U.S. Court of International Trade

Slip Op. 19–69

CONFEDERACIÓN DE ASOCIACIONES AGRÍCOLAS DEL ESTADO DE SINALOA, A.C., CONSEJO AGRÍCOLA DE BAJA CALIFORNIA, A.C., ASOCIACIÓN MEXICANA DE HORTICULTURA PROTEGIDA, A.C., ASOCIACIÓN DE PRODUCTORES DE HORTALIZAS DEL YAQUI Y MAYO, and SISTEMA PRODUCTO TOMATE, Plaintiffs, v. UNITED STATES, Defendant, and THE FLORIDA TOMATO EXCHANGE, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 19–00059

[Denying Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction.]

Dated: June 6, 2019

Neil H. Koslowe, *Thomas B. Wilner*, and *Lisa Rainer*, Shearman & Sterling LLP, of Washington, D.C., argued for Plaintiffs Confederación de Asociaciones Agrícolas del Estado de Sinaloa, A.C., Consejo Agrícola de Baja California, A.C., Asociación Mexicana de Horticultura Protegida, A.C., Asociación de Productores de Hortalizas del Yaqui y Mayo, and Sistema Producto Tomate. With them on the brief was *Robert S. LaRussa*.

Elizabeth A. Speck and *Joshua E. Kurland*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With them on the brief was *Joseph H. Hunt*, Assistant Attorney General. Of counsel was *James H. Ahrens, II*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Jonathan M. Zielinski, Cassidy Levy Kent (USA) LLP, of Washington, D.C., argued for The Florida Tomato Exchange. With him on the brief were *Robert C. Cassidy, Jr.*, *Charles S. Levy*, and *James R. Cannon, Jr.*

OPINION

Choe-Groves, Judge:

Plaintiffs Confederación de Asociaciones Agrícolas del Estado de Sinaloa, A.C. ("CAADES"), Consejo Agrícola de Baja California, A.C. ("CABC"), Asociación Mexicana de Horticultura Protegida, A.C. ("AMHPAC"), Asociación de Productores de Hortalizas del Yaqui y Mayo ("APHYM"), and Sistema Producto Tomate ("SPT") (collectively, "Plaintiffs"), brought this action on May 9, 2019, related to the Department of Commerce's ("Commerce") withdrawal from a suspension agreement and subsequent continuation of an antidumping duty investigation. Summons, May 9, 2019, ECF No. 1; Compl., May 9, 2019, ECF No. 2. For the reasons that follow, Plaintiffs' motion for a Temporary Restraining Order ("TRO") and Preliminary Injunction ("PI") is denied.

BACKGROUND

Commerce initiated an antidumping duty investigation on April 18, 1996 into fresh tomatoes from Mexico to determine whether imports of fresh tomatoes were, or were likely to be, sold in the United States at less than fair value ("LTFV"). *Initiation of Antidumping Duty Investigation: Fresh Tomatoes from Mexico*, 61 Fed. Reg. 18,377 (Dep't Commerce Apr. 25, 1996). The U.S. International Trade Commission completed an investigation and issued an affirmative preliminary injury determination on May 16, 1996. *Fresh Tomatoes from Mexico*, USITC Pub. 2967, Inv. No. 731-TA-747 (May 1996) (Preliminary), *available at* https://www.usitc.gov/publications/701_731/PUB2967.pdf (last visited Jun. 6, 2019). Commerce issued an affirmative preliminary determination on October 28, 1996, finding that imports of fresh tomatoes from Mexico were being sold at LTFV in the United States. *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Tomatoes From Mexico*, 61 Fed. Reg. 56,608 (Dep't Commerce Nov. 1, 1996) ("*Fresh Tomatoes From Mexico Preliminary Determination*"). On the same day, Commerce signed an agreement with producers, who accounted for substantially all imports of fresh tomatoes from Mexico, and suspended the antidumping duty investigation. *See Suspension of Antidumping Investigation: Fresh Tomatoes from Mexico*, 61 Fed. Reg. 56,618 (Dep't Commerce Nov. 1, 1996).

Over the next twenty-three years, Commerce and producers of fresh tomatoes from Mexico entered into a series of agreements that suspended the 1996 antidumping duty investigation. *See Fresh Tomatoes From Mexico: Termination of Suspension Agreement, Rescission of Administrative Review, and Continuation of the Antidumping Duty Investigation*, 84 Fed. Reg. 20,858 (Dep't Commerce May 13, 2019) ("*Termination of Suspension Agreement, Rescission of Administrative Review, and Continuation of the Antidumping Duty Investigation*"). The most recent of these agreements entered into force on March 4, 2013. *Fresh Tomatoes From Mexico: Suspension of Antidumping Investigation*, 78 Fed. Reg. 14,967 (Dep't Commerce Mar. 8, 2013) ("2013 Suspension Agreement").

The 2013 Suspension Agreement provided that any party may withdraw from the Agreement upon 90 days' written notice. 2013 Suspension Agreement at 14,971. Commerce provided written notice of its intent to withdraw from the 2013 Suspension Agreement on February 6, 2019. Letter from P. Lee Smith, Deputy Assistant Secretary for Policy & Negotiations, Enforcement & Compliance, U.S. Department

of Commerce to Signatories to the 2013 Suspension Agreement on Fresh Tomatoes from Mexico (Feb. 6, 2019), Attachment A, May 14, 2019, ECF No. 22–1.

Commerce provided notice of its intent to continue the suspended antidumping duty investigation on May 7, 2019, which was published in the Federal Register on May 13, 2019. *Termination of Suspension Agreement, Rescission of Administrative Review, and Continuation of the Antidumping Duty Investigation*, 84 Fed. Reg. 20,858 (Dep't Commerce May 13, 2019).

Plaintiffs brought the present action and moved for a TRO and PI on May 9, 2019. Summons, May 9, 2019, ECF No. 1; Compl., May 9, 2019, ECF No. 2; Pls.' Mot. for TRO and PI Against Defendant, May 9, 2019, ECF No. 8. Plaintiffs' TRO and PI motion seeks to enjoin Commerce from (1) "ordering a suspension of the liquidation of entries of fresh tomatoes from Mexico," (2) "resuming its antidumping investigation into those tomatoes," and (3) "instructing the U.S. Customs and Border Protection to require a cash deposit or bond for each entry of those tomatoes, pending the Court's disposition of this civil action." Pls.' Mot. for TRO and PI Against Defendant, May 9, 2019, ECF No. 8; Pls.' Mem. in Support of Mot. for TRO and PI, May 9, 2019, ECF No. 9 ("Pls.' Mem."). The court expedited briefing on the TRO and PI motion and requested supplemental briefing on subject-matter jurisdiction on May 10, 2019. Order, May 10, 2019, ECF No. 13.

The Florida Tomato Exchange ("FTE") moved to intervene on May 10, 2019. Partial Consent Mot. to Intervene as a Matter of Right, May 10, 2019, ECF No. 14. The court permitted FTE to intervene as a Defendant-Intervenor under USCIT Rule 24(b). Order, May 10, 2019, ECF No. 18.

Defendant and FTE responded on May 14, 2019. Def.'s Resp. to Pls.' Mot. for TRO and PI, May 14, 2019, ECF No. 22 ("Def.'s Resp."); Resp. of the FTE to Pls.' Mot. for a TRO and PI, May 14, 2019, ECF No. 21 ("FTE's Resp."). Plaintiffs replied on May 15, 2019. Pls.' Mem. in Reply to Def.'s and Intervenor's Opp'ns to Pls.' Mot. for TRO and PI, May 15, 2019, ECF No. 23 ("Pls.' Reply"). Plaintiffs filed an Amended Complaint on May 15, 2019. Am. Compl., May 15, 2019, ECF No. 24 ("Am. Compl.").

The court held a TRO and PI Hearing on May 16, 2019. Hearing, May 16, 2019, ECF No. 25. Plaintiffs, Defendant, and Defendant-Intervenor provided supplemental briefing and exhibits on May 17, 2019. Pls.' Post-Hr'g Mem., May 17, 2019, ECF No. 29; Pls.' Post-Hr'g Mem., May 17, 2019, ECF No. 27; Def.'s Suppl. Br., May 17, 2019, ECF No. 28 ("Def.'s Suppl. Br."); Suppl. Br. FTE, May 17, 2019, ECF

No. 26. Defendant moved to strike Plaintiffs' post-hearing briefs and Plaintiffs' supplement exhibit numbers 8 through 14 on May 20, 2019. Def.'s Mot. to Strike Portions of Pls.' Post-Hr'g Mem., or Alternatively for Leave to File a Sur-Reply to Pls.' Mem., May 20, 2019, ECF No. 30. The court denied Defendant's motion to strike. Order, May 20, 2019, ECF No. 31. Plaintiffs filed a supplemental memorandum on May 28, 2019. Pls.' Emergency Supplemental Memorandum, May 28, 2019, ECF No. 33 ("Pls.' Suppl. Mem."). Defendant responded. Def.'s Resp. to Pls.' Emergency Suppl. Mem., May 29, 2019, ECF No. 34 ("Def.'s Suppl. Mem. Resp."). Plaintiffs replied. Pls.' Reply to Def.'s Resp. to Pls.' Emergency Suppl. Mem., May 30, 2019, ECF No. 35.

DISCUSSION

I. Subject-Matter Jurisdiction

The U.S. Court of International Trade, like all federal courts, is one of limited jurisdiction and is "presumed to be 'without jurisdiction' unless 'the contrary appears affirmatively from the record.'" *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (quoting *King Iron Bridge & Mfg. Co. v. Otoe Cty.*, 120 U.S. 225, 226 (1887)). The Court is empowered to hear civil actions brought against the United States pursuant to the specific grants of jurisdiction enumerated under 28 U.S.C. §§ 1581(a)–(i) (2012). The party invoking jurisdiction must allege sufficient facts to establish the court's jurisdiction, *id.* (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)), and therefore bears the burden of establishing it. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Plaintiffs plead jurisdiction under 28 U.S.C. §§ 1581(i)(2) and (4). Am. Compl. ¶ 2. Under 28 U.S.C. § 1581(i), the Court has exclusive jurisdiction 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— . . .
>
> (2) tariffs, duties, fees or other taxes on the importation of merchandise for reasons other than the raising of revenue; . . . [and]
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i). The court's residual jurisdiction under 28 U.S.C. § 1581(i) may not be invoked when jurisdiction under another sub-

section of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate. *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012).

When determining jurisdiction, the court looks to the true nature of the action. *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1293 (Fed. Cir. 2008). The true nature of an action depends on the facts asserted in the pleadings. *Hutchison Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1360 (Fed. Cir. 2016). To determine the true nature of an action, the court identifies the particular agency action that is the source of the alleged harm, which in turn identifies the subsection of 28 U.S.C. § 1581 that provides the appropriate vehicle for judicial review. Id.

Plaintiffs do not explicitly identify a subsection of 28 U.S.C. § 1581 that would form the predicate for 28 U.S.C. § 1581(i) jurisdiction, so the court examines the facts and claims alleged by the Plaintiffs. *See* Pls.' Reply 11.

The Amended Complaint's factual statement begins with the 1996 investigation into *Fresh Tomatoes from Mexico*. See Am. Compl. ¶ 6 (citing Initiation of Antidumping Duty Investigation: Fresh Tomatoes from Mexico, 61 Fed. Reg. 18,377 (Dep't Commerce Apr. 25, 1996)). Plaintiffs' factual statement then addresses the 2013 Suspension Agreement and Commerce's withdrawal from the 2013 Suspension Agreement. *Id.* at ¶¶ 7–17. Plaintiffs allege that Commerce is not authorized by 19 U.S.C. § 1673c(i) and the statute's implementing regulations to (1) "order[] a suspension of the liquidation of unliquidated entries of fresh tomatoes from Mexico," (2) "resum[e] the antidumping duty investigation into fresh tomatoes from Mexico that [Commerce] initiated in 1996 'as if' it were based on a preliminary determination made on May 7, 2019," and (3) "instruct[] the U.S. Customs and Border Protection . . . to require a cash deposit or bond for each entry of fresh tomatoes from Mexico," and that Commerce's actions are "void *ab initio*." *See* Am. Compl. at ¶ 16; Pls.' Reply 11; *see also* TRO and PI Hr'g Oral Argument at 2:42:53–2:43:22, 3:01:02–3:02:30. Defendant counters that Commerce's actions are permitted by the statutes governing an antidumping investigation, and Plaintiffs may challenge Commerce's actions following the final determination pursuant to 28 U.S.C. § 1581(c). Def.'s Resp. 10, 17; *see also* TRO and PI Hr'g Oral Argument at 3:05:20; FTE's Resp. 7–13.

The court concludes that the facts and allegations in Plaintiffs' Amended Complaint indicate that the particular agency action at issue is Commerce's withdrawal from the 2013 Suspension Agreement. For the purpose of assessing jurisdiction under 28 U.S.C. §

1581(i), the court determines that the true nature of Plaintiffs' action pertains to administration and enforcement of a matter described in 28 U.S.C. § 1581(c).

A. Availability of 28 U.S.C. § 1581(c)

The court considers whether jurisdiction under 28 U.S.C. § 1581(c) is or could be available in the present action. *See Ford*, 688 F.3d at 1323. Plaintiffs argue that jurisdiction under section 1581(c) is not available. *See* TRO and PI Hr'g Oral Argument at 17:30–19:10; Pls.' Reply 12 ("Given the true nature of CAADES' lawsuit, the only statute that confers jurisdiction on this Court is 28 U.S.C. § 1581(i)."); *see also* Am. Compl. ¶¶ 1–2 (asserting jurisdiction under 28 U.S.C. § 1581(i) without elaboration). Defendant counters that jurisdiction under section 1581(c) is not yet available and that jurisdiction will be available to Plaintiffs' challenges "when Commerce completes its resumed investigation." Def.'s Resp. 7. Defendant-Intervenor argues that Plaintiffs do not show that jurisdiction under 19 U.S.C. § 1581(c) is either unavailable or inadequate. *See* FTE Resp. 7–9.

Under 28 U.S.C. § 1581(c), the U.S. Court of International Trade has exclusive jurisdiction over any civil action commenced under 19 U.S.C. § 1516a. *See* 28 U.S.C. § 1581(c). In the context of a suspension agreement, 19 U.S.C. § 1516a identifies three determinations subject to judicial review: (1) the determination to suspend an antidumping duty investigation, (2) the final determination of a continued investigation, and (3) an injurious effect determination. 19 U.S.C. §§ 1516a(a)(2)(B)(iv) & (v). The determination to withdraw from a suspension agreement is not specifically provided for in 19 U.S.C. § 1516a. *See* 19 U.S.C. § 1516a.

The court concludes that jurisdiction under 28 U.S.C. § 1581(c) is unavailable in the context of Plaintiffs' present action arising out of the 2013 Suspension Agreement because (i) Plaintiffs challenge the legality of specific Commerce instructions following the withdrawal from a suspension agreement, (ii) 19 U.S.C. § 1516a does not identify Commerce's decision to withdraw from a suspension agreement as reviewable, and (iii) Plaintiffs do not directly challenge an identified determination reviewable under 19 U.S.C. § 1516a.

B. Jurisdiction Under 28 U.S.C. § 1581(i)

Plaintiffs' complaint challenges (1) the "suspension of the liquidation of unliquidated entries of fresh tomatoes from Mexico," (2) the "resum[ption of] the antidumping duty investigation into fresh tomatoes from Mexico that [Commerce] initiated in 1996 'as if' it were based on a preliminary determination made on May 7, 2019," and (3) Commerce's "instruct[ions to] the U.S. Customs and Border Protec-

tion . . . to require a cash deposit or bond for each entry of fresh tomatoes from Mexico." Am. Compl. ¶ 1. The court determines that Plaintiffs' first and third challenged actions (the suspension of liquidation and the instructions requiring a cash deposit or bond) arise out of a duty on the importation of merchandise for a reason other than the raising of revenue, *i.e.*, the continued antidumping investigation. *See Termination of Suspension Agreement, Rescission of Administrative Review, and Continuation of the Antidumping Duty Investigation* at 20,860. The court determines that all three challenged actions pertain to the administration and enforcement of a matter referred to in 28 U.S.C. § 1581(c), *i.e.*, actions leading to a final determination from a continued investigation. *See* 19 U.S.C. § 1516a(a)(2)(B)(iv). The court concludes that subject-matter jurisdiction exists over this action under 28 U.S.C. § 1581(i).

II. Exhaustion of Administrative Remedies

Because the court has jurisdiction under 28 U.S.C. § 1581(i) and in light of Plaintiffs' motion for emergency injunctive relief in this action, the court exercises its discretion to waive the exhaustion of administrative remedies pursuant to 28 U.S.C. § 2637. *See* 28 U.S.C. § 2637(d).

III. Plaintiffs' Motion for TRO and PI

USCIT Rule 65 allows for a court to grant injunctive relief in an action. USCIT R. 65; 28 U.S.C. § 2643. The court considers four factors when evaluating whether to grant a temporary restraining order or preliminary injunction: (1) whether the party will incur irreparable harm in the absence of such injunction; (2) whether the party is likely to succeed on the merits of the action; (3) whether the balance of hardships favors the imposition of the injunction; and (4) whether the injunction is in the public interest. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); see also Wind Tower Trade Coal. v. United States, 741 F.3d 89, 95 (Fed. Cir. 2014). No one factor is necessarily dispositive because the weakness regarding one factor may be overborne by the strength of the others. Belgium v. United States, 452 F.3d 1289, 1292–93 (Fed. Cir. 2006) (quoting FMC Corp. v. United States, 3 F.3d 424, 427 (Fed. Cir. 1993)).

A. Likelihood of Success on the Merits

Plaintiffs contend that pursuant to 19 U.S.C. § 1673c(i) and the statute's implementing regulations, Commerce may not (1) suspend liquidation on entries of fresh tomatoes from Mexico, (2) resume the antidumping duty investigation "as if" the preliminary determination had been made on May 7, 2019, and (3) require cash deposits or

bonds. *See* Am. Compl. ¶¶ 1, 16; Pls.' Reply 1, 23; *see also* TRO and PI Hr'g Oral Argument at 2:42:53–2:43:22, 3:01:02–3:02:30. In order to succeed on the merits, Plaintiffs must establish that: (1) Commerce took these actions pursuant to 19 U.S.C. § 1673c(i), (2) Commerce's actions were not taken under the authority of 19 U.S.C. § 1673b (preliminary determinations) and 19 U.S.C. § 1673d (final determinations), and (3) that Commerce's actions were not permitted pursuant to 19 U.S.C. § 1673c(i). *See* Pls.' Mem. 1.

First, Plaintiffs are unlikely to be able to establish that Commerce's instructions were issued under the authority of 19 U.S.C. § 1673c(i), which is a provision relating to violations of a suspension agreement. Plaintiffs assert that the Government must have issued its instructions pursuant to the violation provisions in 19 U.S.C. § 1673c(i), despite the Government's denial of this assertion. Defendant states that Commerce withdrew from the 2013 Suspension Agreement pursuant to Section VI.B of the 2013 Suspension Agreement. Def.'s Suppl. Br. 4; *see also Termination of Suspension Agreement, Rescission of Administrative Review, and Continuation of the Antidumping Duty Investigation* at 20,861. Plaintiffs do not contest that Commerce may withdraw from the 2013 Suspension Agreement pursuant to Section VI.B of the 2013 Suspension Agreement,[1] but assert that 19 U.S.C. § 1673c(i) must be the apparent basis for Commerce's actions because: (1) Commerce cited Section 734(i)(1)(B) of the Tariff Act of 1930, which is codified as 19 U.S.C. § 1673c(i)(1)(B), "for guidance" and Commerce states that its actions are "[c]onsistent with Section 734(i)(1)(B)," and (2) Plaintiffs argue that the Government "pretend[ed]" to have made a preliminary determination as of May 7, 2019, when Commerce withdrew from the 2013 suspension agreement. *See Termination of Suspension Agreement, Rescission of Administrative Review, and Continuation of the Antidumping Duty Investigation* at 20,861; Pls.' Suppl. Mem. 2–5.

It is unlikely that Plaintiffs will succeed on the merits in this action. The court finds that the stated basis for Commerce's withdrawal from the 2013 Suspension Agreement is the voluntary withdrawal provi-

[1] Judge: Do you believe that there is a basis for any party to withdraw from the Suspension Agreement, just on voluntary withdrawal?

Mr. Koslowe: Yes, there is. And we don't challenge that. The Agreement itself says on 90 days written notice either side can withdraw.

Judge: And there doesn't have to be a violation, or—?

Mr. Koslowe: Nope.

Judge:—a finding that it doesn't meet the requirements of the Act?

Mr. Koslowe: No.

TRO and PI Hr'g Oral Argument at 10:05–10:30.

sion with 90 days' notice, and that Commerce did not withdraw from the 2013 Suspension Agreement due to a perceived violation of the 2013 Suspension Agreement.

The court also finds that a preliminary determination was made in 1996 when Commerce issued an affirmative preliminary determination decision pursuant to 19 U.S.C. § 1673b, finding that imports of fresh tomatoes from Mexico were being sold at LTFV in the United States. *Fresh Tomatoes From Mexico Preliminary Determination* at 56,608. Because Commerce did not cite 19 U.S.C. § 1673c(i) as the authority for its actions and Commerce's actions could be based on an affirmative preliminary determination issued pursuant to 19 U.S.C. § 1673b, the court concludes that Plaintiffs are unlikely to be able to prove the first necessary finding, that Commerce took these actions pursuant to 19 U.S.C. § 1673c(i).

Second, Plaintiffs are unlikely to be able to establish that Commerce's actions were not taken under the authority of 19 U.S.C. § 1673b (preliminary determinations) and 19 U.S.C. § 1673d (final determinations). *See* 19 U.S.C. §§ 1673b, 1673d. The court has already addressed that an affirmative preliminary determination was noticed pursuant to 19 U.S.C. § 1673b in 1996. *See Fresh Tomatoes From Mexico Preliminary Determination* at 56,608. Regarding Plaintiffs' challenge to Commerce's suspension of liquidation on entries of fresh tomatoes from Mexico, the court notes that following an affirmative preliminary determination from both the ITC and Commerce, 19 U.S.C. § 1673b requires Commerce to "order the suspension of liquidation of all entries of merchandise subject to the determination." 19 U.S.C. § 1673b(d)(2). Plaintiffs challenge Commerce's resumption of the antidumping duty investigation "as if" the preliminary determination had been made on May 7, 2019. Under 19 U.S.C. § 1673d, Commerce is required to proceed toward the issuance of a final determination following an affirmative preliminary determination. 19 U.S.C. § 1673d(a)(1) ("Within 75 days after the date of its preliminary determination . . . the administering authority shall make a final determination."). Plaintiffs' claim overlooks the fact that the 1996 Preliminary Determination was noticed on the same day as the 1996 Suspension Agreement, and that Commerce's schedule for issuance of a final determination is explicitly based on Commerce's schedule as set forth in the 1996 Preliminary Determination:

> As explained in its 1996 Preliminary Determination, Commerce previously postponed the final determination until the 135th day after the date of the preliminary determination. Commerce, therefore, intends to issue its final determination in the inves-

tigation 135 days after the effective date of withdrawal from and termination of the 2013 Agreement.

Termination of Suspension Agreement, Rescission of Administrative Review, and Continuation of the Antidumping Duty Investigation at 20,860. Plaintiffs also challenge Commerce's instructions requiring a cash deposit or bond. The court notes that under 19 U.S.C. § 1673b, Commerce must "order the posting of a cash deposit, bond, or other security." 19 U.S.C. § 1673b(d)(1)(B). The court concludes that each of Commerce's actions challenged by Plaintiffs are mandated actions required by statute following a preliminary determination.

Third, as each of Commerce's actions challenged by Plaintiffs are required by 19 U.S.C. §§ 1673b and 1673d, Plaintiffs' claims are likely to fail on the merits before the court reaches the issue of whether Commerce's actions were permitted pursuant to 19 U.S.C. § 1673c(i).

Because Commerce is required to take each of the actions challenged by Plaintiffs following an affirmative preliminary determination, the court determines that Plaintiffs have not met their burden to establish a likelihood of success on the merits. The likelihood of success on the merits weighs against the issuance of a TRO or PI.

B. Irreparable Harm Absent Immediate Relief

Plaintiffs must show that they will suffer irreparable harm absent a grant of injunctive relief. *See Winter*, 555 U.S. at 20. Irreparable harm includes "a viable threat of serious harm which cannot be undone." *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (internal citations omitted). An allegation of financial loss alone generally does not constitute irreparable harm if future money damages can provide adequate corrective relief. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974). Bankruptcy or substantial loss of business may constitute irreparable harm because "loss of business renders a final judgment ineffective, depriving the movant of meaningful judicial review." *Harmoni Int'l Spice, Inc. v. United States*, 41 CIT __, __, 211 F. Supp. 3d 1298, 1307 (2017) (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975)). "Price erosion, loss of goodwill, damage to reputation, and loss of business opportunities" may also constitute irreparable harm. *See Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012). The showing of irreparable harm must be concrete and more than merely speculative.

Plaintiffs argue that they will suffer irreparable harm in the form of lost sales, loss of goodwill, and loss of business opportunities. *See* Pls.' Mem. 7. Plaintiffs contend that Mexican tomato growers "stand to lose half their exports" which represent "sales and customers that the Mexican [tomato] [g]rowers cannot retrieve," and that "[e]ven if the

Mexican [tomato] [g]rowers ultimately . . . recover the cash deposits," the Mexican tomato growers "will never recover the lost sales revenue and may never recover lost partners and customers." *See id.* Plaintiffs' arguments regarding irreparable harm proffer that a reduction in imports of fresh tomatoes from Mexico would have a disruptive effect on the supply chain of fresh tomatoes, and that Plaintiffs will incur a "significant burden" due to Commerce's requirement to submit data pertaining to the continued investigation in a few weeks as compared to several months. *Id.* at 7–8. In support, Plaintiffs offered, *inter alia*, testimonial and documentary evidence, including: the declaration and testimony of Mr. A. Martin Ley, declarations of certain Plaintiffs and industry participants, two declarations of Plaintiffs' counsel, Mr. Neil Koslowe, a memorandum from Dr. Timothy J. Richards, a University of Arizona study summary, a letter to the Department of Commerce's Secretary Wilbur Ross from a Mexican government official, a news article, documentary submissions relating to the 2013 Suspension Agreement, and documents pertaining to Commerce's continued investigation into fresh tomatoes from Mexico.[2]

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[2] *See* Ley Decl., May 15, 2019, ECF No. 23–1 ("Ley Decl."); Diaz Decl., May 17, 2019, ECF No. 27–1 ("Diaz Decl."); Escalante Decl., May 17, 2019, ECF No. 27–2 ("Escalante Decl."); Valdez Decl., May 17, 2019, ECF No. 27–3 ("Valdez Decl."); Ureta Decl., May 17, 2019, ECF No. 27–4 ("Ureta Decl."); Mojardin Decl., May 17, 2019, ECF No. 27–5 ("Mojardin Decl."); Manson Decl., May 17, 2019, ECF No. 27–6 ("Manson Decl."); Chamberlain Decl., May 17, 2019, ECF No. 27–7 ("Chamberlain Decl."); Koslowe Decl., May 9, 2019, ECF No. 10 ("Koslowe Decl. (May 9, 2019)"); Koslowe Decl., May 28, 2019, ECF No. 33–1 ("Koslowe Decl. (May 28, 2019)"); Mem. from Dr. Timothy J. Richards, PhD, Badger Metrics, LLC, to Lance Jungmeyer, Fresh Produce Association of the Americas (Apr. 22, 2019) ("Richards Mem."), Koslow Decl. (May 9, 2019) Ex. 1, May 9, 2019, ECF No. 10–1; Dari Duval, Ashley K. Bickel, & George Fisvold, *Mexican Fresh Tomatoes: Agribusiness Value Chain Contributions to the U.S. Economy*, Dep't of Agricultural & Resource Economics, University of Arizona Cooperative Extension (Nov. 2018), Koslowe Decl. (May 9, 2019) Ex. 2, May 9, 2019, ECF No. 10–2 ("University of Arizona Study Summary"); Rajesh Kumar Singh, *A tax on a tax: U.S. customs demands bigger bonds as trade tariffs rise*, Reuters, Mar. 29, 2019, Pls.' Reply, Ex. 1, May 15, 2019, ECF No. 23–2; letter from Robert S. LaRussa and Thomas B. Wilner, counsel for CAADES, CABC, AMHPAC, UARS, and CNPH, to Hon. Wilbur Ross, Secretary of Commerce (Dec. 5, 2017), Pls.' Post-Hr'g Mem. Ex. 8, May 17, 2019, ECF No. 27–8; letter from Robert S. LaRussa, counsel for CAADES, CABC, AMHPAC, APHYM, and SPT to Hon. Wilbur Ross, Secretary of Commerce (Jul. 13, 2018), Pls.' Post-Hr'g Mem. Ex. 9, May 17, 2019, ECF No. 27– 9; letter from Robert S. LaRussa, counsel for CAADES, CABC, AMHPAC, APHYM, and SPT to Hon. Wilbur Ross, Secretary of Commerce (Jul. 16, 2018), Pls.' Post-Hr'g Mem. Ex. 10, May 17, 2019, ECF No. 27–10; letter from Robert S. LaRussa, counsel for CAADES, CABC, AMHPAC, APHYM, and SPT to Hon. Wilbur Ross, Secretary of Commerce (Nov. 26, 2018), Pls.' Post-Hr'g Mem. Ex. 11, May 17, 2019, ECF No. 27–11; U.S. Dep't of Agriculture, Agricultural Marketing Service Shipping-Point Data for Roma Tomatoes Imported 2013–2018, Pls.' Post-Hr'g Mem. Ex. 12, May 17, 2019, ECF No. 27–12; letter from Robert S. LaRussa, counsel for CAADES, CABC, AMHPAC, APHYM, and SPT to Hon. Wilbur Ross, Secretary of Commerce (Nov. 28, 2018), Pls.' Post-Hr'g Mem. Ex. 13, May 17, 2019, ECF No. 27–13; Mem. to File from P. Lee Smith, Deputy Assistant Secretary for Policy & Negotiations, Enforcement & Compliance, Pls.' Post-Hr'g Mem. Ex. 14, May 17, 2019, ECF No. 27–14; letter from Thomas B. Wilner, counsel for CAADES, CABC, AMHPAC, APHYM, and SPT to Hon. Wilbur Ross, Secretary of Commerce (May 15, 2019), Pls.' Suppl. Mem. Ex. 1, May 28, 2019, ECF No. 33–2; Mem. from Jacob Keller and

Defendant and Defendant-Intervenor counter that Plaintiffs have not demonstrated immediate, irreparable harm and challenge Plaintiffs' evidence as speculative and unsupported. Def.'s Resp. 10–11; *see also* FTE's Resp. 16–18.

First, the court considers Plaintiffs' assertions of lost sales and loss of export volume. Plaintiffs submitted, *inter alia*, the declaration and testimony of Mr. Ley, who was subject to cross-examination, and the declaration of Mr. Ureta. Mr. Ley testified that Mexican tomato growers would experience lost sales. *See* TRO and PI Hr'g Oral Argument at 39:25–41:18. The court found Mr. Ley's testimony as a fact witness to be credible based on his demeanor and his experience in the fresh tomato industry. *See* TRO and PI Hr'g Oral Argument at 34:20; Ley Decl. ¶¶ 1–2. Mr. Ley explained that following Commerce's withdrawal from the 2013 Suspension Agreement, the fresh tomato import/export industry has experienced difficulty servicing contracts, keeping contracts in place, filling orders, and providing tomatoes. *See* TRO and PI Hr'g Oral Argument at 38:58–39:14; Ley Decl. ¶¶ 1–2. Mr. Ley added that 35 percent of Mexican tomato growers were ending the growing season early and 20 percent of Mexican tomato growers were shifting from tomatoes to other crops. *See* Ley Decl. ¶ 5. Mr. Ley stated that as a result of the early end of the tomato harvest and the shift to other crops, tomato growers would suffer lost sales and Mexican employees would lose their jobs. *See* Ley Decl. ¶ 6. Mr. Ureta, the President of SPT, stated that many of SPT's members have not been able to post the required bonds and many of SPT's members "have given up on selling to the U.S. market" due to the cash deposit requirement. Ureta Decl. ¶¶ 1–2.[3]

Plaintiffs' business decisions to forgo selling in the United States market, end their growing season, or switch production to other agricultural crops are insufficient evidence to establish irreparable harm in this action. *Compare Corus Group PLC v. Bush*, 26 CIT 937, 944, 217 F. Supp. 2d 1347 (2002) (considering the argument that

Yang J. Chun, International Trade Compliance Analysts, to Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations (May 24, 2019), Pls.' Suppl. Mem. Ex. 2, May 28, 2019, ECF No. 33–3; and letter from Minoo Hatten, Program Manager, Antidumping/Countervailing Duty Operations, International Trade Administration, U.S. Dep't of Commerce, to Bioparques De Occidente, S.A. de C.V., Ceuta Produce, S.A. de C.V., Negocio Agricola San Enrique, S.A. de C.V. (May 24, 2019), Pls.' Suppl. Mem. Ex. 3, May 28, 2019, ECF No. 33–4.

[3] Plaintiffs do not claim that cash deposits would constitute irreparable harm, but Plaintiffs state that "[m]ost growers simply cannot satisfy the very stringent requirements adopted for bonding. Therefore, their importers will have to comply with any cash deposit requirements." *See* Pls.' Reply 4, fn. 6; *see also* TRO and PI Hr'g Oral Argument at 19:05, May 16, 2019, ECF No. 25 ("We can get back our cash deposits – that's a financial remedy. We're not concerned about that.").

"sound business principles would require it to close . . . rather than operate at a loss" and finding insufficient evidence of the danger of imminent closure) *with U.S. Auto Parts Network, Inc. v. United States*, 42 CIT __, __, 319 F. Supp. 3d 1303, 1308 (2018) (finding irreparable harm when Plaintiff's financial records demonstrated the company would have been able to meet a bond requirement for "at best, a couple weeks" before going out of business).

The court finds that Plaintiffs' evidence concerning lost sales is supported by mere generalized statements as to trends in the industry and estimated percentages of growers, importers, and exporters affected, and that Plaintiffs' evidence regarding lost sales is unspecific and inconclusive as to the immediate, irreparable harm Plaintiffs will suffer absent injunctive relief.

In regard to the loss of export volume, Plaintiffs submitted, *inter alia*, the declarations of Mr. Diaz, Mr. Valdez, and Mr. Manson. Mr. Diaz, the Director of AMHPAC, stated that 46 percent of AMHPAC's membership did not have a bond in place, 24 percent of AMHPAC's membership had "experienced moderate to severe disruption in their normal business operations," 43 percent of AMHPAC's membership had reduced shipments to the United States, and 10 percent of AMHPAC's membership stopped shipping to the United States. Diaz Decl. ¶¶ 1–5. Mr. Valdez, the President of CABC, stated that 89 percent of the tomato producers in CABC's membership have not been able to secure bonds required for import into the United States, 21 percent of CABC's membership stopped shipping to the United States, and some of CABC's members are unable to renew lines of credit from those businesses' "long-standing" lenders in Mexico. Valdez Decl. ¶¶ 1–4.

Mr. Manson is President of Pacific Brokerage Company, Inc. and a licensed Customs broker. Manson Decl. ¶ 1. Mr. Manson declared that he processes the Customs entries for twelve of the "largest" Mexican tomato growers and helps those entities to secure the required bonds and accounts to process payments of cash deposits. *Id*. at ¶ 2. Mr. Manson stated that "[c]ollateralization of either or both bonds is extremely difficult in the current environment of very high tariffs on many products" and that "[t]he surety my company uses for bonds has required 100% collateral for all except one company." *Id*. at ¶¶ 3–4.[4] Mr. Manson also declared that based on Mr. Manson's conversations

[4] In supplemental briefing, Defendant clarifies that Customs "currently requires either a bond or a cash deposit." Def.'s Suppl. Br. 3 (emphasis removed); see also Def.'s Suppl. Br. Ex. 1, ¶ 1, May 17, 2019, ECF No. 28–1 ("As a result, the suspension of liquidation on Fresh Tomatoes from Mexico is reinstated and cash deposits or the posting of a bond equal to the estimated margins listed in Paragraph 3 below are now required.").

with other Customs brokers, Mr. Manson "understand[s] that about one-third of Mexican growers have reduced volumes and the remaining two-thirds have stopped shipping." *Id*. at ¶ 5.

Plaintiffs' evidence fails to connect the cash deposit or bond requirement and the attendant circumstances of that requirement with specific and substantiated information regarding the ultimate consequences to Plaintiffs' business operations. Plaintiffs' evidence is unspecific regarding the nature and consequences of the business disruptions. Upon review of all Plaintiffs' evidence concerning the loss of export volume, the court concludes that Plaintiffs have not met their burden to show how loss of export volume constitutes irreparable harm. *See also Harmoni Int'l Spice*, 41 CIT at __, 211 F. Supp. 3d at 1307 (discussing that loss of business may be irreparable harm if it would deprive the movant of meaningful judicial review).

Second, the court considers Plaintiffs' assertions as to loss of goodwill and loss of business opportunities. In support, Plaintiffs offered, *inter alia*, the declaration of Mr. Jamie Chamberlain, the President of Chamberlain Distributing Inc. ("Chamberlain Distributing"), which is an importer of Mexican tomatoes, and the declaration of Mr. Escalante, the Director of CAADES's Vegetable Division, as well as the declaration and testimony of Mr. Ley. Chamberlain Decl. ¶ 1; Escalante Decl. ¶ 1; *see* TRO and PI Hr'g Oral Argument at 40:27–40:45; Ley Decl. ¶ 10. Mr. Chamberlain stated that the implementation of a 17.56 percent cash deposit duty on fresh tomatoes from Mexico caused his company to stop importing Mexican tomatoes. Chamberlain Decl. ¶¶ 1–3. As an example of lost business opportunities, Plaintiffs offer that Chamberlain Distributing had contracts with customers to receive tomatoes until the end of May, and that as a result, Chamberlain Distributing had to cancel those commitments. *Id.* at ¶ 6.[5]

Mr. Escalante stated that 33 percent of CAADES's membership "experienced difficulties" securing bonds required to import fresh tomatoes into the United States, 21 percent of CAADES's membership reduced shipments to the United States, 23 percent of CAADES's membership stopped shipping to the United States and ended their export season two months early, and 43 percent of CAADES's membership was "in high risk of losing their contracts." Escalante Decl. ¶¶ 1–5.

Mr. Ley testified that he believed that for every ten contracts held by Mexican tomato producers, he estimated that four were being

[5] The court notes that neither Mr. Chamberlain nor Chamberlain Distributing Inc. is a Plaintiff or Plaintiff-Intervenor in this action.

re-negotiated and six were being terminated as parties to the contracts sought "escape" clauses or were "walking away" from the contracts. *See* TRO and PI Hr'g Oral Argument at 40:27–40:45; Ley Decl. ¶ 10. Mr. Ley noted that these contractual relationships take years of work for businesses to obtain certification and qualification with buyers. *See* TRO and PI Hr'g Oral Argument at 40:45–41:18. Mr. Ley also stated that tomato growers who import 15 loads or less of fresh tomatoes per week account for approximately 90 percent of the Mexican tomato growers, and that Mr. Ley believed that many growers who import 15 loads of fresh tomatoes per week are unable to secure a bond. *See* TRO and PI Hr'g Oral Argument at 40:27–40:45; Ley Decl. ¶ 4.[6]

The court finds that Mr. Escalante's concern that CAADES's membership is "in high risk of losing their contracts" is too uncertain to show that such a consequence will occur absent a TRO or PI, and Mr. Escalante's concern is not sufficiently supported by Plaintiffs' other evidence. Mr. Ley's testimony that at least some percentage of contracts are being re-negotiated also suggests that at least some industry participants are seeking interim solutions, which weighs against Plaintiffs' contention of irreparable harm. The court concludes that Plaintiffs' evidence regarding loss of goodwill and loss of business opportunities is insufficient and too speculative to meet Plaintiffs' burden regarding irreparable harm.

Fourth, the court considers Plaintiffs' assertions regarding market disruptions and disruptions in the supply chain. Pls.' Reply 2–3. In support, Plaintiffs submit, *inter alia*, a memorandum from Dr. Timothy J. Richards and a University of Arizona Study Summary. The first exhibit is Dr. Richards' memorandum, which discusses the economic impact of restricting tomato imports into the United States. Richards Mem. 1–3. Dr. Richards' memorandum discusses a study that attempts to model the possible price effects assuming various reductions in tomato supply from Mexico. *Id.* Dr. Richards' memorandum states that "[t]erminating the suspension agreement will reduce the supply of tomatoes in the [United States] market, and raise prices paid by consumers in the [United States], particularly during the winter tomato season (October - June). The exact extent of these effects depends on the sensitivity of prices to changes in supply." Richards Mem. 1.

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[6] Plaintiffs submitted two pieces of documentary evidence as attachments to Mr. Ley's declaration: (1) a Reuters article to support Mr. Ley's statement that "bonding requirements have surged since the Trump Administration's imposition of tariffs on imports of steel and aluminum, as well as most imports from China" and (2) a letter to Secretary Ross from a Mexican government official. Declaration of A. Martin Ley, Exs. 1 & 2, May 15, 2019, ECF Nos. 23–2 & 23–3.

In considering Dr. Richards' memorandum, the court notes that Dr. Richards' memorandum appears to be written in Dr. Richards' capacity at Badger Metrics, LLC, to the President of the Fresh Produce Association of the Americas. Dr. Richards did not appear in person to testify before the court about his memorandum. Plaintiffs did not provide Dr. Richards' *curriculum vitae* or any other information that provides context as to the preparation of Dr. Richards' memorandum. *See* Koslowe Decl. (May 9, 2019).[7] It is not clear from the record whether Dr. Richards participated in the study discussed in the memorandum, whether Dr. Richards is merely summarizing the results of another entity's study, or if Dr. Richards is conducting an analysis based on a model or data from another entity. Without further record evidence or the testimony of Dr. Richards, the court cannot assess whether the discussion and conclusions in Dr. Richards' memorandum are valid or reliable. *See generally* Fed. R. Evid. 702. The court concludes that Dr. Richards' memorandum adds little weight to Plaintiffs' arguments regarding irreparable harm.

Plaintiffs also submitted a two-page summary of a study conducted by the University of Arizona, which discusses the contribution of Mexican fresh tomatoes to the United States economy. *See* University of Arizona Study Summary. Plaintiffs proffer that the court may infer from Dr. Richards' Memorandum and the University of Arizona Study Summary that "the broader U.S. economy would suffer significant harm if Commerce imposes duties" and "[t]he reduction in imports that will be caused by the termination of the agreement, as modeled in the ASU study, would have a clear disruptive impact throughout the supply chain." Koslowe Decl. (May 9, 2019), ¶¶ 6–7.[8]

As an example, Plaintiffs submitted the declaration of Mr. Mojardin, the Research Programs Coordinator at CAADES. Mojardin Decl. ¶ 1. Mr. Mojardin declared that he visited a Walmart Supercenter in Foothills Mall in Tucson, Arizona on May 10, 2019, and that the store had no tomatoes from Mexico on display. *Id.* at ¶ 3. Mr. Mojardin reports that he asked two store clerks if there was a specific reason as to why the store did not have any tomatoes, and a store clerk replied that he did not have any information. *Id.* at ¶ 5. In the absence of a sufficient causal connection between the shortage of tomatoes asserted in Mr. Mojardin's declaration and the alleged irreparable harm

[7] It is not clear from the record before the court whether either or both of Dr. Richards' memorandum and the University of Arizona Study Summary was prepared in anticipation of litigation.

[8] Defendant argues that because Mr. Koslowe is the Plaintiffs' attorney and offers only speculative allegations of harm, the Koslowe Declaration (May 9, 2019) is weak evidence. *See* Def.'s Resp. 10–14. Defendant argues also that "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 [P]laintiffs." *Id.* at 13.

from the Government's withdrawal from the suspension agreement and resumption of the investigation at issue in this case, the court does not draw any inference regarding irreparable harm from Mr. Mojardin's example.

Defendant counters that Plaintiffs presented no evidence that Commerce's instructions, issued after a party's withdrawal from the 2002, 2008, and 2013 Suspension Agreements, caused widespread disruption in the fresh tomato market. *See* Def.'s Suppl. Br. 4, May 17, 2019, ECF No. 28.

Plaintiffs' motion for a TRO and PI also addresses the burden incurred by the requirement to collect and submit data in relation to the expedited continued investigation over a period of weeks versus a period of months. Pls.' Mot. for TRO and PI 7.[9] The court concludes that Plaintiffs have not sufficiently shown that the burdens identified by Plaintiffs support a determination of irreparable harm.

Although the court acknowledges the potential disruptions to the fresh tomato market and supply chain alleged by Plaintiffs in this matter, the court concludes that Plaintiffs' evidence fails to meet the high burden required to show irreparable harm and that injunctive relief is warranted. Plaintiffs' evidence, when viewed in its totality, is insufficient to support a determination of irreparable harm absent injunctive relief.

C. Balance of Hardships

Plaintiffs contend that the balance of hardships tips in Plaintiffs' favor because Plaintiffs "face irreparable harm" and argue that their requested injunction would maintain the *status quo*. Pls.' Mem. 10 (discussing the balance of the equities). Defendant disputes Plaintiffs' assertions of irreparable harm and argues that Plaintiffs have no vested right to import merchandise into the United States, that the United States may suffer hardship in the collection of duties, and that Plaintiffs suffer no hardship by being subject to "an ordinary consequence of the statutory scheme." Def.'s Mem. 25. Defendant-Intervenor adds that the domestic industry would suffer hardships if an injunction were granted and argues that the hardships to Defen-

[9] Pls.' Mot. for TRO and PI 7 ("Commerce's announced actions also will impose an immediate and significant burden on the Mexican Growers by forcing them to submit data in a few short weeks that normally is collected over several months."); *but see* Pls.' Reply at 4–5 ("CAADES is not complaining about submitting data to Commerce pursuant to a timely antidumping investigation. Instead, CAADES submits that it is irreparably harmed by Commerce's unlawful action in treating its outdated preliminary determination of 1996 'as if' it were made on May 7, 2019, and forcing respondents, including CAADES, to submit entirely new information for individual companies still to be selected so that Commerce can make a final determination on that new data in a few short weeks.").

dant and the domestic industry outweigh Plaintiffs' hardships. *See* FTE's Resp. 22–23.[10]

When assessing the balance of hardships, the court must "balance the competing claims of injury and must consider the effect that granting or denying relief would have on each party." *Winter*, 555 U.S. at 24. The court notes that Plaintiffs' requested injunctive relief would exceed the *status quo*. Plaintiffs seek to enjoin Commerce from ordering suspension of the liquidation of entries of fresh tomatoes from Mexico, resuming its antidumping investigation, and instructing U.S. Customs and Border Protection to require a cash deposit or bond for each entry of tomatoes. Pls.' Mot. for TRO and PI 1. Each of the actions challenged by Plaintiffs is required under 19 U.S.C. §§ 1673b and 1673d, thus issuance of the requested relief in an injunction would suspend the effect of the statute in this matter. The court determines that Defendant and Defendant-Intervenor would face hardship as a result of the injunction. Absent further justification by Plaintiffs, the balance of the hardships tips in favor of denying Plaintiffs' motion.[11]

D. Public Interest

Plaintiffs argue that a TRO or PI is in the public interest because the public interest is served by ensuring compliance with Commerce's governing statutes and regulations, and Plaintiffs believe that Commerce's actions will have a negative effect on consumers and the economy. Pls.' Mem. 10–11. Defendant counters that an injunction does not serve the public interest because an injunction would encourage circumvention of antidumping and countervailing duties investigations, would provide Plaintiffs prematurely with the advantages of a final favorable adjudication of the action, and would not serve the public interest by providing a supply of fresh tomatoes from Mexico. Def.'s Resp. at 26–27. Defendant-Intervenor adds that the public interest is best served by the effective enforcement of the trade laws, including the resumption of a suspended antidumping duty investigation and correct collection of antidumping duties. FTE's Resp. at 23–24. The public interest is neutral and does not favor one party or another.

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[10] FTE argues that the harm to the domestic industry is discernable based on the conclusions of the final determination of the Sunset Review regarding the 2013 Suspension Agreement. FTE's Resp. 22; *see also Fresh Tomatoes From Mexico, Final Results of the Full Sunset Review of the Suspended Antidumping Duty Investigation*, 83 Fed. Reg. 66,680, 66,681 (Dep't Commerce Dec. 27, 2018).

[11] Even if Plaintiffs could meet their burden to establish irreparable harm, in the context of the balance of hardships, Plaintiffs' alleged hardships would not rise to the level to tip the balance of the hardships in favor of granting the requested injunctive relief.

IV. Conclusion

The court has subject-matter jurisdiction under 28 U.S.C. § 1581(i). In consideration of Plaintiffs' motion for a TRO and PI, the court determines that Plaintiffs have not met their burden to establish a likelihood of success on the merits and irreparable harm absent injunctive relief, the balance of the hardships tips in favor of denying Plaintiffs' motion, and the public interest is neutral. Plaintiffs' motion for a TRO and PI is denied.

An order will issue accordingly.

Dated: June 6, 2019
New York, New York

/*s*/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 19–70

TAI-AO ALUMINIUM (TAISHAN) CO., LTD. and TAAL AMERICA LTD., Plaintiffs, and REGAL IDEAS INC., Consolidated Plaintiff, v. UNITED STATES, Defendant, and the ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Consol. Court No. 17–00216

[Plaintiff's motion for judgment on the agency record is granted in part and denied in part. Commerce's *Final Results* are remanded consistent with this opinion.]

Dated: June 7, 2019

Jordan C. Kahn, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY, argued for plaintiffs. With him on the brief were *Ned H. Marshak* and *Peter W. Klestadt*.

Arthur K. Purcell and *Kristen Smith*, Sandler, Travis & Rosenberg, PA, of Washington, DC, argued for consolidated plaintiff. With them on the brief were *David J. Craven* and *Emi Ito Ortiz*.

Amie Lee, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Jessica M. Link*, Assistant Chief Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Robert E. DeFrancesco, III, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor. With him on the brief was *Alan H. Price*.

OPINION

Katzmann, Judge:

This case involves issues of scope interpretation and notice in an anticircumvention investigation. Tai-Ao Aluminum Company ("Tai-Ao") and Regal Ideas, Inc. ("Regal") (collectively, "Plaintiffs") are im-

porters of heat-treated 5050-grade aluminum extrusions from the People's Republic of China ("PRC"). The United States Department of Commerce ("Commerce") had issued antidumping and countervailing duty orders on extrusions made from aluminum alloys with the Aluminum Association designations of series 1xxx, 3xxx, and 6xxx. *Aluminum Extrusions from the People's Republic of China: Antidumping Order*, 76 Fed. Reg. 30,650 (Dep't Commerce May 26, 2011); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) (collectively, "the *Orders*"). The scope of the *Orders* specifically excludes extrusions made from alloys designated as 5xxx. After the *Orders*' publication, Commerce determined, pursuant to an anticircumvention inquiry, that imports of 5050-grade extrusions exported by a Chinese company were later-developed merchandise circumventing the *Orders*. Commerce also ordered Customs and Border Patrol ("CBP") to suspend liquidation on heat-treated 5050-grade extrusions retroactive to the initiation of the anticircumvention inquiry.

Plaintiffs contend that Commerce's determination is unsupported by substantial evidence and contrary to law. They also argue that the anticircumvention inquiry's initiation notice did not provide adequate notice that their products were subject to the inquiry and therefore that liquidation should not have been suspended as of that date. The court sustains Commerce's anticircumvention determination but concludes that retroactive suspension of liquidation was impermissible under the circumstances here.

BACKGROUND

I. Legal and Regulatory Framework for Anticircumvention Inquiries.

Dumping occurs when a foreign company sells a product in the United States for less than fair value – that is, for a lower price than in its home market. *Sioux Honey Ass'n v. Hartford Fire Ins.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). Similarly, a foreign country may provide a countervailable subsidy to a product and thus artificially lower its price. *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1355 n.1 (Fed. Cir. 1996). To empower Commerce to prevent foreign products from undercutting the domestic market and to offset economic distortions caused by dumping and countervailable subsidies, Congress enacted the Tariff Act of 1930. *Canadian Solar, Inc. v. United States*, 918 F.3d 909, 913 (Fed. Cir. 2019); *Sioux Honey Ass'n*, 672 F.3d at 1046–47. Under the Tariff Act's framework, Commerce may — either upon petition by a domestic producer or of its own initiative — begin an investigation into potential dumping or subsidies and, if appropriate,

issue orders imposing duties on the subject merchandise. *Sioux Honey Ass'n*, 672 F.3d at 1047.

Anticircumvention inquiries "prevent foreign producers from circumventing existing findings or orders through the sale of later-developed products or of products with minor alterations that contain features or technologies not in use in the class or kind of merchandise imported into the United States at the time of the original investigation." S. Rep. No. 100–71, at 101 (1987) (quoted in *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998)); *see* 19 U.S.C. § 1677j. "Congress has provided that Commerce's consideration of certain types of articles within the scope of an order will be a proper clarification or interpretation of the order instead of improper expansion or change even where these products do not fall within the order's literal scope." *Wheatland Tube*, 161 F.3d at 1370. Of relevance here, Commerce may properly consider "later-developed products that would have been included in the order" had they existed at the time the order was issued. *Id.* (citing 19 U.S.C. § 1677j(d)).

When determining whether a product is later-developed, Commerce considers whether the merchandise was commercially available at the time the order was issued. *See Target Corp. v. United States* ("*Target III*"), 609 F.3d 1352, 1357 (Fed. Cir. 2010). Commerce defines[1] commercial availability as "products either present in the commercial market or fully developed, i.e., tested and ready for production." *Id.* at 1358. When determining whether a later-developed product would have been included in the original order, Commerce must consider whether: (1) the later-developed product "has the same general physical characteristics" as the products "with respect to which the order was originally issued"; (2) the purchasers of the products have the same expectations; (3) the ultimate uses for the products are the same; (4) the same channels of trade are used; and (5) the products are advertised and displayed in a similar way. 19 U.S.C. § 1677j(d)(1). If Commerce determines that a later-developed product is circumventing the scope of an order and the product constitutes a "significant technological advancement or significant alteration of an earlier product," it must notify the International Trade Commission ("ITC"). 19 U.S.C. § 1677j(e)(1)(C).

When Commerce initiates an anticircumvention inquiry, it must provide notice by publishing the inquiry in the Federal Register. 19 C.F.R. § 351.225(f). Importers are charged with knowledge of regulations as of the date they are published. *See Target Corp. v. United States* ("*Target II*"), 33 CIT 760, 779–80, 626 F. Supp. 2d 1285, 1301

[1] In *Target III*, the Federal Circuit conducted a *Chevron* analysis and found the term "later-developed" ambiguous and Commerce's definition reasonable. 609 F.3d at 1359.

(2009), *aff'd*, 609 F.3d 1352 (Fed. Cir. 2010) (citing 44 U.S.C. § 1507; *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947)). By regulation, the notice must contain "[a] description of the product that is the subject of the scope inquiry." 19 C.F.R. § 351.225(f)(1)(i). When Commerce reaches an affirmative preliminary determination, any suspension of liquidation will continue. 19 C.F.R. § 351.225(l)(2). "[I]f liquidation has not been suspended[,]" Commerce will instruct CBP "to suspend liquidation . . . [retroactive to] the date of initiation of the scope inquiry." *Id.*

II. Background of the Aluminum Extrusions Anticircumvention Order.

In 2011, Commerce investigated and then issued antidumping and countervailing duty orders on aluminum extrusions from the PRC. *Orders*. The *Orders* covered aluminum extrusions made from "alloy series designations published by [t]he Aluminum Association commencing with 1, 3, and 6" but excluded "[a]luminum extrusions made from aluminum alloy with an Aluminum Association series designation commencing with the number 5." *Orders* at 30,650–51. The 6xxx designation covers alloys containing between .1% and 2% magnesium and .1% to 3% silicon. *Id.* The 5xxx designation covers alloys containing more than 1% magnesium. *Id.*

Pursuant to the *Orders*, Commerce issued a scope ruling on a heat-treated 5050-grade aluminum extrusion product which found them to be outside the *Orders'* scope. *See Final Scope Ruling on Aluminum Rails for Showers and Carpets* (Dep't Commerce Sept. 6, 2012). Then, in 2016, Commerce initiated an anticircumvention inquiry in response to a request by the Aluminum Extrusions Fair Trade Committee ("AEFTC") to determine if heat-treated 5050-grade extrusions were later-developed merchandise circumventing the *Orders*. *Aluminum Extrusions from the People's Republic of China: Initiation of Anti-Circumvention Inquiry*, 81 Fed. Reg. 15,039 (Dep't Commerce Mar. 21, 2016), AD PD 164 ("*Initiation Notice*"). The *Initiation Notice* stated that "[t]his anti-circumvention inquiry covers extruded aluminum products that meet the chemical specifications for 5050-grade aluminum alloy, which are heat-treated, and exported by Zhongwang" and that Commerce "intends to consider whether the inquiry should apply to all imports of [5050-grade] extruded aluminum . . . regardless of producer, exporter, or importer, from the PRC." *Id.* at 15,042. The *Initiation Notice* also stated that Commerce was conducting the anticircumvention inquiry pursuant to § 1677j(d), later-developed products. *Id.* The AEFTC contended, as summarized by Commerce, Commerce that:

> the scope of the Orders creates an overlap between the chemical composition standards in that there is a narrow window in which a 5xxx series alloy may and does exist that is comprised of more than one percent but less than two percent magnesium by weight, and that in order to use 5xxx-series alloy (i.e., 5050 alloy) in an extrusion application, the metal would have to be heat-treated to achieve the mechanical properties that make 6xxx-series alloy so attractive for extrusion applications.

Initiation Notice at 15,040 (quotation marks omitted). Additionally, Commerce noted that heat-treatment process was not in use with the 5050-grade alloy at the time of the *Orders* and that the Aluminum Association guidelines[2] did not recognize this type of treatment at the time of the *Orders*. *Id.* at 15,042–44. Commerce issued a questionnaire to Zhongwang during the inquiry, but Zhongwang failed to respond. *Aluminum Extrusions From the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping and Countervailing Duty Orders and Intent To Rescind Minor Alterations Anti-Circumvention Inquiry*, 81 Fed. Reg. 79,444, 79,445 (Dep't Commerce Nov. 14, 2016) ("*Preliminary Determination*"), AD PD 155, CVD PD 158, and accompanying memorandum ("PDM"), AD PD 86, CVD PD 85.

The *Preliminary Determination* was released on November 14, 2016. Commerce determined that heat-treated 5050-grade aluminum extrusions were later-developed products circumventing the *Orders* and suspended liquidation on all heat-treated 5050-grade aluminum extrusions from the PRC, regardless of producer, retroactive to the initiation of the inquiry. *Preliminary Determination*, 81 Fed. Reg. at 79,445–46. Commerce based its determination on evidence submitted by the AEFTC and Endura Products, Inc., a domestic producer. *See* PDM at 2. Commerce found that heat-treated 5050-grade extrusions were not commercially available at the time of the *Orders*. *Id.* at 8. Commerce explained that, while the 5050-grade alloy was commercially available at the time of the initial *Orders*, it was used in rolling and plate applications and not used to form heat-treated extrusions. *Id.* at 8 (citing *Resubmission of Circumvention Inquiry Request* at 54, Ex. 21, Ex. 27 (Dec. 30, 2015), AD PD 57). Additionally, an importer of the merchandise stated that the heat-treated 5050-grade extrusions had been developed to meet the requirements of the industry around

[2] The Aluminum Association is the authority that maintains the standards for the U.S. aluminum industry with respect to aluminum alloy designations, the chemical composition for the alloys, and the approved tempering methods for the different alloys. *See* PDM at 8; Resubmission of Circumvention Inquiry Request at 53–54 (Dec. 30, 2015), AD PD 57–61, AD CD 66–72.

the imposition of the tariffs. *Id.* (citing *Resubmission of Circumvention Inquiry Request* at Ex. 28). Evidence also indicated that Columbia Aluminum Products LLC, the largest importer of door thresholds and sills, had substituted heat-treated 5050-grade extrusions in place of in-scope merchandise after the imposition of the *Orders*. *Id.* at 9. Finally, the Aluminum Association did not recognize, at the time of the *Orders*,[3] the series 5xxx alloys as heat-treatable.

Commerce also examined evidence relating to the statutory criteria[4] and determined heat-treated 5050-grade extrusions were circumventing the *Orders*. PDM at 9–12; *see* 19 U.S.C. § 1677j(d)(1). Commerce further determined heat-treated 5050-grade extrusions did not incorporate a significant technological advancement[5] because the merchandise mimicked the physical and chemical properties of 6xxx in-scope merchandise. *Id.* at 6.

Additionally, Commerce preliminarily determined that the inquiry should apply to all PRC exporters, PDM at 7–8, because evidence had been submitted "indicating at least 25 other Chinese companies [] are producing and/or exporting inquiry merchandise," *id.* at 7 (citing *Letter from Wiley Rein to U.S. Dep't of Commerce* (Oct. 7, 2016), PD 83 CD 82). Commerce instructed CBP to suspend liquidation of all heat-treated 5050-grade extrusions, regardless of producer, from the PRC from the date of the *Initiation Notice*, March 21, 2016. *Preliminary Determination*, 81 Fed. Reg. at 79,446.

Following the *Preliminary Determination*, Plaintiffs petitioned Commerce to submit New Factual Information ("NFI") related to the anticircumvention inquiry. *Letter from Sandler, Travis, & Rosenberg to U.S. Dep't of Commerce* (Nov. 10, 2016) ("*Regal's NFI Request*"), AD PD 89, CVD PD 88. Commerce granted this request and set January 6, 2017 as the deadline for NFI submissions. Regal made NFI submissions on November 30, 2016 and January 6, 2017. *Letter from Sandler, Travis, & Rosenberg to U.S. Dep't of Commerce* (Nov. 30, 2016) ("*Regal's November 30, 2016 Submission*"), PD 91; *Letter from Sandler, Travis, & Rosenberg to U.S. Department of Commerce* (Jan. 6, 2017) ("*Regal's January 6, 2017 Submission*"), PD 98–100. Commerce then set April 17, 2017 as the deadline to submit briefs and April 24, 2017 as the deadline to submit rebuttal briefs. *U.S. Dep't of*

[3] The Aluminum Association still does not recognize the series 5 alloys as heat-treatable. PDM at 8 (citing *Resubmission of Circumvention Inquiry* at 54, Ex. 21, Ex. 27).

[4] Plaintiffs do not appear to challenge this aspect of Commerce's PDM or its *IDM* counterpart. The court therefore does not address Commerce's specific findings regarding these criteria.

[5] 19 U.S.C. § 1677j(e)(1)(C) requires that when merchandise "incorporates a significant technological advance" that Commerce notify the ITC before making a determination.

Commerce Memorandum to File (Apr. 10, 2017) ("*Case Brief Schedule*"), AD PD 127, CVD PD 130. On April 13, 2017, Commerce extended the deadlines to submit case briefs and rebuttal briefs to April 24, 2017, and May 1, 2017, respectively. *U.S. Dep't of Commerce Memorandum to All Interested Parties* (Apr. 13, 2017) ("*Case Brief Schedule Extension*"), AD PD 131, CVD PD 134. On April 28, 2017, Regal attempted to submit additional NFI which Commerce rejected as untimely. *Letter from U.S. Dep't of Commerce to Sandler, Travis, & Rosenberg* (May 1, 2017) (rejecting Regal's NFI submission), AD PD 141, CVD PD 144. Commerce issued its *Final Determination* on July 20, 2017. *Aluminum Extrusions From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping and Countervailing Duty Orders and Rescission of Minor Alterations Anti-Circumvention Inquiry*, 82 Fed. Reg. 34,630 (Dep't Commerce July 26, 2017) ("*Final Determination*"), AD PD 161, CVD PD 166, and accompanying Issues and Decision Memorandum, (Dep't Commerce July 20, 2017) ("*IDM*"), AD PD 159, CVD PD 162.

Commerce found that heat-treated 5050-grade aluminum extrusions were circumventing the orders and affirmed the *Preliminary Determination. IDM* at 1–2. Commerce determined that past scope inquiries, which had found that heat-treated 5050-grade extrusions were not within the scope of the *Orders*, did not preclude an anticircumvention inquiry. *Id.* at 27. Commerce found that the products were not commercially available at the time of the initial *Orders* and therefore were later-developed products. *Id.* at 15–24. Commerce relied on a variety of evidence including the Aluminum Association standards, which do not recognize heat-treatment of the 5050-grade alloy but do refer to the 6xxx series as being heat-treatable. *Id.* at 16–17. Plaintiffs provided evidence from a 2002 Australian government specification for signs that required heat-treated 5050-grade aluminum extrusions. *Id.* at 14. However, Commerce credited the expert opinion of Luke Hawkins, who stated this was likely an error. *Id.* at 19–20. Commerce found that Chinese exporters exploited the chemical overlap between the 5050-grade alloy and series 6xxx to create extrusions that fell outside the scope of the *Orders* but could be used to replace series 6xxx products. *Id.* at 22. Commerce then analyzed whether the heat-treated 5050-grade extrusions met the five statutory criteria, *supra* p. 4, used to determine whether a later-developed product falls within an order's scope, and found that they were met. *Id.* at 21–24. For these reasons, Commerce concluded that heat-treated 5050-grade extrusions were later-developed products that were circumventing the *Orders. Id.* at 15–24.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction in this proceeding pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)2(B)(vi). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion found. . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

DISCUSSION

Plaintiffs contend that Commerce's determination is unsupported by substantial evidence and contrary to law because 5xxx extrusions were specifically excluded from the scope of the *Orders*, record evidence did not show that 5050-grade extrusion products are later-developed merchandise, and Commerce arbitrarily rejected one of Regal's factual submissions. Plaintiffs also argue that, because the *Initiation Notice* did not provide adequate notice that their products were subject to the inquiry, liquidation should not have been suspended as of the *Initiation Notice*'s date. For the reasons stated below, the court sustains Commerce's anticircumvention determination but concludes that retroactive suspension of liquidation was impermissible under the circumstances here.

I. Commerce Acted Within Its Authority in Conducting the Anticircumvention Inquiry.

As has been noted, Commerce initiated a later-developed products inquiry to determine whether heat-treated 5050-grade extrusion products were circumventing the *Orders*. Plaintiffs argue that Commerce impermissibly conducted a later-developed products anticircumvention inquiry because (1) previous scope rulings related to heat-treated 5050-grade extrusions found them outside the scope and (2) the language of the orders excludes series 5xxx extrusions. The court is not persuaded.

First, the existence of a previous scope ruling finding a 5050-grade heat-treated extrusion product outside the literal scope of the *Orders* does not preclude Commerce from undertaking an anticircumvention inquiry. The purpose of the anticircumvention inquiry is to address efforts by manufacturers to create products that fall outside the literal scope of an order to circumvent the order. *See Wheatland*, 161 F.3d at 1370 (citation omitted). Thus, "[i]n order to effectively combat circumvention of antidumping duty orders, Commerce may determine that certain types of articles are within the scope of a duty order,

even when the articles do not fall within the order's literal scope." *Deacero S.A. De C.V. v. United States*, 817 F.3d 1332, 1337 (Fed. Cir. 2016) (internal citation omitted). Thus, as the Federal Circuit held in *Target III*, Commerce is not precluded from conducting an anticircumvention inquiry "by its earlier conventional scope rulings . . . [because] conventional scope inquiries are different from anticircumvention inquiries." 609 F.3d at 1362 ("Conventional scope inquiries are different from anticircumvention inquiries because they are separate proceedings and address separate issues."). Moreover, contrary to Plaintiffs' contentions, this interpretation would not permit Commerce to arbitrarily rewrite an order's scope at will. 19 U.S.C. § 1677j provides specific statutory factors, discussed above, that Commerce must consider when making a later-developed product anticircumvention determination.

Plaintiffs argue, citing *Wheatland*, that Commerce's anticircumvention inquiry was improper because the scope of the *Orders* explicitly excludes 5xxx extrusions. *See* 161 F.3d at 1370 ("Commerce was aware of the limitations on its authority to interpret the scope of an order . . . [I]t can neither change them nor interpret them contrary to their terms" (quotations and citations omitted)). However, *Wheatland* is distinguishable. In that case, Commerce conducted a minor alterations inquiry even though the merchandise was commercially available at the time of the initial investigation, was not examined by the ITC at the petitioner's request, and was intentionally specifically excluded from the scope. *Id.* at 1367, 1369. In contrast, here, the exclusion does not preclude Commerce from conducting the anticircumvention inquiry because products not in existence at the time that an order's scope is written cannot be intentionally, expressly excluded. *See Target III*, 609 F.3d at 1363.

The Federal Circuit case *Target III*, which involved an anticircumvention inquiry into later-developed merchandise outside the literal scope of the relevant order, is analogous. 609 F.3d at 1355. In that case, the products subjected to the ITC injury investigation did not include the products that were the issue of the anticircumvention inquiry. *Id.* at 1363. Addressing the argument that the scope language indicated the merchandise was "clearly and unambiguously" excluded from the order, the Federal Circuit held that, because the "later-developed merchandise was not present in the market at the time of the [relevant] investigation[,] the [order] could not have addressed" the merchandise. *Id.* Similarly, in this case, Commerce correctly concluded that the "Orders could not have addressed" heat-treated 5050-grade extrusions because they are later-developed products, *infra* pp. 13–15, and therefore initiating an anticircumven-

tion inquiry was in accordance with law. *See Target III*, 609 F.3d at 1363.

II. Commerce's Determination That the 5050-Grade Heat-Treated Extrusions Are Later-Developed Products Circumventing the Orders Is Supported by Substantial Evidence and in Accordance with Law.

Plaintiffs argue Commerce's finding that 5050-grade heat-treated aluminum extrusions are later-developed products is unsupported by substantial evidence and not in accordance with the law. The court concludes otherwise.

As discussed above, for a product to be later-developed, Commerce applies the "commercial availability" test which examines whether the merchandise was "present in the commercial market or fully developed" at the time of the investigations. *See Target III*, 609 F.3d at 1358–59. The record supports Commerce's conclusion that heat-treated 5050-grade extrusions were not commercially available at the time of the *Orders*. The Aluminum Association, whose standards are used to define the exception, *see supra* note 2, defines 5xxx alloys as non-heat-treatable. PDM at 8; *IDM* at 16–18. Additionally, industry catalogs contained in the record did not offer the 5050-grade alloy as an alternative to the series 6 alloy until after the *Orders* were issued. PDM at 9; *IDM* at 17, 19. Finally, an importer stated that heat-treated 5050-grade extrusions were developed after the *Orders* were issued for the purpose of replacing in-scope merchandise. PDM at 9; *IDM* at 17, 19.

Plaintiffs contend that Commerce ignored other record evidence that contradicted its conclusion. Specifically, Plaintiffs note: (1) that the 5050-grade alloy was recognized by the Aluminum Association and patented prior to the *Orders*; (2) that the Australian Government's Standard Specifications for Urban Infrastructure Works ("SSUIW") mentioned heat-treated 5050-grade extrusions as a possible material that could be used for metal signs; and (3) that Tai-Ao was extruding the 5052 alloy by the same process as heat-treated 5050-grade extrusions at the time the *Orders* were issued.

These arguments are unavailing. First, as Commerce explained in its *IDM*, although the Aluminum Association recognized the use of 5050-grade alloy for rolling and plate applications, the anticircumvention inquiry specifically involves heat-treated 5050-grade extrusions, which the Aluminum Association did not recognize. *See IDM* at 17–18. This distinction is significant because heat-treatment of the 5050-grade alloy changes its physical properties and causes it to behave more similarly to series 6xxx alloys, which are recognized as heat-treatable and are within the scope of the *Orders*. *Id.* (citing

Resubmission of Circumvention Inquiry at Ex. 28 (explaining how this effect is achieved)). Additionally, the scope's exclusionary language is based on the Aluminum Association's standards. *Orders* at 30,651 (excluding "extrusions made from an alloy with an Aluminum Association series designation commencing with the number 5").

Commerce's determination is also not undermined by either the existence of the Australian SSUIW or production of 5052 extrusions prior to the *Orders*. As has been noted, the affidavit of Luke Hawkins, the general manager of Australia's largest manufacturer and distributor of aluminum profiles and a company to which the SSUIW applied, stated the reference to the 5050-grade alloy in the SSUIW was likely an error. *IDM* at 19–20; *see also Letter from Wiley Rein to U.S.* Dep't of Commerce at Ex. 5 (Feb 8, 2017), PD 112, CD 85–86 ("Given that there is no production of 5050 aluminum alloy extrusions in the Australian market so far as I am aware, the reference to 'Grade 5050 - T5' in the mentioned specifications for road signs appears to be an error . . . [T]his temper designation is not applicable to [the] non-heat treatable . . . 5050 aluminum alloy."). The record contains a letter from an importer of merchandise made from these extrusions that indicates heat-treated 5050-grade extrusions were developed around the time of the *Orders*. *See* PDM at 8; *IDM* at 17 (citing *Resubmission of Circumvention Inquiry* at Ex. 28 ("It was at this time that the Chinese developed the 5050 alloy that met the requirements of our industry.")) Industry brochures in the record also supported Commerce's determination: prior to the *Orders*, advertised merchandise was composed of in-scope materials, while after the *Orders*' imposition, the same products were instead made from heat-treated 5050-grade extrusions. *See* PDM at 9; *IDM* at 17 (citing *Letter to the Sec'y from Endura*, "Aluminum Extrusions from the People's Republic of China - AntiCircumvention Submission of Endura Products, Inc." (Sept. 28, 2016) at 17, Ex. 5 (brochures showing that the same products were advertised using either in-scope merchandise or 5050-grade heat-treated extrusions)). Finally, the issue presented here is the commercial availability of 5050-grade heat-treated extrusions, not the 5052-grade alloy or any other 5xxx series extrusions, so the existence of these unrelated products in no way undermines Commerce's determination. *IDM* 20–21. Commerce's determination that heat-treated 5050-grade extrusions were commercially unavailable at the time the *Orders* were issued is thus supported by substantial evidence.

III. Commerce's Rejection of Regal's Late NFI Was Not an Abuse of Discretion.

Regal argues that Commerce's decision to reject its NFI filing on April 28, 2017 was an abuse of discretion. The court is not persuaded.

"Absent constitutional constraints or extremely compelling circumstances[,] the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (quotations and citations omitted). Commerce may set a deadline for the submission of NFI, 19 C.F.R. § 351.301(a), and Commerce need only consider information submitted before the deadline when making its determination, 19 U.S.C. § 1677m(e).

Here, the NFI was submitted on April 28, 2017, not only after the deadline for the submission of factual information, but also after the deadline for case briefs. *U.S. Dep't of Commerce Memorandum to File* (Dec. 30, 2016), AD PD 96 (setting the deadline for submission factual information to January 6, 2017); *Case Brief Schedule*; *Case Brief Schedule Extension*. Thus, Regal's late submission of NFI would affect the parties' ability to respond to that NFI. Moreover, Commerce had already accepted NFI submissions consisting of several thousand pages on November 30, 2016 and January 6, 2017. *Regal's November 30, 2016 Submission*; *Regal's January 6, 2017 Submission*. Commerce's decision to reject the NFI submitted on April 28, 2017 is consistent with the relevant regulations and within its statutory authority. 19 U.S.C. § 1677m(e); 19 C.F.R. § 351.301(a). Finally, Regal has not explained why it was unable to submit the document, which was published in 2004, within the deadlines. Therefore, Commerce did not abuse its discretion when it rejected Regal's untimely NFI submission.

IV. Commerce Erred in Retroactively Applying the Duty to the Date of Initiation Rather Than the Date of the Preliminary Determination with Respect to Regal and Tai-Ao.

In the *Preliminary Determination*, as affirmed in the *Final Determination*, Commerce directed CBP "to suspend liquidation of inquiry merchandise from the PRC . . . on or after March 21, 2016, the date of publication of the initiation of this inquiry." *Preliminary Determination*, 81 Fed. Reg. at 79,446; *Final Determination*, 82 Fed. Reg. at 34,631. Plaintiffs argue that Commerce incorrectly assessed suspension of liquidation from the date of the *Initiation Notice* because its language did not clearly indicate that the investigation applied to any

PRC exporters other than Zhongwang. The court concludes Commerce's decision to suspend liquidation with respect to Plaintiffs from the date of the *Initiation Notice* was impermissible because Plaintiffs did not receive adequate notice at that time. The *Preliminary Determination* provided the first notice that Plaintiffs' products were subject to the inquiry, and therefore liquidation should be assessed as of that date.

Importers are charged with knowledge of the regulations as of the date that they are published. *See Target II*, 626 F. Supp. 2d at 1301 (citing 44 U.S.C. § 1507; *Fed. Crop Ins.*, 332 U.S. at 384–85). When the scope is ambiguous, Commerce cannot suspend liquidation before a formal inquiry is initiated and notice provided. *See Sunpreme Inc. v. United States*, __ F.3d __, 2019 WL 2127934, at *11 (Fed. Cir. May 16, 2019) ("Although Commerce . . . can interpret the scope of unclear or ambiguous duty orders, our case law is clear that even Commerce cannot order suspension of liquidation of merchandise covered by such orders before the scope inquiry was initiated."); *AMS Assocs. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013) ("Accordingly, when Commerce 'clarifies' the scope of an existing antidumping duty order that has an unclear scope, the suspension of liquidation and imposition of antidumping cash deposits may not be *retroactive* but can only take effect 'on or after the date of the initiation of the scope inquiry.'" (quoting 19 C.F.R. § 351.225(l)(2))). When an affirmative preliminary determination is reached in an anticircumvention inquiry and liquidation of the merchandise has not been suspended, it is usually suspended retroactive to the date of the initiation of the inquiry. 19 C.F.R § 351.225(l)(2). The initiation is required to provide "[a] description of the product that is the subject of the scope inquiry." 19 C.F.R § 351.225(f)(1)(i). Typically, "publication [in the Federal Register] . . . is sufficient to give notice of the contents of the document to a person subject to or affected by it." 44 U.S.C. § 1507. "What the statutory and regulatory notification provisions require is that any reasonably informed party should be able to determine, from the published notice of initiation read in light of announced Commerce Department policy, whether particular entries in which it has an interest may be affected by the administrative review." *Transcom, Inc. v. United States* ("*Transcom I*"), 182 F.3d 876, 882–83 (Fed. Cir. 1999).

In this case, it is undisputed that the products were not clearly included within the scope of the order. Thus, Commerce cannot suspend liquidation until the date at which it provided the parties notice that their products could be subject to the administrative action. *See Sunpreme*, 2019 WL 2127934, at *11 ("Commerce can only act pro-

spectively when the scope of an order is unclear or ambiguous, and thus retroactive authorization of suspension of liquidation is prohibited." (citation omitted)); *AMS Assocs.*, 737 F.3d at 1344. The language in the *Initiation Notice* here was not sufficient to provide PRC exporters of heat-treated 5050-grade extrusions other than Zhongwang with "reasonable notice." *See Transcom Inc. v. United States* ("*Transcom IV*"), 294 F.3d 1371, 1380 (Fed. Cir. 2002). An initiation notice must "*certainly* provide[] notice that the exporters' interests might be affected." *Id.* at 1379 (citing *Transcom I*, 182 F.3d at 884) (emphasis added). The *Initiation Notice* in this case stated that the inquiry would "cover[] extruded aluminum products that meet the chemical specifications for 5050-grade aluminum alloy, which are heat-treated, and exported by Zhongwang. The Department *intends to consider whether the inquiry should apply* to all imports of extruded aluminum products . . . regardless of producer, exporter, or importer, from the PRC." 81 Fed. Reg. at 15,042 (emphasis added).

The Government asserts that this language was sufficient to provide notice and cites to *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369 (Fed. Cir. 2003), *Transcom IV*, and *Target II* for support. However, the indication of the possibility of an administrative action applying is not sufficient unless it states clear and certain circumstances that trigger the action, *Huaiyin*, 322 F.3d at 1376–77, which the notice language did not provide. In addition, *Huaiyin*, *Transcom IV*, and *Target II* are distinguishable, and the differences between the circumstances in those cases and the instant case demonstrate why notice here was inadequate. In *Huaiyin*, the initiation notice stated that all exporters would be covered if a certain condition was met, whereas here Commerce only stated that it "intended to consider" whether to extend the inquiry to products other than Zhongwang's. *Huaiyin*, 322 F.3d at 1376–77 (holding that the following constituted sufficient notice to all PRC exporters: "[i]f one of the above named companies does not qualify for a separate rate, all other exporters of freshwater crawfish tail meat from the People's Republic of China who have not qualified for a separate rate are deemed to be covered"). Similarly, in *Transcom IV*, the court held that the language provided sufficient notice because "it was clear that all exporters of tapered roller bearings from China were subject, in the first instance, to the administrative review." 294 F.3d at 1379. Finally, in *Target II*, plaintiffs argued that their reliance on previous scope rulings, which had determined their merchandise was not within the scope of the orders, should rebut the notice provided by the initiation of the anticircumvention inquiry. *Target II*, 626 F. Supp. 2d at 1293–94. The

court rejected that argument. *Id.* In that case, unlike here, there was no assertion that language used in the initiation notice was unclear as to whether the plaintiff's products were under review. *Id.*

Here, the language "intends to consider whether" does not *certainly* provide Plaintiffs notice that they are subject to the inquiry. *Initiation Notice*, 81 Fed. Reg. at 15,042. The *Initiation Notice* does not provide any sort of set circumstances under which Commerce would determine all exporters were subject to the inquiry's findings. *Id.* In fact, the language "intends to consider whether the inquiry should apply" plainly indicates that Commerce had not yet determined the inquiry applied to all PRC exporters or the circumstances under which it would. *Id.* In contrast, the *Initiation Notice* provides clear notice that the inquiry "covers extruded aluminum products . . . exported by Zhongwang." *Id.* If Commerce had wanted to conduct an inquiry into all PRC exporters, it should have stated this fact in similarly clear language. Additionally, Commerce only sent Zhongwang a questionnaire, which suggests that Commerce only viewed the inquiry as covering Zhongwang at that time. Therefore, liquidation should have been suspended from the date of the *Preliminary Determination* when Plaintiffs first received notice that their products were subject to the anticircumvention inquiry.

CONCLUSION

In conclusion, the court sustains Commerce's determination that it had the authority to conduct a later-developed product anticircumvention inquiry into the heat-treated 5050-grade alloy extrusions. The court also concludes that Commerce's determination that heat-treated 5050-grade extrusions are later-developed products is supported by substantial evidence and that Commerce did not abuse its discretion by refusing to accept Regal's untimely NFI submission. However, the court finds that Commerce's decision to suspend liquidation retroactive to the date of the *Initiation Notice* was not in accordance with law because the language in the *Initiation Notice* did not provide adequate notice. The court remands to Commerce to reformulate its liquidation instructions consistent with this opinion and directs that such action be taken within 30 days of the publication of this opinion.

SO ORDERED.

Dated: June 7, 2019
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE