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Does President Trump Have Authority to Force U.S. Companies to Leave China?

On August 23, 2019, President Trump tweeted that “American companies are hereby ordered to immediately start looking for an alternative to China, including bringing . . . your companies [home] and making products in the USA.”¹ In further tweets, the President raised a series of grievances with China, including intellectual property theft, and ordered several U.S. companies to begin searching for and refusing all deliveries of fentanyl from China.² Responding to press reaction questioning the authority for his directives, President Trump tweeted: “For all the Fake News Reporters that don’t have a clue as to what the law is relative to Presidential powers, China, etc., try looking at the Emergency Economic Powers Act of 1977. Case closed!”³

Although viewed by many observers as a negotiating tactic, the President’s threatened ban on U.S. business in China has provoked debate over whether such action would be authorized by the statute he cites, the International Emergency Economic Powers Act (“IEEPA”), and vulnerable to other legal challenges. Below we provide an overview of the relevant legal issues.

Background on IEEPA

Enacted in 1977, IEEPA provides the President broad authority to “deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside of the United States, to the national security, foreign policy, or economy of the United States.”⁴ Once the President declares a national emergency,⁵ IEEPA authorizes the President to take a series of actions to regulate or prohibit international commerce. Among other things, the President may:

direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.⁶

The President can take these actions by executive order, and implementation authority is ordinarily delegated to the U.S. Treasury Department and, within the Treasury Department, to the Office of Foreign Assets Control (“OFAC”). Absent contrary Congressional action, the President may continue to renew a national emergency and the restrictions he has imposed pursuant to that emergency.⁷

According to the Congressional Research Service, presidents have declared national emergencies under IEEPA 54 times as of March 2019.⁸ Among other things, IEEPA is the main source of authority for the U.S. Government's comprehensive sanctions on Iran, North Korea, Syria, and the Crimea region of Ukraine,⁹ as well as its sanctions on thousands of individuals, companies, and other parties that have been placed on OFAC's Specially Designated Nationals ("SDN") List because of their participation in various activities, such as terrorism, proliferation, human rights abuses, and malicious cyber activity. Generally, U.S. persons are prohibited from dealing with these comprehensively sanctioned jurisdictions and sanctioned parties, and non-U.S. persons are also prohibited from dealings that have a U.S. nexus.

Challenges to a Potential Ban on U.S. Business with China

Hypothetically, relying on IEEPA's broad authority, President Trump could issue an executive order that bans U.S. companies from doing business with China; the scope of such a ban could take many forms and it could include a number of exemptions and wind-down periods. In invoking IEEPA, the President could find that China's actions posed an "unusual and extraordinary threat" to the "national security, foreign policy, or economy of the United States," and could cite a series of threats, ranging from national security concerns to intellectual property theft.

Although courts have traditionally been deferential to presidential exercises of authority under IEEPA¹⁰—and have shown deference to the Executive's actions in the international sphere more generally—this action would doubtless spur a number of legal challenges. The specific legal challenges and their prospects would depend on the particulars of the executive order and any implementing regulations.

Parties challenging the ban would likely argue that it exceeds IEEPA's authority and sharply departs from the statute's past uses because it is based on President Trump's ongoing trade war with China and does not rise to the level of responding to an "unusual and extraordinary threat." The Trump Administration would likely argue, however, that IEEPA by its broad terms applies to threats to the U.S. "economy," as well as to threats to national security and foreign policy. And as noted above, in declaring the ban the Trump Administration would likely cite various national security and foreign policy concerns in addition to economic ones. The Trump Administration could also point to the fact that an Obama-era executive order issued under IEEPA (which concerned malicious cyber activity) cited the "misappropriation of funds or economic resources, trade secrets, personal identifiers, or financial information for commercial or competitive advantage or private financial gain."¹¹

A ban could also give rise to various constitutional claims, including a claim that the ban constitutes an uncompensated taking of property under the Fifth Amendment. In the seminal *Dames & Moore* decision, the Supreme Court upheld a broad range of measures taken by the President under IEEPA in the wake of the Iran hostage crisis, but left open the question whether impacted U.S. parties could bring a takings claim for just compensation.¹² The analysis of any takings claims would turn on the particular facts and

circumstances (including whether the plaintiff enjoyed “legitimate investment-backed expectations”¹³); however, takings challenges in the sanctions context have generally been rejected in the past.¹⁴

Beyond the U.S. legal system, such a ban could potentially be challenged at the World Trade Organization (“WTO”). WTO rules generally prohibit member states from imposing sanctions or “retaliation” against one another unless such measures involve “essential security interests,” and China could argue that President Trump’s ban is rooted in economic, not national security, interests. Although the WTO has traditionally been hesitant to second guess member countries’ use of the national security exemption, and a number of WTO member countries (including the United States and Russia) take the position that the invocation of the exemption is a matter of unilateral discretion that cannot be reviewed by the WTO, a WTO panel earlier this year ruled for the first time that it has jurisdiction to review certain aspects of a member country’s invocation of the national security exemption.¹⁵ A number of WTO member countries have launched WTO cases challenging the invocation of the national security exemption by the United States to justify the imposition of tariffs on imports of steel and aluminum.

Conclusion

Given the broad authority provided by IEEPA, President Trump’s threat to prohibit U.S. companies from doing business with China has a serious basis. Much uncertainty remains, however, regarding whether the President intends to press forward with such a ban or potentially a more narrowly targeted set of prohibitions, and, if so, on what time frame. Indeed, President Trump appeared to walk-back the threat during the recent G7 meetings (after which the President’s spokesperson said that no walk-back was intended).¹⁶ In any event, any use of IEEPA to broadly limit trade with China would have serious consequences for both economies (as well as other global repercussions), and could provoke judicial and Congressional action to limit the President’s authority. We will monitor this evolving situation and provide further updates.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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- ¹ Donald Trump (@realDonaldTrump), Twitter (Aug. 23, 2019, 7:59 AM), available [here](#); see also Alan Rappenport and Keith Bradsher, *Trump Says He Will Raise Existing Tariffs on Chinese Goods to 30%*, NEW YORK TIMES, Aug. 23, 2019, available [here](#); Alan Rappenport and Keith Bradsher, *Trump Ordered U.S. Companies to Leave China. Is that Possible*, New York Times, Aug. 24, 2019, available [here](#).
- ² Donald Trump (@realDonaldTrump), Twitter (Aug. 23, 2019, 7:59 AM), available [here](#); Donald Trump (@realDonaldTrump), Twitter (Aug. 23, 2019, 7:59 AM), available [here](#).
- ³ Donald Trump (@realDonaldTrump), Twitter (Aug. 23, 2019, 8:58 PM), available [here](#).
- ⁴ 50 U.S.C.A. § 1701(a).
- ⁵ The President's powers under IEEPA are subject to the provisions of the National Emergencies Act ("NEA"). The NEA requires that any presidential declaration of an emergency be transmitted to Congress and published in the Federal Register. See 50 U.S.C. §§ 1621(a), 1631. Under the NEA, an emergency may be terminated either by the President or by Congress (through a joint resolution). See 50 U.S.C. § 1622. Like other legislation, a joint resolution terminating an emergency requires the President's signature (or a two-thirds majority in both the House and Senate to override the President's veto).
- ⁶ 50 U.S.C.A. § 1701(a)(B).
- ⁷ 50 U.S.C.A. § 1622.
- ⁸ See Congressional Research Service, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, Mar. 20, 2019.
- ⁹ The U.S. embargo on Cuba is based on the Trading with the Enemy Act ("TWEA"). See 50 U.S.C.A. §§ 4301-4341.

¹⁰ See *Dames & Moore v. Regan* 453 U.S. 654, 675 (1981) (holding that IEEPA authorizes the President to nullify attachments and order the transfer of the assets of the targets of sanctions, but leaving open the question of whether the suspension of claims in U.S. courts constituted a taking of property in violation of the Fifth Amendment).

¹¹ Exec. Order 13694 § 1(a)(i)(D), available [here](#).

¹² 453 U.S. 654, 688-89.

¹³ See e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002).

¹⁴ See e.g., *Paradissiotis v. United States* 49 Fed. Cl. 16, 22 (2001), *aff'd*, 304 F.3d 1271 (Fed. Cir. 2002); *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988).

¹⁵ See World Trade Organization, *DS512: Russia – Measures Concerning Traffic in Transit*, Apr. 26, 2019, available [here](#).

¹⁶ See The White House, *Remarks by President Trump and Prime Minister Johnson of the United Kingdom in Working Breakfast | Biarritz, France*, Aug. 25, 2019, available [here](#); Eli Stokols and Chris Megerian, *Trump Voices “Second Thoughts” About Escalating Trade War with China*, Aug. 25, 2019, available [here](#).