IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

CONFEDERACION DE ASOCIACIONES AGRICOLAS DEL ESTADO DE SINALOA, A.C., *ET AL.*,	
Plaintiffs,	
v.	Court No. 19-00059
UNITED STATES,	
Defendant,	
and	
THE FLORIDA TOMATO EXCHANGE,	
Defendant-Intervenor.	

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

CONFEDERACION DE ASOCIACIONES AGRICOLAS DEL ESTADO DE SINALOA, A.C., *ET AL.*,	)	
Plaintiffs,	)	
v.	)	Court No. 19-00059
UNITED STATES,	)	
Defendant,	)	
and	)	
THE FLORIDA TOMATO EXCHANGE,	)	
Defendant-Intervenor.	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to the Court's order of May 10, 2019 (ECF No. 13), defendant, the United States, respectfully submits this response in opposition to the motion for a temporary restraining order and preliminary injunction filed by plaintiffs Confederacion de Asociaciones Agricolas def Estado del Sinaloa, A.C., *et al*. (plaintiffs or CAADES).[1] Because the Court lacks jurisdiction to entertain this action pursuant to 28 U.S.C. § 1581(i), and because plaintiffs cannot establish the requirements necessary for extraordinary injunctive relief, we respectfully request that the Court deny the motion. If the Court were to grant plaintiffs' motion, we respectfully request that the Court order plaintiffs to post sufficient security with the Court, as required by USCIT Rule 65(c).

[1] Plaintiffs' Complaint, filed on May 9, 2019, ECF No. 2 is referenced as "Compl."; plaintiffs' memorandum of points and authorities in support of the motion for a temporary restraining order, filed on May 9, 2019, ECF No. 9, is referenced as "Pl. Mot," and the declaration of Neil H. Koslowe, filed on May 9, 2019, ECF No. 10, which was submitted in support of plaintiffs' motion, is referenced as "Koslowe Decln."

Plaintiffs have been aware since at least early-February 2019 that the Department of Commerce (Commerce) intended to terminate the 2013 Suspension Agreement on Fresh Tomatoes from Mexico and resume its antidumping investigation after May 7, 2019. *See Fresh Tomatoes From Mexico: Intent To Terminate Suspension Agreement, Rescind the Sunset and Administrative Reviews, and Resume the Antidumping Duty Investigation*, 84 Fed. Reg. 7,872, 7,873-74 (Dep't of Commerce Mar. 5, 2019) (discussing domestic industry's November 14, 2018 request and Commerce's February 6, 2019 notice regarding termination of suspension agreement and resumption of investigation); *see also* Ct. No. 18-00016, ECF No. 20 (voluntarily dismissing lawsuit as moot based on Commerce's notice of intent to withdraw from suspension agreement). Furthermore, plaintiffs submitted record comments on Commerce's notice of intent to withdraw from the suspension agreement and resume the investigation, stating explicitly that they "respect" Commerce's "right to withdraw from the agreement." Attachments A-B (Commerce notification and CAADES comments). Despite this, plaintiffs request extraordinary preliminary relief, while claiming they will suffer immediate, irreparable harm if Commerce proceeds. Given the short amount of time we had to respond to the plaintiffs' late-filed motion, we reserve the right to respond more fully in future filings and do not waive any arguments that we may raise in future filings that we do not raise here.

BACKGROUND

This action stems from Commerce's previously-suspended antidumping investigation concerning fresh tomatoes from Mexico. In April 1996, Commerce initiated an investigation to determine whether imports of fresh tomatoes from Mexico are being, or are likely to be, sold in the United States at less than fair value (LTFV). *See Initiation Notice: Fresh Tomatoes from Mexico*, 61 Fed. Reg. 18,377 (Dep't of Commerce Apr. 25, 1996) (initiation notice). In October

1996, Commerce issued its preliminary determination in the investigation, finding that imports of fresh tomatoes from Mexico were being sold at LTFV in the United States. *See Notice of Termination of Suspension Agreement, Rescission of Administrative Review, and Continuation of the Antidumping Investigation: Fresh Tomatoes from Mexico* (Dep't of Commerce May 7, 1999) (notice) (*May 2019 Withdrawal Notice*), attached as Exh. 1 to Pl. Mot., at 2. Subsequently, however, Commerce entered into a series of suspension agreements with Mexican tomato growers and exporters, pursuant to its authority under 19 U.S.C. § 1673c, agreements from which the Mexican parties withdrew on multiple occasions before agreeing to revised, new agreements. *See generally id.* at 2-4 (discussing history of investigation and suspension agreements).

The most recent of these suspension agreements was concluded in March 2013. *See id.* at 4. Section VI.B of the 2013 agreement states that "{t}he signatories or the Department may withdraw from this Agreement upon ninety days written notice to the other party." *See id.* at 5; *see also Fresh Tomatoes From Mexico: Suspension of Antidumping Investigation*, 78 Fed. Reg. 14,967, 14,971 (Dep't of Commerce Mar. 8, 2013) (2013 suspension agreement). All parties—including CAADES—agreed to (and may exercise) this condition.

In November 2018, the Florida Tomato Exchange (FTE), filed a request that Commerce terminate the 2013 agreement and resume the antidumping investigation under Section VI.B of the 2013 agreement. *See May 2019 Withdrawal Notice*, at 5. Plaintiffs CAADES, Mexican tomato growers and exporters, submitted responses to FTE's request. *See id.*

On February 6, 2019, in accordance with Section VI.B of the 2013 agreement, Commerce notified the Mexican signatories that it intended to withdraw from the 2013 agreement after 90 days. *See Fresh Tomatoes From Mexico,* 84 Fed. Reg. at 7,874; *see also* Attachment A

(Commerce's notification letter). On February 14, 2019, CAADES filed comments in response to Commerce's notification of intent to withdraw. *See Fresh Tomatoes From Mexico*, 84 Fed. Reg. at 7,874; *see also* Attachment B (CAADES comments). Commerce also published a *Federal Register* notification of its intent to withdraw from the suspension agreement on 90 days' notice pursuant to Section VI.B. *See Fresh Tomatoes From Mexico*, 84 Fed. Reg. at 7,874. CAADES did not submit any further comments following the *Federal Register* notice. Since the notification, Commerce has also held extensive consultations with interested parties to discuss a possible new suspension agreement. *See May 2019 Withdrawal Notice*, at 5.

On May 7, 2019, following expiration of the 90-day notification period, Commerce published its notice that it was withdrawing from the 2013 suspension agreement. *See generally May 2019 Withdrawal Notice.* Commerce stated in its notice that it was withdrawing in accordance with its option to do so under Section VI-B of the agreement. *See id.* at 7. Commerce correspondingly stated that this would lead to "{c}ontinuation of the {antidumping} {i}nvestigation" that it had previously suspended. *Id.* In this regard, Commerce explained that the antidumping statute "does not identify the timing for completion of the investigation in this particular scenario," and it, therefore, looked to 19 U.S.C. § 1673c(i)(1)(B) "for guidance" regarding how to proceed in continuing the investigation. *Id.* That provision requires Commerce to resume the investigation as if its affirmative preliminary determination had been made on the date the suspension agreement was terminated. *See* 19 U.S.C. § 1673c(i)(1)(B). Commerce thus indicated that it would instruct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of fresh tomatoes from Mexico from on or after May 7, 2019, and to collect antidumping duty cash deposits or bonds based on the preliminary dumping margins. *See May 2019 Withdrawal Notice*, at 9.

On May 9, 2019, plaintiffs filed this action challenging the lawfulness of Commerce's actions and asking the Court to enjoin Commerce from taking steps to resume the investigation, suspend liquidation, and collect cash deposits or bonds. *See* Summons, ECF No. 1. On May 10, 2019, the Court set a briefing schedule for plaintiffs' motion for a temporary restraining order and preliminary injunction. *See* Order, ECF No. 18.

ARGUMENT

I. Standard For Granting A Temporary Restraining Order

The standard for obtaining a temporary restraining order is virtually the same as the standard for a preliminary injunction. *See, e.g.*, *Kemet Elec. Corp. v. Barshefsky*, 969 F. Supp. 82, 84 (Ct. Int'l Trade 1997) (citations omitted). Thus, it is "an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis added) (citation omitted). A preliminary injunction is "never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)). To obtain preliminary relief, a party must establish each of four elements: "(1) that it will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors the {movant}." *Otter Prods., LLC v. United States*, 37 F. Supp. 3d 1306, 1314 (Ct. Int'l Trade 2014) (citation omitted); *see also Winter*, 555 U.S. at 20-21.

The Supreme Court has made clear, contrary to plaintiffs' contentions at page six of their brief, which ignore key holdings of *Winter* and *Munaf*, that, to prevail, plaintiffs must show that each prong of the test is "likely," as opposed to a balancing or sliding-scale test. *Winter*, 555 U.S. at 20, 21. Thus, if plaintiffs fail to establish any one factor, their motion must be denied.

See Shandong Huarong Gen. Group Corp. v. United States, 122 F. Supp. 2d 143, 145 (Ct. Int'l Trade 2000). For example, this Court recently has denied preliminary injunctive relief based solely on a plaintiff's failure to demonstrate immediate irreparable harm. *Sumecht NA, Inc. v. United States*, 331 F. Supp. 3d 1408, 1412 (Ct. Int'l Trade 2018), *aff'd*, No. 2019-1015, -- F.3d --, 2019 WL 2017370 (Fed. Cir. May 8, 2019).

Similarly, a court may not decide the merits of a case before establishing it has subject matter jurisdiction. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998). This includes granting preliminary relief, which the Court cannot do without first resolving challenges to its jurisdiction. *U.S. Ass'n of Importers of Textiles & Apparel v. United States*, 413 F.3d 1344, 1348 (Fed. Cir. 2005).

II. The Court Lacks Section 1581(i) Jurisdiction

The sole basis for jurisdiction plaintiffs assert in their complaint is the Court's residual jurisdiction under 19 U.S.C. § 1581(i). Compl. ¶ 2 (asserting, without explanation or support, that jurisdiction exists under section 1581(i)). "Section 1581(i)," however, "embodies a 'residual' grant of jurisdiction, and may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018).[2] In this case, where plaintiffs' claim is focused on Commerce's ability to continue its antidumping investigation regarding imports of tomatoes from Mexico, the

[2] The Federal Circuit's "cases make clear that mere allegations of financial harm do not render a remedy established by Congress manifestly inadequate." *Sunpreme*, 892 F.3d at 1193 (citation omitted). Rather, the predicate steps "must be an 'exercise in futility, or incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain.'" *Id.* at 1193-94 (quoting *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1294 (Fed. Cir. 2008)).

Court lacks subject matter jurisdiction under section 1581(i) because plaintiffs' claim may be brought under 19 U.S.C. § 1581(c) if and when Commerce completes its resumed investigation.

Like all Federal courts, the Court of International Trade is a court of limited jurisdiction. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). The party seeking to invoke the Court's jurisdiction has the burden of establishing that jurisdiction exists. *Id*. If a party challenges the Court's jurisdiction, a plaintiff cannot rely merely upon allegations in the complaint, but must bring forth relevant evidence competent to establish jurisdiction. *See McNutt v. Gen. Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936).

Whether jurisdiction exists is a question of law for the court. *Shah Broths., Inc. v. United States*, 770 F. Supp. 2d 1367, 1370 (Ct. Int'l Trade 2011). When jurisdictional requirements are not satisfied, the complaint must be dismissed. *See* USCIT R. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("{W}hen a federal court concludes that it lacks subject-matter jurisdiction, the complaint must be dismissed in its entirety."). Indeed, "{t}he court may dismiss a case for lack of subject matter jurisdiction on its own motion because the court must enforce the limits of its jurisdiction." *Borusan Mannesmann Boru Sanayi ve Ticaret A.S.*, 986 F. Supp. 2d 1381, 1384 (Ct. Int'l Trade 2014) (citations omitted). In assessing the relevant jurisdictional basis, moreover, the Court must "look to the true nature of the action." *Sunpreme*, 892 F.3d at 1193 (citation omitted).

Section 1581(c) states that this Court possesses subject matter jurisdiction over "any civil action commenced under section 516A . . . of the Tariff Act of 1930" or 19 U.S.C. § 1516a. Section 1516a, in turn, lists among the types of "Reviewable determinations" that are actionable for purposes of section 1581(c): "*Final affirmative* determinations" by Commerce "under section

1671d or 1673d of this title, including any negative part of such a determination{.}" 19 U.S.C. § 1516a(a)(2)(B)(i) (emphasis added). A challenge may include "contesting any factual findings or legal conclusions upon which the determination is based." 19 U.S.C. § 1516a(a)(2)(A). These statutory provisions are well-understood to provide a remedy under section 1581(c) for a broad array of Commerce's decisions in connection with its antidumping and countervailing duty investigations, such as the resumed antidumping investigation at issue here. *See, e.g.*, *Gov't of People's Republic of China v. United States*, 483 F. Supp. 2d 1274, 1281 (Ct. Int'l Trade 2007) (applying provision to challenge to legality of Commerce's initiation of investigation).

Such challenges, however, are *only* permissible under the statute upon Commerce's issuance of a *final affirmative* determination. *See, e.g.*, *Gov't of China*, 483 F. Supp. 2d at 1280-81 (holding that challenge to legality of initiating investigation must be brought at investigation's conclusion); *Shandong Dongfang Bayley Wood Co. v. United States*, 236 F. Supp. 3d 1346, 1350-51 (Ct. Int'l Trade 2017) (*Bayley Wood*) (holding that Court lacked jurisdiction prior to final determination). Indeed, under a second provision of the statute referring specifically to parties' ability to challenge determinations under 19 U.S.C. § 1673c—the substantive statutory provision plaintiffs discuss in this case[3]—parties may challenge Commerce's determination to suspend an investigation under section 1673c "including any *final determination* resulting from a continued investigation." 19 U.S.C. § 1516a(a)(2)(B)(iv) (emphasis added). *See May 2019 Withdrawal Notice*, at 1 (noting the "Continuation of the Antidumping Duty Investigation").

[3] Although plaintiffs' pleadings reference 19 U.S.C. § 1673c, the lone count in its complaint refers solely to Commerce allegedly having violated requirements pertaining to a sunset review of the now-defunct 2013 suspension agreement, which is not at issue in this litigation. *See* Compl. ¶ 19; *see also* Ct. No. 19-00016, ECF Nos. 19-21 (documenting voluntary dismissal of action challenging sunset review, following Government's motion to dismiss).

Here, plaintiffs acknowledge Commerce's authority to withdraw from the suspension agreement, Pl. Mot. at 9, and their claim focuses on whether Commerce can in that circumstance resume/continue its investigation. *Id.* at 1. This is not a proper section 1581(i) claim because, whether under section 1516a(a)(2)(B)(i) or 1516a(a)(2)(B)(iv), consistent with the manner in which the jurisdictional statute functions in general, the statute makes Commerce's continuing tomatoes investigation and any subsidiary decisions reviewable upon a "final" determination, rather than at the current stage of proceedings. *See, e.g.*, *Gov't of China*, 483 F. Supp. 2d at 1280-81 (requiring China to wait until final determination to challenge legality of initiating investigation); *Bayley Wood*, 236 F. Supp. 3d at 1346 (denying writ of *mandamus* and dismissing action challenging collection of cash deposits stemming from Commerce's preliminary determination in countervailing duty investigation).

The statute embodies Congress's intent that challenges to investigations generally be made at the investigation's conclusion. This makes sense because Commerce, at the conclusion of its current investigation, assuming matters even progress that far, may not find dumping by plaintiffs, or the United States International Trade Commission (ITC) may not find injury to the domestic industry—meaning that any cash deposits would be refunded with interest. *See Bayley Wood*, 236 F. Supp. 3d at 1350 (holding that allegations of competitive injury from being subject to cash deposit rate during pendency of investigation were "insufficient to demonstrate the inadequacy of the judicial review mechanism Congress provided"). Similarly, by initiating this lawsuit prior to any briefing or argument before Commerce on their claims in the investigation, plaintiffs are depriving Commerce of the opportunity to address the matter in the first instance. Moreover, Commerce and the plaintiffs could in the interim reach a new suspension agreement that moots any challenge to the investigation. *See* Attachments A-B (referencing ongoing

negotiations). Regardless, plaintiffs may, if necessary, raise their claims regarding the continued investigation under section 1581(c) at the investigation's conclusion and, because that remedy is not "manifestly inadequate," the Court lacks jurisdiction to entertain them under section 1581(i).

In sum, Commerce's actions in this antidumping investigation, are subsumed in the Court's section 1581(c) jurisdiction regarding the overall investigation under 19 U.S.C. § 1516a(a)(2)(B)(i). In particular, the three "actions" plaintiffs state they are challenging all stem from Commerce's resumption of its antidumping investigation, and thus may be challenged in the normal course at the investigation's conclusion under section 1581(c). *See* Compl. ¶ 1; *Gov't of China*, 483 F. Supp. 2d at 1280-81 (holding the plaintiff must wait until final determination to challenge legality of initiating investigation). This Court has in such circumstances held that merely being subject to cash deposits does not render the available section 1581(c) remedy inadequate. *See Bayley Wood*, 236 F. Supp. 3d at 1350.

Therefore, this Court lacks jurisdiction to entertain plaintiffs' claim under section 1581(i), and plaintiffs' bald assertion of section 1581(i) jurisdiction in their complaint falls far short of meeting their burden of establishing jurisdiction.

III. Plaintiffs Have Not Demonstrated Immediate, Irreparable Harm

The Federal Circuit has clarified that a plaintiff *cannot* be granted preliminary relief "unless it establishes *both* of the first two factors, *i.e.*, likelihood of success on the merits and irreparable harm." *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001) (emphasis in original) (citation omitted). That principle applies in this case and requires that plaintiffs' motion for extraordinary preliminary relief be denied because plaintiffs have not established irreparable harm, or likelihood of success on the merits.

We address the likelihood of success on the merits in the next section. But, as the Court recently held in *Sumecht NA, Inc. v. United States*, 331 F. Supp. 3d at 1412, inability to establish irreparable harm *alone* warrants denying a request for a preliminary injunction. *See also Otter*, 37 F. Supp. 3d at 1316 (holding inability to establish irreparable harm was sufficient to deny preliminary injunction motion).

Here, plaintiffs allege the same types of "speculative, unsupported" claims of harm that the Court rejected in *Sumecht*. *See* 331 F. Supp. 3d at 1412. Specifically, plaintiffs contend that: (1) based on forecasts from one study from Arizona State University which "presume{es} there will be a fifty percent decrease in imports from Mexico," they may lose exports and have their supply chain disrupted; (2) they may be required to submit data to meet a deadline that is shorter than they would prefer; and (3) CBP will require bonds or cash deposits from importers. Pl. Mot. at 7-8; *see also* Koslowe Decln. at ¶¶ 2-9.[4] Significantly, plaintiffs cite *no* cases establishing that these types of harm constitute irreparable injury. Pl. Mot. at 7-8.

A plaintiff seeking an injunction bears an "extremely heavy burden" to establish irreparable injury. *Shandong Huarong Gen'l Grp. v. United States*, 122 F. Supp. 2d at 146. To satisfy this standard, plaintiffs must offer more than "speculative" evidence; they must demonstrate that they face an "immediate and viable" threat of irreparable harm. *Otter*, 37 F. Supp. 3d at 1315 (quoting *Kwo Lee, Inc. v. United States*, 24 F. Supp. 3d 1322, 1326 (Ct. Int'l

[4] As plaintiffs correctly note, Commerce's notice provided that CBP could require either cash deposits *or* bonds. Pl. Mot at 7. That CBP can require either cash deposits or bonds actually puts plaintiffs in a *better* position than a typical respondent to an antidumping investigation. This is because, effective November 2, 2011, Commerce revised its regulation at 19 C.F.R. § 351.205(d), which previously allowed for bonding in lieu of cash deposit, to require cash deposits in most circumstances. *See* 19 C.F.R. Part 351, 76 Fed. Reg. 61, 042 (Oct. 3, 2011) (Dep't of Commerce) (final rule). Because the investigation regarding Mexican tomatoes was initiated before the regulation was revised, Commerce permitted CBP to require *either* a cash deposit or a bond. *See* 19 C.F.R. § 351.701.

Trade 2014)); *Sumecht*, 331 F. Supp. 3d at 1412 (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)). As the Federal Circuit explained in *Zenith*: "A preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective injury is great. A presently existing actual threat must be shown." *Zenith*, 710 F.2d at 809 (citing *S.J. Stile Assoc. v. Snyder*, 646 F.2d 522, 525 (C.C.P.A. 1981)). And, as *Otter* recognized "{t}he threat of irreparable harm must be 'demonstrated by probative evidence,'" and "'cannot be determined by surmise.'" 37 F. Supp. 3d at 1315 (quoting *Am. Inst. for Imported Steel Inc. v. United States*, 600 F. Supp. 204, 209 (Ct. Int'l Trade 1984) and *Elkem Metals Co. v. United States*, 135 F. Supp. 2d 1324, 1331 (Ct. Int'l Trade 2001)). Thus, "{t}he court must deny a preliminary injunction where the plaintiff fails to present evidence that the alleged injuries are likely to occur." *Otter*, 37 F. Supp. 3d at 1315.

It is well-established that "{a}n allegation of financial loss alone generally does not constitute irreparable harm if future money damages can provide adequate corrective relief." *Sumecht*, 331 F. Supp. 3d at 1412 (citing *Sampson v. Murray*, 415 U.S. 61, 90, 94 (1974)); *see also Olympia Indus., Inc. v. United States*, 30 CIT 12, 15 (2006) (rejecting plaintiffs' claims of irreparable harm due to a requirement to pay cash deposits). Here, if plaintiffs prevailed on the merits, importers of merchandise subject to this requirement to pay cash deposits or post a bond would receive a refund of any estimated duties found to have been wrongly collected, plus interest. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004); 19 U.S.C. § 1505(b).

The Court repeatedly has declined to find irreparable harm based merely on claims of financial losses. *E.g.*, *Corus Group PLC v. Bush*, 217 F. Supp. 2d 1347, 1355 (Ct. Int'l Trade 2002) (concluding that threat of "economic injury" does not constitute irreparable harm). In

Corus Group, the Court heard testimony from one witness that "sound business principles would require it to close the plant rather than operate at a loss," but the Court concluded that the plaintiff failed to establish irreparable harm because there was no evidence the plaint was "in danger of imminent closure." *Id.* And, in *Shandong Huarong General Group v. United States*, the Court concluded that the plaintiff failed to establish irreparable harm when it submitted an affidavit from its "major customer" in the United States stating that it would cancel all existing and future orders if cash deposits were required. 122 F. Supp. 2d at 1369-70. Noting that "affidavits submitted by interested parties are weak evidence, unlikely to justify a preliminary injunction," the Court further criticized the plaintiff because the affidavits were not supported by evidence "indicating exactly how and when these lost sales would force it out of business." *Id.*

Here, plaintiffs rely on even weaker evidence than the plaintiff submitted in *Shandong* – an affidavit from their attorney Mr. Koslowe. But "{a}ttorney argument is not evidence." *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017); *see also International Fresh Corp v. United States*, 26 F. Supp. 3d. 1363, 1368 (Ct. Int'l Trade 2014) (rejecting a claim of irreparable harm in which plaintiff produced "neither independent evidence nor witnesses for cross examination to support its affidavits" and failed to provide "financial statements to prove lack of necessary capital reserves").

Even if the Court were to treat attorney argument as evidence, the declaration and attachments focus primarily on the effect of a reduction in Mexican tomatoes to United States customers and not the immediate harm to the plaintiffs, which is the *sole* focus of the Court's inquiry when examining irreparable harm. *See Zenith*, 710 F.2d at 809 (focus of irreparable

injury analysis is on the harm to the plaintiff).[5] In any event, when Mr. Koslowe's declaration does address the purported specific harm to the plaintiffs, he offers only speculative allegations of harm. *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (explaining that "'issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief'") (quoting *Winter*, 555 U.S. at 22)).

Plaintiffs contend that if the Court denies the motion, Mexican tomato growers "stand to lose half their exports." Pl. Mot. at 7. But plaintiffs' only "evidence" in support of this claim is a summary document of study conducted by Arizona State University, which appears to be funded by an interest group, the Fresh Produce Association of the Americas. *Id.* at ¶ 2 (citing the study as Exh. 1). As best we can tell, the study underlying this summary document was not a peer-reviewed or otherwise subject to critical examination. Thus, its veracity is uncertain and should be viewed with appropriate caution. Further, the study does not establish what sales will be lost by the plaintiffs or provide other concrete examples of immediate, viable harm. It merely forecasts various market scenarios, which are based solely upon a "presum{ption}" that terminating the suspension agreement will result in "a fifty percent decrease in imports from Mexico." Koslowe Decln. at ¶ 2; Koslowe Decln. at Exh 1. pp. 1-2. There is no evidence that such a decrease has occurred or will occur in the future.

Also, paragraph 5 hypothesizes that a reduction in imports would "have an immediate disruptive impact throughout the supply chain, severely impacting the Mexican Grower's relationships with its importers, distributors, shipping and warehousing partners." Koslowe

[5] Mr. Koslowe's declaration references two studies, one from Arizona State University, attached as Exhibit 1, and one from the University of Arizona, attached as Exhibit 2. We understand plaintiffs' motion and Mr. Koslowe's declaration to claim that Exhibit 1 supports plaintiffs' claim of irreparable harm, Koslowe Decln. at ¶¶ 1-5, and that Exhibit 2 supports plaintiffs' claim that the public interest weighs in favor of entering the injunction, Koslowe Decln. at ¶¶ 6-9.

Decln. at ¶ 5; Pl. Mot. at 7 (claiming harm based on supply chain disruptions and citing the declaration). Other than offering Mr. Koslowe's opinion based on his "general knowledge "of plaintiffs' business operations, plaintiffs offer nothing that substantiates these assertions.

Thus, the plaintiffs have failed to submit substantive, supporting evidence establishing "'a viable threat of serious harm which cannot be undone.'" *Sumecht*, 331 F. Supp. 3d at 1412 (quoting *Zenith*, 710 F.2d at 809); *see also id.* (rejecting claims of irreparable harm because "{p}laintiff's perceived financial harm is hypothetical and unsubstantiated"); *see also Shandong*, 122 F. Supp. 2d at 1371 (affidavits declaring harm are insufficient when unsupported by concrete evidence); *Int'l Fresh*, 26 F. Supp. 3d at 1367-68 (rejecting a claim of irreparable harm based on affidavits).

To the extent that the remainder of Mr. Koslowe's declaration, which primarily theorizes about the effect on U.S. tomato prices and potential harm to the United States economy, is relevant to plaintiffs' discussion of irreparable injury, it is also unhelpful and speculative. Paragraph 3 surmises that the effects of suspending the agreement could be "even more substantial if something were to happen to the remaining supply of U.S. tomatoes," such as an unforeseen weather or a disease related event. Koslowe Decln. at ¶ 3. Also, paragraph 4 discusses impacts that could occur during the tomato growing season, which is October through June, and that it could potentially result in increased prices for United States consumers. *Id.* at ¶ 4. To the extent that plaintiffs contend that consumer prices may rise during this time period, which is not imminent, that contention also does not establish the required "presently existing, actual threat." *See Zenith*, 710 F.2d at 809.

Thus, if the Court were to find that the plaintiffs' speculative and conclusory claims of economic harm amounted to irreparable harm, the Court would be required to find irreparable

harm in almost any case. But this is at odds with the standard for establishing irreparable harm. As explained in *Corus Group PLC v. Bush*, 217 F. Supp. 2d at 1355, "{e}very increase in duty rate will necessarily have an adverse affect on foreign producers and importers," but if "the court were to find irreparable harm under these facts, the court would likely be required to do so in any challenge to a duty increase because every plaintiff could argue that increased tariffs would cause revenue shortfalls possibly resulting in either operating at a loss or plant closure at some future date." *Id.* Thus, "the mere threat of an adverse economic impact" cannot establish irreparable harm because it would "effectively create a *per se* irreparable harm rule in similar challenges-a result likely contrary to the extraordinary nature of the remedy." *Id.* (citing *Am. Spring Wire Corp. v. United States*, 578 F. Supp. 1405, 1408 (Ct. Int'l Trade 1984)).

Plaintiffs also claim that they will suffer irreparable harm if CBP "require{s} a cash deposit or bond for entries of fresh tomatoes from Mexico." Pl. Mot at 7. Again, although plaintiffs speculatively may claim that requiring a cash deposit will decrease exports, the plaintiffs have presented no evidence that importers will be unable to post bonds or pay the deposits or will immediately cancel existing tomato orders. *See Shandong*, 122 F. Supp. 2d at 1371; *Int'l Fresh*, 26 F. Supp. 3d at 1367-68 (holding that importer failed to establish irreparable harm based on affidavits that paying cash deposits would threaten to put the company out of business).

In any event, as explained above, the requirement to collect deposits does not constitute irreparable harm because, should plaintiffs prevail in this matter, the parties who have made the deposits or posted the bonds would be entitled to receive refunds and interest on any overpayments. 19 U.S.C. §§ 1505(b); *Sampson*, 415 U.S. at 90.

Plaintiffs also ignore that "paying deposits pending court review is an ordinary consequence of the statutory scheme." *MacMillan Bloedel, Ltd. v. United States*, 16 CIT 331, 333 (1992) (rejecting this argument as a basis for entertaining section 1581(i) jurisdiction over an interlocutory appeal from a continuing Commerce administrative review). That a preliminary cash deposit rate may be high or may even later be found not to be the actual or appropriate assessment rate, reflects the functioning of our retrospective duty assessment system: "those with goods that may be imported rarely can predict with accuracy what the duty will be." *GPX Int'l Co. v. United States*, 893 F. Supp. 2d 1296, 1313 (Ct. Int'l Trade 2013). There is no getting around cash deposits (or bonding, here) – the statute permits Commerce to collect as security estimated duties, i.e., cash deposits, until an administrative review is conducted determining the assessment rate for specific entries of merchandise or such a review is not requested for a party and its entries are liquidated as entered. This is the comprehensive statutory procedure that Congress has designed.

Congress did not intend that the ordinary operation of the antidumping duty law—which includes the collection of estimated duties in the form of cash deposits, *e.g.*, 19 U.S.C. § 1673d(c)(1)(B)(ii), could be considered irreparable harm, or it would not have limited section 1516a(c)(2) injunctions to liquidation. *See, e.g.*, *Bayley Wood*, 236 F. Supp. 3d at 1350 (rejecting attempt to enjoin collection of cash deposits after preliminary determination for want of residual jurisdiction because plaintiff "ma{de} no argument that this is imminent harm to {it} showing that the ordinary means of obtaining judicial review of a Commerce determination will be inadequate in the circumstances of this litigation").

And, in interpreting this Court's residual jurisdiction statute, the Federal Circuit consistently has held that allegations of financial harm, even severe harm, "do not make the

remedy established by Congress manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 964 (Fed. Cir 1987); *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1550-51 (Fed. Cir. 1983); *Int'l Custom Prods. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006).

Finally, the plaintiffs claim that they will suffer irreparable harm because Commerce will require them to produce data on an expedited basis. Pl. Mot. at 7-8. We are aware of no case that establishes that the requirement to submit information on a short timeline constitutes irreparable harm, and the plaintiffs have cited nothing in support of this point.

Accordingly, the Court should find that plaintiffs' speculative claims of economic harm fail to establish irreparable injury.

IV. Plaintiffs Have Failed To Establish A Likelihood Of Success On The Merits

Turning to the likelihood of success on the merits prong, the sole claim in plaintiffs' complaint alleges that Commerce's actions to continue its investigation are unlawful, allegedly "because Commerce has not complied with the applicable and mandatory requirements of section 752(d)(2) of the Act, 19 U.S.C. § 1675(d)(2), and its implementing regulation, 19 C.F.R. § 351.218." Compl. ¶ 19. These allegations refer to an alleged violation of the statute and regulation regarding Commerce's five-year "sunset" review of the now-defunct 2013 suspension agreement, which has little relevance to the actions plaintiffs seek to enjoin and can no longer be challenged. *See* Ct. No. 19-00016, ECF Nos. 19-21 (documenting plaintiffs' voluntary dismissal of action challenging sunset review as moot based on Commerce's impending withdrawal from suspension agreement). Because plaintiffs' sole claim straightforwardly fails to state a claim on which relief can be granted, plaintiffs' motion should be denied.

Second, plaintiffs have failed to exhaust (or otherwise waived) their claim by failing to raise it in the first instance before Commerce. By statute, this Court "shall, where appropriate,

require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). As a general matter, "{t}he exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Timken Co. v. United States*, 201 F. Supp. 2d 1316, 1340 (Ct. Int'l Trade 2002) (citation omitted). Thus, a party that fails to present an issue before the agency normally is "precluded from raising this issue de novo before the court." *AIMCOR v. United States*, 141 F.3d 1098, 1111 (Fed. Cir. 1998) (citations omitted).

Although plaintiffs assert that Commerce's actions are unlawful because Commerce was required to permit comments on its intended withdrawal from the suspension agreement and to make a determination based on those comments, *see* Pl. Mot. at 1, plaintiffs *did* receive an opportunity to comment on Commerce's intended withdrawal. Notwithstanding this opportunity, plaintiffs did not raise any argument that Commerce's intended actions were unlawful. In fact, plaintiffs did precisely the opposite by recognizing Commerce's right to withdraw.

Specifically, following Commerce's February 6, 2019 notification to the signatories that it intended to exercise its option to withdraw from the agreement and to resume the underlying antidumping investigation (Attachment A), CAADES submitted responsive comments on the record of the tomatoes proceeding (Attachment B). *See Fresh Tomatoes From Mexico: Intent To Terminate Suspension Agreement, Rescind the Sunset and Administrative Reviews, and Resume the Antidumping Duty Investigation*, 84 Fed. Reg. at 7,874 & n.26 (discussing plaintiffs' comments submission). CAADES *did not* contest *either* Commerce's ability to withdraw from the suspension agreement under the explicit clause in the 2013 agreement permitting it to do so—a clause to which CAADES agreed when it entered into that agreement—or Commerce's ability to resume its suspended investigation upon its withdrawal. *See* Attachment B. To the

contrary, CAADES instead stated that it "respect{s} {Commerce's} right to withdraw from the agreement suspending the antidumping investigation on imports of fresh tomatoes from Mexico." *Id.* at 1. This statement recognizing Commerce's right to withdraw from the suspension agreement is consistent with the parties' historical dealings, in which Mexican parties have themselves on multiple occasions exercised the right to withdraw from earlier iterations of the suspension agreement with 90 days' notice. *See, e.g.*, *Fresh Tomatoes From Mexico: Intent To Terminate Suspension Agreement and Resume Antidumping Investigation and Intent To Terminate Sunset Review*, 78 Fed. Reg. 9,366 (Dep't of Commerce Feb. 8, 2013) (*February 2013 Notice*) (discussing withdrawal history). Not only did CAADES fail to raise its claim before the agency: CAADES expressly signaled *the opposite* view before the agency, a view it acted in accordance with *repeatedly* in the past.

Likewise, following Commerce's March 5, 2019 *Federal Register* notice of its intent to withdraw from the suspension agreement and to resume the suspended investigation, plaintiffs *did not* (despite submitting earlier comments) submit any comments challenging the legality of Commerce's proposed actions during the ensuing 90-day period. Instead, contrary to their previous recognition of Commerce's express option to withdraw and failure to contest Commerce's notification, plaintiffs *now*, after the fact, claim that Commerce's actions are unlawful.

If plaintiffs believed that Commerce's intended actions were unlawful, it was incumbent upon them to raise that claim in the proceeding before Commerce. Yet, despite actually submitting comments and having ample further opportunity to do so, plaintiffs did not provide Commerce an opportunity to consider and address, if necessary, their arguments in the first instance. *See, e.g.*, *Timken*, 201 F. Supp. 2d at 1340 ("A reviewing court usurps the agency's

function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the {agency} of an opportunity to consider the matter, make its ruling, and state the reasons for its action" (quoting *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946))). Having failed do so—and, in fact, having taken the opposite position of recognizing Commerce's prerogative to withdraw—plaintiffs should not be permitted to reverse course and challenge Commerce's determination now. *See also AIMCOR*, 141 F.3d at 1112 ("Ordinarily, when a party fails to make an argument in proceedings below, the argument is waived, and we will not hear it on appeal.") (citation omitted).

Third, even if plaintiffs' claim were properly before the Court, it lacks merit. Plaintiffs acknowledge that the suspension agreement itself contains a stand-alone provision authorizing parties to withdraw from the agreement on 90 days' notice without further requirements. *See* Pl. Mot. at 3. Section VI.B of the agreement states in full: "The signatories or the Department may withdraw from this Agreement upon ninety days written notice to the other party." *Fresh Tomatoes From Mexico: Suspension of Antidumping Investigation*, 78 Fed. Reg. 14,967, 14,971 (Dep't of Commerce Mar. 8, 2013). As we noted above, the Mexican parties have exercised similar options in previous agreements multiple times in the proceeding's history. *See generally February 2013 Notice*, 78 Fed. Reg. 9,366 (discussing withdrawal history). Commerce expressly relied on Section VI.B of the agreement in first notifying parties of its intent and withdrawing from the agreement. *See* Attachment A; *May 2019 Withdrawal Notice*.

Plaintiffs argue that Commerce's actions in resuming its suspended investigation following withdrawal are unlawful because they allegedly violate statutory and regulatory provisions relating to the termination of suspension agreements based on certain findings, specifically 19 U.S.C. § 1673c(i) and 19 C.F.R. § 351.209. *See* Pl. Mot. at 7-10. The flaw in

plaintiffs' reasoning is that they presume, incorrectly, that these statutory and regulatory provisions provide the exclusive means of terminating the agreement. This claim is unfounded and inconsistent with the statute and regulations, and the settled expectations of the parties, as evidenced by the 2013 agreement and CAADES' own past conduct. The statutory and regulatory provisions govern termination of suspension agreements when violations occur. They *do not* preclude Commerce from acting where the statute is silent by negotiating a provision, such as the one in this case, that permits any signatory to withdraw by providing the requisite notice where there has not been a statutory violation. Having negotiated and acceded to such a term, the statutory and regulatory provisions plaintiffs cite do not prevent Commerce from exercising its option under the agreement to withdraw.

Indeed, plaintiffs acknowledge both that "Commerce was authorized under section VI of the Agreement to withdraw from it on 90 days' written notice," Pl. Mot. at 9, and further that Section VI-B "does not provide for any consequences of a withdrawal from the Agreement." *Id.* at 3. In doing so, they concede that Commerce was authorized to withdraw from the agreement under the provision it invoked, and that the provision does not provide guidance on how to proceed upon doing so. Plaintiffs claim that, despite Commerce's option to withdraw from the agreement, Commerce could not then resume its suspended investigation and correspondingly collect cash deposits without also satisfying requirements set forth in 19 U.S.C. § 1673c(i) and 19 C.F.R. § 351.209. But the continued flaw in this argument in that it again presumes that Commerce acted pursuant to these provisions when Commerce did not purport to do so.

Rather, as plaintiffs concede, the Section VI-B withdrawal provision under which Commerce acted does not dictate how to proceed in such circumstances, nor does the statute. *See May 2019 Withdrawal Notice*, at 7 ("The statute does not identify the timing for completion

of the investigation in this particular scenario."). Hence, as it routinely does in other contexts, Commerce looked to section 1673c(i)(1)(B) "for *guidance*." *Id.* (emphasis added); *cf. Apex Frozen Foods Private Ltd. v. United States*, 144 F. Supp. 3d 1308, 1315 (Ct. Int'l Trade 2016) ("{T}o determine whether to employ an alternative method to calculate dumping margins in reviews, Commerce has by practice chosen to adopt the approach it uses in investigations{.}"), *aff'd*, 862 F.3d 1337 (Fed. Cir. 2017); *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1328 (Fed. Cir. 2017) (discussing same). Plaintiffs' attempt to interpret the statute and regulation as limiting Commerce's discretion to resume its investigation "only" if it makes determinations under those provisions, and not when it invokes its option to withdraw from the agreement. *See* Pl. Mot. at 8. But nothing in the statute provides this limitation. The provisions upon which CAADES relies simply require that, if Commerce *does* make such determinations and terminates the agreement, it resume its suspended investigation. *See* 19 U.S.C. § 1673c(i); 19 C.F.R. § 351.209. Nor, contrary to plaintiffs' claims, do the provisions say anything about requiring Commerce to "go back to square one" before it can resume its investigation upon exercising its option to withdraw. Pl. Mot. at 8.

And, given the nature of a "suspension" agreement—*i.e.*, suspending an otherwise active investigation—it is appropriate that Commerce *would* resume the suspended investigation upon withdrawal from the agreement. *See Vicente Camalu SPR de RI v. United States*, 366 F. Supp. 2d 1373, 1374 (Ct. Int'l Trade 2005) ("The termination of the 1996 Suspension Agreement {following Mexican producers' and exporters' withdrawal} led perforce to . . . resumption of the agencies' antidumping investigations initiated some six years earlier."). Indeed, it is difficult to contemplate what Commerce would do other than resume the underlying suspended investigation. Plaintiffs assert that "Commerce may order the suspension of the liquidation of

entries of merchandise or instruct CBP to demand cash deposits or a bond for each such entry only if it has made a preliminary determination based on a thorough investigation that there are grounds for issuing an antidumping duty order." Pl. Mot. at 7. But that contention ignores that the general requirement is satisfied in this case because Commerce had made an affirmative preliminary determination prior to entering into the suspension agreement.

Ultimately, plaintiffs attempt to push the statute beyond its limits in claiming that it *affirmatively precludes* Commerce from resuming its investigation upon exercising an authorized option to withdraw from a suspension agreement. Thus, plaintiffs are unlikely to succeed on the merits of their claim.

V. The Balance Of Hardships And Public Interest Factors Weigh In Favor Of Denial

Turning to the remaining factors, contrary to plaintiffs' arguments, the balance of hardships does not weigh in the growers' favor, nor is it in the public interest to grant a preliminary injunction. Pl. Mot. at 10. Plaintiffs reiterate that they will suffer "irreparable harm" if an injunction is not granted. *Id.* But, as we demonstrated above, plaintiffs have not supported that allegation with any specific, much less probative, evidence. And plaintiffs' claim that there will be a "disastrous impact on U.S. consumers and the U.S. economy" is similarly speculative. *Id.*

Plaintiffs have no vested right to import foreign merchandise into the United States. *See, e.g., Bd. of Trustees of the Univ. of Ill. v. United States*, 289 U.S. 48, 57 (1933) ("The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States."); *Buttfield v. Stranahan*, 192 U.S. 470, 497-98 (1904); *Arjay Assocs., Inc. v. Bush*, 891 F.2d 894, 896 (Fed. Cir. 1989) ("It is beyond cavil that no one has a

constitutional right to conduct foreign commerce in products excluded by Congress.") (citations omitted)); *Am. Ass'n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985).

Plaintiffs' claim that the balance of equities weighs in favor of granting an injunction overlooks the harm to the Government in the form of lost revenue if the Court grants plaintiffs' request. Pl. Mot at 10. CBP is directed to protect the revenue of the United States. *See generally Carolina Tobacco Corp. v. United States*, 402 F.3d 1345 (Fed. Cir. 2005). If an importer does not pay duties upon each entry at the time the entry is made, the importer must post bonds that provide security for the duties owed. 19 U.S.C. § 1623. As explained above, the antidumping statute requires that importers post cash deposits of the estimated antidumping duties. 19 U.S.C. §§ 1675(a)(1) and 1675(a)(2)(B).

There is also no merit to plaintiffs' assertions that "there is no basis upon which the Government can say it would be harmed." Pl. Mot. at 10. The hardship to the Government is that the revenue to which the statutory scheme is directed would be left unprotected, which is not in accordance with the antidumping statute, and which includes the collection of estimated duties in the form of cash deposits, *see*, *e.g.*, 19 U.S.C. § 1673d(c)(1)(B)(ii). By contrast, the primary purported hardship that plaintiffs allege on page 10 of the motion is simply the requirement that importers be subject to "an ordinary consequence of the statutory scheme." *Shree Rama Enterprise v. United States*, 983 F. Supp. 192, 196 (Ct. Int'l Trade 1997); *Inmax Sdn. Bhd., et al. v. United States*, No. 17-0205, 2017 WL 3420747, at *2 (Ct. Int'l Trade Aug. 8, 2017) (accepting the Government argument on this issue); *Int'l Fresh*, 26 F. Supp. 3d at 1370-71 (concluding that the harm to the United States in the form of lost revenue weight in favor of denying the injunction.

Plaintiffs also cannot establish that granting a TRO or preliminary injunction is in the public interest. As the Supreme Court has recognized, "{i}n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Here, plaintiffs are in no different position than any other plaintiff that is subject to an antidumping or countervailing duty investigation. Granting plaintiffs' motion will only encourage other parties to attempt to circumvent the congressionally-mandated administrative remedies by raising the very same claim in other antidumping or countervailing duty investigations. But neither the financial harms alleged, nor any "delays inherent in the statutory process," warrant this Court's exercise of jurisdiction, let alone the extraordinary remedy of an injunction against the Government. *Int'l Customs Prods. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006).

Further, "{t}he sole purpose of a preliminary injunction is to 'preserve the status quo ante litem pending a determination of the action on the merits.'" *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1023 (9th Cir. 2009) (citation omitted). "When the granting of a motion for preliminary injunction would give a plaintiff all the advantages which would be obtained as a result of a final favorable adjudication of the controversy, the motion ordinarily should be denied." *Associated Dry Goods Corp. v. United States*, 515 F. Supp. 775, 780 (Ct. Int'l Trade 1981). The ultimate relief that plaintiffs request is to stop the suspension of liquidation of entries of fresh tomatoes from Mexico, stop the resumption of the antidumping investigation, and stop CBP from collecting cash deposits. Compl. at ¶ 1; Prayer for Relief. This is the same relief that plaintiffs seek in their request for temporary restraining order and preliminary injunction. Pl. Mot. at 11. Because a grant of a temporary restraining order or preliminary injunction to

plaintiffs would achieve the ultimate relief plaintiffs seek in this action, the public interest is not served by granting the motion.

Finally, plaintiffs' contention that there will be "broad{} harm" to the United States economy if there are fewer available tomatoes from Mexico is unsubstantiated and hyperbolic. Koslowe Decln. at ¶¶ 6-8 and Exh. 2; Pl. Mot. at 10. Mr. Koslowe's declaration cites a *two-page* summary of a study from the University of Arizona, and claims that reducing the Mexican tomato imports will "have a *disastrous* impact on U.S. consumers and the U.S. economy." Pl. Mot. at 10 (emphasis added). As we previously have explained, the veracity of this study is unclear, and it is unclear who funded this study. Koslowe Decln., Exh. 2. Also, the study does not address whether, assuming the price of Mexican tomatoes increase, the tomatoes could be obtained from other countries or whether United States domestic suppliers could make up the difference. Accordingly, it does not support that the public interest is dependent upon having a large supply of imported Mexican tomatoes.

Thus, neither the balance of equities nor the public interest weigh in favor of granting the plaintiffs' motion.

VI. Plaintiffs Should Be Required To Post Security In The Event Relief Is Granted

If the Court were to issue a preliminary injunction, USCIT Rule 65(c) provides, in relevant part, that: "{t}he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Despite this requirement in the Court's rule, the plaintiffs' motion fails to address the requirement of security. Should the Court enter a temporary restraining order or a preliminary injunction, we request that the Court require plaintiffs to post a bond, in an amount the Court

determines, in its discretion to be appropriate. In the event the Court enjoins the Government from requiring cash deposits or bonds, the bond should, at a minimum, equal the full amount of the cash deposits or the bonds that CBP has been instructed to collect.

CONCLUSION

For these reasons, we respectfully request that the Court deny plaintiffs' request for a temporary restraining order and preliminary injunction and dismiss this action for lack of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to section 2(B)(1) of the Standard Chambers Procedures of this Court, that this brief contains 8,094 words, excluding the table of contents, table of authorities, any addendum containing statutes, rules or regulations, any certificates of counsel, and counsel's signature, as calculated by the word processing system used to prepare this brief (Microsoft Word).

/s/ Elizabeth Anne Speck