

UNITED STATES COURT OF INTERNATIONAL TRADE

THE KRAFT HEINZ COMPANY,

Plaintiff,

v.

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

Defendants.

Court No: 20-03021

COMPLAINT

Through its attorneys, Plaintiff, The Kraft Heinz Company (“Kraft Heinz”) alleges and states as follows:

1. Kraft Heinz brings this action to contest Defendants’ unlawful imposition and collection of certain duties on its imported merchandise from the People’s Republic of China pursuant to Section 301(b) of the Trade Act of 1974 (“Trade Act”), 19 U.S.C. § 2411(b). 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 (U.S. Trade Rep. Sept. 21, 2018) (“List 3 Notice”); *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and*

Innovation, 84 Fed. Reg. 22,564 (U.S. Trade Rep. Aug. 20, 2019) (“List 4 Notice”).¹

Defendants’ imposition and collection of the List 3 and List 4A duties are inconsistent with the statute, violate the Administrative Procedure Act (“APA”), and are otherwise contrary to law.

2. Kraft Heinz therefore requests that this Court declare void *ab initio* Defendants’ imposition of the List 3 and List 4A duties and order Defendants to refund, with interest, the List 3 and List 4A duties that Kraft Heinz has paid.

JURISDICTION

3. The Court has jurisdiction over this action contesting the imposition and collection of the duties at issue pursuant to 28 U.S.C. § 1581(i)(1)(B), conferring exclusive jurisdiction to this Court over any civil action against the United States, its agencies, or its officers, arising out of any law providing for “tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.”

STANDING

4. Kraft Heinz is a U.S. importer of merchandise that has been or will be subject to the additional *ad valorem* duties under List 3 and List 4A. Kraft Heinz is also a purchaser of merchandise imported by its suppliers that has been or will be subject to the additional duties. Kraft Heinz reimburses its suppliers for duties paid on such merchandise.

¹ The Office of the U.S. Trade Representative (“USTR”) refers to the duties contested in this action as “List 3” and “List 4”, in light of the fact that USTR imposed a series of successive duties allegedly in connection to the same “action” taken pursuant to Section 301(b) of the Trade Act. List 4A refers to duties imposed on September 1, 2019 pursuant to the List 4 Notice. List 4B refers to duties that were scheduled to be imposed on December 15, 2019 pursuant to the List 4 Notice. List 4B duties were never imposed. The series of duties imposed is further described in the Statement of Facts, *infra*.

5. Kraft Heinz has paid duties, or reimbursed suppliers for such duties, on merchandise included in List 3 and List 4A. Defendants' imposition and collection of these duties is unlawful. These unlawful duties, therefore, have affected adversely and aggrieved Kraft Heinz within the meaning of the APA, 5 U.S.C. § 702. Accordingly, Kraft Heinz has standing to commence this action. *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.”).

TIMELINESS

6. This cause of action accrued, at the earliest, upon USTR's publication of the List 3 and List 4 notices imposing the List 3 and List 4A duties on September 21, 2018 and August 20, 2019. Accordingly, this action is timely because Kraft Heinz commenced this action “in accordance with the rules of the court within two years after the cause of action first accrue[d].” 28 U.S.C. § 2636(i).

RELEVANT LAW

7. Section 301(b) of the Trade Act authorizes USTR to investigate whether a “an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce.” 19 U.S.C. § 2411(b).

8. If USTR's finding is affirmative, Section 301(c)(1)(B) permits USTR to impose special duties on imports from the foreign country subject to investigation. *Id.* § 2411(c)(1)(B). Section 304(a)(2)(B) requires USTR to determine whether to impose import restrictions in light of any affirmative determination within “12 months after the date on which the investigation is

initiated.” *Id.* § 2414(a)(2)(B). The Trade Act does not authorize USTR to increase or expand duties imposed under Section 301(b) outside of the 12-month time limit.

9. In relevant part, Section 307(a)(1) of the Trade Act permits USTR to “modify or terminate” the action taken pursuant to Section 301(b) where “the burden or restriction on United States commerce . . . of the acts, policies, and practices, that are the subject of such action has increased or decreased,” or where the action “is no longer appropriate.” *Id.* § 2417(a)(1)(B), (C).

10. Before modifying any action pursuant to Section 307, however, USTR must, *inter alia*, “provide opportunity for the presentation of views” of interested parties “affected by the proposed modification . . . concerning the effects of the modification . . . and whether any modification . . . of the action is appropriate.” *Id.* § 2417(a)(2). Modification, “as applied to any duty or other import restriction, includes the elimination of any duty or other import restriction.” 19 U.S.C. § 2481(6).

11. The authority granted by Section 307 to modify an action taken under Section 301(b) does not authorize USTR to impose entirely *new* duties. Reading USTR’s modification authority in Section 307(a) as a license to impose entirely new duties outside of the 12-month time limit envisioned in 304(a)(2)(B) would create an unintended and unauthorized loophole allowing USTR to circumvent the carefully calibrated, procedurally intricate process that Congress required for imposing duties pursuant to Section 301(b).

12. When Congress intended to grant USTR the authority to include additional goods subject to an action taken pursuant to Section 301 *after* duties were imposed, it said so explicitly. For example, in the context of actions taken under Section 301(a), Congress referred to “taking further” action, or revising the action “to affect other goods” —not to “modifying” the action.

See 19 U.S.C. § 2416(b)(1) (“the Trade Representative shall determine what further action the Trade representative shall take under section 2411(a) of this title. For purposes of Section 2411 of this title, any such determination shall be treated as a determination made under section 2414(a)(1) of this title); *see also id.* § 2416(b)(2)(B) (where a country fails to implement “the recommendation made pursuant to a dispute settlement proceeding under the World Trade Organization, the Trade Representative shall periodically revise the list or action to affect other goods” of that country.).

STATEMENT OF FACTS

Initial Investigation and List 1 and 2 Duties

13. On August 14, 2017, President Trump directed USTR to consider initiating an 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. *See Addressing China’s Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology*, 82 Fed. Reg. 39,007 (Aug. 17, 2017).

14. USTR initiated the investigation into Chinese technology transfer and intellectual property practices on August 18, 2017. *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. 40,213 (Aug. 24, 2017).

15. On March 22, 2018, USTR released its report announcing the results of its investigation. *See Office of the U.S. Trade Representative, Findings of the Investigation into China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and*

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