

UNITED STATES COURT OF INTERNATIONAL TRADE

DEL MONTE FOODS, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA;
OFFICE OF THE UNITED STATES TRADE
REPRESENTATIVE; U.S. CUSTOMS &
BORDER PROTECTION,

Defendants.

Court No. 20-00378

COMPLAINT

Plaintiff Del Monte Foods, Inc. (“Del Monte”), by and through its attorneys, allege and state as follows:

1. The instant action concerns the unlawful expansion of the scope of Section 301 of the Trade Act of 1974 by imposing tariffs on imports from the People’s Republic of China included on what has commonly been referred to as List 3 (accounting for an approximate trade value of \$200 billion) *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47,974 (Sept. 21, 2018) (publishing List 3). Neither the Trade Act of 1974 (“Trade Act”) nor the Administrative Procedure Act (“APA”) authorizes the imposition of import duties beyond the remedial purpose provided by statute. The Court should set aside Defendants’ actions as *ultra vires* and otherwise contrary to law, as well as order Defendants to refund, with interest, any duties paid by Plaintiff pursuant to List 3.

JURISDICTION

2. The Court possesses subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1581(i)(1)(B), which confers “exclusive jurisdiction” to the Court over “any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.” 28 U.S.C. § 1581(i)(1)(B).

PARTIES

3. Plaintiff Del Monte is one of the country’s largest producers, distributors and marketers of premium quality, branded food products, including processed fruits and vegetables for the U.S. retail market. Del Monte operates 8 production facilities in the U.S. and, as of 2018, employs approximately 2,100 fulltime and 5,100 seasonal employees in the United States. Plaintiff is the importer of record of many products imported subject to List 3. By way of example, Plaintiff has made numerous entries of canned mandarin oranges under HTSUS subheading 2008.30.4800, which is subject to *ad valorem* duties under List 3.

4. Defendant United States of America received the disputed tariffs and is the statutory defendant under 5 U.S.C. § 702 and 28 U.S.C. § 1581(i)(1)(B).

5. The Office of the United States Trade Representative (“USTR”) is an executive agency of the United States charged with investigating a foreign country’s trade practices under Section 301 of the Trade Act and implementing “appropriate” responses, subject to the direction of the President. USTR conducted the Section 301 investigation at issue and made numerous decisions regarding List 3.

6. Defendant U.S. Customs & Border Protection (“CBP”) is the agency that collects duties on imports. CBP collected payments made by Plaintiff to account for the tariffs imposed by USTR under List 3.

STANDING

7. Del Monte has standing to sue because it is “adversely affected or aggrieved by agency action within the meaning of” the APA. 5 U.S.C. § 702; *see* 28 U.S.C. § 2631(i) (“Any civil action of which the Court of International Trade has jurisdiction . . . may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of Section 702 of title 5.”). Tariffs imposed by Defendants pursuant to List 3 adversely affected and aggrieved Del Monte because they were required to pay these impermissible duties.

TIMELINESS OF THE ACTION

8. A plaintiff must commence an action under 28 U.S.C. § 1581(i)(1)(B) “within two years after the cause of action first accrues.” 28 U.S.C. § 2636(i).

9. The instant action contests two actions taken by Defendants, which resulted in the imposition of List 3. *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47,974 (Sept. 21, 2018). As to the action resulting in List 3, Plaintiff’s claims accrued at the earliest on September 21, 2018, when USTR published notice of List 3 in the *Federal Register*. 83 Fed. Reg. 47,974. Plaintiff has therefore timely filed this action.

RELEVANT LAW

10. Section 301 of the Trade Act authorizes USTR to investigate a foreign country’s trade practices. 19 U.S.C. § 2411(b). If the investigation reveals an “unreasonable or

discriminatory” practice, USTR may take “appropriate” action, such as imposing tariffs on imports from the country that administered the unfair practice. *Id.* § 2411(b), (c)(1)(B).

11. Section 307 of the Trade Act allows USTR to “modify or terminate” an action taken pursuant to Section 301 of the Trade Act under certain circumstances, such as when the “burden or restriction on United States commerce” imposed by the investigated foreign country’s practice has “increased or decreased” or when the action “is no longer appropriate.” *Id.* § 2417(a)(1)(B), (C).

PROCEDURAL HISTORY

I. USTR’s Investigation

12. On August 14, 2017, President Trump directed Ambassador Lighthizer to consider initiating a targeted investigation pursuant to Section 301(b) of the Trade Act concerning China’s laws, policies, practices, and actions related to intellectual property, innovation, and technology. *Addressing China’s Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology*, 82 Fed. Reg. 39,007 (Aug. 17, 2017). According to the President, certain Chinese “laws, policies, practices, and actions” regarding intellectual property, innovation, and technology “may inhibit United States exports, deprive United States citizens of fair remuneration for their innovations, divert American jobs to workers in China, contribute to our trade deficit with China, and otherwise undermine American manufacturing, services, and innovation.” *Id.*

13. Four days later, USTR formally initiated an investigation on August 18, 2017 into “whether acts, policies, and practices of the Government of China related to technology transfer, intellectual property, and innovation are actionable under [Section 301(b) of] the Trade Act.” *Initiation of Section 301 Investigation; Hearing; and Request for Public Comments: China’s Acts,*

Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 82 Fed. Reg. 40,213 (Aug. 24, 2017).

14. Seven months later, USTR released a report on March 22, 2018 announcing the results of its investigation. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *Findings of the Investigation Into China's Acts, Policies, And Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of The Trade Act of 1974* (Mar. 22, 2018) (“Section 301 Report”), available at <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>. USTR found that certain “acts, policies, and practices of the Chinese government related to technology transfer, intellectual property, and innovation are unreasonable or discriminatory and burden or restrict U.S. commerce.” *Id.* at 17. USTR based its findings on (1) China’s use of foreign ownership restrictions, foreign investment restrictions, and administrative licensing and approval processes to pressure technology transfers from U.S. to Chinese companies, *id.* at 45; (2) China’s use of licensing processes to transfer technologies from U.S. companies to Chinese companies on terms that favor Chinese recipients, *id.* at 55; (3) China’s facilitation of systematic investment in, and acquisition of, U.S. companies and assets by Chinese entities to obtain technologies and intellectual property for purposes of large-scale technology transfer, *id.* at 147; and (4) China’s cyber intrusions into U.S. computer networks to gain access to valuable business information, *id.* at 171. In its report, USTR did not quantify the burden or restriction imposed on U.S. commerce by the investigated practices.

15. On the same date, USTR published a “Fact Sheet” stating that “[a]n interagency team of subject matter experts and economists estimates that China’s policies result in harm to the U.S. economy of at least \$50 billion per year.” OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *Section 301 Fact Sheet* (Mar. 22, 2018), available at <https://ustr.gov/about->

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