.

including those two bookend countries. Id. at 13. These identified countries then became the universe or "basket" of countries available for consideration as a source of surrogate labor wage rate data.⁴

The result in the 2010 Redetermination was a group of countries with GNIs which were largely skewed toward a spectrum below China's GNI. Upon review of that decision, in Dorbest V, the court held that Commerce must either reconsider its selection of that significantly unbalanced pair of endpoint or "bookend" countries, or provide a reasonable explanation as to why it selected these countries as its starting point. Dorbest V, 755 F. Supp. 2d at 1299.

In its 2011 Redetermination, responding to Dorbest V, Commerce has amended its methodology by expanding the range of countries available for initial consideration as the source of surrogate labor rate data. Under this amended methodology, Commerce has selected a pair of "bookend" countries so that the range includes a number of countries with GNIs higher than China's GNI equal to the number of countries with GNIs lower than

⁴ In the 2010 Redetermination, none of the parties challenged Commerce's initial choice to use a "bookend" methodology for selecting an initial basket of countries; nor did the parties challenge whether the initial basket of countries are truly economically comparable to China. Rather, Petitioners challenged the data that Commerce used in its subsequent selection and calculations. See Dorbest V, 755 F. Supp. 2d at 1293-94.

China's. 2011 Redetermination at 6.⁵

The next step in Commerce's methodology is to ascertain which countries in this "basket" are also significant producers of wooden bedroom furniture.⁶ Commerce has defined "significant producer" as any country which "had exports of comparable merchandise between 2001 and 2003." Id. at 8-9. From the resulting 30 countries, Commerce then determines which countries reported the necessary wage rate data. Id. at 9. In this case, only 17 countries reported "reliable wage data." Id. at 9-10. Finally, as before, Commerce further refines its list by applying a filtering step to determine which countries reported industry-specific wage data under ISIC Rev. 2, Sub-Classification 33.⁷ Id. at 12.

Based on this analysis, Commerce has identified Colombia,

⁵ The lower bookend country remains the same. Id. at 6-7. Commerce has selected the upper bookend such that it obtains a number of countries with GNIs above that of China's equal to the number of countries with GNIs below that of China's. 2011 Redetermination at 6-7. This approach is sometimes called the "country count methodology." See e.g., id. The result is a list, or "basket," of 46 countries with GNIs that fall between the low and high "bookends," Pakistan (GNI 410 USD) and Colombia (GNI 1,830 USD), respectively. Id. at 6-7.

⁶ The remainder of Commerce's methodology remains unchanged from the 2010 redetermination.

⁷ This aspect of Commerce's methodology was affirmed in Dorbest V. Dorbest V, 755 F. Supp. 2d at 1303. Here, as in the prior remand results, Commerce properly explains that ISIC Rev. 2 Sub-Classification 33 was more specific to wooden bedroom furniture than ISIC Rev. 3 Sub-Classification 36. See 2011 Redetermination at 12; 2010 Redetermination at 28-29.

India, Indonesia, Pakistan and Macedonia as countries economically comparable to China which are significant producers of wooden bedroom furniture, and from which the preferred wage data is available. Using the data from these five countries, Commerce has calculated an average wage rate of 0.44 USD/hour. Using that average wage rate as a surrogate for the cost of labor in the production of Dorbest's merchandise, Commerce has determined that Dorbest has an antidumping margin of 2.40 percent. Id. at 24.

STANDARD OF REVIEW⁸

The court will find Commerce's remand redetermination unlawful if 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). Substantial evidence is that which, given the record as a whole, "'a reasonable mind might accept as adequate to support a conclusion[.]" when evaluating the agency's findings. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 477, 491 (1951) (quoting Consol. Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).

The court notes further that, in presenting its findings, the agency must explain its standards and "rationally connect

⁸ No party claims that Commerce's 2011 Redetermination fails to comply with the court's remand order in Dorbest V. See Amanda Foods (Vietnam) Ltd. v. United States, Slip Op 11-39, 2011 WL 1423125 at *3 (CIT Apr. 14, 2011)

them to the conclusions drawn from the record." U.S. Steel Corp. v. U.S., Slip Op 10-104, 2010 WL 3564705 at *1 (CIT 2010)(citing Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983); Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984)). The conclusion Commerce reaches need not be the best or only possible conclusion, merely a reasonable one. See Lifestyle Enterprise, Inc. v. United States, __ CIT __, 768 F. Supp. 2d 1286, 1305 (2011).

DISCUSSION

Commerce's country-count methodology.

Dorbest asserts that Commerce's determination was contrary to its established agency practice in counting upwards from China's per-capita GNI to ensure a more balanced set of bookends from which to select economically comparable countries. Dorbest Comments at 10-11. Dorbest further asserts that this method is results-oriented and arbitrary and that using a range based on numerical difference in GNI would have resulted in a more reasonable set of results. Specifically, Dorbest advocates placing Egypt (GNI 1,470 USD) as the upper bookend country. Id. at 17. Dorbest claims that because Egypt's GNI is USD 530 above China's and Pakistan's is USD 530 below China, this is a more appropriate way to achieve balanced bookends. Id. at 19.

Accordingly, Dorbest claims, Commerce's bookend choices are unsupported by substantial evidence in the record.⁹ Id. at 21.

Where Commerce adopts a practice that substantially deviates from precedent, it must at least acknowledge the change and show that there are good reasons for the new policy.¹⁰ Pakfood Pub. Co. Ltd. v. United States, ___ CIT ___, 753 F. Supp. 2d 1334, 1341-42 (2011)(citations omitted). The new practice must also be within the scope of authority granted to Commerce by the relevant statute. Id. Commerce may depart from an established practice so long as it does so in the manner required by law. Id.

Here, Commerce clearly explains that the methodology employed is "appropriate only in this unique instance." 2011

⁹ The court notes that Commerce recently announced a new methodology for calculating surrogate wage rate in proceedings initiated on or after June 21, 2011. See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor, 76 Fed. Reg. 36,092 (Dep't Commerce June 21, 2011). Under the new methodology, Commerce will no longer use multiple countries to calculate surrogate wage rate, and will instead rely on data from the primary surrogate country. Id. at 36,093. While Dorbest urges the court to hold that Commerce's current methodology is unlawful when considered in light of Commerce's recent announcement, the court cannot do so because Commerce's change in methodology is not retroactive. Id.

¹⁰ "This is not to say that Commerce's prior determinations are legally binding in subsequent administrative proceedings . . . Nevertheless, Commerce must comply with the basic principle of law that, absent a rational explanation for acting to the contrary, like cases should be decided alike." Pakfood Pub. Co. Ltd. v. United States, ___ CIT ___, 753 F. Supp. 2d 1334, 1342 n.20 (2011)(citations omitted).

Redetermination at 8. Conceding that the set of bookends used in the 2010 redetermination resulted in a basket of countries that was "largely unbalanced," Commerce has applied a methodology explicitly designed to address the problem as identified by the court in Dorbest V. Id. at 8, 16-17. Commerce further explains that, given the inherent imbalance in the first set of bookend countries and the "uniqueness of the data in this investigation," this methodology constitutes the "best option in this instance." Id. at 17 & n.42 (noting other instances where the bookend countries based on surrogate country memoranda resulted in an "initial basket of economically comparable countries [that] was more equitably distributed around [China]").¹¹

In response to Dorbest's assertion that Commerce should have used a specific numerical difference in per-capita GNI to calculate the number of countries, with Egypt as the upper bookend, Commerce responds that, in the global context, it finds countries with GNIs as high as Colombia's to be economically

¹¹ Dorbest incorrectly asserts that the administrative decisions to which Commerce cites do not support Commerce's assertion that the countries in those surrogate country memoranda are more equally distributed than those here. Dorbest Comments at 18. To the contrary, the Issues and Decision Memoranda for the two decisions cited by Commerce both clearly provide GNI data for the upper and lower bookend countries. See Certain Chlorinated Isocyanurates from the People's Republic of China, A-570-898, Comment 2 at 9-10, (Nov 10, 2010)(noting 1,040-3,990 USD as the GNI range used); Certain Steel Nails from the People's Republic of China, A-570-909, Comment 2 at 5, (Mar. 23, 2011) (noting 1,070-3,990 USD as the GNI range used).

comparable to China's and that its decision is consistent with the CAFC's holding in Dorbest IV. 2011 Redetermination 7, 18 (noting that the CAFC held in Dorbest IV that countries with GNIs "between one and two times that of China" could be found economically comparable). Furthermore, Commerce has not established a practice of using absolute differences in per-capita GNI to select bookend countries and has in the past rejected a strict adherence to that approach. See Def-Int. Br. at 6 (citing Certain Aluminium Extrusions from the People's Republic of China, 76 Fed. Reg. 18,524 (Dep't Commerce Apr. 4, 2011), and accompanying Issues & Decision Memorandum at Comment 1E). Finally, Commerce argues that this approach is consistent with its long-standing preference for drawing data from a broader dataset. 2011 Redetermination 8.

Commerce has provided sufficient reasonable explanation for choosing the country count methodology in this instance. Here, the parties have not objected to Commerce's approach of using some "bookends" to frame its initial selection. Given that the agency is using "bookends" to make such an initial selection, it is not obligated to choose the best methodology, but merely one that is reasonable given the circumstances and supported by a rational connection to the record. See Natl. Fisheries Inst. v U.S. Bureau of Customs & Border Prot., 637 F. Supp. 2d 1270, 1286 (2009). Faced with the task of replacing an unbalanced and

invalidated selection based on a surrogate country memorandum compiled for other purposes, Commerce has explicitly chosen a methodology in response to the court's concerns. It has also provided a reasonable explanation for its selection in this context, and it has selected bookend countries based on a reasonable reading of the record evidence. The fact that Dorbest can suggest other reasonable methods does not alter this result. See Lifestyle Enterprise, Inc. v. United States, __ CIT __, 768 F. Supp. 2d 1286, 1305 (2011).

Commerce's inclusion of Equatorial Guinea in the dataset.

Dorbest next asserts that Commerce erred in including data from Equatorial Guinea because that data was from a different time period than other GNI data. Dorbest Comments 21-22.

The court need not address Dorbest's concerns regarding the inclusion of Equatorial Guinea because Dorbest waived its right to challenge this Commerce finding, which first appeared in the 2010 Redetermination. Bond Street, Ltd. v. United States, 2011 WL 1398770 at *9 n.4 (CIT Apr. 12, 2011)

In that 2010 Redetermination, Commerce used the 2002 GNI figures, as reported in the 2004 World Development Report, to generate a list of 24 countries with GNIs between USD 410 and USD 1,020. 2010 Redetermination 12. Equatorial Guinea, with a GNI of USD 700, is on that list. Request for Comment Regarding Wage

Rate Data, 2010 PR Doc. 1 Attach. 1 (August 11, 2010). In its comments on those remand results, Dorbest raised a general concern with the use of multiple countries to generate a surrogate wage rate, but did not object to, or even address, the inclusion of Equatorial Guinea. See Dorbest 2010 Comments ("Dorbest concurs with the result of the U.S. Department of Commerce remand redetermination filed on November 10, 2010"); Dorbest 2010 Remand Comments on Wage Rate Data 2, 2010 Remand PR Doc. 4 (Aug. 16, 2010) (arguing in part that wage rates from one country, India, should be used and failing to raise the issue of 2002 Equatorial Guinea data) ("Dorbest 2010 Wage Rate Data Comments"); Dorbest 2010 Remand Rebuttal to AMFC Raw Data Comments 8, 2010 Remand PR Doc. 5 (Aug. 18, 2010) (reiterating the argument that only India should be used to provide surrogate wage rate and failing to raise the issue of 2002 Equatorial Guinea data) ("Dorbest 2010 Rebuttal"); Dorbest 2010 Remand Comments on Draft Remand Redetermination 3, 2010 Remand PR Doc. 12 (Oct 22, 2010 (stating which arguments are preserved in the event that the margin rises above de minimis) ("Dorbest 2010 Draft Comments"). Dorbest has thus waived this argument.¹²

Accordingly, any arguments that Dorbest may have with

¹² Because Dorbest also failed in the underlying 2010 administrative proceeding to challenge Commerce's inclusion of Equatorial Guinea, it has also failed to exhaust its administrative remedies on this issue. 28 U.S.C. § 2637(d).

regards to the inclusion of Equatorial Guinea are not properly raised before the court.

Guinea as a "substantial producer."

Finally, Dorbest correctly argues that Commerce erred in including Guinea because its reported export figure, USD \$308 over the course of three years, cannot possibly be sufficient, by itself, to support a determination that Guinea is a significant producer of wooden bedroom furniture. Dorbest Comments 24 (citing Shandong Rongxin Import & Export Co. v. United States, Slip Op 11-45, 2011 WL 1542651 at *8, (CIT Apr. 21, 2011)); Analysis Memorandum for the Redetermination, 2011 PR Doc. 2, ECF Doc. 475-1, Attach. 3 at 85, (Mar. 14, 2011).

As with its Equatorial Guinea claim, however, Dorbest's arguments with regards to Guinea are waived. Guinea was first identified as a significant producer in the 2010 Redetermination, see 2010 Redetermination at 13, and Dorbest failed to timely contest this decision. See Dorbest 2010 Comments ("Dorbest concurs with the result of the U.S. Department of Commerce remand redetermination filed on November 10, 2010"); Dorbest 2010 Wage Rate Data Comments 2 (failing to raise the issue of data from Guinea); Dorbest 2010 Rebuttal 8; Dorbest 2010 Draft Comments 3 (stating which arguments are preserved in the event that the margin rises above de minimis). Dorbest has thus waived its argument in this regard.

CONCLUSION

The court finds that Commerce's methodology for calculating surrogate labor rate is **affirmed**.

Judgment will be entered accordingly.

_____/s/ Donald C. Pogue_____
Donald C. Pogue, Chief Judge

Dated: August 3, 2011
New York, New York