WINSTON & STRAWN LLP

35 WEST WACKER DRIVE
CHICAGO, ILLINOIS 60601-9703

43 RUE DU RHONE
1204 GENEVA, SWITZERLAND

BUCKLERSBURY HOUSE
3 QUEEN VICTORIA STREET
LONDON EC4N 8NH

1700 K STREET, N.W.
WASHINGTON, D.C. 20006-3817

(202) 282-5000

FACSIMILE (202) 282-5100

www.winston.com

333 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071-1543

200 PARK AVENUE
NEW YORK, NEW YORK 10166-4193

21 AVENUE VICTOR HUGO
75116 PARIS, FRANCE

101 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94111-5894

January 23, 2009

PUBLIC DOCUMENT

The Honorable Ronald K. Lorentzen
Acting Assistant Secretary for Important Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
Pennsylvania Avenue at 14th Street, N.W.
Washington, D.C. 20230

Attn: Michael Rill

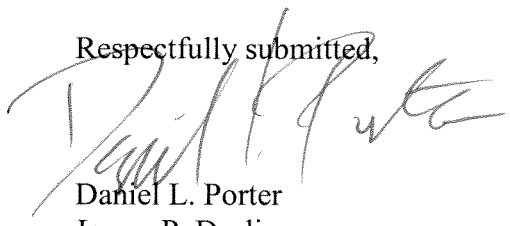
Re: Rescission of Targeted Dumping Regulations

Dear Mr. Lorentzen:

With this submission, the Korea International Trade Association ("KITA") provides its response to the Commerce Department's *Federal Register* notice, dated December 10, 2008, requesting comments regarding the immediate rescission of existing regulations that govern the targeted dumping methodology.

KITA appreciates the opportunity to provide comments; these comments are set forth in the attached document.

Respectfully submitted,



Daniel L. Porter
James P. Durling
Ross Bidlingmaier

DC:584668.4

Before the United States Department of Commerce
International Trade Administration

Comments of the Korea International Trade Association on the Department's Rescission of Its Regulation Governing Targeted Dumping in Antidumping Duty Investigations

Daniel L. Porter
James P. Durling
Ross Bidlingmaier

Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

January 23, 2009

Table of Contents

Page

INTRODUCTION AND SUMMARY

This submission provides the comments of the Korea International Trade Association ("KITA") in response to the Commerce Department's request for comments concerning the Department's December 10, 2008 interim final rule that withdrew certain Commerce Department regulations governing targeted dumping in antidumping duty investigations. KITA is the largest and most influential business association in Korea. Founded in 1946, KITA represents more than 65,000 companies involved with international trade. KITA appreciates the opportunity to provide these comments to the Department regarding the Department's targeted dumping regulation.

KITA's comments are detailed in the discussion below. In brief, KITA respectfully urges the Department to reverse its decision to withdraw its regulation governing targeted dumping in antidumping duty investigations. First, with all due respect, the Department's withdrawal of its regulation is contrary to law as it does not comply with the requirements of the Administrative Procedures Act (APA). It is black letter law that an agency must follow the notice and comment rulemaking provisions of the APA before rescinding a properly promulgated regulation. Here, the Department has not done so and the exceptions it relies upon are unavailing.

Second, even if somehow the Department's withdrawal of its targeted dumping regulation does not violate the APA, there are sound policy reasons why the Department should still not do so. In its haste to throw out the current regulation, the Department also overlooks a very simple but important point: the current regulation in fact already

articulates the only sensible standard for measuring targeted dumping. To impose any other standard – or to have no standard at all – makes no sense.

Finally, we note that the Department has spent considerable time and efforts developing an analytical approach for tackling targeted dumping allegations. It makes no policy sense for the Department to abandon all of its hard work.

We explain these points below in more detail.

DISCUSSION

I. The Department's Withdrawal of Its Targeted Dumping Regulation Does Not Meet the Requirements of the Administrative Procedure Act and Therefore Is Contrary to Law.

Rescission of a previously adopted rule by an agency constitutes a rulemaking and must adhere to the same procedural requirements as the original promulgation. The APA explicitly defines a rulemaking as the "process for formulating, amending or repealing a rule."[1] Withdrawal of a rule has the same practical effect as the promulgation of a new rule. In both cases, the agency's action creates new rights and obligations for the affected parties.

Based on the clear statutory language and its logical underpinnings, courts consistently hold that an agency must engage in notice and comment rulemaking to rescind a rule. As the D.C. Circuit stated, "[t]o allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment would

---

[1] Administrative Procedure Act, 5 U.S.C. 551(5).

obviously undermine the Administrative Procedure Act requirements."[2] In an earlier case, the Federal Energy Regulatory Commission attempted to revoke without notice and comment an order challenged as unconstitutional.[3] The court flatly dismissed this effort, emphasizing the APA's express requirement of a notice and comment rulemaking prior to repeal of a rule. In doing so, the court highlighted the clear value of this procedure specifically in the case of repeal, saying that "it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal."[4] Such reasoning is precisely applicable in this instance.

The Department here acknowledges its intention to bypass the statutorily-required procedures, seeking coverage under the good cause exception to the notice and comment rulemaking requirement. But the Department has done so in a cavalier way – providing only two paragraphs of explanation – that ignores the fundamental public policy advantages of notice and comment rulemaking and disregards precedent that limits this exception to only the rarest of situations.

A. The Department's Withdrawal of the Regulation Violates the Administrative Procedure Act Because its Failure to Employ Notice and Comment Rulemaking Cannot be Excused for Good Cause

Despite the strong public policy preference for notice and comment rulemaking, the APA grants a narrow exception to this requirement that can be employed in critical

---

2 *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

3 *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 445 (D.C. Cir. 1982).

4 *Id.* at 446.

situations. Section 553(b)(B) of the APA permits good cause in such situations where the agency finds that notice and comment is "impracticable, unnecessary or contrary to the public interest." In drafting the APA, Congress made clear the limited nature of these exceptions, stating that "the exemption of situations...is not an 'escape clause' in the sense that any agency has discretion to disregard its terms or the facts."[5]

Since the APA's passage, courts have upheld this Congressional intent, permitting the good cause exception in only the narrowest of cases.[6] For example, in response to a rise in helicopter accidents, the FAA in *Hawaii Helicopter Operators Association v. FAA* properly invoked the good cause exception to implement a regulation governing minimum flight altitudes, with the court noting that the exception "should be waived only when delay would do real harm."[7] In a similar case, the D.C. Circuit recently upheld the FAA's use of the good cause exception for regulations implemented after September 11, 2001, governing revocation of pilots' certificates for security reasons.[8] In allowing the exception, the court made clear its applicability only in "emergency situations."[9] The life and death nature of the rule in those cases fit within the narrowly interpreted exception to notice and comment rulemaking.

---

5 H.R. Rep. 1980, at 258 (1946).

6 *See, e.g., New Jersey Dept. of Environmental Protection v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (holding that exceptions must be "narrowly construed and only reluctantly countenanced" to assure that "an agency's decisions will be informed and responsive"); *Asiana Airlines et al., v. FAA*, 134 F.3d 393, 396 (D.C. Cir. 1998) ("[w]e have looked askance at agencies' attempts to avoid the standard notice and comment procedures").

7 51 F.3d 212, 214 (9th Cir. 1995) (internal quotations omitted).

8 *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004).

9 *Id.* at 1179 (citing *Am. Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

Such is not the case here. While the Department tosses into the final interim rule the excuses of impracticability and public interest, these justifications do not apply in this situation and the Department's failure to adequately address these legal justifications cannot be sustained.

B. Impracticability Cannot Justify Withdrawal of the Regulation Because the Department Can Continue to Effectively Enforce U.S. Trade Laws Under the Current Scheme

The interim final rule published by the Department lists impracticability as an excuse and provides a one line explanation of the exception, with a similarly brief discussion on its applicability to this rescission. The Department is correct that notice and comment may be impracticable where the required procedures interfere with timely execution of the agency's functions. But to grasp the true meaning of this statement the Department must look beyond a simple statement of the law. The Attorney General's Manual on the APA ("Manual") provides useful illustrations of each exception, which have been relied on and cited approvingly by the D.C. Circuit.[10]

The Manual exemplifies impracticability as "when a safety investigation shows that a new safety rule must be put in place immediately."[11] This example implies the exception's applicability for circumstances where the agency's fundamental purpose would be contravened without immediate action. This type of situation did not arise in *Zhang v. Slattery*, where the court rejected the department's impracticability argument for a rule intended to liberalize refugee status for aliens, reasoning that the delay caused by a

---

[10] *See, e.g., Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001).

[11] *See* Attorney General's Manual on the Administrative Procedure Act 30-31 (1947).

rulemaking would not prevent immigration services from functioning.[12] A rulemaking may prevent immediate action related to that rule specifically, but it did not interfere with the department's general function and purpose.[13]

The court ruled similarly in *Levesque v. Block*, a case cited by the Department in the interim final rule. The Secretary there, as in this case, issued a final interim rule effective immediately, received comments, and then published an identical final rule.[14] The Secretary cited impracticability because of an approaching, self-imposed deadline for implementation that would have cost the department billions of dollars and directly impacted its ability to administer the food stamp program.[15] The court rejected this argument, finding dispositive that Congress did not mandate this change to the rules and, although the Secretary wanted an immediate change, it could continue to meet its obligations without the new rule.[16]

Immediate action is similarly unnecessary in this case, as the Department has carried out its mission to "enforce effectively the U.S. unfair trade laws" under the existing rule for over ten years. The Department indicates that rescission is essential in light of the experience gained since implementation of the rule. As in both cases cited above, the Department may prefer to alter its methodology immediately, but it can continue to conduct antidumping investigations under its current scheme of a continually

---

12 55 F.3d 732, 747 (2d Cir. 1995).

13 *Id.*

14 723 F.2d 175, 184 (1st Cir. 1983).

15 *Id.*

16 *Id.*

evolving analysis until it has compiled a complete record from which it can base its decision. The Department makes claims that the current methodology denies relief to domestic industries, but offers no examples or proof of this being the case. A notice and comment rulemaking will give the Department the opportunity to adequately assess whether rescission is actually necessary to protect domestic companies. The Department's claim of impracticability is precisely the type of end-around of the procedural requirements not permitted under the statute.[17]

C. The Public Interest Exception Cannot Justify Withdrawal of the Regulation Because the Department Cannot Provide Evidence of Any Threat of Evasion of a Proposed Rule

The Department's second justification, the public interest, is similarly unfounded. The Department offers zero discussion on the exception or its applicability here. Given the public interest exception's complete irrelevance to these circumstances, this is not a surprise. The Manual illustrates this exception as "when announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent." Manual at 31. More generally, this exception permits foregoing notice and comment to prevent the rescinded rule from being evaded.[18] In *Utility Solid Waste Activities Group*, the EPA sought to alter rules regulating toxic substances without the use of notice and comment.[19] The court rejected the EPA's public interest argument because the agency provided no

---

17 *American Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

18 *Utility Solid Waste Activities Group*, 236 F.3d at 755.

19 *Id.* at 752.

evidence of any threat that the amended rule may be evaded if the agency undertook notice and comment rulemaking procedures.[20]

The Department has similarly failed to justify this exception here. Nowhere in the interim rule publication does the Department claim that any party will immediately alter their activities in response to the rescinded rule. In fact, the Department cannot make this claim because it is not true. The rules at issue have no relation to the rules envisioned under the public interest exception, and should instead go through the notice and comment rulemaking procedure.

In sum, Congress, agencies, and the courts recognize the benefit of notice and comment rulemaking. Particularly in the case of rules relied on by the Department for over ten years as a platform to grow and develop its methodologies, notice and comment would permit the affected parties the opportunity to work with the Department and craft sound polices moving forward. Given the inherent advantages of notice and comment rulemaking, exceptions to this procedure are necessarily narrow, and simply not applicable here. We request that the Department adhere to its statutory obligations and conduct a full notice and comment rulemaking on the proposed rescissions.

II. Even If It is Not Contrary to Law, the Withdrawal of The Department's Targeted Dumping Regulation Is Bad Policy and Should Be Reversed

Even if somehow the Department's withdrawal of its targeted dumping regulation does not violate the APA, there are sound policy reasons why the Department should still

---

[20] *Id.* at 755.

not do so. In its haste to throw out the current regulation, the Department also overlooks a very simple but important point: the current regulation in fact already articulates the only sensible standard for measuring targeted dumping. To impose any other standard – or to have no standard at all – makes no sense.

First, the current standard is flexible. The standard does not require statistical analysis to the exclusion of other analysis. To the contrary, the regulation simply identifies statistical analysis as one of several ways to approach the underlying statutory question of whether there is a "pattern" of prices that differ "significantly" among purchasers, regions, or periods of time. 19 U.S.C. 1677f-1(d)(1)(B). Under the current regulation, any factor or analysis that could shed light on this statutory question could be considered. It simply makes no sense to throw out as somehow too restrictive a regulation that in fact provides more than adequate discretion.

Second, the current standard is reasonable. The apparently offensive language is simply that in addition to any other relevant analysis, the Department should use "standard and appropriate statistical techniques." What could possibly be offensive or restrictive about this language? Does the Department wish to apply "non-standard" or "inappropriate" statistical analysis? It is hard to see what sound public policy purpose would be served by ignoring the extensively studied and well established statistical principles that can inform the analysis of whether there is a "pattern" and whether an apparent difference should be deemed "significant."

Third, the current standard is necessary. It would be illogical and indefensible to ignore the principles of statistics when analyzing this issue. We note that the statute

makes explicit that the Department must find a "pattern of U.S. prices ... that differ significantly among purchasers, regions, or periods of time." And the Department's regulations make explicit that this pattern of significant price differences must be demonstrated through the use of "standard and appropriate statistical techniques."

Both of these legal parameters reflect basic common sense. Simply observing that an exporter sells at a lower price to a specific customer, or a specific region, or a specific period of time should not be sufficient to trigger targeted dumping. In any set of pricing data that varies, there will be some prices that are lower than others. The set of suspect transactions must differ from the others frequently enough and in a significant enough way to meet the strict statutory test. Statisticians have long thought about such issues, so it makes perfect sense that the Department regulations would also require the use of standard statistical techniques. It makes no sense for the Department to make up new approaches in an area that has been so extensively explored by standard statistics.

Or stated differently, the science of statistics focuses precisely on the issues of how to discern a "pattern" or trend from a mass of data, and how to tell when an estimate or a difference is "significant" in some meaningful sense. To approach the issue of targeted dumping and not to consider statistics would be like trying to diagnose a heart illness without bothering to consider the modern science of cardiology.

For example, consider the basic statistical concept of a "standard deviation" – a measure of how much a group of data points collectively vary from the average value of all those data points. This concept captures and develops in a logical and neutral manner the common sense notion that it matters how much each data point varies from the

average. Is the extent to which a particular data point varies from the average typical – within a reasonable range – or can one say that it is atypical? One can answer these questions thoughtfully by using the statistical idea of a standard deviation.

Or consider the concept of a "confidence interval" – a way to take a single average value and then express that value as a range of values that are all roughly equivalent. This well known and well established statistical concept recognizes that if the average value is 10, but that average comes from a large number data points that range from 8 to 12, it really makes no logical sense to say that a particular data point with the value of 9 is "too low." The inherent variability of the data means that the average of 10 is really better thought of as a range of values. The range will vary depending on the extent to which the underlying data points are widely disparate.

None of these statistical concepts tie the Department's hands. They are just tools – logical and neutral ways to approach the statutory questions. Indeed, that is precisely why the Department included the phrase "standard and appropriate statistical techniques" in the regulation as originally drafted. It just made sound legal and policy sense to do so, and in no way restricted the flexibility to use the tools on a case-by-case basis.

In fact, while the Department believes rescission is necessary for it to "analyze extensively" targeted dumping, the viability and effectiveness of the current standard is already the result of the considerable time and resources invested into its development on a case-by-case basis. The Department first articulated standards to evaluate targeted dumping allegations – the *Pasta* Test – in response to the CIT's decision in *Borden, Inc.*

v. United States.[21] Based on the Court's decision and statutory requirements, these standards allowed for the methodical evaluation of all relevant elements required under the statute. The Department next confronted the issue nearly ten years later in *CFS Paper from Korea*, where the Department departed from the *Pasta* test and adopted the petitioners' suggested "P/2" test, recognizing, however, "the need to develop a standardized test for future cases."[22]

To meet this end, the Department solicited comments and, based on its prior experience and the nineteen comments submitted from petitioner and respondent interested parties, adopted a reformed analysis in *Certain Steel Nails from China*, recognizing the clear benefit of an established statistical methodology using a standard deviation test. The Department also recognized that additional comments from interested parties would be helpful to continue to evolve its methodology and issued a second request for comments, affording it an added opportunity to analyze this issue. As the Department recently stated, its methodology has evolved and improved significantly from the P/2 test of before,[23] thanks to its own experience analyzing this issue in nine cases in 2008 and to the comments received from interested parties.

---

21 4 F. Supp 2d 1221 (Ct. Int'l Trade 1998).

22 *Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea*, 72 Fed. Reg. 60630 (Oct. 25, 2007), Issues and Decision Memorandum, Comment 2.

23 *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 40485 (July 15, 2008), Issues and Decision Memorandum, Comment 23.C. ("...the standard deviation test uses a measurement common in statistical analysis to provide a more appropriate and balanced threshold for

The Department should continue to develop its methodology in this manner and not allow these good faith efforts to be so readily abandoned. Indeed, it is perplexing why the Department now wishes to discard these efforts and the cumulatively acquired knowledge that statistical analysis can shed any light on these questions. If the Department intends to consider "standard and appropriate statistical techniques" in the future, then why withdraw the regulation?

CONCLUSION

For all of the foregoing reasons, we respectfully request that the Department reverse its decision to withdraw its targeted dumping regulations.

---

identifying a pattern and the gap test provides a more reasonable threshold for identifying significant price differences.").