

UNITED STATES COURT OF INTERNATIONAL TRADE

DIAMOND FOUNDRY, INC.

Plaintiff,

v.

UNITED STATES OF AMERICA;  
OFFICE OF THE UNITED STATES TRADE  
REPRESENTATIVE; KATHERINE TAI, U.S.  
TRADE REPRESENTATIVE; U.S. CUSTOMS &  
BORDER PROTECTION; CHRIS MAGNUS, U.S.  
CUSTOMS & BORDER PROTECTION  
COMMISSIONER,

Defendants.

Court No. 22-00084

**COMPLAINT**

Plaintiff Diamond Foundry, Inc. (“Diamond Foundry” or “Plaintiff”), by and through its attorneys, alleges and states as follows:

1. This action concerns Defendants’ unlawful and unjustified use of its authority to impose tariffs on certain imported goods from the People’s Republic of China that are covered by so-called “List 3” and “List4A” *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”) does not confer such expansive authority on Defendants. 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 within 12 months after initiation of that investigation. USTR failed to issue List 3 and List 4 within that window. USTR further was not

entitled to rely on its “modification” authority under Section 307 of the Trade Act (19 U.S.C. § 2417) to issue List 3 or List 4A. Section 307 of the Trade Act does not permit USTR to expand the imposition of tariffs to other imports from China except on the grounds originally investigated under Section 301 of the Trade Act, which related to intellectual property policies and practices. Defendants nonetheless based the imposition of List 3 and List 4A duties on China’s retaliatory duties and other unrelated issues. To the extent that USTR deemed the existing tariffs “no longer appropriate,” the Trade Act only permitted USTR to delay, taper, or terminate its actions—not to expand them.

3. The arbitrary manner in which Defendants implemented the List 3 and List 4 tariff actions also violates the Administrative Procedure Act (“APA”). USTR (1) failed to provide sufficient opportunity for comment (for example, requiring interested parties to submit affirmative and rebuttal comments on the same day); (2) failed to consider relevant factors when making its decision (for example, 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. In fact, USTR received many thousands of comments but failed to address how those comments shaped its final promulgation of List 3 and List 4. 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 4.

### **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 is a United States manufacturer of man-made diamonds. Plaintiff grows the diamonds in the United States, which then need to be cored, cut, polished, and inspected before they are sold. Plaintiff ships the diamonds abroad to be cored, cut, polished, and inspected. Plaintiff has made entries of man-made diamonds classified under HTSUS subheading 7104.90.1000 (9903.88.15 for China), which is subject to the additional *ad valorem* duties under List 4A.

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 and List 4.

9. Katherine Tai currently holds the position of USTR and serves as the director of the Office of the USTR. In these capacities, she and her predecessor Robert Lighthizer made numerous decisions regarding List 3 and List 4.

10. 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 4.

11. Defendant Chris Magnus is the Commissioner of CBP. In this capacity, he oversees (and his predecessor Mark A. Morgan oversaw) CBP's collection of duties paid by Plaintiff under List 4.

### STANDING

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 4A adversely affected and aggrieved Plaintiff because it is 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). This action was timely commenced "within two years after the cause of action first accrue[d]." 28 U.S.C. § 2636(i).

14. Plaintiff contests action taken by Defendants that resulted in the imposition of List 4A duties. List 4A became applicable to listed merchandise entered, or withdrawn from warehouse, for consumption on or after September 1, 2019. *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); *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 (August 20, 2019).

15. A cause of action accrues for purposes of this Court's jurisdiction under § 1581(i) at the time when the duties subject to dispute are paid. *See Old Republic Ins. Co. v. United States*, 645 F. Supp. 943, 953 (Ct. Int'l Trade 1986) ("Thus, plaintiff's cause of action did not accrue

until it paid the duties, that is, until it could claim Customs had money that should be reimbursed or refunded to it.”). Therefore, a new justiciable cause of action accrues each time an importer or its broker paid or pays the duties in dispute.

16. Plaintiff’s claims accrued, at the earliest, when List 4A tariffs were paid by Plaintiff or its broker. Thus, Plaintiff has timely filed this action with respect to all such entries for which List 4A tariffs were paid in the two years prior to this action or thereafter.

17. Alternatively, Plaintiff’s cause of action accrued when the assessment of List 4A tariffs was finalized. Thus, Plaintiff has timely filed this action with respect to all entries for which List 4A tariffs were paid and assessment was finalized in the two years prior to the date of this action or thereafter.

#### **RELEVANT LAW**

18. 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).

19. 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).

20. 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).

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