

The President's Authority to Order Companies Out of China

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CFIUS, International Trade Controls

On August 23, 2019, President Donald J. Trump tweeted: “Our great American companies are hereby ordered to immediately start looking for an alternative to China, including bringing . . . your companies HOME and making your products in the USA.” The President later referred to the International Emergency Economic Powers Act of 1977, 50 U.S.C. § 1701 *et seq.* (“IEEPA”) as support for his statement.

The August 23 tweet and follow-on statements from the President have raised questions regarding the scope of his authority under IEEPA and whether the President could force U.S. companies to stop doing business in or with China. Below we address key questions regarding the Administration's potential invocation of the President's powers under IEEPA to implement measures that attempt to require U.S. companies to exit the Chinese market.

1. What is IEEPA?

IEEPA is a federal statute enacted in 1977 that allows the President to exercise broad authorities to regulate commerce after declaring a national emergency:

to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.

50 U.S.C. § 1701(a). Historically, IEEPA has most often been invoked to implement sanctions on specific foreign countries and persons, such as Iran, Russia, and Venezuela, but it has occasionally been used more broadly. Most notably, when the Export Administration Act, which allowed the President, under different statutory authority, to control the export and reexport of dual-use goods, technologies, and software (that is, items that have both military and civilian applications), lapsed in 2001, the substantive provisions of its implementing regulations were maintained for an extended period through an invocation of IEEPA, until the enactment of the Export Control Reform Act of 2018. More recently, President Trump invoked IEEPA as support for an [Executive Order](#) on “Securing the Information and Communications Technology and Services Supply Chain.”

2. Could IEEPA Be Invoked Officially to Restrict Trade with China?

The answer is “possibly” – the President’s authority under IEEPA is broad, but it is not unfettered.

As a starting point, to invoke the authorities granted under IEEPA, the President must declare a “national emergency” under the National Emergencies Act (“NEA”) regarding an “unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States.” *Id.* The President’s tweets do not constitute the declaration of a national emergency. However, such a declaration may be contemporaneous with the President’s invocation of his authorities under IEEPA, and would most likely come in the form of an Executive Order that (1) broadly identifies the national emergency; and (2) imposes specific restrictions on dealings with China.

For example, when President Clinton imposed sanctions on the Iranian petroleum sector through [Executive Order 12957](#), the Order began with the following declaration of a national emergency: “I, WILLIAM J. CLINTON, President of the United States of America, find that the actions and policies of the Government of Iran constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with that threat.” Subsequent Executive Orders by Presidents Clinton, Bush, Obama, and Trump have all relied on this same national emergency (as modified or reiterated by subsequent Executive Orders) to impose additional sanctions on Iran.

Although it is not clear what “national emergency” the President would declare to justify the invocation of his authorities under IEEPA, prior statements by the Trump Administration provide some guidance. In his tweets on August 23, President Trump cited China’s alleged theft of U.S. “Intellectual Property at a rate of Hundreds of Billions of Dollars a year.” Vice President Pence alleged last year that China is using stolen U.S. intellectual property to strengthen its military, and that China is meddling in U.S. democracy by interfering in the electoral process. The President has also repeatedly cited China’s exchange rate policy, the trade deficit, and China’s increased tariffs resulting from the escalating trade war as constituting a threat to the U.S. economy.

Whether any of these justifications would be sufficient to constitute a “national emergency” is uncertain, as is the ability of the justifications to withstand the political, practical, and/or legal challenges discussed below.

3. IF IEEPA Were Invoked Officially, What Measures Could President Trump Impose Under IEEPA to Attempt to Require U.S. Companies to Disengage from China?

The President may take a range of actions pursuant to IEEPA to require U.S. companies to disengage from China. The most drastic would be a direct prohibition on any dealings by U.S. persons with China, including the Chinese government and persons resident in China, and any property in which the foregoing have an interest. Such an action would be akin to the complete embargoes imposed on Iran, Syria, North Korea, and Cuba. A slightly less drastic step would be to prohibit any dealings with the Government of China, including property in which it has an interest, a move akin to the sanctions imposed on the Maduro regime in Venezuela. But either step would have the practical effect of eliminating U.S. companies’ ability to do business in China. The President could take a range of other actions that would severely hamper the ability of U.S. companies to do business in China, if not requiring outright exit from the Chinese market, including: (1) restrictions on dealing in Chinese debt; (2) restrictions on extending credit to Chinese counterparties; (3) further restrictions on the provision to China, its government, or

persons resident in China of goods, technology, software, or services that are subject to U.S. jurisdiction; and (4) restrictions on imports from China or dealing in Chinese-origin items.

4. Have Other Presidents Invoked IEEPA for Similar Purposes of Broadly Restricting Business with a Country?

Yes. While IEEPA provides that authorities granted under the statute “may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose,” 50 U.S.C. § 1701(b), presidents have relied on IEEPA to impose comprehensive sanctions on countries such as Iran, Syria, and North Korea. Although the Executive Orders imposing these comprehensive sanctions identified specific threats to U.S. national security, foreign policy, and economic interests, all invoked broad remedies to address the identified threats—restricting virtually all dealing by U.S. persons with or involving these countries, their governments, or residents.

Accordingly, it would not be unprecedented for the President to impose broad restrictions on trade and other dealings with China to address specific malign conduct.

What would be unprecedented, however, is the potential application of broad restrictions on trade and dealings by U.S. persons with one of the United States’ largest trading partners. The consequences to U.S. companies from having to exit a market such as Iran pale in comparison to the disruption that would result from a mass exodus of U.S. businesses from China.

5. What Obstacles Could be Presented to the President’s Invocation of IEEPA to Attempt to Require U.S. Businesses to Leave China?

There are at least three potential obstacles to President Trump officially invoking IEEPA to attempt to require U.S. companies to exit the Chinese market.

First, given the impact on constituent businesses—and the arguably extraordinary exercise of executive authority that such a use of IEEPA would entail—the President could face congressional pushback, including from his own party, with an active U.S. business community raising concerns. IEEPA itself was enacted due to congressional concern over the scope of presidential authorities under a predecessor statute, the Trading with the Enemy Act, and IEEPA in turn rests on another law, the National Emergencies Act, which was also enacted to restrain excessive presidential use of emergency authorities.

Reflecting this congressional concern, section 202 of the National Emergencies Act, 50 U.S.C. § 1622, provides that Congress may disapprove any presidential declaration of a national emergency through the enactment of a joint resolution of disapproval. Further, section 202 makes available expedited procedures for congressional consideration of such proposed joint resolutions of disapproval. The practical effect of those procedures is to circumvent obstacles that often prevent adoption of proposed legislation, such as the Senate filibuster, the authority of Committee chairmen to bottle up legislation they do not support, and the ability of the majority leadership of both houses to control the floor schedule. Under the procedures of section 202, a joint resolution disapproving the declaration of a national emergency can be brought to a floor vote in either chamber of Congress within about three weeks. Of course, in order for such a joint resolution to become law, both houses still must pass it, and the President must either sign it into law or have his veto of it overridden by a 2/3 vote of both houses, but the threat of a veto override can serve as a powerful political deterrent.

The disapproval procedure set forth in section 202 is essentially the same one that governs congressional review of proposed international arms sales, and also decisions by the President to relax U.S. sanctions on Russia. Those procedures were invoked earlier this year by Congress with respect to both arms sales to Saudi Arabia (both houses voted to disapprove, but President Trump's veto of the disapproval legislation was sustained) and the lifting of U.S. sanctions on Rusal and two other Russian companies (the House voted overwhelmingly to disapprove, but the Senate fell 3 votes short of the 60 votes needed to pass the joint resolution of disapproval). Given these recent efforts by Congress to utilize similar disapproval mechanisms, it seems likely that an effort will be mounted to invoke section 202 with respect to any emergency declaration under IEEPA directed against U.S. investment in China.

Second, there would be certain practical challenges to implementing and enforcing any Executive Order that would attempt to preclude U.S. business activity in China. China is not only an important commercial market for many U.S. and non-U.S. businesses, but it also is the site of sizeable business operations that cannot be turned off overnight without causing massive disruptions.

Although the President has proven to be unpredictable in earlier tweets, the Administration also has proven to be cognizant of market reactions. We expect that the Administration ultimately will be cautious about taking action that would precipitate extraordinary market tumult and exacerbate the recessionary signals in the economy that are currently flashing yellow, if not red.

Third, an Executive Order would almost certainly face legal challenges in U.S. courts. It is an open question as to whether such challenges would be successful. Courts are particularly deferential to the President in matters of national security and foreign policy, including authorities exercised pursuant to IEEPA. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Nonetheless, there are arguments unique to the present situation that could be raised in a court challenge. Among others, the potential legal challenges include:

- Challenges based on the limited reach of the plain text of IEEPA or the NEA as enacted by Congress, including:
 - The identified emergency does not in fact constitute an “emergency” as that term was used by Congress in the statute. Before exercising his authority under IEEPA, the President must declare a national emergency under the NEA. The legislative history of IEEPA makes clear that Congress viewed emergencies to be “rare and brief” as opposed to “normal, ongoing problems.” See *Revision of Trading With the Enemy Act: Markup Before the H. Comm. on Int’l Relations*, 95th Cong. 4 (1977). However, neither IEEPA nor the NEA defines “emergency,” beyond that it must be an “unusual and extraordinary threat.” 50 U.S.C. § 1701(a). And IEEPA authorities have already been used to address asserted emergencies such as malicious cyber-intrusion, see [Executive Order 13694](#), and threats against information and communications technology and services in the United States, see [Executive Order 13873](#). Nonetheless, a court may conclude that the purpose of such an Executive Order is for strategic purposes in trade negotiations, and not to deal with an “unusual and extraordinary threat” to the national security, foreign policy, or the economy of the United States, as required by IEEPA.
 - Broad restrictions on dealings with China were not adequately tailored to address whatever specific scenario the President declares as constituting a “national emergency.” This challenge would break new ground under IEEPA. Although the

background and text of IEEPA suggest Congress limited the President's economic powers under IEEPA to address the declared emergency itself, no comprehensive sanctions regime has been struck down based on a claim that the President's invocation of economic powers was too attenuated to the declared emergency.

- Constitutional challenges, including claims that:
 - The Executive Order violates the Due Process Clause of the Fifth Amendment. A court may conclude that a U.S. company's procedural due process rights entitle it to notice and a hearing before the government deprives it of productive assets and investments located in China, as well as business and contractual opportunities.
 - A prohibition on trade or dealings with China violates the Takings Clause of the Fifth Amendment, which forbids the government from taking private property for public use without just compensation. The remedy for a Takings claim is compensation from the government, rather than an injunction of the government's conduct.

The availability and strength of these arguments would turn on the exact scope and effective timing of the Order. While the President is likely to get considerable deference for a national security-based order under IEEPA, there have been successful due process challenges to other national security-related determinations of the Executive Branch. See *Ralls Corp. v. Comm. on For. Inv. in U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

To be sure, as noted, there are potential obstacles to each of these challenges, with considerable precedent upholding prior IEEPA-based orders by multiple Presidents. But given the unprecedented use of IEEPA to compel a disengagement from a significant economic partner such as China, we expect that legal challenges would arise, and the prospect of such challenges may both temper the use of IEEPA and/or lead to a narrowing of measures if IEEPA is officially deployed.

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We will continue to monitor and report on developments arising out of the U.S.-China trade dispute. In the interim, please do not hesitate to contact the following Covington attorneys and advisors if you would like to discuss any aspect of the foregoing in further detail:

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