

UNITED STATES COURT OF INTERNATIONAL TRADE

BCFOODS, INC.

Plaintiffs,

v.

UNITED STATES OF AMERICA; ROBERT E.
LIGHTHIZER, IN HIS OFFICIAL CAPACITY AS
UNITED STATES TRADE REPRESENTATIVE;
OFFICE OF THE UNITED STATES TRADE
REPRESENTATIVE; MARK A. MORGAN, IN HIS
OFFICIAL CAPACITY AS ACTING
COMMISSIONER OF U.S. CUSTOMS & BORDER
PROTECTION; U.S. CUSTOMS & BORDER
PROTECTION

Defendants.

Court no. 20-01214

COMPLAINT

Plaintiff, BCFOODS Inc. (“BCFOODS”), by and through its attorneys, alleges and states as follows:

1. This action concerns Defendants undertaking of a trade war not authorized by the narrow parameters of U.S. statutory authority found at section 301 of the Trade Act of 1974 (“Trade Act”).

2. The escalation of the trade war through the imposition of a third round of tariffs was unauthorized on products covered by the so-called “List 3.” See, *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).

3. Section 304 of the Trade Act (19 U.S.C. § 2414) required USTR to determine what

action to take, if any, within 12 months after initiation of that investigation.

4. The Office of the United States Trade Representative (“USTR”) conducted an investigation into China’s unfair intellectual property policies and practices pursuant to Section 301 of the Trade Act (19 U.S.C. § 2411). The investigation was initiated on August 18, 2017.

5. The list 3 tariffs were implemented on September 21, 2018.

6. USTR therefore failed to issue List 3 and List 4 within that one year window.

7. “Modification” authority under Section 307 of the Trade Act (19 U.S.C. § 2417) to salvage List 3 does not permit USTR to expand the imposition of tariffs to other imports from China for reasons that are unrelated to the scope of the investigation.

8. USTR did however alter the tariffs in List 3 and List 4. These decisions to impose and then alter the tariff rates were in response to China’s retaliatory duties and other issues unrelated to the original grounds for the Section 301 measures.

9. The arbitrary manner in which Defendants implemented the List 3 and List 4 tariff action also violates the Administrative Procedure Act (“APA”).

10. USTR failed to provide sufficient opportunity for comment. Interested parties were required to simultaneously submit affirmative and rebuttal comments.

11. USTR failed to consider factors that were required by statute, such as the quantified burden imposed on U.S. commerce by China’s unfair policies.

12. USTR also failed to adequately respond to the over 6,000 sincere comments received.

13. Therefore, this complaint asks that the Court set aside Defendants’ actions as *ultra vires* and contrary to law. Defendants should be required to refund all tariffs collected under Lists 3 and 4 as applicable to Plaintiff, including interest accrued.

JURISDICTION

14. Subject matter jurisdiction exists in this action under 28 U.S.C. § 1581(i)(1)(B). Said provision 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.” See, 28 U.S.C. § 1581(i)(1)(B).

PARTIES

15. Plaintiff was and is an importer of various goods subject to section 301 tariffs on list 3 and/or list 4a.

16. Defendant United States of America imposed, assessed and collected the disputed tariffs and is the statutory defendant under 5 U.S.C. § 702 and 28 U.S.C. § 1581(i)(1)(B).

17. The Office of the 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 Lists 3 and 4.

18. Defendant U.S. Customs & Border Protection (“CBP”) collects duties on imports. CBP collected payments made by Plaintiff to account for the tariffs imposed by USTR under Lists 3 and 4.

STANDING

19. Plaintiff holds standing to sue because it was “adversely affected or aggrieved by agency action within the meaning of” the APA per 5 U.S.C. § 702.

20. Title 28 U.S.C. § 2631(i) states that “[a]ny 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.”).

21. The tariffs imposed by Defendants pursuant to Lists 3 and 4A adversely affected and aggrieved Plaintiff by requiring the payment of unlawful duties.

TIMELINESS OF THE ACTION

22. A plaintiff must commence an action “within two years after the cause of action first accrues” pursuant to 28 U.S.C. § 2636(i). Such action here takes place under 28 U.S.C. § 1581(i)(1)(B).

23. This lawsuit contests Defendants’ action in imposing section tariffs in List 3 and List 4. The earliest of these, List 3, was implemented on September 21, 2018. See, *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).

24. Plaintiffs’ claims therefore accrued at the earliest on September 21, 2018, when USTR published notice of List 3 in the *Federal Register*. *Id.* Plaintiffs have therefore timely filed this action within 2 years of that date.

RELEVANT LAW

25. Section 301 of the Trade Act authorizes USTR to investigate a foreign country’s trade practices for “unreasonable or discriminatory” practices. See, 19 U.S.C. § 2411(b).

26. Once an investigation shows such practices exist, the USTR may imposing appropriate tariffs on imports as a direct remedy to that unfair practice. See also, § 2411(b), (c)(1)(B).

27. USTR is required under Section 304 of the Trade Act to determine its course of action within 12 months after the initiation of the underlying investigation. *Id.* § 2414(a)(1)(B),

(2)(B).

28. Thereafter, Section 307 of the Trade Act allows USTR to “modify or terminate” actions already taken under Section 301, when the “burden or restriction on United States commerce” imposed by the foreign country’s practice has either “increased or decreased” or when the action “is no longer appropriate.” See, § 2417(a)(1)(B), (C). No such “modification” decision was ever published.

PROCEDURAL HISTORY

I. USTR’s Investigation

29. On August 14, 2017, President Trump directed Ambassador Lighthizer to consider initiating an investigation pursuant to Section 301(b) of the Trade Act. The investigation concerned China’s laws, policies, practices, and actions related to intellectual property, innovation, and technology. See, *Addressing China’s Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology*, 82 Fed. Reg. 39,007 (Aug. 17, 2017).

30. The issue was therefore stated as whether Chinese laws and actions on 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.*

31. On August 18, 2017, USTR formally initiated its investigation 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.” See, *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.

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