

**REVISED PROPOSAL ON THE SUBMISSION OF DATA
HELD BY AFFILIATED PARTIES**

Communication from Japan

The following communication, dated 20 April 2006, is being circulated at the request of the Delegation of Japan.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(06)/108), also be circulated as a formal document.

Explanation

This proposal is a further reflection on our earlier proposal (TN/RL/GEN/72) regarding the severe burdens that respondents experience when compelled to provide data held by their “affiliates” and how to define situations in which authorities may require respondents to provide information that is held by other parties.

In many cases, authorities ask respondents to provide information that is held by other companies. This often imposes a heavy burden on the respondents and the respondents often find it very difficult or sometimes impossible to have those other parties provide such information. In case where such information is not provided, the respondents often face the use of “adverse” facts available.

On the other hand, authorities sometimes need information held by the respondent’s affiliates – in particular, to examine whether transactions between the affiliated parties are in the ordinary course of trade, and/or reasonably reflect the affiliate’s costs.

The AD Agreement should provide a rule that properly balances the interests of authorities to obtain information and the interests of respondents in avoiding undue difficulties when submitting such information. In TN/RL/GEN/72, we proposed that a “control” standard best achieves this balance. Specifically, we proposed that authorities could require respondents to provide information held by another company only if the respondent “controls” that company or vice versa. Where the respondent controls the affiliate, the respondent should have less difficulty in obtaining the cooperation of its subordinate affiliated party. Similarly, where the affiliated party controls the respondent, the entities’ close relationship suggests a substantial identity of interest between the parties, and therefore the respondent should be able to collect information from its “affiliated” party. On the other hand, it would be unreasonable and unjust to punish the respondent with adverse facts available when there is no “control” relationship between those parties and the collection of the requested data is beyond the respondent’s means.

We would like to emphasize that the proposal ONLY relates to the scope of “affiliated parties” for which respondents may be required to provide information. The criteria does NOT necessarily relate to the scope of “affiliated parties” for other purposes in the conduct of an investigation, including in which situations sales to affiliated parties could be considered to be outside of the ordinary course of trade. The scope of “affiliated parties” for which respondents may be required to provide information does not necessarily have to be the same as the scope of “affiliated parties” for other purposes.

In the discussions in the Negotiating Group on TN/RL/GEN/72, some Members argued that authorities should be allowed to seek information of parties even if strict “control” does not exist. Our present proposal attempts to address these arguments. We believe that the situation where respondents own more than 50% of the shares of the other party should still be the primary case where the authorities may require respondents to provide data concerning other parties. However, as some Members have argued, there could be other cases where the relationship of respondents with other parties could allow the respondents to make reasonable efforts to provide information from such other parties. While we agree that there could be some limited situations where such relationship exist, we believe that there shall never be situations where the respondents are required to provide information held by other parties when the importance or necessity by the authorities to obtain such information is relatively low and, in comparison, the difficulty of respondents to provide such information is relatively large, so that the efforts required to provide such information is disproportionate to the necessity of such information to the conduct of information. Furthermore, we believe that there should be a clear line in the AD Agreement below which the relationship with other parties shall be regarded as simply too weak so that the respondents should be relieved from such unreasonable efforts. Nevertheless, this does not mean that the authorities cannot “request” such information from respondents in which case the respondents are free to provide such information, if they can, on a voluntary basis.

Specifically, our proposal contemplates three scenarios or “cases:”

Case (1): The respondent owns more than 50% of the shares of the other party (or vice versa).

- Control exists between the respondent and the other party. There is likely to be a substantial identity of interest between the two parties.
- Authorities may ask the respondent to provide any necessary information that is held by the other party.
- If the respondent fails to provide the requested information, and fails to demonstrate that it acted to the best of its ability, the authorities may regard the respondent not being cooperative.

Case (2): (a) one party owns 20% or more but not more than 50% of the voting power of the other; and (b) such party is the largest shareholder of the other.

- Neither party strictly “controls” the other. However, a party that owns 20% or more of the voting power of another may have significant power to participate in the financial and operating policy decisions of the other, if the former party is the largest shareholder of the latter.
- In these situations, the authorities may require respondents to make reasonable efforts to provide the other party’s information. The authorities may do so, however, only where they demonstrate that the efforts required to provide the information is proportionate to the need for the information.¹

¹ For example, assume that the respondent sells a small quantity of products to a home market distributor, of which the respondent holds only 20% of the outstanding shares. If the respondent makes many

- The authorities may not deem the respondent “uncooperative” so long as the respondent made reasonable efforts to provide the requested information.

Case (3): Neither party owns 20% or more of the voting power of the other, or is the largest shareholder of the other.

- In this situation, the degree of ownership is insufficient to confer control or meaningful influence. The authorities therefore may not require the respondent to provide information held by the other party.
- The authorities may not deem the respondent “uncooperative” even when the respondent failed to provide or make reasonable efforts to provide such information.

We are ready to discuss any suggestions from other Members on the criteria proposed in our proposals, including any additional criteria that they feel may confer control or have significant power to participate in the financial and operating policy decisions of other parties.

sales to other home market customers (in which it has no shareholding), then these sales should provide the authorities with a sufficient basis for normal value. The authority’s need for the distributor’s resale data therefore is small. In such a case, it should be difficult for the authorities to demonstrate that their need for the distributor’s resales data is proportionate to the efforts that (a) the respondent would have to expend in order to persuade the distributor to provide the information, and (b) the distributor would have to expend in order to prepare its resale price and expense information (and to undergo an on-site verification by the authorities).

Proposal

Add a new subparagraph to Article 6.1 clarifying the criteria when the authorities can require the respondents to provide data concerning “affiliated parties”. The proposed text is as follows:

6.1.4 The authorities may require exporters or foreign producers to provide necessary information held by other parties if such other parties directly or indirectly control, or are controlled by, the exporter or foreign producer; or if the exporter or foreign producer and the other parties are under the common control of a third party.

Even when such other parties do not control, or are not controlled by, the exporter or foreign producer; or if the exporter or foreign producer and the other parties are not under the common control of a third party, the authorities may nevertheless require the exporters or foreign producers to make reasonable efforts to provide necessary information held by other parties, provided that the authorities demonstrate that requiring such efforts is not disproportionate in the light of the balance between the importance of such information to the conduct of the investigation and the difficulty of the exporters or foreign producers to provide such information.

In any case, the authorities may not require the exporters or foreign producers to make such efforts if the following conditions are met:

- (i) neither of them holds, directly or indirectly, 20 per cent or more of the voting power of the other or is the largest shareholder of the other; and
- (ii) no third party holds, directly or indirectly, 20 per cent or more of the voting power of both of them or is the largest shareholder of both of them.

6.1.4.1 For the purposes of sub-paragraph 1.4, “control” is the power to govern the financial and operating policies of an enterprise by having:

- (a) more than one half of the voting power of an enterprise;
 - (b) power over more than one half of the voting rights by virtue of an agreement with other investors;
 - (c) such power under a statute or an agreement;
 - (d) power to appoint or remove the majority of the members of the board of directors or equivalent governing body; or
 - (e) power to cast the majority of votes at meetings of the board of directors or equivalent governing body.
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