

UNITED STATES COURT OF INTERNATIONAL TRADE

Axiom Foods, Inc.,

Plaintiff,

v.

Court No. 20-01239

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

Defendants,

COMPLAINT

Plaintiff Axiom Foods, Inc. (“Axiom”) by its undersigned attorneys, alleges the following:

1. This action contests Defendants’ unlawful imposition of tariffs on Chinese-origin goods imported by Plaintiff pursuant to Section 301 of the Trade Act of 1974 (“Trade Act”), 19 U.S.C. § 2411. This Complaint specifically asserts that tariffs imposed under Section 301 upon a list of products generally referred to as “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), and tariffs imposed under Section 301 upon a list of products generally referred to as “List 4” or “List 4A,” 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), are unlawful.

2. The List 3 and List 4 tariffs are unlawful because they were imposed in violation of time limits specified by statute. 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). 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. But USTR failed to issue List 3 or List 4 within the 12 month time period specified by statute.

3. The List 3 and List 4 tariffs are also unlawful because they were imposed for reasons other than the acts, policies, or practices which were the subject of the investigation under Section 301. The stated purposes of the investigations on China which the USTR conducted were China's unfair intellectual property policies and practices. However, the List 3 and List 4 tariffs were imposed in response to retaliatory duties which China had imposed on U.S. imports, as well as for other purposes unrelated to the investigation. While USTR asserted authority to "modify" the tariffs which it was imposing pursuant to Section 307 of the Trade Act (19 U.S.C. § 2417), Section 307 of the Trade Act does not permit USTR to expand the imposition of tariffs to other imports from China for reasons untethered to the unfair intellectual property policies and practices it originally investigated under Section 301 of the Trade Act.

4. The List 3 and List 4 tariffs are also unlawful because they were imposed in an arbitrary manner which violates the APA. Specifically, USTR: (1) failed to provide sufficient opportunity for comment, e.g., requiring interested parties to submit affirmative and rebuttal comments *on the same day*; (2) failed to consider relevant factors when making its decision, e.g., undertaking no analysis of the supposed "increased burden" imposed on U.S. commerce from the unfair policies and practices that it originally investigated; and (3) failed to connect the record facts to the choices it made.

5. The Court should set aside Defendants' actions as *ultra vires* and as arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, as well as order Defendants to refund (with interest) all duties paid by Plaintiff pursuant to List 3 and List 4 (specifically, pursuant to a portion of List 4 known as "List 4A").

### **JURISDICTION**

6. 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**

7. Plaintiff is an importer of various products subject to duties under List 3 and/or the portion (tranche) of List 4 known as "List 4A."

8. Plaintiff has made numerous entries of goods classified under HTSUS subheadings which were subject to *ad valorem* duties under List 3.

9. Plaintiff has made numerous entries of goods classified under HTSUS subheadings which were subject to *ad valorem* duties under List 4 (specifically, under List 4A).

10. 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).

11. 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 and List 4.

12. Ambassador Robert Lighthizer currently holds the position of USTR and serves as the director of the Office of the USTR. In these capacities, he made numerous decisions regarding List 3 and List 4.

13. Defendant U.S. Customs & Border Protection (“CBP”) is the agency that collects duties on imports. CBP collected payments made by Plaintiffs to account for the tariffs imposed by USTR under List 3 and List 4.

14. Defendant Mark A. Morgan is the Acting Commissioner of CBP. In this capacity, he oversees CBP’s collection of duties paid by Plaintiffs under List 3 and List 4.

### **STANDING**

15. Axiom 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 and List 4 adversely affected and aggrieved Axiom because it was required to pay these unlawful duties.

### **TIMELINESS OF THE ACTION**

16. 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).

17. The instant action contests action taken by Defendants that resulted in List 3 and List 4. *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) (notice that List 3 was being imposed) and *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) (notice that List 4 was being imposed). Plaintiff's claims accrued at the earliest on September 21, 2018, when USTR published notice of List 3 in the *Federal Register*. *Id.* Alternatively, Plaintiff's claims accrued at the earliest on September 24, 2018, when tariffs were first levied on goods on List 3 pursuant to the USTR's determination published in the *Federal Register* on September 21, 2018. *Id.*

18. Plaintiff has timely filed this action because it was filed within two years of the date that the List 3 notice and List 4 notices were issued.

19. Alternatively, Plaintiff has timely filed this action because it was filed within two years of the date that Plaintiff paid the List 3 and List 4A duties.

### **RELEVANT LAW**

20. 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).

21. Section 304 of the Trade Act requires USTR to determine what action to take, if any, within 12 months after the initiation of the underlying investigation. *Id.* § 2414(a)(1)(B), (2)(B).

22. Section 307 of the Trade Act (in pertinent part) allows USTR to "modify or terminate" an action taken pursuant to Section 301 of the Trade Act either 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**

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