

UNITED STATES COURT OF INTERNATIONAL TRADE

DOLE PACKAGED FOODS, LLC,

Plaintiff,

v.

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 & BORDER
PROTECTION ACTING COMMISSIONER,

Defendants.

Court No. 20-01400

COMPLAINT

Plaintiff, Dole Packaged Foods, LLC (“Dole”), by and through its attorneys, allege and state as follows:

1. This action concerns Defendants’ prosecution of a trade action impacting over \$500 billion in imports from the People’s Republic of China. This Complaint focuses on Defendants’ unlawful imposition of a third round of tariffs on products covered by so-called “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).

2. The Trade Act of 1974 (“Trade Act”) did not confer authority on Defendants to escalate tariffs for however long, and by whatever means, they choose. 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 within that window. USTR may not fall back on its “modification” authority under Section 307 of the Trade Act (19 U.S.C. § 2417) to salvage List 3. 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. Yet that is exactly what Defendants did here when they promulgated the List 3 duties in response to China’s retaliatory duties and other unrelated issues. And even if USTR deems the existing tariffs “no longer appropriate,” as it also did here, the Trade Act permits USTR only to delay, taper, or terminate—not ratchet up—the actions it has already taken.

3. The arbitrary manner in which Defendants implemented the List 3 tariff action also violates the Administrative Procedure Act (“APA”). 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. Indeed, despite receiving over 6,000 comments, USTR said absolutely nothing about how those comments shaped its final promulgation of List 3. USTR’s preordained decision-making bears no resemblance to the standards that the APA demands.

4. 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 Dole pursuant to List 3.

JURISDICTION

5. 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

6. Dole is a global leader in sourcing, processing, distributing, and marketing fruit products throughout the world. The Company sources fruit from both the northern and southern hemispheres to ensure a year-round supply and it markets a full line of canned, jarred, cup, frozen, and dried fruit products in the United States. Dole has been a leader and innovator in new forms of packaging and processing for fruit products and the Company takes pride in its role of delivering nutritious snacks to consumers throughout the United States. The Dole brand was introduced in 1933 and is one of the most recognized brands in the world. The Company currently owns and farms hundreds of acres of peach orchards in California and owns and operates a plant in Atwater, California that produces individually quick frozen fruit, with a second production facility in Decatur, Michigan. Company affiliates operate pineapple plantations, canneries, and production facilities in both the Philippines and Thailand. Dole has made numerous entries of agricultural and food products classified under the subheadings listed in the annex which are subject to the List 3 duties.

7. 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).

8. 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 List 3.

9. 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.

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

11. Defendant Mark A. Morgan is the Acting Commissioner of CBP. In this capacity, he oversees CBP's collection of duties paid by Dole under List 3.

STANDING

12. Dole 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 Dole because it was required to pay these unlawful duties.

TIMELINESS OF THE ACTION

13. 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).

14. The instant action contests action taken by Defendants that resulted in 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). Dole’s claims accrued at the earliest on September 21, 2018, when USTR published notice of List 3 in the *Federal Register*. *Id.* Dole has therefore timely filed this action.

RELEVANT LAW

15. 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).

16. 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).

17. 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

18. The current U.S.-China trade war grew from a narrow dispute. 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

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