

CHAPTER 19

COURT RECORDS AND LITIGATION

I. PREPARATION OF COURT RECORDS 1
 A. Introduction 1
 B. Responsibility for Preparation of the Record 1
 C. Compiling the Documents 2
 D. Organizing and Indexing 3
 E. Amending the Record 5

II. BRIEFS 6

III. REMANDS 6
 A. Introduction 6
 B. Remand Proceeding 7

IV. SETTLEMENTS 9

V. INJUNCTIONS 10

LIST OF ACRONYMS & ABBREVIATIONS

AD	ANTIDUMPING
AS	ASSISTANT SECRETARY
CCIA	CHIEF COUNSEL FOR IMPORT ADMINISTRATION
CFR	CODE OF FEDERAL REGULATIONS
CIT	COURT OF INTERNATIONAL TRADE
CRIMS	CENTRAL RECORDS INFORMATION MANAGEMENT SYSTEM
CRU	CENTRAL RECORDS UNIT
CVD	COUNTERVAILING DUTY
DAS	DEPUTY ASSISTANT SECRETARY
DOC	DEPARTMENT OF COMMERCE
FR	FEDERAL REGISTER
GATT	GENERAL AGREEMENT ON TARIFFS AND TRADE
ICA	IMPORT COMPLIANCE ASSISTANT
ITA	INTERNATIONAL TRADE ADMINISTRATION
ITC	INTERNATIONAL TRADE COMMISSION
OD	OFFICE DIRECTOR
PM	PROGRAM MANAGER

COURT RECORDS AND LITIGATION

SAA

STATEMENT OF ADMINISTRATIVE ACTION

ANTIDUMPING
AGREEMENT

AGREEMENT ON INTERPRETATION OF ARTICLE VI
OF THE GATT

THE ACT

THE ANTIDUMPING ACT OF 1930, AS AMENDED

COURT RECORDS AND LITIGATION

References:

The Tariff Act of 1930, as amended (the Act)
Section 516A - judicial review in antidumping
duty proceedings
Department of Commerce (DOC) Regulations
None
SAA
None
Antidumping Agreement
Article 13 - judicial review
North American Free Trade Agreement
Section 1904.14

I. PREPARATION OF COURT RECORDS

A. Introduction

Unless otherwise stipulated by the parties, when determinations are challenged in court, a complete administrative record must be filed with the Court. As explained in the preceding guidelines on keeping the administrative record, the record should be maintained from the beginning of the administrative proceeding. If the record has been diligently maintained, compilation for the Court should be simple. These guidelines address the final steps to be taken to gather all documents necessary to complete the record and file it with the Court.

B. Responsibility for Preparation of the Record

The case analyst, as the person most familiar with the administrative proceeding, is responsible for preparation of the record, and must provide the required attestation to the Court that the record is complete. Chapter 2 describes the record and the analyst's responsibility to maintain it. The analyst or import compliance assistant (ICA) will maintain the record on a regular on-going basis during the course of the investigation or **administrative review**. This will facilitate the preparation of the court record should a final determination, review, or scope proceeding be challenged in the Court. The analyst is required to certify the file for completeness to the office director (OD) following the

COURT RECORDS AND LITIGATION

final determination for an investigation or review and, again, after the International Trade Commission (ITC) injury determination in the case of an investigation.

The case attorney will prepare a certification for the case analyst to sign when a record is filed with the Court. Other team members are to assist the case analyst when needed. The staff attorney assigned to the case is responsible for providing legal guidance, especially concerning the scope of the record and classification of documents. If the case analyst is unavailable at a time when the record must be prepared, the program manager (PM) or supervisor should assign someone to be responsible for preparation of the record.

Records are due to the court within 40 days from the day the complaint is filed which, in most cases, is due no later than 60 days after the order or the final results of review. However, for various reasons many parties file the complaint long before the deadline. It is the responsibility of the Import Administration (IA) office that is involved to see that records are prepared on time. Note, however, that this time limit must include the time necessary for the paralegals in the Office of the Chief Counsel for Import Administration (CCIA) to review the record and, usually, for microfiche copies to be made.

C. Compiling the Documents

After the administrative proceeding, the CCIA will notify the case analyst when 1) a lawsuit has been filed, 2) assistance is necessary for the court brief, or 3) it receives a court decision (see Attachment 19-1). When notified that a lawsuit has been filed, the case analyst should do the following:

1. Check with other team members and offices in the delegation chain to be sure all documents received or generated by these offices have been included. If requested, the case attorney will draft a memorandum to be sent by the case analyst to canvass other offices for documents relating to the proceeding that may not have made their way to the Central Records Unit (CRU) (see Attachment 19-2 for a list of documents contained in most records).
2. Check the appropriate segment of the official file out of CRU and request a copy of the CRIMS index for that segment.

COURT RECORDS AND LITIGATION

3. Check to be sure all documents collected by or received from International Trade Administration (ITA) employees overseas have been included. If the analyst does not receive a request to prepare the file for the court from the CCIA, you should check with the case attorney shortly after the expiration of the period for filing a lawsuit (typically 30 days after an order or final results of review is issued) to ensure that a request has not been made.

D. Organizing and Indexing

The record should be organized and indexed by the case analyst, as he or she is best able to identify documents that are part of the record and to describe them; the case analyst is also most likely to be aware of any documents that might be missing. Once the initial organizing and indexing is done, the paralegals in the CCIA will be available to finalize the index and number the documents, as well as to see to the microfiching, photocopying, assembling, and mailing of the record.

1. The case analyst should:
 - a. Place all documents in chronological order, keeping the public, business proprietary and privileged documents separate, beginning with the oldest document and ending with the most recent in each of the three groups.
 - b. Make all corrections to the CRU index in the form required by CRU. Note that business proprietary and privileged documents are kept separate from the public documents, and are sent to the court in separate, sealed, marked envelopes. Privileged documents should be identified early so that privilege claims can be cleared through the Under Secretary for International Trade and approved by the Department of Justice. There usually are very few and, most often, no privileged documents are in a record.
 - c. Meet with the case attorney to determine whether changes are necessary in the contents of the record or classification of documents.

COURT RECORDS AND LITIGATION

- d. Check to be sure that all business proprietary or privileged documents are marked as such on their face and are properly designated in the index.
 - e. Take the corrected final index to CRU where the correction will be made and a final index will be printed.
 - f. After checking with the CCIA Paralegal Office that there is room to store the record, bring the final corrected CRU index and the documents to the CCIA Paralegal Office.
2. The paralegals will then:
- a. Number documents: Begin with the oldest document as number 1. Place the number in the bottom right hand corner of the first page of each document.
 - b. If a record is to be microfiched, the microfiche contractor will place the page numbers on the index. If a record is to be photocopied, the paralegal will place the page numbers in the index as the documents are numbered.
 - c. Three copies must be made of the complete record: one for the Court of International Trade (CIT), one for the CCIA, and one for the Department of Justice. CRU maintains the original paper document after photocopying or microfiching. The paralegal will order microfiche copies of the record for parties who want them and agree to pay for the copies. At least two weeks before the record is due, the record, along with a requisition form appropriately signed, will be sent to the microfiche contractor.
 - d. When the copies or microfiche cards are returned, they are assembled for mailing to the Court; the public documents are separated from the business proprietary documents. Business proprietary and privileged documents are placed in separate, sealed envelopes and marked accordingly. Privileged documents are sent to the CIT separately with a declaration of privilege by the Under Secretary for International Trade.

COURT RECORDS AND LITIGATION

- e. The complete package for mailing includes:
 - i. all public documents or microfiche cards of public documents.
 - ii. a separate, sealed envelope of business proprietary documents or business proprietary cards and a separate, sealed envelope of privileged or government classified documents and tapes.
 - iii. the case analyst's certification that the record is complete (see Attachment 19-3
 - iv. the transmittal letter (prepared by the case attorney).
- f. The record package, along with mailing labels, goes to the mail room for mailing by 10:30 A.M. on the date due (prepared by the CCIA attorney). Mailing must be by certified, return receipt requested. To be post marked on a certain day, the record must be mailed by midnight from a U.S. post office.

E. Amending the Record

If documents were inadvertently omitted from the record which has been filed with the Court, you should notify your case attorney, who will:

1. Follow the same procedure used to compile the original record: number the pages, add a description of the document to the index, and make copies. Be sure that the document and the index show any business proprietary or privilege classification.
2. Prepare another certification, explaining the reason for the amendment, for the case analyst to sign.

COURT RECORDS AND LITIGATION

3. Send the complete package (new documents, complete copy of the index as amended (marked "amended on date"), new certification, and transmittal letter) to the Court, and notify parties that the record has been amended.

II. BRIEFS

When the CCIA receives a brief challenging a determination of the ITA, it will notify the appropriate office with a brief notification form (see Attachment 19-1). The form will indicate the date that the DOC's brief is due and will highlight the issues on which Chief Counsel believes it will need assistance from ITA. Unless this request is received directly from your supervisor or PM, you should immediately advise this individual that you have received a request. The supervisor or PM and the analyst should also immediately work out a schedule for completion of the work with the case attorney and any other IA officials that are involved. This schedule should allow for the final brief to be reviewed through the DAS level before it is sent to the Justice Department.

III. REMANDS

A. Introduction

When a court (in antidumping and countervailing duty cases, it is the CIT in New York City) decides that something the agency determined was wrong, it remands the case back to the agency to correct the error and issue a new determination. These errors can be ones of fact (a factual determination by ITA that is not supported by substantial evidence in the record) or errors of law (ITA's determination is not in accordance with law). A remand is a "mini" investigation or "mini" 751 review. The agency opens the administrative process, including, in some cases, opening the record, and makes a new determination consistent with the Court's decision. The new determination is published in the Federal Register (FR) after it is approved by the Court. A remand is an order from the court to the operational offices of the agency, not to the Justice Department or DOC lawyers.

COURT RECORDS AND LITIGATION**B. Remand Proceeding**

When the CCIA receives a court decision and remand, it will forward the decision to the director of the appropriate office along with a copy of the court report form (see Attachment 19-1). This notice will provide the due date for the remand results to be sent to the Court, a summary of the issue or issues being remanded and the name of the Chief Counsel attorney assigned to the case. The PM or supervisor should immediately assign an analyst to the remand (preferably the original analyst on the case). Once the analyst is assigned, he or she should immediately set up a meeting with the case attorney, the Office of Policy person, and, if appropriate, an Office of Accounting accountant assigned to the case in order to discuss the procedures, time limits and plan of action for the remand. If the analyst is advised of the remand by anyone other than his or her supervisor or PM, he or she should immediately advise the supervisor or PM as he or she should be part of the meeting that sets the plan of action for the remand. The completion date for the remand should, in most instances, allow enough time to circulate the draft remand to the parties to the lawsuit for comments prior to finalizing it. There must also be sufficient time for internal review of the draft and final remand results through the assistant secretary's (AS) level.

Every remand procedure is not the same. The nature of the error or errors, the type of work required of ITA, the necessity to gather new evidence, and the magnitude of the change in policy all influence what type of remand procedure should be followed. For example, if the Court determines that ITA should have used respondent's advertising adjustment of 2% instead of the DOC's reallocated figure of 1%, then the remand is a simple mathematical calculation which should be able to be completed without adding new evidence to the record. ITA will simply have to release its new calculations for comments from the parties so that it is sure there are no ministerial errors in the final remand results it submits to the Court. However, if the Court determines that ITA's reasons for allowing a 1% advertising adjustment are not in accordance with law, it orders the ITA, on remand, to choose a different figure and explain it. If this is the case, then new evidence may be required and ITA will have to write up a detailed final remand after gathering comments from the parties on ITA's draft remand results. These comments, complete explanation, and any new evidence gathered will create a complete record for the Court to review. A more complex remand where the ITA is ordered to develop a new theory or methodology requires a more complete proceeding than a remand where ITA

COURT RECORDS AND LITIGATION

does not have to make a new decision but only has to do a calculation. The more complete remand proceeding is usually required because the Court seldom simply orders the DOC to use a particular number.

If a complete remand proceeding is needed, the following procedures should be followed:

- o Send out questionnaires if new information is needed.
- o Even if new information is not needed, requests may be made of the parties to submit comments before ITA proceeds with the remand if ITA believes this would be helpful. (This step is often used when the remand order by the Court is unclear or when what the Court has ordered is a complete change from past practice. Often in these cases, comments from the parties assist the ITA in focusing its options and in anticipating the reactions from the parties.)
- o Draft notice of remand results. This should look somewhat like a FR notice. It should give the history of the case, what the CIT ordered, what ITA has done to comply with the remand, why what ITA has done is correct, and what the new final results are as a result of the remand. This notice goes through the concurrence chain to the AS level, but it does not get signed by the AS nor is it published.
- o Send a copy of the draft remand results (including any calculations) to all parties and give them a limited time to comment (two to seven days, but it could be longer or shorter depending on the total time the Court gave for completing the remand).
- o Consider the comments and make any changes to the draft remand results as a result of those comments. Add a section to the draft results called comments, and summarize the comments and write answers. The “draft results” are now the “final results”.
- o Make a copy of the final remand results, add a concurrence sheet and send it through the concurrence chain as you would any final determination. The notice will be signed by the AS.

COURT RECORDS AND LITIGATION

- o While the package is in the review chain, convene a calculation review panel to review the calculation changes.
- o Prepare the record of the final remand results, an index and a certification. Send this to the Court soon after (within a week of) the final remand results.

In very simple calculation remands, the recalculations should be done and written up in a draft notice of final remand results. After clearing the draft with the AS's office, notify the parties and allow them to review the calculations for errors. Make any corrections, and correct the notice and work sheets. The final remand results notice should be signed by the AS and sent to the Court along with the record (often just the calculation sheet or new computer printout).

The Court will either approve the remand results or remand them to the ITA again. When the remand results are approved and become final (after 60 days if no appeal is filed), ITA must publish the new results in the FR. In certain cases, we may be sued again on these published results.

IV. SETTLEMENTS

Lawsuits in some cases may be settled. This can only be done with the agreement of the Department of Justice and with the recommendation of the CCIA. If a settlement offer is made in a lawsuit involving an antidumping or countervailing duty case, the case attorney will notify the appropriate office and involve them in the negotiations. Advise your supervisor or PM about these negotiations immediately if they are not the ones to advise you about them. A settlement agreement will not be made without the approval of the AS for IA.

COURT RECORDS AND LITIGATION**V. INJUNCTIONS**

At various points during the life of an antidumping or countervailing duty order ITA must order Customs to liquidate entries and instruct them on the proper amount of antidumping or countervailing duties to collect. All parties to ITA's proceedings, (e.g. the domestic industry, the foreign producer, the U.S. Importer) have a right to file a suite in court to challenge the correctness of ITA's determinations which result in the ordering of liquidation. Along with this suite the party challenging ITA can also ask the court to issue an injunction ordering ITA and Customs not to liquidate the entries subject to the challenged determination until the court either corrects the ITA calculations or determine that ITA was correct. When the court issues its final decision, the injunction lifts and, if ITA was upheld, it can order Customs to collect duties. If ITA's rate was changed by the court decision then ITA must publish a Federal Register Notice (Timken Notice) and wait until after any appeals before ordering liquidation at the rate approved by the court. Because of possible injunction, no orders to Customs to liquidate entries should ever be issued until the CCIA attorney assigned to the case tells you that there are no injunctions on the particular entries. Injunctions can be placed on entries after a final in an investigation and can prevent automatic liquidation at the deposit rate so always check for injunction almost never prevent the collection of the cash deposits. Send instructions to Customs to change or begin collecting the cash deposit rate as soon as you issue your final determination without waiting to see if a party files suite on the determination.

COURT RECORDS AND LITIGATION**Attachment 19-1****CCIA Notification Forms**

An explanation of the CCIA's notification forms follows. These forms notify IA of court decisions, of actions that we have to take in response to court orders (remands, order liquidation, etc.), of administrative records that must be prepared for filing with the Court and of court briefs which require our input and approval.

You will notice that the new forms circulate all litigation information to the DAS group level. This is being done so that all substantive litigation information and deadlines can be circulated from the group level down to all levels of the office with the result that the DASs can manage the workloads and assignments of their staffs by having information on the litigation work and deadlines that are being imposed on their offices by the litigation requirements of our work.

The three types of litigation notification forms are:

1. Administrative Record Notification Form

This form is sent to the DAS whose group did the investigation, review, or **scope** determination being challenged in the Court. The form is sent as soon as the CCIA receives notice of a suit (by either a summons or a summons and complaint filed together). Work must begin immediately even if only a summons is filed. If we wait until a complaint is filed, the allowable 45 days from filing (a complaint may be filed any time up to 30 days after a party files its summons) is never enough time to compile, copy and file a record. This form will be printed on green paper so that it will stand out from other paper work. So that the CCIA will know the names of the assigned analysts to contact about a record, the receipt attached to the record notification form should be filled in, folded with the return address showing, stapled, and returned to CCIA by the analyst or supervisor or PM who is assigned the record compilation task.

COURT RECORDS AND LITIGATION

2. Court Brief Assistance Request Form

When the CCIA receives a brief from a party challenging an IA determination, it will forward a copy of the brief to the DAS whose group issued the determination. Copies of the brief should be forwarded by the DAS to the analysts and supervisors or PMs who did the work on the challenged determination and who will have the responsibility for giving guidance on and approving the final DOC response brief.

3. Report Of Court Decision Form

When the CCIA receives the Court's decision, order, slip. op., and/or judgement, it reports and distributes the Court decisions and orders to IA using a four-part form. Page 1 of the form is a cover memo which distributes the court opinion to the AS, all DASs, the Director for Policy and Analysis, the Office of Accounting, and to each of the nine ODs. Because of the mix of cases in each group, each DAS usually requires that all ODs setup a system for distributing and tracking all court opinions on all cases so that all analysts and managers are aware of the current state of the law.

Page 2 is a cover memo which is printed on green paper and which notifies the specific DAS, OD, supervisor or PM, and analyst that a case has been remanded to them for action or has been finalized and requires a corrected publication of a notice and liquidation instructions. Four copies of the Court decision form covered by the green memo will be sent to you at the DAS group level. Once the analysts and supervisor or PM receive this copy they should follow any specific directions typed on this green cover memo and any general directions on page 3 of the form.

Page 3 gives the general information about what type of decision has been issued and what IA action is now required. This information is of particular interest to the DAS group staff who receive the green action cover memo described in the paragraph above and to anyone in the DAS's office who is tracking deadlines, remands or other litigation actions.

COURT RECORDS AND LITIGATION

Page 4 is the summary of the issues decided by the Court. This page will be updated in court decision notices of later decisions on remands of the same case. It will finally be distributed on green paper when the issues have become final and conclusive due to no appeal of a final court decision or because the Appeals Court has issued a final decision on the issue. You should set up a system to save and track tentative (white) and final (green) issues pages for use by your office.

COURT RECORDS AND LITIGATION

Attachment 19-2

List of Documents for the Administrative Record

I. INVESTIGATIONS

A. Documents that Are Always Part of the Record of an Investigation

1. Petition
2. Memo recommending initiation and signed FR notice
3. Published FR notice of initiation
4. Cables to embassies notifying of initiation
5. Questionnaires
6. Responses (public and business proprietary versions)
7. Any “Applications for Disclosure under **Administrative protective order**” and the administrative protective orders
8. Memo recommending preliminary determination and signed FR notice
9. Published FR notice of preliminary determination
10. E-mails to Customs advising of preliminary determination
11. Memos and calculations, if any, for consideration of ministerial error claims
12. Preliminary ITC injury determination
13. Records of any ex-parte meetings

COURT RECORDS AND LITIGATION

14. **Verification** documents (exhibits and reports)
15. Any requests for hearings, pre-hearing briefs, rebuttal briefs, transcript of hearings, or supplemental submissions
16. Memo recommending final determination (or **termination** of investigation or suspension of investigation) and signed FR notice
17. Published FR notice of final determination (or termination of investigation or suspension of investigation)
18. Memos and calculations, if any, for ministerial error claims

B. Documents that Are Part of the Record of an Investigation if They Exist

1. All incoming and outgoing correspondence relating to the proceeding
2. Memos to the file regarding telephone conversations and meetings
3. Inter and intra-agency memoranda relating to the proceeding
4. Interested party and party to the proceeding lists
5. Excerpts from publications relied upon
6. Cables containing information obtained from overseas
7. Signed suspension agreement
8. All memos and FR notices relating to the proceeding (postponements, extensions, corrections, extraordinarily complicated determinations)

COURT RECORDS AND LITIGATION**C. Documents that May be Included in a Record of an Investigation in Some Cases - Consult Your Staff Attorney**

1. Letter notifying DOC of ITC final injury determination
2. Memo recommending antidumping duty order and signed FR notice of order
3. Published FR notice of order

II. REVIEWS**A. Documents that Are Always Part of the Record of an Administrative Review**

1. FR notice of “Opportunity to Request Administrative review”
2. Letters requesting a review
3. Notice of initiation of review
4. Written request for information for review (questionnaire)
5. Responses to questionnaires (public and business proprietary versions)
6. Any “Applications for Disclosure under Administrative protective order”, and the administrative protective orders
7. Signed FR notice of preliminary results
8. Published FR notice of preliminary results
9. Any requests for hearings, pre-hearing briefs, rebuttal briefs, or transcripts of hearings
10. Records of any ex-parte meetings

COURT RECORDS AND LITIGATION

11. Signed FR notice of final results of administrative review
12. Published FR notice of final results

B. Documents that Are Part of the Record of an Administrative Review

1. All incoming and outgoing correspondence relating to the particular segment of the proceeding
2. Memos to the file regarding telephone conversations and meetings
3. Inter-agency and intra-agency memoranda relating to the particular segment of the proceeding
4. Interested party and party to the proceeding lists
5. Excerpts from publications relied upon
6. Cables containing information obtained overseas
7. Verification documents (exhibits and reports)
8. Application for **revocation** and signed assurance letter

COURT RECORDS AND LITIGATION

Attachment 19-3

Analyst's Certification that Record Is Complete

UNITED STATES COURT OF INTERNATIONAL TRADE

-----:

: XXXXXXXXXXX & _____, Inc.

:
Plaintiff, :

:
V. : COURT NO.
: 00-0-00001

UNITED STATES, :

:
Defendant. :

AFFIDAVIT OF XXXXXXXXXXXXXXXXXXXX

1. I, XXXXXXXXXXXXXXXXXXXX, Import Compliance Specialist or Financial Analyst, Department of Commerce, do hereby certify that I have legal custody and control of all documents constituting the administrative record of the investigation of XXXXX from XXXXX, which is the subject of the above captioned case. The notice of final determination of sales at less than fair value was published in the Federal Register on XXXXX (XX Fed. Reg. XXXX).
2. To the best of my knowledge, I have included in this record all documents relating to this investigation presented to or obtained by the Secretary of Commerce and his delegates.
3. Pursuant to Rule 71 of the United States Court of International Trade, I have prepared and hereby transmit to the Clerk of the Court a true and complete copy of this administrative record, which is attached to this affidavit.
4. The attached index is a complete list of the documents in this administrative record.

COURT RECORDS AND LITIGATION

I affirm, under the penalties of perjury, that the foregoing is true and correct.

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
Import Compliance Specialist or Financial Analyst
Import Administration
Department of Commerce

(Date)