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## Article

### OFAC - Insights into the US sanctions regime

By Arpit Mehra

In the previous article<sup>1</sup>, we shed light on the nature and extent of Western sanctions. We explained that among the numerous measures adopted by the Western nations in response to the Russia-Ukraine conflict, unilateral sanctions have been employed as a primary instrument to economically penalize Russia and its allies such as Belarus.

As a leading user of sanctions, the United States has one of the most comprehensive legal frameworks for imposition of sanctions that it can be mind-boggling for both US and foreign businesses alike. One of the key agencies implementing sanctions in the United States is the Office of Foreign Assets Control ('OFAC'). This article intends to discuss some of the salient aspects of the US sanctions regime as administered by the OFAC.

#### Overview

The OFAC is a body under the United States' Department of the Treasury. It "administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States".<sup>2</sup>

The power for OFAC to implement sanctions derives from statutes enacted by US Congress, Executive Orders issued by the US President and the federal regulations formulated by the competent branch of the US government.

#### Specific bar on Specially Designated Nationals

One of the key mechanisms by which the OFAC gives effect to the sanctions administered by it is the list of Specially Designated Nationals ('SDN'). The SDN list is a list of specifically sanctioned persons, companies, or organizations whose assets in the United States are frozen by the OFAC and with whom engaging in business is strictly prohibited. It is understood that one of the reasons for maintaining such a list is that the persons in the SDN list may move from country to country or may be operating from more than one country.

One of the important aspects of the SDN list is that the OFAC also prohibits US persons in dealing with an entity that is not part of the SDN list, if 50% or more of the entity is owned, directly, or indirectly, by an entity or person named in the SDN list.

#### Allowing certain transactions through licensing

It is important to note that the prohibitions imposed *vide* sanctions administered by the OFAC are not absolute in nature. That is, a US person may obtain a license from the OFAC for engaging in transactions with the sanctioned entities. There are two types of licenses that can

<sup>1</sup> Article available here - <https://www.lakshmisri.com/insights/articles/beware-of-sharks-in-the-water-navigating-trade-in-a-world-of-sanctions/>

<sup>2</sup> Office of Foreign Assets Control - Sanctions Programs and Information, <https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information>

be issued by the OFAC: a. General; and b. Specific. While general licenses authorise a class of persons to engage in a particular type of transaction, specific licenses are issued to a particular person or entity to engage in a specific transaction. There are specific terms and conditions attached to both these licenses which are to be strictly complied with. The OFAC's regulations may also provide for a specific licensing policy for specific transactions where such transactions are considered in line with the U.S. Foreign Policy and national security objectives.

### **Penalties**

Violations are strongly deemed by OFAC as a hazard to international relations and national security. The offenders thus risk financial penalties spanning from a few thousand to several million dollars as well as jail term of up to 30 years. There may be financial and criminal repercussions if an OFAC requirement is not followed. In fact, when an investigation is ongoing, the OFAC may block (freeze) property of the alleged violators.

Civil monetary penalties of up to USD 250,000 or double the value of the underlying transaction, whichever is larger, may be imposed for violations of the sanctions. Anyone found guilty of wilfully committing, attempting to commit, colluding to commit, or aiding or abetting the commission of a breach of the Executive Orders or the Regulations may face criminal penalties of up to USD 1,000,000, 20 years in prison, or both.

### **Challenges to Indian businesses**

The US sanctions regime as administered by the OFAC is comprehensive and imposes substantive obligations. The obligation to comply with sanctions administered by OFAC is upon US persons, which have been defined in US law to

include all US citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, all US incorporated entities and their foreign branches. However, there may be circumstances where a non-US person may be subject to OFAC sanctions.

Many Indian companies are subsidiaries of US incorporated or resident businesses, or branches of such businesses. In such a scenario, they would be obliged to comply with the obligations under laws administered by the OFAC. To comply with these obligations, Indian businesses may need to strengthen customer authentication and due diligence procedures to verify that the eventual beneficiaries of any goods supplied, or service provided are not on the SDN List.

It would be advantageous to check upcoming operations in sanctioned regions to identify the recipients and owners of counterparties and clients. Before moving through with a transaction involving parties based in sanctioned regions, it is advised that Indian businesses operating outside of India have a compliance monitoring system to build, enforce, and regularly update a strong sanctions compliance system. This system should focus on promoting a compliance culture and instruct staff members on how to comprehend and follow the compliance system's rules. Further, Indian businesses must also put in place required measures, policies, and processes to reduce the likelihood of violations by adopting risk assessment and highlighting warning signs to enhance the system and corporate governance through routine audits.

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## Trade Remedy News

### Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
Resin Bonded Thin Wheels	China PR	F. No. 190354/124/2022- TRU	4 November 2022	Central Government decides not to impose anti-dumping duty as recommended
Solar cells	China PR, Thailand, and Vietnam	F. No.6/56/2022-DGTR	9 November 2022	Anti-dumping Duty investigation terminated at request of domestic industry
Styrene Butadiene Rubber (SBR)	European Union, Korea RP & Thailand.	F. No. 190354/133/2022- TRU	28 October 2022	Central Government decides not to impose anti-dumping duty as recommended

### Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Corrosion-resistant steel sheet	Canada	Canada Border Services Agency (COR1 2022 RI)	31 October 2022	Re-investigation initiated to update normal values and export prices
Finished Carbon Steel Flanges	USA	2022-25247	21 November 2022	Affirmative findings in 5 year reviews for ADD and CVD
Frozen Warmwater Shrimp	USA	2022-24468	9 November 2022	ADD changed circumstances review - Preliminary determination that M/s. Kader Exports is successor-in-interest to Liberty Group

Product	Investigating Country	Document No.	Date of Document	Remarks
Frozen Warmwater Shrimp	USA	2022-25177	18 November 2022	ADD - Notice of the scheduling of full five-year review
Glycine	USA	2022-24604	10 November 2022	ADD Administrative Review – Affirmative finding of sales below normal value during 1 June 2020 and 31 May 2021.
Grinding media	Canada	Canada Border Services Agency (GM 2022 RI)	26 October 2022	Re-investigation of the normal values and export prices initiated
Oil country tubular goods	USA	2022-23954	3 November 2022	Initiation of administrative review of anti-dumping duty
Paper File Folders	USA	2022-24315, 24316	8 November 2022	CVD and Less Than Fair Value investigations initiated
Phthalocyanine pigments	China PR	Announcement no. 7 (initially issued on March 1, 2022)	31 October 2022	Anti-dumping duty imposed after conclusion of preliminary investigation
Stainless Steel Flanges	USA	2022-23601	31 October 2022	CVD - Affirmative finding of countervailable subsidies during 1 January 2020 and 31 December 2020
Stainless Steel Flanges	USA	2022-24022	4 November 2022	ADD – Preliminary finding of sales below normal value (NV) between 1 October 2020 and 30 September 2021



## WTO News

### Customs valuation – India justifies ‘average’ addition of cost of transportation, handling charges and insurance in certain circumstances

The United States has questioned India’s *ad valorem* ‘average rate’ of up to 22% of the FOB value of the goods (covering transportation; loading, unloading and handling; and insurance) while computing value of goods for the purpose of levy of import duty. Observing that the same does not reflect an ‘actual cost’, the USA doubted as to how does India’s use of these rates comport with Article 8.3 of the WTO’s Customs Valuation Agreement and Commentary 21.1 of the Technical Committee on Customs Valuation of the World Customs Organization. India has in turn responded on 8 November 2022 (G/VAL/Q/IND/5) stating that this provision is to be used only in cases where the importer is not able to declare the cost of transport and insurance, and that in all other cases, additions are made on an actual basis.

### India’s Quality Control Orders questioned by Canada, USA and customs territory of Taiwan, Penghu, Kinmen and Matsu

Canada, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States of America have raised their concerns that quality control orders, as introduced by India, across a variety of sectors, including toys, chemicals, ICT products, and automobile parts, are seriously concerning as it relates to India’s obligations under the WTO’s Technical Barriers to Trade (TBT) Agreement. Raising concerns before the Committee on Technical Barriers to Trade, the abovementioned Members highlight that since 2019, 19 Members

have raised 35 specific trade concerns with India and out of these, more than a third are related to quality control orders, and more than two-thirds are concerns that Members have raised more than once. Few of the concerns or suggestions are highlighted below.

- India has been asked to reinstate full and permanent recognition of results from internationally accredited labs and to utilize the benefits of International Laboratory Accreditation Cooperation (ILAC) membership. The Members have also requested India to provide greater clarity and transparency regarding the steps laboratories can take to obtain such recognition from BIS.
- Foreign Inspections – Members have raised concerns regarding absence of provisions relating to virtual audits. India has been urged to consider virtual and/or alternative options for inspections for those products that are low risk, thereby facilitating, rather than restricting, trade. The Members in this regard also point out that India continues to require testing of every import shipment of toys in addition to on-site sampling at manufacturing facility, with those samples then shipped to India for in-country testing. According to the Members, situations like these not only add to the cost of the importation process.
- India has been asked to consider establishing a process by which Indian standards can be updated so that they are aligned with the related international standards over time.
- In respect of e-labelling, India has been asked to provide an update on whether the proposed e-labels satisfy the Quality Control Order’s designation code requirements.



## WTO Members still falling behind on subsidy notifications

Concerns with delays in the submission of required subsidy notifications by WTO members and incomplete information in the notifications submitted continued to be expressed at the Committee on Subsidies and Countervailing Measures, which held its latest meeting on 25 October.

The Chair of the Committee said that in spite of reminders to members to submit their notifications in time, more than half the WTO membership have still not submitted their 2021 subsidy notification. Australia, Canada, the European Union, Japan, the United Kingdom and the United States once again placed a separate item on the agenda regarding subsidies and overcapacity. Co-sponsors referred to the recent joint report by the WTO, IMF, OECD and World Bank indicating that trade distortions being caused by industrial subsidization create overcapacity in certain sectors. China along with Russia reiterated that overcapacity was a problem with multiple causes other than subsidies.

Under other business, Indonesia raised concerns regarding a countervailing duty investigation launched by India on imports of saturated fatty alcohol from Indonesia.

## WTO Members review safeguard actions on 19 products

WTO members, at the biannual meeting of the Committee on Safeguards, on 24 October 2022, reviewed safeguard actions taken by fellow members with regard to 19 investigations. Notifications of various safeguard actions from the European Union; India; Indonesia (five investigations); Madagascar; Morocco (two investigations); the Philippines; South Africa; Tunisia; Türkiye; Ukraine (three investigations);

the United Kingdom; and the United States were reviewed by the committee.

Several members reiterated their general concern regarding the way this instrument was used. China, Japan and Australia reiterated their general concern regarding the way this instrument was used, including concerns on the timeliness of notifications, the effect of existing safeguard measures on trade, and the numerous extensions of measures.

Ukraine notified the committee that three safeguard investigations had been terminated, with a main reason being the inability of domestic producers to participate, as they were situated in the area occupied by Russia or were under attack by Russia.

## G20 trade restrictions increasing amidst economic challenges: WTO report

According to the 28<sup>th</sup> WTO *Trade Monitoring Report* on G20 trade measures issued on 14 November, the G20 economies have in between mid-May and mid-October 2022 introduced export restrictions at an increased pace, particularly on food and fertilizer. These are being seen in context of economic uncertainty exacerbated by the Covid-19 pandemic, the war in Ukraine and the food security crisis

As of mid-October 2022, WTO members still had in place 52 export restrictions on food, feed and fertilizers, in addition to 27 export restrictions on products essential to combat Covid-19. During the review period, G20 economies introduced 66 new trade-facilitating measures (covering trade worth \$451.8 billion) and 47 trade-restrictive measures on goods (with a trade coverage of \$160.1 billion). These measures were not related to the pandemic. Anti-dumping measures continued to be the most frequent trade remedy action in terms of initiations and terminations.



## India Customs & Trade Policy Update

### Iron and steel – Export duty removed on specified goods

The Ministry of Finance has with effect from 19 November 2022 removed export duty on specified goods falling under Heading 2601 (iron ores and concentrates) and Chapter 72 (iron and steel) of the Customs Tariff Act, 1975. As per Notification No. 58/2022-Cus., dated 18 November 2022, the omission of export duty has been done on many products including iron ore pellets; pig iron and spiegeleisen in pigs, blocks or other primary form; flat rolled products of iron or non-alloy steel, hot rolled, not clad, plated or coated; flat rolled products of iron or non-alloy steel, cold rolled, not clad, plated or coated; flat rolled products of iron or non-alloy steel of a width of 600 mm or more, clad, plated or coated; bars and rods, hot-rolled, in irregularly wound coils, or iron or non-alloy steel; and other bars and rods of iron or non-alloy steel, not further worked than forged, hot-rolled, hot-drawn or hot extruded, but including those twisted after rolling. Similarly, export duty has also been reduced on flat-rolled products of stainless steel, of a width of 600 mm or more; other bars and rods of stainless steel; angles, shapes and sections of stainless steel; and bars and rods, hot-rolled, in irregularly wound coils, of other alloy steel. It may be noted that the export duty on these products was increased earlier with effect from 22 May 2022 by Notification No. 29/2022-Cus., dated 21 May 2022.

### Food products (specified) – Import only through 61 specified ports and registration of foreign food manufacturing facilities, mandatory w.e.f. 1 February 2023

The Food Safety and Standards Authority of India has mandated registration of foreign food manufacturing facilities falling under the few specified food categories, who are intending to export to India the specified food products. As per Customs Instruction No. 30/2022-Cus., dated 14 November 2022 which forwards the FSSAI Order dated 10 October 2022, the specified food categories are milk and milk products, meat and meat products (including poultry, fish and their products), egg powder, infant food, and nutraceuticals. Further, as per another Instruction No. 31/2022-Cus. of the same date, import of these high-risk products shall be permitted only through 61 specified ports which are directly manned and managed by FSSAI office/officials. Both these changes will come into effect from 1 February 2023. It may be noted that the changes relating to mandatory registration of foreign manufacturers have also been notified to the WTO's Committee on Technical Barriers to Trade on 14<sup>th</sup> of November (G/TBT/N/IND/237).

### Milk, pork and fish and their products – Requirement of health certificate for imports, postponed till 1 January 2023

The requirement of Health Certificate, issued by Competent Authority of the exporting country, to be accompanied with the import of certain food consignments, namely milk and milk products, pork and pork products, and fish and fish products has been postponed till 1 January 2023. The FSSAI Order dated 3 August 2022 was to come into force from 1 November 2022 earlier.



This Order had in this regard also provided various formats of health certificates for the different food items. It may be noted that FSSAI had on 26 September 2022 also clarified that integrated/single certificate incorporating food safety related requirements/attestations is also acceptable at the time of import clearance.

### **Coal, specified varieties – BCD and AIDC exemption on imports withdrawn**

The Ministry of Finance has from 19 November 2022 withdrawn exemption from Basic Customs Duty (BCD) and Agriculture Infrastructure Development Cess (AIDC) on Anthracite or pulverised coal injection (PCI) coal and coking coal. Further, exemption from BCD has been withdrawn on coke and semi-coke of coal, of lignite or of peat, whether or not agglomerated. Notifications Nos. 59 and 60/2022-Cus., both dated 18 November 2022 amend Notifications Nos. 50/2017-Cus. and 11/2021-Cus., respectively for this purpose.

### **Coal import monitoring system – Last date for registration relaxed**

The Directorate General of Foreign Trade has relaxed the provisions relating to registration under the Coal Import Monitoring System (CIMS). The importer can now apply for registration not earlier than 60 days and not later than 5 days from the expected date of arrival of import consignment. The last date was earlier 15<sup>th</sup> day before the expected date of arrival of import consignment. Notification No. 41/2015-20, dated 7 November 2022 amends Policy Condition No. 7(ii) of Chapter 27 of ITC(HS) for this purpose.

### **Export/import in Indian Rupees – Benefit of export promotion schemes available – FTP and HoP amended to reflect RBI Circular No. 10**

The Ministry of Commerce and Industry has amended the Foreign Trade Policy to reflect the RBI A.P. (DIR Series) Circular No. 10, dated 11 July 2022, allowing for export and import trade using Indian Rupees. Paragraphs 2.46, 2.53, 3.20 and 4.21 of the FTP have been amended to highlight the latest changes in this regard. Notification No. 43/2015-20, dated 9 November 2022 has been issued for the purpose. Further, Para 5.11 of the Handbook of Procedures, relating to EPCG Scheme, has been amended to permit invoicing, payment, and settlement of exports and imports in Indian Rupees. Public Notice No. 35/2015-20, dated 9 November 2022 has been issued for the purpose. The changes come into force with immediate effect.

### **India-UAE Comprehensive Economic Partnership Agreement – Electronic Certificate of Origin is valid**

The International Customs Division in the Central Board of Indirect Taxes and Customs has clarified that Electronic Certificate of Origin is a valid document for the purpose of claiming preferential benefit under the India-UAE CEPA. According to Instruction No. 28/2022-Cus., dated 27 October 2022 issued for the purpose, eCoO would be valid provided that the same is issued in the prescribed format, bears electronically printed seal and signatures of the authorised signatory of the issuing authority and fulfils all requirements as mentioned in Notification No. 39/2022-Cus. (N.T.).



## Ratio Decidendi

### Valuation – Value of design engineering and site run (technical documents) when not includible

The CESTAT Delhi has held that merely because more than one goods are bought by buyer from seller under same agreement and under same invoice, sale of one good does not become condition of sale for another. The assessee had imported Fermenters and Control Panel Assembly and also 'design engineering and site run' under the same airway bill number but had filed two bills of entry – one for Fermenter and Control Panel Assembly and another for technical documents (latter under Chapter 49 of the Customs Tariff Act, 1975). The Tribunal in this regard observed that there was nothing to say that the purchase of the design engineering and site run was a condition for sale of the fermenters, even though both were purchased as per the same contract and invoice and were imported under the same Airway bill.

However, it may be noted that the Tribunal rejected the contention that since the technical documents had already been allowed assessment under Chapter 49 at Nil rate of duty, therefore, the value of the same cannot be included in the value of the fermenter. It noted that while the Bill of Entry was assessed by the appraising group based on the documents submitted, the process was not complete because, the second half of the assessment *viz.*, examination of the goods had to be completed. [*Panacea Biotec Ltd. v. Commissioner* – 2022 TIOL 1027 CESTAT DEL]

### Handheld enterprise mobile computers, with or without SIM is classifiable as ADP machine and not as smartphone

The Customs Authority for Advance Rulings has held that handheld enterprise mobile computers having many features such as higher scanning capacity, data editing functionality, ruggedness, enterprise-level security features, and used by enterprises to capture data, in inventory management, store receiving, order processing, package tracking, tracing delivering etc., is classifiable under Tariff Item 8471 30 90 of the Customs Tariff Act, 1975. The AAR rejected the plea of classification as smartphone even when the goods had Cellular connectivity which can also be used for making calls. [In RE: *Ret-Tech Private Limited* – 2022 VIL 70 AAR CU]

### 'Viewsonic Creative Touch Interactive Flat Panel' is classifiable under Tariff Item 8471 41 90

The Customs Authority for Advance Rulings has held that 'Viewsonic Creative Touch Interactive Flat Panel' merit classification under Heading 8471 and more specifically under Tariff Item 84714190 of the first Schedule to the Customs Tariff Act, 1975. The subject item was an all-in-one computer system, functioning like a large size tablet computer, having an inbuilt Mother Board, Micro Processor (CPU), Graphics Card, RAM and SSD storage. It also had an embedded Android system pre-loaded with Android 9.0 (Oreo) Android Operating System (OS). [In RE: *Audio Distribution House Pvt. Ltd.* – 2022 VIL 72 AAR CU]

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