ORF ISSUE BRIEF
JANUARY 2019
ISSUE NO. 273

US Secondary Sanctions: Framing an Appropriate Response for India

Aarshi Tirkey

ABSTRACT Sanctions, a mechanism to penalise international legal violations, usually prohibit nationals of the "sanctioning country" from engaging in specified activities with the "targeted country." Secondary or extraterritorial sanctions, on the other hand, penalise third-country individuals and companies for dealing with sanctioned countries. Recent measures adopted by the US—the enactment of the Countering America's Adversaries Through Sanctions Act (CAATSA) and the re-imposition of Iran sanctions—could impose secondary sanctions on India for its dealings with Iran and Russia. This brief discusses such provisions and highlights India's lack of a strong framework to protect itself against secondary sanctions. It also studies prominent examples of the use of secondary sanctions and examines foreign countermeasures in the form of "blocking statutes" that aim to tackle them. The brief concludes by determining whether India can utilise these countermeasures to circumvent secondary sanctions and protect its national, political and economic interests.

INTRODUCTION

In the past year, two major US decisions have compelled India to grapple with the prospect of facing possible "secondary sanctions" measures. The first is the enactment of Countering America's Adversaries Through Sanctions Act (CAATSA, P.L. 115–144), which imposes unilateral sanctions against Iran, Russia and North Korea, and aims to penalise actions that allegedly threaten American foreign-policy and security interests. The second is the US withdrawal from the Joint Comprehensive Plan of Action (JCPOA) or the

Attribution: Aarshi Tirkey, "US Secondary Sanctions: Framing an Appropriate Response for India", *ORF Issue Brief No. 273*, January 2019, Observer Research Foundation.

ISBN 978-93-88262-74-3

Iran nuclear deal, which will lead to re-imposition of sanctions on Iran's energy and petroleum sector. While these measures do not impose any sanctions on India, they contain provisions that could indirectly affect India's strategic interests by way of secondary sanctions.

"Primary sanctions" restrict persons and entities of the "sanctioning country" from engaging with the "targeted country." "Secondary" or "extraterritorial sanctions," on the other hand, are meant to deter a third-party country or its citizens and/or companies from transacting with the sanctions target.[1] To illustrate, State A (sanctioning country) may prohibit trade or investment by X, a national of State C (third-party country), if it trades with State B (targeted country).

Sanctions are often used as a mechanism to control and punish errant states who violate international legal norms. Primary sanctions adopted by international organisations, such as the United Nations, are known as "collective sanctions" and are considered a legitimate means to deter states from engaging in illegal behaviour. Its legitimacy comes from being based on legally binding constitutive instruments of an international organisation and its endorsement by a collective of states.[2] While unilateral sanctions, i.e. sanctions imposed by only one country against another country, are not held as illegitimate, they are often perceived as "unilateral coercive measures not based on international law" since they "impose the will of some states on other states" and "undermine the prerogatives of the United Nations Security Council as set forth in the UN Charter."[3]

Extraterritorial sanctions, applied unilaterally, have received strong disapproval from the international community. They have been criticised as attempts to induce foreign countries and their companies to forego economic activities to advance foreign-policy goals of the sanctioning state.[4] They aim to control the strategic decision of states and encroach on the sovereign rights of self-government.[5] Several UN General Assembly resolutions[6] have condemned them as "coercive measures used as a means of political and economic compulsion." They call for the "immediate repeal" of extraterritorial laws that impose sanctions on corporations and nationals of other states and invite states to apply effective "administrative or legislative measures, as appropriate, to counteract the extraterritorial application or effects of unilateral coercive measures."[7] Official documents of international coalitions and organisations such as the G77[8] and the Asian–African Legal Consultative Organisation (AALCO) consider the imposition of such sanctions as impermissible under International Law.[9]

Secondary sanctions are controversial in nature since they are an illegal, extraterritorial application of domestic laws. They exceed the limits of national jurisdiction and do not have sufficient nexus (or basis of jurisdiction) to justify the application of domestic laws to third-country entities. Further, they coerce third-state parties to unwillingly comply with sanctions measures and violate principles of sovereignty and non-intervention. Such actions adopted by the US create the possibility of Washington playing a "big brother" role over India's relations with other countries. It also sends mixed signals to New Delhi regarding

their evolving defence and strategic partnership.

These developments show that India is underprepared to tackle secondary sanctions and does not have appropriate mechanisms in place to insulate itself from the US' extraterritorial measures. Within this context, this brief will examine the possible secondary sanctions that India could face and how the country has tackled them before. It will then look at the solutions offered by "countermeasures," which refer to laws used by foreign countries to block compliance with secondary sanctions.

An important clarification here is that countermeasures, within the context of this brief, refers to jurisdictional countermeasures that frustrate the illegal exercise of jurisdiction by another state.[10] Under international law, a "countermeasure" is defined as a response to an internationally wrongful act by another state and aims to induce that state to cease the wrongful act.[11] A countermeasure is itself an illegal act, but is deemed legal, since it is a valid exercise of self-help against the wrongful conduct of another state.[12] Most blocking statutes themselves are not illegal, and a lot of their provisions are not prohibited by international law. Thus, they cannot be considered countermeasures in the legal context.[13] This brief will, therefore, not examine the definition and contested legalities of countermeasures under international law.

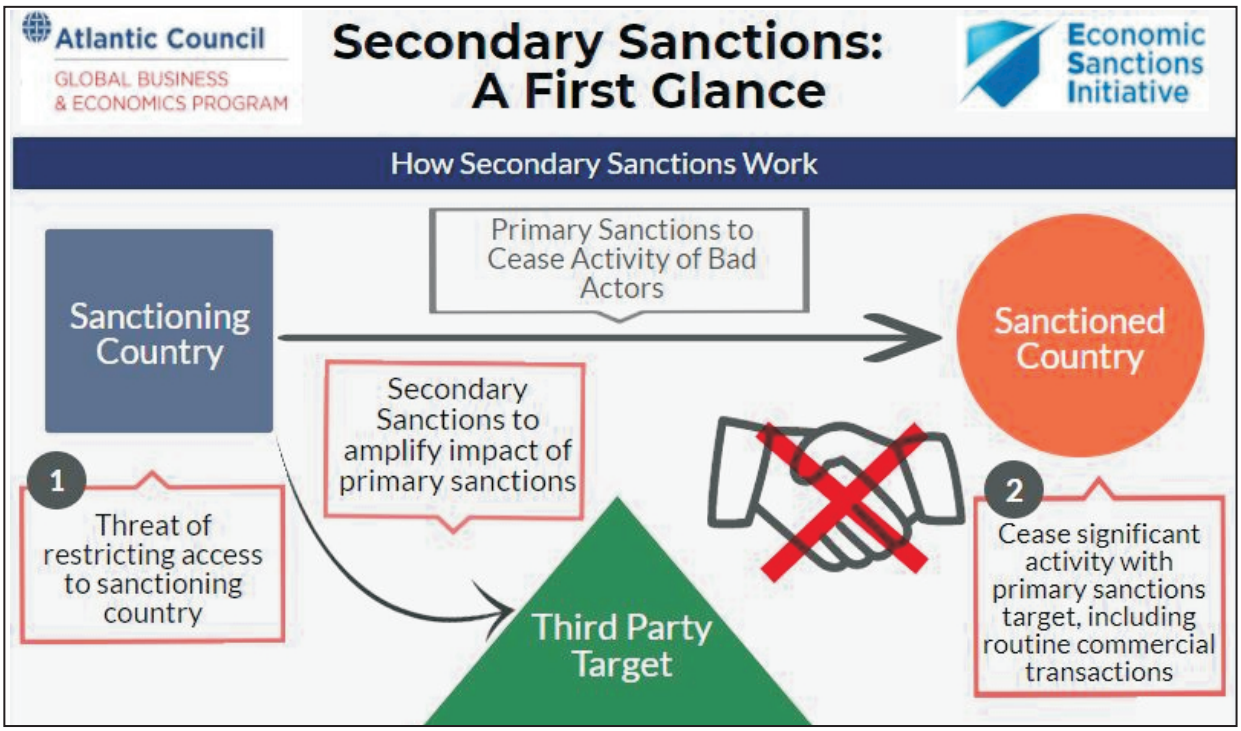
SECONDARY SANCTIONS AGAINST INDIA: LIKE A GAME OF RUSSIAN ROULETTE

Title II of CAATSA aims to punish Russia for its 2014 intervention in Ukraine and its alleged involvement in the 2016 US presidential elections. Section 231 of the Act imposes secondary sanctions against individuals and entities that carry out "significant transactions" with Russian defence or intelligence sectors.[14] The term "significant transaction" is not defined under the Act. However, the US Department of State clarifies that in determining whether a transaction is "significant" or not, it will consider all facts and circumstances, including its impact on US national security and foreign-policy interests and its significance to the defence or intelligence sector of the Russian government.[15]

Section 235 of the Act lists 12 sanctions, out of which any five may be imposed against the sanctioned entity. Measures such as the prohibition on banking and foreign-exchange transactions could make it difficult for India to pay for its Russian defence purchases in dollars.[16] Other sanctions, such as the denial of export licences and equity-debt restrictions will directly affect US–India defence ties by prohibiting joint-venture defence agreements between the two countries and disallowing American defence exports to India.[17]

India has had a long history of defence cooperation with Russia. Presently, India has planned several defence purchases from Russia, such as the S-400 Triumf surface-to-air missile system, the Project 1135.6 frigates and the Ka-226T helicopters.[18] The procurement of new defence technology, particularly the S-400 system, will help improve India's military capabilities and defence preparedness and enable it to thwart possible attacks from China and Pakistan.

However, on 20 September 2018, the US imposed its first set of secondary sanctions



***Source**: Ole Moehr, "Secondary Sanctions a First Glance," Atlantic Council, 6 February 2018, http://www.atlanticcouncil.org/blogs/econographics/ole-moehr-3.*

under CAATSA. Sanctions were imposed on China's Equipment Development Department (an organ under China's Central Military Commission) and its director, Li Shangfu, for the purchase of Su-35 combat aircraft and S-400 surface-to-air missile system-related equipment from Russia.[19] Following this, there have been concerns about India's ability to face similar sanctions measures.

The US has introduced a "modified waiver" to Section 231 of CAATSA through the National Defence Authorization Act of 2019.[20] It gives authority to the US President to waive sanctions if it is in the US' national security interests to do so, and if the country in question agrees to take steps to reduce its defence purchases from Russia. There is a possibility that India may receive a waiver, but the US is yet to announce it.[21]

The US has also stated that each waiver will be granted on a case-by-case basis, and it will not give a blanket waiver to any specific country.[22] It is, thus, a conditional waiver and not a permanent one and will leave future Indo-Russia defence cooperation open to US scrutiny. Leaving the grant of future waivers to Washington's discretion could pose various difficulties, and US waivers may become dependent on the nature and state of global politics at a given time. For instance, if US–Russia relations were to deteriorate, the US may not give waivers to India's future defence deals. This will directly threaten India's defence preparedness: Russia accounted for 62 percent of India's arms imports in 2016.[23]

INDIA'S REMEDIES AGAINST SECONDARY SANCTIONS: THE CASE OF IRAN

After withdrawing from the Iran nuclear deal, the US is now set to re-impose sanctions against the country. Some sanctions took

effect on 6 August 2018, while the oil and banking-sector sanctions took effect from 4 November 2018. These measures include secondary sanctions, which could target investments made by Indian companies in Iran's oil and gas development projects, pipeline projects and the purchase of Iranian crude oil. Measures that could be imposed against sanctioned entities include the prohibition on opening of new US bank accounts, restriction on loans and denial of licences and Ex-Im bank credit. As an immediate aftermath of these provisions, India will be unable to use the dollar to pay for Iranian crude-oil imports. Recently, the SBI clarified that it will no longer be able to handle oil payments to Iran.[24] A detailed look at possible secondary sanctions against India's projects and investments, was undertaken by this author as part of ORF's Special Report titled "Beyond JCPOA: Examining the consequences of US withdrawal."[25]

India is not new to secondary sanctions and has previously devised measures to tackle them in the pre-JCPOA era. The country has looked for ways to conduct transactions with Iran through institutions with no exposure to the US financial system. In early 2012, India and Iran set up a "rupee-rial mechanism" to avoid using the dollar to pay for Iranian crude oil.[26] Iran opened an account with UCO Bank (India), which had no exposure to the US financial system. Through this bank account, India would be able to make payments for oil imports to Iran in rupees. The rupee payments received by Iran in the UCO bank account were used to pay for exports of goods and services from India. India used this mechanism to pay for 45 percent of its dues to Iran. The remaining dues were paid in Euros through the Ankara-based Halkbank (after Deutsche Bank buckled under US pressure and stopped clearing payments to Iran).[27] Later, India conducted bilateral negotiations with the US to seek a waiver against sanctions measures. The US granted the same in June 2012.[28]

India currently has a conditional waiver to import oil from Iran for the next six months.[29] During this period, the US has said that it will continue to push India to bring its Iranian imports down to zero. Cutting down crude-oil imports from India's third-largest oil supplier could impair its energy-security needs. Moreover, India faces the prospect of paying expensive crude-oil bills due to the combined effect of increased oil prices and the depreciation of the rupee. Thus, complying with the US' coercive sanctions measures could prove detrimental for India.

Since the waiver is not permanent, India has shown prudence by exploring alternative means to pay for its Iranian imports. Both India and Iran are in talks to revive the rupee-rial mechanism for trade and crude-oil transactions between the two countries.[30] There have also been reports that Iranian banks such as Pasargad[31] and Parsian[32] are planning to open branches in Mumbai to support and facilitate bilateral trade.

In light of this, it will be useful to examine countermeasures adopted by other countries such as the UK, EU, Mexico and Canada to protect individuals and companies situated in their territory from secondary-sanctions measures. The following section will enumerate and analyse such countermeasures in an attempt to determine whether India can adopt them.

SECONDARY-SANCTIONS MEASURES AND COUNTERMEASURES

Secondary-sanctions measures and their countermeasures can take several forms. The primary means of imposing secondary sanctions include broad trade and investment embargoes, export-related prohibitions, re-export controls and asset freezes. Blocking statutes enacted to counteract secondary sanctions include, *inter alia*, compliance blocking, mandatory reporting requirements, clawback rights and non-recognition of foreign judgments and determinations.

The following table provides a brief overview of three examples of the use of secondary sanctions in the past and countermeasures used against them.

Table: Secondary Sanctions and Countermeasures

S. No.	Targeted Country	Sanctioning Country/ Countries	Reasons for Sanctions	Secondary-Sanctions Measures	Countermeasures by Countries
1.	Israel (1946 onwards) Also known as the "Arab Boycott of Israel"	Members of the Arab League	As a part of the ongoing Arab Israel conflict	**Secondary boycott** : Blacklisting of third-country companies and individuals that maintained commercial relations with Israel[33] **Tertiary boycott** : Prohibiting trade with any company that used parts from the blacklisted company in its own products[34] If a company was blacklisted, Arab countries were not to deal with or use their goods[35] For e.g. Coca-Cola, despite being blacklisted in 1966, set up a plant in Israel. As a result of boycott measures, most of its plants in Arab countries were closed down by 1968.[36]	**The US** implemented "Anti-boycott measures" through the 1977 Export Administration Act and the Export Administration Regulations.[37] It became illegal for US persons to comply with boycott measures by: • Refraining to do business with Israel or with blacklisted companies. **["Compliance Blocking"]** • Discriminating on the basis of religion, race and/or national origin • Furnishing information on its business relations with Israel or a blacklisted company Reporting requirements mandated US persons to inform officials if they had been asked to comply with sanctions measures. There are criminal and administrative penalties for violations of anti-boycott regulations.[38]

2.	Cuba	US	Part of the ongoing Cold War and the Cuban Missile crisis. Sought to enforce sanctions until "democracy was restored in Cuba."	**Prohibition** on all dealings with Cuba, by any person subject to US jurisdiction, including foreign entities owned or controlled by US companies[39] **Exemption,** in "appropriate cases," whereby licences could be issued to permit these companies to trade with Cuba **Prohibition** of transactions involving US property, if Cuba or a Cuban national had an interest in it **Re-export controls,** forbidding non-US companies to re-export US-origin commodities, software and technology to Cuba Violations could lead to asset freezes, fines and imprisonment.[40] The Cuban Democracy Act (1996) strengthened sanctions by:[41] • Doing away with licensed exemption mentioned above. • Restricting US trade through vessels that were used for trade with Cuba Violation of sanctions could lead to withholding of foreign assistance, suspension of arms sales and decreased chances for US debt waiver/reduction. The Helms-Burton Act (1996), a highly controversial statute,[42] created a right of action before US courts against persons who "traffic" in property confiscated by the Cuban government.[43] "Trafficking" under the Act was deemed to include dealing in or benefitting from property, confiscated by the Cuban government.	The EU,[44] UK,[45] Canada[46] and Mexico[47] enacted laws and regulations that mirrored US' own anti-boycott measures mentioned above, i.e. compliance blocking and reporting requirements. In addition to this, they also added: **"Clawback" rights,** allowing persons affected by sanctions to recover damages caused to them. The damages could be recovered from the assets of the plaintiff of the foreign judgment situated in local jurisdiction.[48] **Non-recognition of judgments**, prohibiting the recognition of judgments and administrative determinations that give effect to these sanctions **Restriction on production of records** and information in connection with foreign sanctions proceedings **Exemption** from blocking laws, in cases in which non-compliance with sanctions Law could seriously damage the entity's interests.[49] Additionally, the EU filed a **complaint before the WTO** to challenge restrictions on its trade with Cuba.[50] The US had intended to challenge the complaint on the grounds of national security.[51] However, negotiations between the two countries led to an understanding before the dispute could be heard. In pursuance of the understanding, the US suspended the application of stringent sanctions on the EU.

3.	Iran	US	To tackle Iran's support for terrorism and restrict its means to acquire weapons of mass destruction	The Iran and Libya Sanction Act (1996, amended on December 2016): Sanctions on foreign persons who invested in the development of Iranian or Libyan petroleum reserves.[52] Any two of the following sanctions could be imposed on them:[53] • Denial of Ex-Im bank assistance for exports • Proscription on procurement of goods from sanctioned company • Prohibition on imports to sanctioned party • Ban on loans from US financial institutions • Preclusion of services by sanctioned party to the US government. **Waiver** : The president could waive these sanctions if it was in US' "national interests" or if the country has taken substantial measures, including economic sanctions, to deter Iran from proliferating weapons of mass destruction or pursuing activities related to terrorism.[54]	EU extended its blocking regulation (EC No. 2271/1996) to cover these sanctions.

The first well-known example of the use of secondary sanctions did not come from the US, but from the Arab League through the Arab boycott of Israel. The efficacy of the boycott was uneven, since the implementation of sanctions measures was left to individual members of the Arab League, and the League had no means of enforcing compliance. However, the implementation of boycott measures peaked during the 1970s, when members of the League discovered the utility of using oil as a means of leverage against Western nations. The Arab League soon came up with new sanctions measures, which permitted oil sales to only those companies that refused to do business with Israel.[55] The US condemned this measure and responded in kind by adopting Anti-Boycott laws and regulations in 1977.

The US has frequently used secondary sanctions to regulate the behaviour of both targeted states and third states. Statutes that impose trade embargoes and export controls, such as the Export Administration Act (1979), Trading with the Enemy Act (1917) and the International Emergency Economic Powers Act (1977), extend US jurisdiction to overseas companies by using the term "persons subject to jurisdiction of the US." This phrase is defined broadly and includes "any corporation, partnership or association, wherever organized or doing business, that is owned or controlled by US persons."[56] Thus, even an Indian bank established under Indian laws could be subject to US jurisdiction, if it is owned or controlled by a US person. The extraterritorial reach of US laws is wide and requires countermeasures to prohibit companies from complying with US sanctions laws.

Most countermeasure mechanisms mentioned above—compliance blocking, non-recognition of foreign judgments, clawback rights, reporting requirements—aim to prevent local persons from complying with extraterritorial sanctions. Currently, India does not have dedicated law and policy mechanisms to prevent Indian entities from complying with extraterritorial sanctions measures. For instance, India's procedural laws create a presumption that foreign judgments are issued by a competent court and are thus considered automatically enforceable, unless the defendant can prove otherwise.[57] Therefore, in the absence of appropriate proof, there is a possibility that Indian courts may enforce foreign judgments against Indian entities, penalising them for not complying with sanctions. This could be problematic for India if it has deemed that complying with sanctions measures will be against India's national and foreign-policy interests. Introducing countermeasures will allow the Indian government to prevent Indian companies from complying with foreign-sanctions measures, which may be against India's foreign-policy interests. Countermeasures further shield a company from fines imposed by the sanctioning country, allowing it to recover damages through "clawback" rights.

However, blocking statutes cannot prevent the practical effects of certain sanctions measures, [58] such as prohibition on any credit or payments between the entity and any US financial institution; restriction on imports from the sanctioned entity; a ban on a US person from investing in or purchasing significant amounts of equity or debt instruments from a sanctioned person; and exclusion from the US of corporate officers or controlling shareholders of a sanctioned firm.

There is another flaw in the countermeasures described above. If countermeasures are enacted, companies could find themselves caught between the conflicting directives of the sanctioning country and country seeking to implement countermeasures. In today's globalised era, this is a common problem for multinational companies (MNCs) who have widespread networks across the world. For example, in 1997, a Canadian subsidiary of Walmart had to choose between two conflicting directives. US sanctions regulations wanted the subsidiary to end sales of Cuban clothing in Canada, while Canadian authorities sought to impose fines on Walmart Canada, if it decided

to comply with the US sanctions regime.[59] As aptly put in academic writings, companies may find themselves trapped between a "rock and a hard place."[60]

There are certain steps that Indian companies could take to reduce hardships on them as a result of conflicting legal obligations. A company could invoke the "foreign compulsion" defence before US courts, where it can argue that it had no other choice but to comply with the laws of the country it was situated in. The defence essentially conveys that even though the company did violate sanctions, it is not guilty because it was compelled to do so by government of the country it is located in. The success of this defence depends on the facts and circumstances of the case: a) there must be proof of compulsion, and b) the foreign nations' interest must override US' competing interests.[61]

Domestic courts can use the established rules of private international law (where courts determine which country's law is applicable to a dispute) to determine whether an entity can be forcibly subject to sanctions measures. In 1982, the US applied export and re-export controls on American pipeline technology to prevent its use in the construction of the Yamal natural gas pipeline between Western Europe and the Soviet Union.[62] On 18 June 1982, the US extended sanctions to equipment *produced* abroad if they (1) contained US-made components, or (2) were produced by subsidiaries of US companies, or (3) were produced under licences issued by US companies. Violations by the third-country entity could lead to revocation of export licences and denial of commodity and technical data exports from the US.[63] In one case, the US sought to impose sanctions on the French subsidiary of an American parent company for supplying equipment for the pipeline project. The Dutch court held that the sanctions were inconsistent with private international law and could not be enforced to prevent performance of a contract.[64] Following protests by other countries, the sanctions were lifted by the US on 13 November 1982.[65]

If an MNC is caught between conflicting obligations, corporate groups can insulate themselves from liability by allowing subsidiaries to operate independently and with minimal direction from the parent company. Adopting caution during subsidiary–parent communication will help reduce liability and culpability issues under both sanctions and countermeasures law. For instance, the parent company must ensure that they do not give overt directions to their subsidiaries to comply with sanctions measures. Thus, it is prudent for MNCs to thoroughly assess their obligations under sanctions and countermeasures law and formulate a plan to minimise liability under both.

CONCLUSION

Secondary sanctions are considered illegal extraterritorial application of domestic laws and are condemned widely. They affect third-party countries, which are either neutral or are allies of the targeted state and have not instituted comparable sanctions to prohibit their own citizens or companies from doing business with the target regime.[66]

Since India could face sanctions for its relations with Russia and Iran, it must adopt

an appropriate response to tackle them. India could pursue bilateral negotiations with the US to dissuade it from imposing these sanctions. India is one of the US' most important allies: it has strategic importance and strong defence ties with the US. Thus, the US is unlikely to alienate India, which also explains its conditional waiver to India to import oil from Iran.

However, there are limitations to the powers of persuasion. If secondary sanctions violate India's sovereignty and interfere in its domestic affairs and foreign policy, India must take a strong stand and adopt appropriate blocking statutes to provide itself the tools and means to protect and further its domestic and foreign-policy interests.

Blocking statutes can also constitute an important bargaining chip in negotiating cessation or waivers of secondary sanctions. In 1998, following the adoption of the 1996 EU Blocking Regulations, the US and the EU reached an understanding in a bilateral US–EU summit. In the agreement, the US vowed to freeze the application of controversial sanctions laws with regard to EU investments in Iran, Cuba and Libya.[67] The understanding also aided in strengthening political and economic cooperation; exchange of information; analysis and early consultations, to avert friction; and greater cooperation through formulating responses to such issues. The US was asked to not propose "the passage of new economic sanctions legislation based on foreign policy grounds which are designed to make economic operations of the other behave in a manner similar to that required of its own economic operators."[68]

Unlike the EU, India does not represent a group of countries that—based on their sheer numbers—can exercise a greater sway over the US administration. Nonetheless, India can explore whether a political understanding, similar to the one in 1998, can be entered into between the US and India, the EU and other countries affected by secondary-sanctions measures.

While the efficacy of blocking statutes has been questioned, they send an important political message to the US and to other countries affected by the US' secondary sanctions. It will establish that India's relations with Iran and Russia will be conducted freely and independently of the US. At the same time, it will declare India's desire for a multilateral, cooperative solution to the issues posed by secondary sanctions.ORF

ABOUT THE AUTHOR

Aarshi Tirkey is a Research Assistant at Observer Research Foundation.

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20, Rouse Avenue Institutional Area, New Delhi - 110 002, INDIA
Ph. : +91-11-35332000 Fax : +91-11-35332005
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