

UNITED STATES COURT OF INTERNATIONAL TRADE

KEEN COMMUNICATIONS LLC,

Plaintiff,

v.

UNITED STATES OF AMERICA; OFFICE
OF THE UNITED STATES TRADE
REPRESENTATIVE; U.S. TRADE
REPRESENTATIVE; U.S. CUSTOMS &
BORDER PROTECTION; and ACTING
COMMISSIONER OF U.S. CUSTOMS &
BORDER PROTECTION,

Defendants.

Court No. 21-00455

COMPLAINT

Plaintiff Keen Communications LLC (“Plaintiff”), by and through its attorneys, alleges and states 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 fourth round of tariffs on products covered by so-called “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) (publishing List 4A).

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

4A 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 4. 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 List 4A 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 4A tariff actions also violates the Administrative Procedure Act (“APA”). USTR (1) failed to provide sufficient opportunity for comment; (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 approximately 10,000 comments, USTR said absolutely nothing about how those comments shaped its final promulgation of List 4A. 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 Plaintiff pursuant to List 4A.

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. Plaintiff Keen Communications LLC (d/b/a AdventureKEEN) is a privately owned book publishing enterprise. AdventureKEEN is one of the top independent nature and outdoor activity publishers in the United States, reaching an audience of readers interested in the natural world through a broad cross-section of national and independent gift, book, library, and park channels. AdventureKEEN employs 33 individuals in the United States, supports more than 400 authors and sales representatives, and generates more than \$6 million in revenue annually. AdventureKEEN has made numerous entries of books subject to the additional *ad valorem* duties under List 4A, including, but not limited to, those classified under HTSUS statistical reporting numbers 4901.99.0070, 4901.99.0092, and 4901.99.0093.

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 4A.

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

STANDING

10. Plaintiff has standing to sue because they are “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 4A adversely affected and aggrieved Plaintiff because it was required to pay these unlawful duties.

TIMELINESS OF THE ACTION

11. 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).

12. The instant action contests action taken by Defendants that resulted in List 4A duties assessed on goods imported from China. *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, 43,306-29 (Aug. 20, 2019). Plaintiff’s claims accrued at the earliest on August 20, 2019, when USTR published notice of List 4A in the *Federal Register*. *Id.* Plaintiff has therefore timely filed this action.

RELEVANT LAW

13. 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).

14. 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).

15. 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

16. The current U.S.-China trade war grew from a narrow dispute. On August 14, 2017, President Trump directed Ambassador Robert 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 President Trump, certain Chinese “laws, policies, practices, and actions” on intellectual property, innovation, and technology “may inhibit United States exports, deprive United States citizens of fair remuneration for their innovations, divert American jobs to workers in China, contribute to our trade deficit with China, and otherwise undermine American manufacturing, services, and innovation.” *Id.*

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