

UNITED STATES COURT OF INTERNATIONAL TRADE

CNH INDUSTRIAL AMERICA, LLC, a Delaware limited liability
company,

Plaintiff,

v.

UNITED STATES OF AMERICA;

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

ROBERT E. LIGHTHIZER, in His Official Capacity as
United States Trade Representative;

U.S. CUSTOMS & BORDER PROTECTION,

MARK A. MORGAN, in His Official Capacity as Acting
Commissioner of U.S. Customs & Border Protection,

Defendants

Court No. 20-02477

COMPLAINT

CNH Industrial America, LLC (“CNH” or “Plaintiff”), by and through its attorneys (Foley & Lardner LLP), hereby states and alleges the following:

STATEMENT OF THE CASE

1. This action challenges the imposition of duties and the use of Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411, as it relates to certain imported goods from China.
2. Specifically, Plaintiff alleges that Defendants’ use of Section 301, as it relates to the imposition and collection of duties on Chinese-origin products covered by so-called “List 3”

and “List 4,” are not authorized under the Trade Act of 1974 and violate the Administrative Procedure Act (“APA”), 5 U.S.C. §551 *et seq.*, because they: (1) were imposed in an untimely fashion; (2) are inconsistent with the findings of the underlying Section 301 Report issued by the Office of the U.S. Trade Representative (the “Report”); (3) exceed the scope of any allowed remedy for the alleged Intellectual Property Practices found in the Report; (4) were imposed for reasons entirely unrelated to the Intellectual Property practices at issue; (5) were issued without any consideration of the thousands of comments submitted during the public comment process; and (6) are otherwise contrary to law.

THE PLAINTIFF

3. CNH is an importer of products covered by List 3 and List 4, and expects to continue importing products that are covered by these Lists.
4. CNH was the Importer of Record of various Chinese-origin goods that are covered by List 3 and List 4, and directly paid duties for imports covered by these Lists. Thus, CNH suffered a direct monetary loss due to the imposition of duties under List 3 and List 4 and continues to suffer a direct monetary loss each and every time it imports Chinese-origin goods covered by List 3 or List 4.

STANDING AND DEFENDANTS’ STATUS

5. As the Importer of Record of Chinese-origin goods covered by List 3 and List 4, Plaintiff has paid tariffs as a result of duties illegally imposed pursuant to List 3 and List 4. Plaintiff has, therefore, been adversely affected or aggrieved by agency actions within the meaning

of the APA. 5 U.S.C. § 702 and 28 U.S.C. § 2631(i). Plaintiff therefore has standing to bring this claim.

6. Defendant United States of America received the disputed tariffs, including tariffs paid by Plaintiff, and thus is the statutory defendant pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1581(i)(1)(B).
7. The Office of the United States Trade Representative (“USTR”) is an executive agency of the United States Government charged with investigating a foreign country’s trade practices under Section 301 of the Trade Act. The Office of the USTR is the agency that issued the Report and implemented (or otherwise oversaw the implementation of) Section 301, subject to the direction of the President. The Office of the USTR made numerous decisions regarding both List 3 and List 4 and otherwise caused the List 3 and 4 duties on Chinese-origin products to be imposed.
8. Ambassador Robert Lighthizer currently holds the position of USTR and serves as the director of the Office of the U.S. Trade Representative. In these capacities, he made numerous decisions regarding List 3 and List 4.
9. Defendant U.S. Customs & Border Protection (“CBP”) is the U.S. Government agency that collects duties on imports. At the direction of the USTR and the President, CBP collected payments List 3 and 4 tariffs, including those payments made by Plaintiff, in accordance with the List 3 and List 4 tariffs imposed by the USTR.
10. Defendant Mark A. Morgan is the Acting Commissioner of CBP. In this capacity, he oversees CBP’s collection of duties under List 3 and List 4, including those paid by Plaintiff.

JURISDICTION

11. This action is commenced 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 of International Trade has exclusive jurisdiction over this action pursuant to 28 U.S.C. § 1581(i)(1)(B).
12. Plaintiff 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 Plaintiff because Plaintiff was required to pay these unlawful duties.
13. Further, there is no other jurisdictional basis directly specified, whether under another subsection of Section 1581 or otherwise. Because there is no other statutory basis for proceeding in this Court, the invocation of the residual jurisdiction of this Court pursuant to Section 1581(i)(1)(B) is appropriate.

TIMELINESS OF ACTION

14. Any action brought under 28 U.S.C. § 1581(i)(1)(B) is timely if the Plaintiff commences the action at this Court “within two years after the cause of action first accrues.” 28 U.S.C. § 2636(i).

15. List 3 was first published in the Federal Register on September 21, 2018, under the title “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).
16. Pursuant to that Federal Register publication, “[a]dditional duties at a rate of 10 percent ad valorem on the tariff subheadings set out in the Annexes to this notice [became] applicable with respect to products that [were] entered for consumption, or withdrawn from warehouse for consumption, on or after September 24, 2018.” *Id.*
17. Comments regarding the potential imposition of List 4 were first published in the Federal Register on May 17, 2019, under the title “List 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, (May 17, 2019). The USTR subsequently imposed the List 4 duties in a later Federal Register publication titled, “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). Pursuant to that Federal Register publication, “[a]dditional duties at a rate of 10 percent ad valorem on the tariff subheadings set out in Annex A to this notice [became] applicable with respect to products that [were] entered for consumption, or withdrawn from warehouse for consumption, on or after September 1, 2019.” *Id.*
18. Thus, the action that is the subject of this Federal Register notice was first implemented on September 24, 2018 (List 3) and September 1, 2019 (List 4), respectively. The earliest date

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