

UNITED STATES COURT OF INTERNATIONAL TRADE

ACME FOOD SALES, INC.,

Plaintiff,

v.

UNITED STATES, OFFICE OF THE
UNITED STATES TRADE
REPRESENTATIVE, and ROBERT E.
LIGHTHIZER, U.S. TRADE
REPRESENTATIVE,

Defendants.

Court No. 20-cv-00687

COMPLAINT

Plaintiff, ACME FOOD SALES, INC. (“ACME” or “Plaintiff”), by and through its undersigned counsel, FISHERBROYLES, LLP, brings this action and states and alleges the following:

BRIEF DESCRIPTION OF THE ACTION

1. ACME brings this action to contest the unlawful imposition of so-called “List 3” and “List 4” tariffs upon goods it imported from the People’s Republic of China (“PRC”) pursuant to Section 301 of the Trade Act of 1974, codified at 19 U.S.C. § 2411. On September 21, 2018, the United States Trade Representative announced the imposition of so-called “List 3” tariffs on goods imported from the PRC. Those tariffs and the subsequent “List 4” tariffs were imposed in a manner that was arbitrary, capricious and otherwise not in accordance with Federal law and therefore should be refunded *in toto*.

JURISDICTION

2. This action arises under 28 U.S.C. § 1581(i)(1)(B), which confers exclusive jurisdiction in the U.S. Court of International Trade 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.

3. Plaintiff's claims accrued on September 21, 2018, when the USTR announced the imposition of the List 3 tariffs on goods imported from PRC. *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).

4. This action is filed timely pursuant to 28 U.S.C. § 2636(i).

STANDING

5. ACME is the importer of record of the merchandise that is the subject of this action upon which duties were imposed pursuant to List 3 and List 4.

PARTIES

6. ACME is a U.S. corporation, incorporated in Washington state, with its principal place of business at 5601 6th Avenue South, Suite 180 Seattle, Washington.

7. Defendant United States received the disputed duties and is the statutory defendant under 28 U.S.C. § 1581 and 5 U.S.C. § 702.

8. Defendant Office of the United States Trade Representative ("USTR") is an executive agency with responsibility under 19 U.S.C. § 2411 to investigate foreign country's trade practices and to implement responses to those practices, and is the agency which investigated the trade practices of the PRC and imposed the List 3 and List 4 tariffs.

9. Defendant Ambassador Robert Lighthizer is the current U.S. Trade Representative who was involved in the decision-making process resulting in the List 3 and List 4 tariffs.

RELEVANT LAW

10. Section 301 of the Trade Act of 1974, codified at 19 U.S.C. § 2411, authorizes the USTR to investigate the trade practices of any foreign nation. 19 U.S.C. § 2411(b). If the results of the investigation reveal that foreign country is engaging in unreasonable or discriminatory practices, USTR is authorized to, *inter alia*, impose tariffs on imports from the subject foreign country under 19 U.S.C. § 2411(b) and (c).

11. Section 304 of the Trade Act of 1974 requires USTR to determine which action to take within one year of the commencement of its investigation. 19 U.S.C. § 2414(a)(1)(B), (2)(B).

12. Section 307 of the Trade Act of 1974 authorizes USTR to modify or terminate an action it has taken under Section 301 of that Act, where the burden or restriction imposed on U.S. commerce by the investigated foreign country's policy practices, etc., has increased or decreased, or if the action taken by USTR is no longer appropriate.

FACTS

13. On August 18, 2017, USTR commenced an investigation into trade practices relating to "technology transfer, intellectual property and innovation" of the PRC. *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. 40,123 (Aug. 24, 2017) ("the Investigation").

14. On September 21, 2018, the USTR announced it was modifying the actions previously announced pursuant to the Investigation to add tariffs on goods valued at over \$200 billion coming from PRC (“List 3”). *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 82 Fed. Reg. 47,974 (Sept. 21, 2018).

15. On August 20, 2019, USTR announced another group of products from PRC would be subjected to retaliatory tariffs (“List 4”). *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 43,304 (Aug. 20, 2019)

16. In announcing the List 3 and the later List 4 tariffs, both in public media and in the Federal Register, USTR made a series of statements, none of which referred to the actions, policies and practices of the PRC that were the subject of the original Investigation.

17. USTR’s actions leading up to and imposing the List 3 and List 4 tariffs were arbitrary, capricious, and abuse of discretion and otherwise not in accordance with law. 5 U.S.C. § 706.

18. The Trade Act of 1974 does not authorize the actions taken by the USTR in promulgating and imposing the List 3 and List 4 tariffs.

COUNT ONE – DECLARATORY JUDGMENT

19. Paragraphs 1 through 18 are hereby incorporated by reference.

20. Under 28 U.S.C. § 2201(a), this Court is authorized to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

21. Defendants' actions under the alleged authority of the Trade Act of 1974 were *ultra vires* and unauthorized by that Act, because the USTR failed to predicate its action in imposing the List 3 and List 4 tariffs upon any determination related to the Investigation.

22. USTR's actions in imposing the List 3 and List 4 tariffs violates 19 U.S.C. § 2414(a)(1)(B) and (2)(B), because the actions were taken more than 12 months after USTR initiated the Investigation.

23. USTR violated 19 U.S.C. 2417(a)(1)(B) by increasing the tariffs imposed pursuant to the Investigation when it imposed the tariffs in List 3 and List 4, because that law only permits USTR to "modify or terminate" duties imposed pursuant to Section 301 of the Trade Act of 1974, and not to increase such duties.

24. Plaintiff is therefore entitled to a declaratory judgment that the USTR's actions giving rise to List 3 and List 4 are *ultra vires* and otherwise contrary to all applicable law.

COUNT TWO – ADMINISTRATIVE PROCEDURE ACT

25. Paragraphs 1 through 24 are hereby incorporated by reference.

26. In promulgating the tariffs contained in List 3 and List 4, Defendant USTR unlawfully violated the Administrative Procedure Act, codified at 5 U.S.C. § 511 *et seq.*, which action is reviewable in this Court pursuant to 5 U.S.C. § 702, *et seq.*

27. USTR's actions in promulgating List 3 and List 4 exceeded its authority under the Trade Act of 1974 for the reasons set forth in Count 1.

28. USTR failed to offer any evidence of any alleged increased burden to justify promulgating List 3 and List 4 and imposing those tariffs on merchandise imported from PRC to the U.S.

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