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Can the U.S. Government Ignore Final Orders of the Court of International Trade Solely Because an Appeal Has Been Taken?

by Paul C. Rosenthal*
Kathleen Weaver Cannon**

I. INTRODUCTION

The bifurcated investigatory roles of the Department of Commerce and the International Trade Commission (ITC or Commission) make antidumping and countervailing duty proceedings complex. The two agencies have separate investigatory mandates under Title VII of the Tariff Act of 1930, as amended (the Act),1 but the investigation of each agency is triggered by the other's decision. The role of the Court of International Trade (CIT) in reviewing the agencies' decisions has raised the question of what happens when the CIT overturns a decision of one agency if the second agency's action is dependent upon the first. That problem is compounded when the agency whose decision has been reversed decides to appeal the CIT's decision to the Court of Appeals for the Federal Circuit (CAFC). While the agency that is appealing the CIT's decision proceeds with the appeal, what does the other agency do? What is the CIT's role in this investigatory ping-pong game?

This Article will address the issue presented when an ITC preliminary negative injury determination is reversed by the CIT, and the Commission decides to appeal the CIT's decision. Is the Commerce Department obligated to resume its preliminary investigation while the ITC's appeal is pending? Absent a stay pending appeal, the answer should be an unqualified yes. The Commerce Department is obligated to resume its preliminary investigation.

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1 Title VII of the Trade Act of 1930, as amended, represents congressional implementation of the General Agreement on Tariffs and Trade (GATT) principles on the conduct of antidumping and countervailing duty investigations. Title VII was added to the Trade Act of 1930 by the Trade Agreements Act of 1979. Pub. L. No. 96-39, 93 Stat. 144, 150. Title VII is codified at 19 U.S.C. §§ 1671-1673 (1982) as “Subtitle IV—Countervailing and Antidumping Duties.” [Hereinafter references to Title VII will be cited to the relevant United States Code section.] Title VII establishes a bifurcated procedure whereby the Department of Commerce determines whether unfair trade practices exist, while the International Trade Commission determines whether a U.S. industry is injured by the unfair practices.
Department, however, has refused to proceed with its investigation in such circumstances.

The Commerce Department's refusal to investigate violates the statute and undermines the Court of International Trade's authority. In essence, the Department has decided that final judgments of the CIT need not be heeded unless and until they are upheld by the Court of Appeals for the Federal Circuit. The government's failure to follow lower court judgments not only breeds disrespect for the CIT's decisions but also delays relief to the successful plaintiff in direct contravention of the congressional intent that relief in dumping and subsidy actions be provided expeditiously.2

II. The Dual Investigatory Roles of the Department of Commerce and the International Trade Commission

An examination of the timetable of events set forth in the Act for antidumping3 and countervailing duty4 investigations reveals the bifurcated but highly interconnected procedural relationship of the Commerce Department and the U.S. International Trade Commission. Decisions by the Commerce Department trigger investigations at the ITC, and decisions of the Commission compel further action by the Commerce Department.

Assume, for example, that petitions alleging both dumping and subsidization of imports are filed simultaneously with the Department of Commerce and the International Trade Commission. Within twenty days of receiving the petitions, the Commerce Department must make a decision about whether to initiate antidumping and countervailing duty investigations.5 If the Commerce Department does not accept the petitions on the twentieth day from the filing date, the ITC does not proceed with its preliminary injury determination.6

If, on the other hand, the Commerce Department decides affirmatively to initiate the investigations on day twenty, this decision triggers two actions. First, the ITC must, within forty-five days from the date the petition was filed, issue preliminary injury determinations.7 Second, the Commerce Department must proceed with investigations of the allegations regarding dumping and subsidies and must issue preliminary determinations by the one hundred sixtieth day after the date on which the petition was filed in a dumping case and the eighty-

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7 19 U.S.C. §§ 1671b(a), 1675(b)(a) (1982).
fifth day after the date on which the petition was filed in a countervailing duty investigation. 8

If the ITC decides by day forty-five that there is no reasonable indication of injury or threat of injury, the antidumping and countervailing duty proceedings end. 9 The Commerce Department will respond to the negative ITC preliminary injury determinations by terminating its investigations. Conversely, if the ITC preliminary determinations are affirmative, then the Commerce Department's investigations continue through to a final determination. 10

The Commerce Department's affirmative final determinations of dumping and subsidies trigger final injury investigations and determinations by the ITC.11 If the ITC's investigations yield affirmative injury determinations, then the Commerce Department must publish antidumping and countervailing duty orders.12 On the other hand, if either the Commerce Department or the ITC reach a negative final determination, the investigation is terminated and no further action is taken by the other agency.13

Aside from the complexity of the investigatory scheme, two underlying themes emerge from a review of the statute. First, Congress was concerned about undue delay in the investigations and therefore set strict time deadlines for agency action. 14 Second, the procedural schedule devised by Congress shows a clear legislative intent that certain decisions by one agency trigger an investigation and resulting decision (either preliminary or final, depending upon the stage of investigation) by the other agency. The Commerce Department and the ITC, while investigating very different aspects of the unfair trade laws, work in tandem procedurally in reaching each determination. That a determination by one agency is conditioned on a decision of the other, and in turn triggers certain, statutorily required actions by the other, 15 is an important consideration in analyzing the Commerce Department's refusal to take action following a court order reversing an ITC determination.

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8 19 U.S.C. §§ 1673(b), 1671b(b) (1982).
9 19 U.S.C. §§ 1671b(a), 1673b(a) (1982).
10 19 U.S.C. §§ 1671b(a), 1673b(a) (1982).
11 19 U.S.C. §§ 1671d(b), 1673d(b) (1982).
13 Congress has set forth in some detail the kinds of agency decisions that are subject to judicial review. While there are exceptions, generally agency decisions that have the effect of terminating the investigation are subject to review whenever such determinations take place. See 19 U.S.C. § 1516a (1982).
III. CIT Reversal of ITC Negative Preliminary Determinations

Under the statutory scheme outlined above, the Department of Commerce must continue its investigation when the ITC issues an affirmative preliminary injury determination. If the ITC preliminary determination is negative, however, the investigation by the Commerce Department is terminated. What happens when the ITC's negative preliminary determination is reversed by the Court of International Trade and the CIT's final decision is then appealed to the Court of Appeals for the Federal Circuit?

That issue has presented itself in three recent cases. In each of those cases, the ITC followed the order of the CIT on remand and issued a preliminary, affirmative determination. That affirmative determination was presented to and approved by the CIT. Thereupon, the ITC decided to appeal the CIT's decision to the Court of Appeals for the Federal Circuit. Despite the issuance of an affirmative preliminary determination by the Commission, however, the Commerce Department refused in all three cases to recommence its investigation or to issue its preliminary determination as required by statute, pending resolution of the appeal.

A. Armstrong Rubber Co.

In Armstrong Rubber Co. v. United States the plaintiffs asked the CIT to hold certain officials of the Commerce Department in contempt of court for refusing to resume an investigation into whether radial ply tires from the Republic of Korea were being sold at less than fair value. Plaintiff's contempt action followed a judgment by the court reversing a preliminary negative ITC determination. The court found that the ITC applied an erroneous legal standard and remanded the matter to the ITC for the issuance of a determination in accordance with the CIT's decision. Following the ITC's issuance of its affirmative preliminary determination, the Commerce Department refused to resume its dumping investigation. In a separate opinion in the same case, the court denied the defendants' motion for a stay pending appeal.

In response to plaintiffs' contempt motion, the CIT stated: "Although it was within the contemplation of the court that the judgment it was issuing would lead to the resumption of the investigation by the Department of Commerce, the court did not say so specifically . . . ." The court felt that "the awesome

18 Id.
20 No. 86-15, slip op. at 2.
power of contempt is not to be used unless the party said to be in contempt has been given a clear direction by the Court." 21 Although declining to grant the motion for contempt, the CIT nonetheless made it clear that "the court expected its judgments with respect to erroneous ITC determinations (determinations which had the effect of terminating investigations) to lead inexorably to the continuation of the investigations by the Commerce Department . . . ." 22

B. **Jeannette Sheet Glass**

Similarly, in *Jeannette Sheet Glass Corp. v. United States* 23 the Department of Commerce refused to proceed with its dumping investigation, despite the issuance of an ITC preliminary affirmative determination. The ITC issued its affirmative determination as a result of a remand from the CIT reversing a negative preliminary determination. The CIT affirmed the new determination, and the ITC appealed the CIT's holding. Thus, at the point of the ITC's filing of the appeal, a new, affirmative preliminary ITC finding was in effect. The Commerce Department, however, refused to recommence its dumping investigation, essentially ignoring the new ITC determination.

The Court of Appeals for the Federal Circuit (CAFC) dismissed the ITC's appeal of the CIT's decision. Its opinion suggested that an appeal at that point was untimely since the CIT's order was not final. 24 Upon a motion for reconsideration by the government, the Federal Circuit reaffirmed its dismissal of the ITC's appeal, suggesting that the CAFC was waiting for the lower court to issue a final order. After the case was again sent back to the CIT, the ITC moved, and the CIT agreed, to vacate the CIT's decision because that decision was based at least in part on a case that had subsequently been reversed by the appellate court. 25 During the ITC's round trip journey to the CAFC, the Commerce Department maintained its refusal to continue its investigation. 26

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21 Id. at 3. The CIT also noted that the plaintiff had commenced a separate action to compel the Department of Commerce to resume the investigation, acknowledging that the substance of the dispute regarding an action by the Department of Commerce would be reached in the new action.

22 Id. at 2 (emphasis added).


24 Appeal Nos. 86-519 and 86-700 (Fed. Cir. 1986).


26 Plaintiffs in *Jeannette Sheet Glass* filed an application for declaratory judgment, a writ of mandamus, and an order to show cause to compel the Commerce Department to recommence its investigation under section 733(b) of the Act. 19 U.S.C. § 1673b(b) (1982). That action was filed in October of 1985.
C. *Bingham & Taylor*

The most recent case to present the issue of the Commerce Department's responsibility to recommence an investigation when the ITC appeals a reversal of its negative preliminary determination is *Bingham & Taylor Div., Virginia Industries v. United States.* Following a CIT decision reversing the Commission's negative injury determination, the Commission found a reasonable indication that imports of light construction castings from Brazil materially injure or threaten to materially injure a domestic industry. The Commission's revised determination on the *Bingham & Taylor* remand was published in the *Federal Register* on April 9, 1986.

Despite a written request by plaintiffs, the Commerce Department refused to recommence its investigation following the ITC's published notice of its affirmative preliminary injury determination. The Commerce Department stated that no further action would be taken, despite publication of the ITC affirmative preliminary determination, because it was the Department's belief that the results of the CIT remand were not final. The Department asserted that the original ITC negative determination was in effect pending "a final court decision adjudicating the legality of that determination." On March 31, 1987, the CAFC affirmed the CIT's holding in *Bingham & Taylor*, thereby sustaining the affirmative preliminary determination. The Commerce Department's preliminary determination was issued June 15, 1987—a delay of two years from the date the petition was filed.

D. **Summary**

Thus, the court has on three occasions been presented with the opportunity to order the Commerce Department to commence an investigation following reversal of a preliminary negative ITC decision. Despite the court's strong statement in the *Armstrong* case that it expected its judgments reversing ITC determinations "to lead inexorably to the continuation of the investigations by the Commerce Department," the Court of International Trade has not yet taken the initiative to order the Commerce Department to continue its investiga-

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but was not decided prior to the Court's reversal of *Jeannette Sheet Glass* on the merits. Therefore, the dismissal of the suit at the CIT level rendered the issue moot.

29 Letter from G. Kaplan, Dept. of Commerce, Int'l Trade Administration, to P. Rosenthal (September 15, 1986).
30 Id.
31 Appeal No. 86-1440 (Fed. Cir. Mar. 31, 1987).
33 No. 86-15, slip op. at 2 (emphasis added).
gation. Given the CIT’s belief that such decisions should unquestionably lead to continued Commerce Department investigations, and given the Commerce Department’s equally clear refusal to take action continuing its investigations in these circumstances, this issue is one which needs to be resolved.

IV. THE COMMERCE DEPARTMENT’S REFUSAL TO INVESTIGATE

The plain terms of the statute indicate that under sections 703(b) and 773(b) of the Act, when the Commission renders an affirmative preliminary determination, the Commerce Department must investigate and preliminarily determine whether the imported product is being subsidized or dumped in the United States.34 Because an appeal of the Commission’s preliminary affirmative injury determination does not operate to stay the court’s decision or the Commission’s decision, the Commerce Department has a mandatory duty to conduct an investigation and render a preliminary determination.

It is well settled that under federal law the “pendency of an appeal does not suspend the operation of a final judgment for purposes of collateral estoppel, except where appellate review constitutes a trial de novo . . . .”35 The mere filing of an appeal from the court’s decision does not provide an automatic stay of judgment.

The instant controversy is unique, and hence does not compare easily with other administrative law scenarios, in that two U.S. government agencies—with interdependent functions—are simultaneously compelled to act by a single court order. If there are no questions or complications attached to the responsibilities of the ITC following remand from the CIT, then a redetermination must be issued by the ITC. Because the Commerce Department is a separate administrative agency from the ITC, however, it is the Commerce Department’s belief that its responsibilities upon remand are somehow distinguishable from those of the ITC.

Thus, despite the existence of clear law on the need to abide by final court judgments during the pendency of an appeal, the Commerce Department filed numerous memoranda with the CIT setting forth reasons why it believes that it need not proceed with investigations where the ITC appealed the CIT’s decision.36 Although the Commerce Department does not argue that the Commission’s revised injury determination based upon the direction of the Court is

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34 19 U.S.C. §§ 1671(b), 1673(b) (1982).
35 Nixon v. Richey, 513 F.2d 430, 438 n.75 (D.C. Cir. 1975) (citations omitted).
36 See, e.g., Memorandum in Support of Defendant’s Motion for Summary Judgment or, Alternatively, to Dismiss this Action for Lack of Jurisdiction or Failure to State a Claim for Which Relief Can be Granted, Jeannette Sheet Glass Corp. v. United States (No. 85-10 01485); Defendant’s Reply to Plaintiff’s Response to Motion to Affirm Agency Determination, Bingham & Taylor Div., Virginia Industries, Inc. v. United States (No. 85-07-00909).
invalid, it does suggest that the Department should not be required to reinitiate its investigation because the CIT's decision is not a final determination.\textsuperscript{37} The Commerce Department relies upon 19 U.S.C. § 1516a(c) and (e), which provides that liquidation of entries must be in accordance with a final court decision in the action, and cites 28 U.S.C. § 2645 and the case of \textit{Melamine Chemicals, Inc. v. United States},\textsuperscript{38} to explain what constitutes a final court decision for purposes of administering the antidumping and countervailing duty law.\textsuperscript{39}

\textbf{A. The CIT Order as a Final Court Decision}

The government's argument that a CIT order affirming a remand determination by the ITC is not a final order is a curious one. If the determination by the CIT is not final, it cannot be appealed to the CAFC. If it is final, the Commerce Department is bound to follow it. The Commerce Department simply cannot have the argument both ways.

Yet these contradictory claims regarding the finality of the ITC's decision are precisely what the Commerce Department has advanced in each of the determinations discussed above. In \textit{Bingham & Taylor}, for example, the U.S. government argued that no final decision by the U.S. Court of International Trade existed and, hence, the Commerce Department need not recommence its investigation.\textsuperscript{40} Subsequently, the government filed an appeal of the CIT's order to the appellate court, citing the CIT decision as a final order. Indeed, if the CIT's order was not a final judgment, then the U.S. government's appeal would be premature and the Federal Circuit would not have had jurisdiction over the case. The government's attempt to treat the final judgment by the CIT as a final court decision for purposes of a court appeal but not for purposes of its effect upon an administrative agency is simply unsupportable.

It is important to note, too, that the defendant in this and all other Title VII cases is the United States, not a specific agency such as the Commerce Department or the ITC. Thus, the Commerce Department's further assertion that the CIT may not order the Commerce Department to take action in appeals from ITC decisions because the Department is not the real party-in-interest\textsuperscript{41} is

\textsuperscript{37} See, e.g., Memorandum in Support of Defendant's Motion for Summary Judgment or, Alternatively, to Dismiss this Action for Lack of Jurisdiction or Failure to State a Claim for Which Relief Can be Granted, Jeannette Sheet Glass Corp. v. United States (No. 85-10-01485); Defendant's Reply to Plaintiff's Response to Motion to Affirm Agency Determination, Bingham & Taylor Div., Virginia Industries, Inc. v. United States (No. 85-07-00909).
\textsuperscript{39} Defendant's Reply to Plaintiff's Response to Motion to Affirm Agency Determination, Bingham & Taylor (No. 85-07-00909) at 15–21.
\textsuperscript{40} Id.
\textsuperscript{41} See, e.g., Defendant's Reply to Plaintiff's Response to Motion to Affirm Agency Determination, Bingham & Taylor (No. 85-07-00909).
incorrect. The Department’s argument is faulty for two reasons. First, the United States and not the ITC is the named defendant in the action, and second, under the U.S. trade laws, the CIT’s judgment is clearly applicable to and enforceable against both of these related agencies. Accordingly, an order of the CIT should be binding on the relevant U.S. government agencies and not limited in applicability to one agency or the other.

B. Court Decisions on the Finality of CIT Judgments

The Court of International Trade and the Court of Appeals for the Federal Circuit both examined the question of finality of determinations issued by the CIT in several cases. The following discussion of each of the major cases on finality of CIT judgments indicates, however, that neither court has yet established firm procedures to be followed at the agency level when appeals of CIT judgments are pending. An analysis of the facts and circumstances underlying the various court opinions on finality reveals that despite the apparent inconsistencies reflected in the various decisions, certain key principles have emerged by which courts may anticipate how agencies will treat CIT judgments pending resolution of the appeal.

1. Melamine Chemicals

The government relied heavily on the Melamine case to support its finality argument. Melamine arose as an appeal from a final negative determination by the Commerce Department in an antidumping investigation of imports from the Netherlands. The Commerce Department originally had issued a final affirmative determination but then amended that determination and published a negative determination. The Court of International Trade held that the Commerce Department’s interpretation of a key regulation at issue was contrary to the statute and remanded the action to the agency. The court also ordered the agency to rescind its amended (and negative) determination that had been based on the challenge to the regulation.

The Court of International Trade stayed the remand proceeding pending appeal of the CIT’s decision to the Court of Appeals for the Federal Circuit. Ultimately, the CAFC reversed the holding of the Court of International Trade and affirmed the legality of the agency’s application of the regulation at issue.

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47 Id.
48 732 F.2d 924 (Fed. Cir. 1984).
Thus, in *Melamine*, unlike the *Armstrong, Jeannette and Bingham & Taylor* cases discussed above, the agency action was stayed pending appeal.\(^{49}\) Moreover, in *Melamine* the Court of International Trade did not issue a final judgment concerning the litigation. Finally, the *Melamine* decision dealt with a final Commerce Department determination, whereas *Armstrong, Jeannette*, and *Bingham & Taylor* each involved reversal of an ITC preliminary determination.

Unlike *Melamine*, in which the agencies had completed their investigations entitling the prevailing parties to an order, the cases involving an ITC preliminary determination entitled the petitioners only to an investigation. As the House Ways and Means Committee noted, “no irrevocable harm occurs to any party until after the agencies have completed their investigations . . . .”\(^{50}\) The Court of International Trade has quite properly refused to stay preliminary investigations pending appeal because the damage to the domestic industry is greater than the burden on the agency and foreign parties.\(^{51}\)

A major concern of the *Melamine* court in connection with the CIT’s decision was the potential “yo-yo effect” on liquidations that the proposed action would entail.\(^{52}\) This concern appeared to relate specifically to the unusual fact pattern presented in *Melamine*. Given the statutory scheme for dumping and subsidy investigations and cases, however, the *Melamine* court appears unduly concerned with the potential yo-yo effect. A yo-yo effect, whereby a decision may change over the course of an investigation and a court appeal several times and affect the liquidation of entries, is the natural consequence of the unfair trade statutory scheme. A preliminary affirmative determination by the Commerce Department triggers the suspension of liquidation of the relevant imports; a final negative determination by the Commerce Department or the ITC dissolves that liquidation. Reversal of either the Commerce Department or ITC decision by the Court of International Trade, followed by issuance of an order, once again requires the suspension of liquidation.

The potential for a yo-yo effect is therefore plain in the procedural scheme that Congress devised. There is no indication that Congress sought to avoid

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\(^{49}\) Indeed, it is the authors’ belief that the reason the government did not seek a stay pending appeal in *Armstrong, Jeannette Sheet Glass*, and *Bingham & Taylor* is precisely because it realized that it would be unable to satisfy the requirements to obtain a stay in such circumstances.


\(^{51}\) See *American Grape Growers Alliance for Fair Trade v. United States*, No. 85-104, slip op. at 7 (Ct. Int’l Trade Oct. 7, 1985); *Armstrong Rubber Co. v. United States*, No. 85-109, slip op. (Ct. Int’l Trade Oct. 18, 1985). Because the CIT had also rescinded the agency’s final negative determination in *Melamine*, the CAFC felt it necessary to address the CIT’s “rescission.” The CAFC was concerned about the legality of the CIT’s interlocutory order concerning liquidation of entries. 732 F.2d at 934 (Fed. Cir. 1984). The CIT’s decision contemplated a remand proceeding in due course followed by final action by the court.

\(^{52}\) See *American Grape Growers*, No. 85-104, slip op. at 7.
this changing status. Congress was well aware that injunctions were available in extraordinary circumstances to maintain the status quo.

Thus, Congress clearly contemplated that in each of these instances the most recent decision would govern, whether that decision was reached by a court or by an agency. Only the issuance of a temporary injunction would alter this principle and result in maintenance of the status quo. There is no reason that the mere appeal of the CIT's decision to the Federal Circuit should, in and of itself, dispense with the basic principles that the last decision should govern, or that a stay should be obtained to preserve the status quo. The appellate court's preoccupation with the potential for varying court decisions seems inconsistent with the very scheme Congress devised.

Accordingly, Melamine does not claim, and should not be interpreted, to alter the ordinary federal rule that final judgment by a district court is entitled to full effect during the pendency of an appeal and is not subject to collateral attack or disregard, absent the grant of a stay. To the extent Melamine is interpreted in this broad way, it is incorrect.

2. American Grape Growers

The CIT's ruling in the American Grape Growers Alliance for Fair Trade v. United States,53 which the CIT issued after Melamine, provides the clearest holding by the court concerning the actions taken following a final determination by the court that is later appealed. In the American Grape Growers case, the ITC attempted to avoid making a redetermination pursuant to the court's order because the ITC had filed an appeal of the decision. The court refused to accept the restrictive reading of "final court decision" in the statute that the U.S. government relied upon. The court specifically rejected the government's assertion that 28 U.S.C. § 2645 indicates that the CIT's judgment is not final where an appeal to the CAFC has been filed. The court held that the pendency of an appeal has no bearing on enforcement of a judgment absent receiving a stay of that judgment.54 The Court noted that, under the government's interpretation of the statute, "[t]he taking of an appeal would operate as an automatic stay, rendering all rules on the subject of stays unnecessary."55 The Court further

54 Id. at 297.
55 Id. Interestingly, the CAFC has recently ruled that an agency appeal of a CIT remand order—prior to conducting the remand—is premature. Badger-Powhatan v. United States, 808 F.2d 823 (Fed. Cir. 1986). Under Badger-Powhatan, the agency would have to conduct the remand and receive CIT approval of the results prior to an appeal to the CAFC. Id. at 825. Accord, Cabot Corp. v. United States, 788 F.2d 1539 (Fed. Cir. 1986). Thus, the CIT remand order is not final/appealable; only the approved results of the remand are appealable. Badger and Cabot plainly require the agency to act upon a remand order, and the results of the remand determination are as valid and binding as the first determination. If an ITC determination triggers action by the Commerce Department, then there should be no distinction between a "regular" ITC determination and a remand determination.
admonished the government for attempting to evade enforcement of its final decision, noting that "[i]f anything, the government should set an example for obedience to judgments of the Court." 56

Thus, while the American Grape Growers holding did not discuss the Commerce Department's responsibility to continue its investigation following the reversal of an ITC negative determination, it made clear that the government may not avoid enforcement of a CIT decision that has been appealed, but where no stay has been granted.

3. Roses Inc. v. United States

Interestingly, in the case of Roses Inc. v. United States, 57 the Commerce Department took a different approach regarding whether a CIT decision had to be followed absent a stay pending appeal. In Roses, the Court of International Trade rejected the Commerce Department's standard for initiation of dumping investigations. 58 Following the CIT's decision, the Commerce Department filed an appeal with the Federal Circuit. 59 Because the Commerce Department recognizes that the CIT's order to initiate the investigation would cause the administrative process to continue notwithstanding its appeal, the Commerce Department sought a stay from the Federal Circuit. The Federal Circuit granted the Commerce Department's motion for a stay in all respects. Thus, in Roses, the Commerce Department recognized that the judgment of the Court of International Trade must control absent a stay pending appeal. Although the Roses decision was issued prior to Melamine, the Roses approach is still good law.

4. Badger-Powhatan

In Badger-Powhatan, Div. of Figgie Int'l Inc. v. United States, 60 the CIT rejected the Commerce Department's contention that the intervenors' appeal in that case prevented the Commerce Department from implementing the latest final determination and antidumping duty order until the CAFC had ruled on the matter. The court's decision disclaimed addressing the issue of whether or not the decision reached by the CIT may be considered a controlling final court decision. The court expressed doubt that Melamine applies to the entire entry process 61 and found that the most recent determination must govern the

58 Id., interpreting 19 U.S.C. § 1673 (1982). By rejecting the initiation standard, the CIT reversed the Department's decision not to proceed.
59 United States v. Roses, Inc., Appeal No. 82-27.
61 Id. at 346.
amount of deposits to be made while the appeal is pending, unless a stay of the judgment is granted under CIT Rule 62 or otherwise.62

5. Summary

Both Badger-Powhatan and Melamine involved appeals of final Commerce Department determinations. Neither case dealt with a preliminary negative determination by the ITC (or even the Commerce Department) that had the effect of terminating an otherwise mandatory investigation by the agency. While the case law fails to dictate firm procedures to be followed when appeals are pending, there exist several principles followed by the CIT and CAFC which prohibit an agency from "inferring" the existence of a stay where none has been granted. Those principles are as follows:

(1) An appeal of a CIT remand order does not absolve the agency from actually conducting a redetermination on remand. There is no automatic stay.63

(2) A CIT remand order is not an appealable action. The remand must be performed and approved by the CIT before it is appealable to the CAFC.64

(3) When an agency believes that the continuation or implementation of a determination may result in irreparable harm, the agency may seek a stay of its effect from the court exercising jurisdiction over the appeal.65

One further case identifying the court's expectations as to agency actions following remand is significant. In Freeport Minerals Co. v. United States66 the Federal Circuit rejected an argument advanced by the intervenor that the agency's actions on remand were solely governed by the court's authority rather than the statutory mandates and deadlines set forth for agency action. The CAFC refuted the intervenor's assertion:

This contention—in effect, that the ITA [International Trade Administration] abandons the carefully wrought statutory scheme of the antidumping law once it returns to [a] case on remand . . . flies in the face of Congress' detailed and painstaking efforts to create a procedurally precise and substantively valid avenue of relief for domestic producers confronting unfairly traded (dumped) imports. Certainly neither ITA nor the courts are free to abandon the statutory framework when a case is remanded.67

The Freeport Minerals court made clear that when it remanded an action to the agency, it expected the agency to continue to follow the statutory deadlines to

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62 Id. at 347.
64 Badger-Powhatan, 808 F.2d at 825.
65 Id.
66 758 F.2d 629 (Fed. Cir. 1985).
67 Id. at 636.
which it was subject, and that the court appeal did not eliminate those statutory deadlines. This basic principle should also govern the Commerce Department's actions following the issuance of an affirmative ITC preliminary determination on remand and bar the inference of an automatic stay in such circumstances.

V. POLICY CONSIDERATIONS

In addition to the illogic of failing to investigate following a decision by the CIT, and the violation of the statutory scheme and judicial holdings with respect to the agency's obligations following a final CIT decision, there are compelling policy reasons why the Commerce Department should recommence investigations following a reversal of a preliminary ITC negative determination. If the Department investigates only after a petitioner prevails at the CAFC, relief to the domestic industry will be severely delayed in a manner inconsistent with congressional intent. Congress was very concerned with delay in the resolution of judicial proceedings, as the following excerpt from the Senate Finance Committee Report on the Trade Agreements Act of 1979 indicates:

The inclusion of provisions for interlocutory review of administering authority and U.S. International Trade Commission determinations and antidumping and countervailing duty procedures is intended to enable a party to obtain review of administrative determinations at the earliest possible opportunity so as to avoid delay. Any substantial delay can make an ultimate resolution of an issue in a party's favor irrelevant because of the irreversible damage suffered during the interim period.68

In keeping with this policy of expedited reviews, it is the duty of the U.S. government to ensure that its investigations are not unduly delayed. Unfortunately, the Commerce Department's actions in recent cases indicate an attempt to delay rather than expedite resolution of these cases. In addition to the Commerce Department's general position that it need not act while an appeal of a revised ITC decision is pending, the Commerce Department has set forth additional arguments in memoranda submitted to the CIT supporting delay of its investigations which raise serious doubts about the Department's commitment to the congressional mandates on expeditious enforcement of the unfair trade laws.

For example, the Department asserted that the plaintiffs may not bring an action to compel the Department to recommence its investigation, following publication of the ITC's revised affirmative injury determination, until the deadline for the Department's preliminary determination has passed. Thus, in the *Jeannette Sheet Glass* case, where (1) the plaintiff had been orally informed by a responsible official of the Commerce Department that no action would be taken on the case, (2) the relevant product had been removed from the Department's internal list of products under investigation, and (3) the agency had failed to send questionnaires to the foreign producers as it must in order to perform its preliminary investigation, the Department insisted on appeal that plaintiff must wait two additional months—until the due date of the preliminary determination passed—before it could be considered aggrieved by agency action.69

Such a position is not only disingenuous but is directly contrary to the agency's duty of upholding congressional intent by not delaying investigations of unfair trade practices. Where the agency is taking no action whatsoever to investigate unfair imports, it is ludicrous to assert that there could be a preliminary determination in the near future. In addition, as expected, the Department never issued a preliminary determination in *Jeannette Sheet Glass* or in the other cases reviewed. The Commerce Department's attempt to avoid its statutory responsibility to reinitiate its investigation, coupled with its argument that plaintiffs cannot prove that they are aggrieved by the agency's nonaction until the preliminary determination deadline has come and gone, represents a plain abdication of the agency's responsibility.

The government has also asserted that if an action to contest the Commerce Department's determination is not commenced within thirty days from the date that determination is published, or within thirty days of the date the court enters judgment, the CIT does not have jurisdiction to review the Department's failure to investigate.70 Both of these proposed periods for filing an action are absurd because plaintiff will not know at the times identified by the Department whether the Department will reinitiate its investigation. The government's position—refusing to inform plaintiffs officially whether it will perform its investigation and issue a preliminary determination, while at the same time insisting that plaintiffs file an appeal within thirty days of the court's order—places plaintiffs in an unwinnable position, with no recourse to address final agency action. The government's position is inconsistent with Congress' intent that final agency actions be subject to judicial review and is inexcusable coming from an


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VI. CONCLUSION

In sum, sound policy and congressional intent require the Commerce Department to recommence its investigation once the Court of International Trade overturns an ITC negative preliminary determination.\footnote{72}{As a historical note, the original judicial review provisions of Title VII, as contained in the Trade Agreements Act of 1979, permitted an appeal following a preliminary affirmative ITC decision. (The Trade and Tariff Act of 1984 eliminated such "interlocutory" appeals of actions which do not terminate an investigation.) Under the original statute, an appeal of an affirmative preliminary ITC finding did not stop the parallel Commerce Department investigation pending resolution of the appeal. Why, then, should an appeal of an ITC affirmative preliminary determination reached after remand stall the parallel Commerce Department action? The relative postures of the cases are identical; there is a standing ITC preliminary affirmative finding, triggering a Commerce Department investigation, and there is an appeal. In both cases, the Commerce Department should begin its investigation regardless of the appeal.
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The government's responsibility in these matters was best summed up in President Abraham Lincoln's First Message to Congress, which was cited by Judge Watson of the Court of International Trade in the \textit{American Grape Growers} case: "It is as much the duty of government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals."\footnote{73}{622 F. Supp. at 298.
}

The Commerce Department's failure to abide by the final decisions of the Court of International Trade breeds disrespect for the unfair trade laws and for the CIT. It should not be necessary for Congress to legislate on this issue. The CIT should reassert itself to ensure that its judgments are given the appropriate regard.