

Introduction

In a recent Panel Report of the World Trade Organization (**WTO**) regarding a dispute filed by Russia against the European Union (**EU**) cost adjustment methodologies applied in anti-dumping investigations, the Panel found that EU's cost adjustment methodology is inconsistent with certain provisions of the Anti-Dumping Agreement (**ADA**).

This note briefly examines the Panel Report, in particular the issue of the EU's cost adjustment methodology being inconsistent with Article 2.2 and Article 2.2.1.1 of the ADA.

Claims made by Russia

Russia challenged four sets of measures attributed to EU as being inconsistent with certain provisions of the ADA, which included the following:

- An unwritten measure comprising of the manner in which the European Commission determines the costs of production in the country of origin for investigated companies (referred to as the **Cost Adjustment Methodology**);
- Certain aspects of provisions of Regulation (EU) No. 2016/1036 (**the Basic AD Regulation**);
- Certain aspects of the expiry review investigation of anti-dumping duties on imports of certain welded tubes and pipes of iron or non-alloy steel originating in Russia; and
- Certain aspects of the third expiry review investigation of anti-dumping duties on imports of ammonium nitrate originating in Russia.

Findings of the Panel

The Panel found that Russia's challenge against EU's Cost Adjustment Methodology in anti-dumping investigations, as well as its anti-dumping measures on Russian welded tubes and pipes and on Russian ammonium nitrate were inconsistent with the ADA. But the Panel dismissed the "as such" claims made by Russia against certain provisions of the Basic AD Regulation.

The next section is going to examine the issue whether EU's Cost Adjustment Methodology is inconsistent with Article 2.2.1.1 and Article 2.2 of the ADA.

Assessment of Panel's findings of the Cost Adjustment Methodology

Russia claimed that the Cost Adjustment Methodology applied by the EU leads to:

- Rejection of certain costs reflected in the records kept by the exporter or producer under investigation when these costs were deemed artificially low or affected by government intervention; and
- Replaces and/or adjusts such recorded cost data using cost data obtained from other sources, including so-called "representative markets", which are viewed by the authority as unaffected by such "distortions" or "market impediments", without ensuring that such adjusted or established costs represent the cost of production in the country of origin.

In view of the above, Russia argued that EU's Cost Adjustment Methodology was inconsistent with first sentence of Article 2.2.1.1. and Article 2.1 of the ADA.

At the outset, the Panel made a threshold determination regarding the existence of the unwritten measure like the Cost Adjustment Methodology. In order to prove the existence of a challengeable measure, a complainant must clearly establish that the alleged measure is attributable to the responding Member, its precise content, and that it has "general and prospective application". The term general and prospective application is understood to mean that it affects an unidentified number of economic operators, and it has "prospective application" to the extent that it applies in the future.¹ Such an analysis is required to be undertaken on a case by case basis. In this regard, the Panel found that Russia had established the existence of the Cost Adjustment Methodology as a measure of "general and prospective application" attributable to the EU.²

With respect to the inconsistency with Article 2.2.1.1 of the ADA, Russia argued that when constructing normal value, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that two conditions are met (a) the records are in accordance with the generally accepted accounting principles (**GAAP**) of the exporting country; and (b) the records "reasonably reflect the costs associated with the production and sale of the product under consideration".³

¹ Panel Report, *EU — Cost Adjustment Methodologies II (Russia)*, para. 7.49

² Panel Report, *EU — Cost Adjustment Methodologies II (Russia)*, para. 7.64

³ Panel Report, *EU — Cost Adjustment Methodologies II (Russia)*, para. 7.83

In particular, Russia argued that the second condition does not provide for analysis of “reasonableness” of the recorded costs and the EU Cost Adjustment Methodology that rejects the records of the exporter or producer on the basis that these costs were deemed artificially low or affected by government intervention is in violation of the first sentence of Article 2.2.1.1 of the ADA.

Whereas, the EU sought to argue that the circumstances in which data or information in the records kept by the exporter or producer under investigation, may be rejected are highly fact-dependent and the two express conditions specified in Article 2.2.1.1. of the ADA (as specified in paragraph above) do not exhaust all the circumstances in which costs reflected in the records of the producer or exporter under investigation may be rejected.⁴ The EU based its argument on the words “normally” and “[f]or the purpose of paragraph 2” in the first sentence of Article 2.2.1.1 of the ADA to argue that there are circumstances, other than those explicitly set out in that sentence,⁵

In this regard, the Panel relied on two recent disputes where the first sentence of Article 2.2.1.1 of the ADA was interpreted *viz.* *EU – Biodiesel (Argentina) and Ukraine – Ammonium Nitrate*. In these disputes, it was held that the existence of government measures in the country of origin, and effect on domestic input prices in each case, did not constitute a basis to conclude that the records of the producer or exporter under investigation do not “reasonably reflect the costs associated with the production and sale of the product under consideration” under Article 2.2.1.1 of the ADA.⁶

The Panel observed that the reasons that the EU Cost Adjustment Methodologies reject recorded costs provided by the producer or exporter are similar to those provided under *EU – Biodiesel (Argentina) and Ukraine – Ammonium Nitrate*.⁷ The Panel accordingly found that the practice of disregarding prices when prices are low or affected by government intervention under the EU Cost Adjustment Methodology, does not constitute an adequate or sufficient basis under the second condition in the first sentence of Article 2.2.1.1 to conclude that the records of the investigated companies do not reasonably reflect the costs associated with the production and sale of the product concerned.⁸ The Panel also rejected EU’s argument and found that there is no evidence suggesting that the Cost Adjustment Methodology has been applied through any intention on part of the EU to give effect to its interpretation of the term “normally” in Article 2.2.1.1 of the ADA.⁹

Accordingly, the Panel found that the EU Cost Adjustment Methodology provides for the rejection of the costs reflected in the records of the exporter or producer under investigation in a manner inconsistent with the second condition of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.¹⁰

With respect to Article 2.2 of the ADA, Russia argued that the Cost Adjustment Methodology uses costs other than “the cost of production in the country of origin” in the construction of normal value but when relying on such out of country information, the Cost Adjustment Methodology does not ensure that such information is used to arrive at the cost of production “in the country of origin”.¹¹ On the other hand, the EU argued that Article 2.2 of the ADA allows an investigating authority to look at cost of production from sources outside the country of origin and the process of considering whether or not an adjustment is necessary and has been substantiated is a highly fact-dependent process.¹² According to the EU the adjustment must be made to ensure a “proper” and “fair” comparison, as provided for in Articles 2.2 and 2.4 of the ADA.¹³

However, the Panel found that Russia had demonstrated that, in applying the Cost Adjustment Methodology, the European Commission does not explain whether or how this adapted out of country input price information reflects or represents the costs of production in the country of origin.¹⁴ The Panel disagreed with the European Union’s argument and found that an investigating authority must provide a reasoned and adequate explanation of how the information used in its calculations was adapted to ensure that it represented the cost of production in the country of origin.¹⁵ Accordingly, the Panel concluded that the Cost Adjustment Methodology, by providing for the use of out-of-country input price information, without establishing

⁴ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.87

⁵ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.88

⁶ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.98

⁷ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.101

⁸ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.102

⁹ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.105

¹⁰ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.107

¹¹ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.113

¹² Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.118

¹³ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.119

¹⁴ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.124

¹⁵ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.129

whether or explaining how such information was adequate to reflect or represent the cost of production in the country of origin was inconsistent with Article 2.2 of the ADA.¹⁶

Conclusion

This is an important decision and confirms that the practice under the EU Cost Adjustment Methodology is inconsistent with Article 2.2.1.1 of the ADA. It is unclear whether the EU will adopt this Panel Report. However, considering there is no Appellate Body in place and Russia is not a party to the Multiparty Interim Appeal Arbitration (**MPIA**) mechanism, it is likely that the EU may adopt the report. This has serious implications on trade remedial measure applied by the EU.

Further, the Panel Report provides clarity that the rejection of records provided by exporters or producers on the basis that costs were deemed artificially low or affected by government intervention is in violation of the first sentence of Article 2.2.1.1 of the ADA. But it remains to be seen how other jurisdictions like, the Designated Authority in India will give effect to these findings during anti-dumping investigations.

In the meantime, should you require any information or clarification, please do not hesitate to contact us at insights@elp-in.com

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¹⁶ Panel Report, *EU — Cost Adjustment Methodologies II (Russia)*, para. 7.131