

UNITED STATES COURT OF INTERNATIONAL TRADE

KW FOOD INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Court No. 20-01800
	:	
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.	:	
	:	

COMPLAINT

Plaintiff, KW Food Inc. (“KWF”), by and through its attorneys ACI LAW GROUP, PC, states the following claims against the defendants as follows:

1. The claim challenges the imposition of duties on merchandise imported from the People’s Republic of China pursuant to Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411. The Trade Act of 1974 (“Trade Act”) did not confer authority on Defendants to arbitrarily conduct a trade war at their sole discretion, for an extended period of time. The arbitrary manner in which the Defendants implemented the tariff actions violate the Administrative Procedures Act (“APA”). Plaintiff alleges that Defendants’ additional imposition and collection of duties on products, also known as List 3 and List 4, are not authorized under the ACT, violate the APA because they are inconsistent with the findings of the underlying USTR report and are otherwise contrary to law.

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PARTIES

2. KWF is an importer of dried foods and related products. Its tariff classifications applicable to its products that appear on “List 3” are the following: 0712.90.8580, 0712.39.1001, 0712.90.1000, 0712.90.4040, 0712.90.8580, 0712.20.4000, and 1212.21.0000. Its tariff classifications applicable to its products that appear on “List 4” are the following: 0910.91.0000, 0904.22.7600, and 2103.90.9091.
3. 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. § 158(i)(1)(B).
4. The United States Trade Representative is an exclusive agency of the United States charged with investigating a foreign nation’s trade practices under Section 301 of the Trade Act and implementing appropriate responses, subject to the direction of the President.
5. All other Defendants are also named in their official capacity as the decision makers of the agencies responsible for, investigating and implementing, the arbitrary trade practices.

STANDING

6. Plaintiff is an American importer, has paid duties as a result of additional tariffs illegally imposed pursuant to List 3 and List 4. In addition, plaintiff is adversely affected or aggrieved by agency actions within the meaning of the Administrative Procedures Act. 5 U.S.C. § 702 and 28 U.S.C. § 2631(i). Additional tariffs imposed by Defendants pursuant to List 3 and List 4A adversely affected and aggrieved Plaintiff because it has compelled Plaintiff to pay these unlawful duties. Therefore, Plaintiff has standing to bring this claim.

JURISDICTION

7. This claim action is initiated against the United States, its agencies, or its officers and arises out of a law providing for tariffs, duties, fees, or other taxes on the importation of

merchandise for reasons other than the raising of revenue. As such, the Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1581(i)(1)(B), which confers exclusive jurisdiction to the Court.

TIMELINESS OF THE ACTION

8. An action brought under 28 U.S.C. § 1581(i)(1)(B) is timely if commenced “within two years after the cause of action first accrues.” 28 U.S.C. § 2636(i).

9. List 3 was published on September 21, 2018 as *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). The earliest date on which Plaintiff’s right to bring an action may have accrued is the date of publication. The action is, therefore, timely.

10. List 4 was published on May 17, 2019 as *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 22,564, 22,564 (May 17, 2019). The earliest date on which Plaintiff’s right to bring an action may have accrued is the date of publication. The action is, therefore, timely.

RELEVANT LAW

11. 19 U.S.C. § 2411(b), “Section 301,” and 19 U.S.C. § 2412 authorize the United States Trade Representative (“USTR”) to investigate whether a foreign country has engaged in an “unreasonable or discriminatory” practice that burdens or restricts U.S commerce.

12. Pursuant to 19 U.S.C. § 2411(c)(1)(B), if the investigation reaches an affirmative determination, the USTR may impose duties on imports from the offending country.

13. Pursuant to 19 U.S.C. § 2414(a)(2)(B), USTR must determine what, if any, action to take within 12 months after the initiation of the investigation.

14. Section 307 of the Trade Act (in pertinent part) allows USTR to modify or terminate an action taken in furtherance of Section 301 when the burden or restriction on United States commerce imposed by the investigated foreign country's practice has increased or decreased when the action is no longer appropriate. 19 U.S.C. § 2417(a)(1)(B)-(C).

FACTS AND PROCEDURAL HISTORY

15. Under the direction of President Trump, USTR initiated its investigation into Chinese technology transfer and intellectual property practices on August 18, 2017. *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).

16. On March 22, 2018, USTR published a report announcing the results of its investigation in 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).

- <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>. The report concludes that the investigated practices of the Chinese government are unreasonable and discriminatory and burden or restrict U.S. commerce. *Id.* at 47.

17. On June 20, 2018, USTR published *Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed.

Reg. 28,710 (June 20, 2018), imposing an additional 25% *ad valorem* duty on selected products of China. This is the so-called “List 1.”

18. On August 16, 2018, USTR published *Notice of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 40,823, 40,823-24 (Aug. 16, 2018), imposing an additional 25% *ad valorem* duty on selected products of China. This is the so-called “List 2.”

19. China retaliated by imposing additional *ad valorem* tariffs on \$50 billion of U.S. goods in response to U.S. actions collecting 25% tariffs under List 1 and List 2.

20. In immediate response to China’s retaliation and without reference to China’s technology transfer, intellectual property, or innovation policies, the USTR proposed to impose duties on additional Chinese-origin products. *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 33,608, 33,609 (July 17, 2018).

- *Statement by U.S. Trade Representative Robert Lighthizer on Section 301 Action* (July 10, 2018), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/statement-us-trade-representative>.

21. On August 1, 2018, USTR announced that it would impose an additional 25% *ad valorem* duty on selected products of China.

- *Statement by U.S. Trade Representative Robert Lighthizer on Section 301 Action* (Aug. 1, 2018) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/august/statement-us-trade-representative>.

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