

CHAPTER 16
HEARINGS AND BRIEFS

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References:

- The Tariff Act of 1930, as amended (the Act)
 - Section 774 - hearings for investigations
- Department of Commerce (DOC) Regulations
 - 19 CFR 351.309 - briefs
 - 19 CFR 351.310 - hearings

I. Introduction

In an investigation or an administrative review, any interested party may submit briefs explaining its positions regarding the information on the record of the particular investigation or review. Interested parties may also request hearings in certain scope and anti-circumvention proceedings. Interested parties may also request a hearing to discuss the arguments contained in the case and rebuttal briefs before the Department of Commerce officials.

II. Briefs and Rebuttals

The Department’s requirements for submitting written argument are set out in 19 CFR 351.309(c). Case briefs may be submitted within 50 days after the preliminary determination in an investigation, or 30 days after the preliminary results in a review, unless we alter this time limit. The case briefs must be submitted to the Department one week prior to any hearing. The rebuttal briefs may be submitted within five days after the time limit for filing the case brief, unless we alter this time limit. As part of their case brief and rebuttal briefs, parties should provide a summary of their arguments not to exceed five pages and a table of authorities. Case briefs must contain all arguments which parties believe are relevant so that the Department has the opportunity to address these issues in the final determination or final results of review. Rebuttal briefs may only address issues raised in the case briefs.

III. Types of Hearings

A. General Hearings

At a general hearing, public information from the case record is discussed. In accordance with 19 CFR 351.310(c), a general hearing is held when requested by an interested party in an investigation or review. Hearing requests must be submitted within 30 days after the date of publication of the preliminary determination or preliminary results, unless the Department alters this time limit. Anyone may attend a public hearing, however only those parties who have submitted a case or rebuttal brief may address Department officials during the hearing.

B. Closed Hearings

A closed hearing is held when it is necessary to discuss business proprietary information from the case record. In accordance with 19 CFR 351.310(f), an interested party may request that a portion of a hearing be closed. This type of request must be made no later than the date when the case briefs are due. The requesting party must identify the subjects to be discussed and the time needed and must justify the request for a closed hearing with respect to each subject.

The analyst should notify the APO Office of any requests for closed hearings to ensure that the appropriate arrangements are made.

C. Consolidated Hearings

In a consolidated hearing, multiple investigations or reviews are discussed. In accordance with 19 CFR 351.310(e), we may consolidate hearings in two or more investigations or reviews. Cases where we are most likely to consolidate hearings are those where common issues exist concerning the same product from different countries or where common issues exist concerning different products from the same country. Note that a consolidated hearing which is “closed” may present special APO issues.

IV. Internal Procedures

A. Pre-hearing Procedures

The analyst or PM should contact interested parties to plan for the hearing. While 19 CFR 351.310(b) states that we may conduct a pre-hearing telephone conference with representatives of interested parties to facilitate the conduct of the hearing, in nearly all cases, in lieu of a more formal pre-hearing conference, brief phone calls between the analyst or PM and counsel for the interested parties are adequate for preparing for and facilitating the conduct of the hearing. Pre-hearing conferences may also be held if deemed appropriate. Matters to be discussed include day and time of the hearing, attendees (e.g., attorneys, outside trade analysts, and company officials), any schedule the Department has in mind (e.g., the amount of time that will be allocated to each party for affirmative and rebuttal arguments, and the allocation of time between

the open and closed portions of the hearing if appropriate), and the issues on which the parties intend to focus. Thus, it is important to have some preliminary dates and schedules in mind before contacting parties. The number of participants in a hearing can be high (analysts, PM, OD, policy, legal, accounting, DAS staff and the DAS, AS staff and the AS, outside counsel and analysts, company officials, foreign embassy officials, or interested members of the public), and reaching a date and schedule that works for all can be difficult and time consuming. The Department attempts to be flexible—hearings do not all have to be structured identically—to accommodate all parties involved, but occasionally a structure has to be set that might not be completely acceptable to everyone.

An issue that often becomes contentious is the allocation of time, especially in situations when there is one petitioner and more than one respondent participating in the hearing. In such a case, each respondent may request an allocation of time equal to that given to the petitioner. However, the petitioner may object because such a structure allocates much more time to respondents en masse than to the petitioner. The petitioner might have to respond to several, separate issues raised by more than one respondent, while the respondents as a group might only have to respond to a single set of issues raised by the petitioner. Sometimes we will resolve such an issue by allocating time to respondents as a group which is somewhat more than the amount of time given to the petitioner, but less time for each individual respondent than we give to the petitioner (e.g., we may give one hour to the petitioner, and an hour and a half to two respondents to be divided into 45 minute portions). Other times, the Department will give the same amount of time to respondents as a group as to the petitioner, and ask the respondents to determine among themselves how the time should be used (e.g., the respondents might divide the issues between themselves so as not to duplicate arguments). Sometimes, one approach is used for one major issue, and the other approach is used for the remaining issues. As stated, we attempt to be flexible, accommodate the concerns of all parties, and choose an appropriate structure on a case-by-case basis. This flexible approach underlies the need to contact the parties early to discuss their concerns.

When setting a hearing date for an investigation, the analyst should consider the following: 1) verification reports should be issued at least one week prior to the due date for the case briefs; 2) hearings usually occur seven to nine days after the submission of briefs; and 3) hearings should usually be conducted no later than 30 days prior to the final determination date.

When scheduling a hearing for an administrative review, the analyst should keep in mind that 1) briefs are due within 30 days of the publication date of the preliminary results, 2) rebuttal briefs are due five days later, 3) as in an investigation, the hearing should be conducted no later than 30 days prior to the final results date, and 4) requests for hearings must be received within 30 days of the publication date of the preliminary FR notice.

Section 774(b) of the Act requires us to publish notice of a hearing in the Federal Register. This provision is satisfied by the Department's practice of announcing a tentative date in the preliminary notice (e.g., "if requested, the Department will hold a hearing approximately 57 days from the publication of this notice") and advising the public to contact the analyst in order to

learn of the exact date of the hearing.

Once a written request for a hearing has been received, the following steps should be followed:

1. Determine the approximate number of attendees so that you can reserve a hearing room of a proper size. Those expected to attend are the analysts, policy and legal team members, supervisor, staff accountant if one is assigned to the case, petitioners' and respondents' counsel, company officials, and other interested persons. If there is any doubt about the number of outside attendees, you should call all participants to determine an approximate number.
2. Closed hearing sessions will be considered business proprietary. All attendees must have APO access to business proprietary information or be authorized to have access to the business proprietary information; otherwise they cannot participate. Closed hearing sessions will not consume the entirety of a hearing. This portion of the hearing will be limited to discrete issues that must be identified by the requesting party and approved by the Department. The requesting party must also specify the amount of time needed to present the issues, and justify the need for a closed session with respect to each issue. See 19 CFR 351.310(f).
3. The analyst's secretary should reserve a conference room as far in advance as possible. The analyst should inform the program secretary of the approximate hearing time and expected duration, number of attendees, and product under investigation or review. Ask him or her to make the necessary arrangements for obtaining the services of a court reporter as well. After the reservation has been made, the analyst should visit the conference room to make sure the room is adequate.
4. If one hour is allowed per party for combined direct and rebuttal arguments, a normal hearing will last from two to four hours. The analyst should always check with the hearing examiner (usually the OD or DAS) to determine how much time can be allotted to each participant.
5. A Lotus Notes meeting invite should be sent to everyone on the team (e.g., PM, Office Director, legal, policy, and DAS).
6. As soon as the case briefs (and later, the rebuttal briefs) are received (typically one week prior to the hearing for case briefs and two days prior to the hearing for rebuttal briefs both in an investigation and a review), business proprietary versions should be distributed to all members of the team and concurrence chain. Check whether the briefs include executive summaries of the issues of no more than five pages and tables of authorities. Section 351.309(c)(2) of the regulations states that in case and rebuttal briefs, "parties are encouraged to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited." (Emphasis added.) However, the analyst may need to prepare summaries if they are not provided. In any case, the analyst should ensure that summaries highlight and adequately address issues discussed in internal Department meetings and issues

of particular interest to the hearing examiner. Briefs should be given to the hearing examiner as part of the “Briefing Book” prepared for the hearing examiner, discussed below.

7. New factual information cannot be submitted as part of the briefs or rebuttals. If the analyst detects new factual information in the briefs and/or rebuttal briefs, he or she should discuss with the PM or supervisor whether it is necessary to return the documents to the submitter in order to have the new information removed.
8. Prior to the hearing, the analyst will prepare a briefing book for use by the examiner. The book should be prepared in a loose-leaf, 3-ring binder with appropriate index tabs. A well-prepared briefing book usually consists of the following:
 - a. “Welcoming and Closing Remarks”;
 - b. Participant list (if part of the hearing will be closed, a separate list of the participants that have APO coverage should be included);
 - c. Summaries of briefs;
 - d. Copies of briefs and rebuttal briefs;
 - e. Initiation and preliminary determination notices;
 - f. Concurrence memos (i.e., memos analyzing relevant issues, such as analysis memos, date of sale memos, etc.);
 - g. Relevant excerpts of verification reports; and,
 - h. Legal authority (such as excerpts from the Act, the regulations, FR notices, and court decisions) under debate (it is not necessary to include legal authority which is not the subject of controversy, or to include passages from FR notices or court cases dealing with matters not at issue in the hearing).

See the sample Briefing Book table of contents in Attachment I.

Confirm with the hearing examiner that the above list meets his or her requirements. Keep in mind that it is important to keep the contents of the briefing book, and your summaries of the briefs, limited to what is important. The hearing examiner, as well as other Department officials attending the hearing, should not have to search through an over-stuffed briefing book to find what is significant. Moreover, the briefing book should be as well indexed as time allows.

9. Ask the program’s secretary to phone the recording service two days before the scheduled hearing to make certain that a reporter has been scheduled and that this person has the correct date, time, and room number, and to ensure that the room is still available.

B. HEARING PROCEDURES

1. If a portion of the hearing will be closed, the analyst must have the reporter sign a confidentiality statement before the hearing starts. A current copy of this statement can be obtained from the APO office.

2. The analyst may want to provide the reporter with a list of participants, a list of frequently used acronyms such as CEP, APO, etc., acronyms relative to the specific case, and any foreign words or names that may be used.
3. During the welcoming remarks, the hearing examiner will apprise the participants of their allotted time, and the rules of the hearing, e.g., that the participants must limit their arguments to what has been briefed, in accordance with 19 CFR 351.310(c). See Attachment II, for sample welcoming and closing remarks for both the public and closed portions of the hearings. The analyst should time each speaker and, when necessary, inform the hearing examiner when the speaker nears the end of his allotted time. The analyst and other team members should also be attentive to ensure that speakers limit their remarks only to issues raised in their briefs. You should advise the hearing examiner if you believe the speaker has introduced issues that have not been briefed. Also advise the hearing examiner if the participants attempt to introduce new factual information either orally or by the submission of exhibits for the transcript record. Generally, we do not accept exhibits which were not made part of the briefs and, therefore, were not properly filed on the record with the CRU.

If an analyst or any other Department official believes that an un-briefed argument or new factual information is being introduced at the hearing, the team member can either interrupt the speaker, or advise the hearing examiner of the concerns. Most often, the party opposing the speaker will state their objections to the line of argument. The examiner will then tell parties, and most importantly the court reporter, that the ensuing discussion will be off the record while the dispute is resolved. If the objection involves the introduction of new arguments, the matter can usually be resolved quickly by reference to the briefs. The examiner will then instruct the speaker whether to proceed with the argument, or to move on to another argument. The examiner will then reopen the hearing record. The examiner will usually explain on the record the reason for the interruption, in general terms so as not to place any prohibited arguments on the record, and state his or her conclusion regarding the objection. No adjustments need to be made to the hearing transcript.

If the objection involves the introduction of new factual information, resolution of the matter can be more complicated. After going off the record, the examiner will ask the speaking party to reference where in the record the factual information exists. If the party can provide a reference, the hearing examiner will allow the speaker to continue, reopen the record, and state for the record the reason for the interruption, the objection, and the conclusion that the speaker can continue. If the party cannot provide a reference, but affirms his belief that the information is on the record, the examiner, at his discretion, may allow the speaker to continue with his argument, with the understanding that shortly after the hearing concludes, the speaker must submit a letter stating where the information can be found in submissions made before the hearing. If the speaker fails to do so, or if the letter is unconvincing (occasionally, the speaker will argue that while not actually on the record, the information is implied by other facts on the record, or synonymous with other facts on the record), the analyst will write a memo to the file informing parties that the contested information will not be considered in reaching the final determination or results of review. The analyst should

wait until the transcript from the court reporter arrives in order to refer to the specific lines in the transcript to be ignored, rather than to the actual information itself. Note that the analyst may also need to do such a memo, if the examiner agrees with the objection, because of any new information that may have been added to the record before going off the record.

Another common concern that arises during a hearing is the inappropriate use of business proprietary information during an open hearing. Such concerns, if they cannot be resolved instantly, are also resolved off the record. If it is determined that business proprietary information was disclosed, the remarks at issue will have to be stricken from the transcript.

4. The public hearing provides an excellent opportunity for Department personnel to ask questions about outstanding issues. Analysts may be asked to prepare questions for the hearing examiner. If not, the analyst may plan to ask his own questions when asked by the examiner to do so. Remember, no business proprietary information can be discussed during the public session of the hearing.
5. If there is a closed portion to the hearing, all interested parties who do not have access to business proprietary information under APO must vacate the room before this segment of the hearing begins. The hearing examiner will then apprise the participants of their allotted time for direct and rebuttal remarks. The court reporter should also be advised that all portions of the closed session will have to be placed in a business proprietary document, apart from the transcript of the open portions of the hearing.

C. POST-HEARING PROCEDURES

1. When the hearing concludes, in the closing remarks the examiner informs the interested parties how they may obtain copies of the transcript. The hearing transcript is generally received within one week. In accordance with 19 CFR 351.310(g), copies should be sent to the CRU for immediate filing. In some cases, due to time constraints, we ask the reporting service to provide the transcript within one or two business days after the hearing. Hearing participants may come to the CRU and copy the public file version of the transcript, or they can request a copy of the transcript from the reporter at the hearing. The business proprietary section of the transcript, if any, is subject to an administrative protective order and must be released under APO through the APO Office.
2. Sometimes the hearing examiner may ask participants for supplemental written submissions on selected issues. If this is the case, the analyst must ensure that these submissions are timely and meet all procedural filing requirements.

ATTACHMENT I

HEARING BOOK
Contains Public/BPI Information

Case Name
Case Number
POR/POI/Other Proceeding As Appropriate

(Petitioner Name)

(Respondent Name)

Date

Room Number
Time of Hearing

TABLE OF CONTENTS**HEARING ON THE PRELIMINARY RESULTS/DETERMINATION) OF THE ANTIDUMPING DUTY
ADMINISTRATIVE REVIEW/INVESTIGATION OF
(CASE NAME)**

1. List of Participants
2. Hearing Examiner's Remarks for Public Hearing
 - a. Introductory Remarks
 - b. Closing Remarks
3. Hearing Examiner's Remarks for Closed Session
 - a. Introductory Remarks
 - b. Closing Remarks
4. Summary of Parties' comments
5. Case Briefs (BPI/public Versions)
 - a. Petitioner's Briefs (Dates)
 - b. Respondent's' Briefs (Dates)
6. Rebuttal Briefs (BPI/Public Versions)
 - a. Petitioner's Rebuttals (Dates)
 - b. Respondent's Rebuttals (Dates)
7. Federal Register Notice –preliminary results/determination
8. Verification Reports (BPI/Public Versions)
9. Sections from the Act and Regulations Relevant to Issues

LIST OF PARTICIPANTS

U.S. DEPARTMENT OF COMMERCE:

PETITIONER:

COUNSEL FOR PETITIONER:

RESPONDENT:

COUNSEL FOR RESPONDENT:

OTHER INTERESTED PARTIES (I.E., FOREIGN EMBASSY OFFICIALS)

ATTACHMENT II

PUBLIC HEARINGIntroductory Remarks:

Good afternoon. Welcome to the Department of Commerce's public hearing on the final results of the Second Administrative Review of the Antidumping Duty Order on Low Enriched Uranium from France.

My name is Barbara Tillman. I am the Acting Deputy Assistant Secretary for Import Administration, and I will be the examiner for today's hearing. To start, let's go now around the room and have each person identify her or himself for the record (*pause for introductions*).

This hearing is not subject to the Administrative Procedures Act. However, a verbatim transcript of the hearing is being made for the official record. Parties involved in the hearing should make arrangements directly with the reporter to obtain copies of the transcript of the hearing.

This hearing was requested by both Petitioner and Respondent. Petitioner requested that a portion of the hearing be conducted as a closed session, for purposes of discussing business proprietary information. We will first conduct the public hearing. At the conclusion of the public hearing we will clear the room, and the APO staff will grant entry to those authorized to participate in the closed hearing. I urge the participants in the public hearing to take every precaution to ensure that business proprietary information is not discussed.

The Department of Commerce published its preliminary results of this Antidumping Duty Administrative Review on March 7, 2005. Petitioner and respondent submitted comments on the preliminary results and the verification reports in case briefs. I remind the parties to limit their presentations today to information and argument contained in their case and rebuttal briefs.

The rules we normally follow for a hearing call for specific time limits for direct and rebuttal presentations. As discussed with the parties, we have allocated 45 minutes to Petitioner and 45 minutes to Respondent for their direct and rebuttal presentations in both public and closed hearing sessions.

Unless there are any changes that we should be aware of or comments regarding the time allotments in general, I propose to give the floor to Petitioner's counsel for their presentation.

PUBLIC HEARINGClosing Remarks:

Thank you for participating in this proceeding. This concludes the public portion of the Hearing.

Please make arrangements directly with the court reporter concerning copies of the public hearing transcripts.

We will now clear the room and the APO office staff will grant entry to those authorized to participate in the closed hearing.

CLOSED SESSIONIntroductory Remarks:

Good afternoon. Welcome to the Department of Commerce's closed hearing on the final results of the Second Administrative Review of the Antidumping Duty Order on Low Enriched Uranium from France.

My name is Barbara Tillman. I am the Acting Deputy Assistant Secretary for Import Administration, and I will be the examiner for today's hearing. To start, let's go now around the room and have each person identify her or himself for the record (*pause for introductions*).

This hearing is not subject to the Administrative Procedures Act. However, a verbatim transcript of the hearing is being made for the official record. Parties involved in the hearing should make arrangements directly with the reporter to obtain copies of the transcript of the hearing.

This closed hearing was requested by Petitioner. The Department of Commerce published its preliminary results for this Administrative Review on March 7, 2005. Petitioner and respondent submitted comments on the preliminary results and the verification reports in case briefs. Both Petitioner and Respondent also submitted rebuttal briefs.

Petitioner and respondent were allocated 45 minutes each for both direct and rebuttal presentations. Part of that time was used in the public section of this hearing. Petitioner and respondent may both use their remaining time. We will start with petitioner's presentation.

Closing Remarks:

Thank you for participating in this proceeding. This concludes the closed portion of the Hearing.

Please make arrangements directly with the court reporter concerning copies of the closed hearing transcripts.