

The Application of the International Emergency Economic Powers Act in the U.S.–China Trade War: Can A President Order U.S. Companies Out of China

INTRODUCTION

In a tweet posted on August 23, 2019, President Donald Trump ordered American companies to move out of China and advised the companies to bring their business back to the U.S.¹ Later that day, President Trump claimed that the International Emergency Economic Powers Act (“IEEPA”) justified his order; case closed.²

IEEPA was enacted on October 28, 1977.³ It authorizes the U.S. President to regulate international commerce by declaring a national emergency when the country faces an unusual and extraordinary threat.⁴ President Trump is the first president to apply IEEPA to justify tariffs and also the first president to invoke the statute in a trade war.⁵ The U.S.–China trade war, started by President Trump, focuses on increasing tariffs on imports to force China to change its alleged “unfair trade practices.”⁶ The

1 Donald Trump (@realDonaldTrump), Twitter (Aug. 23, 2019, 7:59 AM), (“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.”) (this account has been permanently suspended).

2 Donald Trump (@realDonaldTrump), Twitter (Aug. 23, 2019, 8:58 PM), (“For all of 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 International Emergency Economic Powers Act of 1977, Pub. L. No. 95-223, 91 Stat. 1626.

4 50 U.S.C. § 1701(a):

Any authority granted to the President by section 1702 of this title may be exercised 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, if the President declares a national emergency with respect to such threat.

5 President Trump invoked IEEPA to impose tariffs on imports from Mexico in 2019, and thus became the first president to apply IEEPA to justify the tariffs. See Press Release, WHITE HOUSE PRESS OFF., Statement from the President Regarding Emergency Measures to Address the Border Crisis (May 30, 2019), <https://www.aila.org/infonet/white-house-statement-trump-emergency-measures>; see also Anya van Wagendonk, *Trump “Ordered” U.S. Companies out of China. Despite Claiming Otherwise, He Can’t Do That*, VOX (Aug 24, 2019, 11:19 AM), <https://www.vox.com/2019/8/24/20830954/trade-war-donald-trump-china-hereby-order-us-companies-tariffs-economic-powers-act-1977>.

6 Ana Swanson, *Trump’s Trade War with China Is Officially Underway*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/business/china-us-trade-war-trump-tariffs.html>.

order to force U.S. companies out of China was announced as a signal of aggravation in the trade war.⁷

This note discusses the legal framework of IEEPA and whether IEEPA gives the U.S. President the authority to order U.S. companies to stop business in China. First, this note explains the legal framework, the previous applications of IEEPA, and the economic background of President Trump's order. Second, this note focuses on the theoretical application of IEEPA and its limits. Finally, this note predicts the legal practicability and economic impact for the President to apply IEEPA to justify his U.S.–China trade war policy.

BACKGROUND: LEGAL FRAMEWORK OF IEEPA AND THE U.S.–CHINA TRADE WAR

A. Legal Framework

Generally, under IEEPA, the President is granted the authority to deal with “unusual and extraordinary threat[s]” posed by foreign countries during a declared national emergency.⁸ After the President declares a national emergency, the President may affect foreign trade by investigating, regulating, or prohibiting any transactions in foreign currencies.⁹ The President may also regulate or block any transactions involving property subject to the jurisdiction of the U.S. in which a foreign country has an interest.¹⁰ During wartime, the President could confiscate any property that

⁷ OFF. OF U.S. TRADE REPRESENTATIVE, EXEC. OFF. OF PRESIDENT, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT 1974 (2018).

⁸ 50 U.S.C. § 1701(a).

⁹ *Id.* §1702(a)(1):

[T]he President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit— (i) any transactions in foreign exchange, (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof, (iii) the importing or exporting of currency or securities, by any person, or with respect to any property, subject to the jurisdiction of the United States.

¹⁰ *Id.* §1702 (a)(1): “The President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise

is subject to the jurisdiction of the U.S.¹¹ Above all, the President may issue regulations that are necessary for the exercise of these authorities.¹² To help enforcement of the act, IEEPA also provides penalties for people or companies willfully violating the President's order.¹³

Before IEEPA, the President had broader authorities after declaring a national emergency under the Trading with the Enemy Act of 1917 ("TWEA"), which could only be invoked during wartime.¹⁴ Many scholars criticized the overbroad presidential authorities under TWEA.¹⁵ Therefore, to reduce the presidential overuse of TWEA, IEEPA was passed, which makes the authorities subject to the National Emergencies Act ("NEA").¹⁶ NEA had a legislative veto that allowed Congress to end a national emergency using a concurrent resolution.¹⁷ However, the legislative veto in

(B) investigate, block during the pendency of an investigation, regulate, 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."

11 *Id.* §1702(a)(1)(C).

12 *Id.* §1704: "The President may issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by [IEEPA]."

13 *Id.* § 1705(b).

14 CHRISTOPHER A. CASEY, IAN F. FERGUSSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 3 (2020), <https://fas.org/sgp/crs/natsec/R45618.pdf> (alterations in original) (TWEA granted to the executive an extraordinary degree of control over international trade, investment, migration, and communications between the United States and its enemies. TWEA defined "enemy" broadly and included "any individual, partnership, or other body of individuals [including corporations], of any nationality, resident within the territory . . . of any nation with which the United States is at war, or resident outside of the United States and doing business within such a territory."); see also Trading with the Enemy Act, § 2, Pub. L. 65-91, 40 Stat. 411 (codified as amended at 50 U.S.C. § 4305).

15 See H.R. REP. NO. 95-459, 9 (1977) (In testimony before the House Committee on International Relations in 1977, Professor Harold G. Maier criticized TWEA as: "Section 5(b)'s effect is no longer confined to 'emergency situations' in the sense of existing imminent danger. The continuing retroactive approval, either explicit or implicit, by Congress of broad executive interpretations of the scope of powers which it confers has converted the section into a general grant of legislative authority to the President . . .")

16 *Id.*; see also 50 U.S.C. §§ 1703(d), 1706; H. Christopher Boehning et al., *Does President Trump Have Authority to Force U.S. Companies to Leave China?*, PAUL WEISS (August 26, 2019), https://www.paulweiss.com/practices/litigation/economic-sanctions-aml/publications/does-president-trump-have-authority-to-force-us-companies-to-leave-china?id=29279#_edn16.

17 CASEY ET AL., *supra* note 14, at 8.

NEA was held unconstitutional following *INS v. Chadha*.¹⁸ Due to this decision, Congress amended the requirement of a concurrent resolution in NEA to a joint resolution, which also applies to IEEPA.¹⁹

The possible termination by Congress after each six-month interval provides a procedural check on the President's exercise of authorities.²⁰ To ensure Congress's legislative superiority, there are additional procedural limitations in IEEPA.²¹ For example, the President must consult with Congress before exercising the authorities and must regularly consult Congress when exercising the authorities.²² Also, the President is required to make an immediate report to Congress, and periodic reports thereafter, to exercise their authority under IEEPA.²³

B. Previous Applications of IEEPA

Although IEEPA was passed to check the misuse of TWEA, ironically, the application of IEEPA is expanding in the stated motivations, subject matter, and nature of the sanction targets.²⁴ Since IEEPA's passage, Presidents have relied on IEEPA to declare national emergencies 59 times, as of June 2020.²⁵ Under IEEPA, Presidents predominately enacted

18 *INS v. Chadha*, 462 U.S. 919, 959 (1983). In *Chadha*, the Supreme Court held that "Congress cannot void the exercise of power by the Executive Branch through concurrent resolution, but could act only through bicameral passage, followed by presentment of the law to the President." *United States v. Romero-Fernandez*, 983 F.2d 195, 196 (11th Cir. 1993) (citing *Chadha*, 462 U.S. at 954–55) (following *Chadha*, the Eleventh Circuit found the legislative veto provision of IEEPA also unconstitutional).

19 See CASEY ET AL., *supra* note 14, at 11; see also Benjamin A. Coates, *The Secret Life of Statutes: A Century of the Trading with the Enemy Act*, MOD. AM. HIST. (May 16, 2018), <https://www.cambridge.org/core/journals/modern-american-history/article/secret-life-of-statutes-a-century-of-the-trading-with-the-enemy-act/77DD7CF528D3190CFC8CF8FF6DDAACB0>.

20 50 U.S.C. § 1622(b); see also § 1706(b) (providing for the cessation of presidential authority under IEEPA upon congressional termination of an emergency declared under NEA).

21 See *United States v. Amimazmi*, 645 F.3d 564, 572 (3d Cir. 2011) (IEEPA subjected the President's authority to "a host of procedural limitations designed to ensure Congress would retain its essential legislative superiority in the formulation of sanctions regimes erected under the Act's delegation of emergency power").

22 50 U.S.C. § 1703(a)(1) ("The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter and shall consult regularly with Congress so long as such authorities are exercised.")

23 50 U.S.C. § 1703(b)–(c).

24 Peter E. Harrell, *How to Reform IEEPA*, LAWFARE (Aug. 28, 2019, 11:49 AM), <https://www.lawfareblog.com/how-reform-ieepa>; see also CASEY ET AL., *supra* note 14, at 21–22.

25 CASEY ET AL., *supra* note 14, at 17 ("Since 1977, Presidents have invoked IEEPA in 59 declarations of national emergency. On average, these emergencies last more than nine years. Most emergencies have been geographically specific, targeting a specific country or government.")

economic sanctions against countries for threats including terrorism, narcotics trafficking, and human rights violations.²⁶ Among other things, IEEPA is the main source of authority for the U.S. Government's comprehensive sanctions on Iran, North Korea, Syria, South Sudan, Russia, and Cuba.²⁷ Under IEEPA, U.S. persons could not deal with these comprehensively sanctioned jurisdictions and sanctioned parties, and non-U.S. persons are also prohibited from these dealings that are related to U.S. interests.²⁸

Since its first use in the Iran hostage crisis, one repeated rationale for invoking IEEPA has been the security of the country and its people.²⁹ During the hostage crisis, President Jimmy Carter applied IEEPA after Americans were taken hostage in Iran to block all the assets in the U.S. belonging to Iran.³⁰ This move was supported by the U.S. Supreme Court in *Regan v. Wald*, which focused on the congressional intent behind the Amendments to TWEA and IEEPA, and held that the two statutes grant the President broad discretion.³¹ This decision also indicates that, despite the limiting amendments from TWEA to IEEPA, the Court will keep deferring to and allocating broad discretion for the President's invocation of the emergency power.³² After the application of IEEPA in the Iranian Hostage Crisis, Presidents have relied on IEEPA to protect the security of the country

26 Aaron Arnold, *Where Does Trump Get the Power to Reimpose Sanctions?*, BULL. ATOMIC SCIENTISTS (Aug. 15, 2018), <https://thebulletin.org/2018/08/where-does-trump-get-the-power-to-reimpose-sanctions/#>.

27 *Id.*

28 Brad S. Karp, Roberto J. Gonzalez & Jessica S. Carey, *Presidential Authority to Ban Companies from Operating in China*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REGULS. (Sept. 8, 2019), <https://corpgov.law.harvard.edu/2019/09/08/presidential-authority-to-ban-companies-from-operating-in-china/#9b>.

29 Arnold, *supra* note 26.

30 Tom Hals & Brendan Pierson, *Trump's Mexican Tariffs Test Limits of U.S. Emergency Powers: Legal Experts*, REUTERS (May 31, 2019, 2:06 PM), <https://www.reuters.com/article/us-usa-trade-mexico-legal-analysis/trumps-mexican-tariffs-test-limits-of-us-emergency-powers-legal-experts-idUSKCN1T12AB>; see also Stephanie Zable, *What Comes After Tariffs: An IEEPA Primer*, LAWFARE (July 19, 2018, 3:12 PM), <https://www.lawfareblog.com/what-comes-after-tariffs-ieepa-primer> (alterations in original) ("President Jimmy Carter used IEEPA to 'block[] the removal or transfer of 'all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States.'").

31 *Regan v. Wald*, 468 U.S. 222, 232 (1984).

32 *Id.*; See also Thomas M. Mashburn, *Regan v. Wald, The Supreme Court Defers to Presidential Authority in Matters of Foreign Policy by Upholding Travel Restrictions to Cuba*, 15 GA. J. INT'L & COMP. L. 83 (1985) (citations omitted) ("In the resulting decision the Court mistakenly characterized the two acts as broad grants of Presidential discretion in matters of foreign policy, rather than the limiting statutes their drafters intended.").

using asset freezing or blocking.³³ For example, President George W. Bush invoked IEEPA to block the assets of terrorist organizations after the 9/11 attack.³⁴ Also, Congress upheld the order and passed the USA PATRIOT Act, which permits asset blocking during the “pendency of an investigation,” enlarging the application of property-blocking provision of IEEPA.³⁵

The stated motivations of IEEPA also witnessed an expansion in subject matter from protecting the country’s security to protecting the economy. On March 15, 1995, President Bill Clinton applied IEEPA to sanction Iran again by issuing Executive Order 12957 and declaring a national emergency due to the “the actions and policies of the Government of Iran,” which posed an “unusual and extraordinary threat.”³⁶ However, this order was not about terrorism but aimed to prohibit U.S. persons from getting involved in Iran’s petroleum development.³⁷ President Clinton signed a further order on May 6, 1995, generally banning U.S. firms from importing from Iran, exporting to Iran, or investing in Iran.³⁸ The Executive Orders executed Section 1704 of IEEPA by authorizing the Secretary of the Treasury to make necessary rules to achieve the orders’ purposes.³⁹ Following the orders, the Office of Foreign Assets Control (OFAC) issued the Iranian Transactions and Sanctions Regulations (ITSR).⁴⁰ Based on ITSR, OFAC administers a comprehensive sanctions regime against Iran by prohibiting transactions involving Iran.⁴¹

33 Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979); Exec. Order No. 12,978, 60 C.F.R. 54,579 (1995).

34 Exec. Order No. 13,224, 3 C.F.R. 13,224 (2001).

35 *Kindhearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 866 (2009); 50 U.S.C. §1702 (a)(1)(B).

36 *Cf. Karp et al.*, *supra* note 28; Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (Mar. 17, 1995).

37 Exec. Order No. 12,957, *supra* note 36.

38 *See* Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (May 6, 1995); *See also* Exec. Order No. 13,059, 62 Fed. Reg. 44,531 (Aug. 21, 1997) (clarifying the preceding Orders).

39 *See, e.g.*, Exec. Order No. 12,957, *supra* note 36, § 3 (the Secretary of the Treasury is authorized “to take such actions, including the promulgation of rules and regulations . . . as may be necessary to carry out the purposes” of the Orders).

40 *See generally* Iranian Transactions and Sanctions Regulations, 31 C.F.R. pt. 560 (2012).

41 *Id.* (“The ITSR virtually prohibit all direct or indirect transactions involving Iran, the Government of Iran, persons who ordinarily reside in Iran and entities either located in Iran or formed under Iranian law.”); *see also Wind-Down of JCPOA Related Activity and the Re-Imposition of Sanctions*, PRICE BENOWITZ LLP (last visited Jan. 31, 2021), <https://ofaclawyer.net/economic->

Presidents have increasingly declared national emergencies and applied IEEPA in recent decades.⁴² Prior to its application in the US-China trade war, IEEPA had been applied by President Trump in many situations, ranging from economic sanctions towards North Korea to increasing tariffs on Mexican imports.⁴³ On September 20, 2017, President Trump signed Executive Order 13810 to impose additional financial and economic sanctions on North Korea because “its commission of serious human rights abuses” and “nuclear and missile programs” posed national security threats to the U.S.⁴⁴ There were several extraterritorial provisions in the enhanced sanctions, which threatened sanctions on foreign entities, including non-U.S. businesses, that make an investment in or conduct business with North Korea.⁴⁵ Due to illegal immigration from Mexico, on May 30, 2019, President Trump invoked IEEPA to put tariffs on U.S. imports from Mexico “unless and until Mexico substantially stops the illegal inflow of aliens coming through its territory.”⁴⁶

There were debates about whether President Trump could invoke IEEPA to increase tariffs.⁴⁷ Although President Trump is the first President to apply

sanctions-programs/iran/ (“The Iran sanctions also prohibit the exportation, re-exportation, sale, or supply of goods to a person in a third country undertaken with knowledge or reason to know that the goods are intended specifically for supply, transshipment, or re-exportation—directly or indirectly—to Iran or the Government of Iran.”).

42 See CASEY ET AL., *supra* note 14, at 17 (The erosion of geographic limitations of IEEPA application “has been accompanied by an expansion in the nature of the targets of sanctions issued under IEEPA authority. Originally, IEEPA was used to target foreign governments; however, Presidents have increasingly targeted groups and individuals.”).

43 Statement from the President Regarding Emergency Measures to Address the Border Crisis, *supra* note 5; see also Exec. Order No. 13,810, 82 Fed. Reg. 44,705 (Sept. 25, 2017).

44 Exec. Order No. 13,810, *supra* note 43.

45 Arnold, *supra* note 26.

46 Statement from the President Regarding Emergency Measures to Address the Border Crisis, *supra* note 5.

47 CHRISTOPHER A. CASEY, CONGRESSIONAL RSCH. SERV., THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT (IEEPA) AND TARIFFS: HISTORICAL BACKGROUND AND KEY ISSUES (2020), <https://fas.org/sgp/crs/row/IN11129.pdf>; see also Fred Barbash, *Use of Emergency Declaration to Impose Tariffs on Mexico Is Legally Questionable, Scholars Say*, WASH. POST (June 14, 2019, 6:08 PM), https://www.washingtonpost.com/world/national-security/use-of-emergency-declaration-to-impose-tariffs-on-mexico-is-legally-questionable-scholars-say/2019/06/04/f9b60004-86ed-11e9-a870-b9c411dc4312_story.html; Andrew Boyle, *The Danger from Trump’s Mexico Tariff Threat*, BRENNAN CTR. FOR JUST. (June 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/danger-trumps-mexico-tariff-threat>.

IEEPA to tariffs, there are similar cases under TWEA.⁴⁸ To deal with an ongoing economic crisis, President Nixon invoked TWEA to impose a ten-percent tariff on all imports for several months in 1971.⁴⁹ However, right after the President Trump's statement on threatened tariffs against Mexico, several proposed amendments to IEEPA were introduced to restrict its use on tariffs.⁵⁰

When President Trump ordered US companies out of China, it was the first time that a U.S. president had applied IEEPA in a tariff-related trade war to intervene directly with international commerce.⁵¹ However, based on the past behavior pattern of President Trump, one cannot say for sure whether he will carry out the alleged executive order in his tweet. President Trump made many threats that were not executed, including closing the border and revoking birthright citizenship.⁵² Indeed, during the G7 meeting in August 2019, President Trump's statements and attitude showed that he already seemed to "walk-back" from the threatened order.⁵³ After Joe Biden won the 2020 election, it is still unclear whether he would sustain the order or similarly apply IEEPA in the US-China trade war. But the incoming president might not be a "game changer" for the trade war.⁵⁴

48 Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump's New Tariffs on Mexico*, LAWFARE (June 3, 2019, 4:19 PM), <https://www.lawfareblog.com/legal-authority-behind-trumps-new-tariffs-mexico>; see also CASEY ET AL., *supra* note 14, at 27 (citing Trade Expansion Act of 1962, Pub. L. 87-794, § 232(b)–(c), 76 Stat. 877 (codified as amended at 19 U.S.C. § 1862(b)–(c))) ("While a President could likely use IEEPA to impose additional tariffs on imported goods as President Nixon did under TWEA, no President has done so. Instead, Presidents have turned to Section 232 of the Trade Expansion Act of 1962 in cases of purported emergency.").

49 Anderson & Claussen, *supra* note 48.

50 See, e.g., S. 764, 116th Cong. (2019); S. 2413, 116th Cong. (2019); H.R. 3557, 116th Cong. (2019); CASEY, *supra* note 47, at 3.

51 Van Wagtenonk, *supra* note 5.

52 Gene Healy, *Trump's Emergency Economic Powers: "Case Closed"?*, CATO INST. (Aug. 27, 2019, 4:14 PM), <https://www.cato.org/blog/trumps-emergency-economic-powers-case-closed>.

53 H. Christopher Boehning et al., *supra* note 16; see also Interview with News Media, Remarks in a Working Breakfast with Prime Minister Boris Johnson of the United Kingdom and an Exchange with Reporters in Biarritz, France, GOVINFO (Aug. 25, 2019), <https://www.govinfo.gov/app/details/DCPD-201900568>; Eli Stokols & Chris Megerian, *Doubts over China Trade War and Rifts over Iran Dominate G7 Summit of World Leaders*, L.A. TIMES (Aug. 25, 2019, 9:40 PM), <https://www.latimes.com/politics/story/2019-08-25/trump-attends-g-7>.

54 Ashutosh Pandey, *Joe Biden Is Hardly the Free Trader Asia Is Hoping For*, DW (Nov. 13, 2020), <https://www.dw.com/en/joe-biden-trump-us-china-trade-war-asia-india/a-55588355>.

C. U.S.–China Trade War

On March 22, 2018, President Trump signed a memorandum, invoking Section 301 of the 1974 Trade Act, to place \$50 billion in tariffs on Chinese goods exported to the U.S., initiating the U.S.–China Trade war.⁵⁵ President Trump claimed the trade restrictions, including the tariff plan, were in response to intellectual property theft.⁵⁶ However, some scholars suggested this trade war is a necessary result of the economic and political competition between the two largest economies.⁵⁷ With the growing trade deficits, President Trump may have wanted to place an increased tariff on Chinese goods to encourage consumers to buy American goods.⁵⁸ The trade war negatively impacted U.S.–China relations, especially after President Trump ordered all U.S. companies to move out of China.⁵⁹ However, it is unclear how President-elect Biden would handle tariffs.⁶⁰ Based on Biden's previous statements about China like "the United States does need to get tough with China," analysts estimate that the US-China trade war might not be resolved under Biden's administration.⁶¹

The tariffs on Chinese goods started in July 2018.⁶² China responded by adopting retaliatory tariffs, beginning "tit-for-tat" tariffs between the U.S.

55 Jeremy Diamond, *Trump Hits China with Tariffs, Heightening Concerns of Global Trade War*, CNN POLITICS (March 23, 2018, 6:10 AM), <https://www.cnn.com/2018/03/22/politics/donald-trump-china-tariffs-trade-war/index.html>.

56 *Id.* (Trump said: "We have a tremendous intellectual property theft problem.")

57 See Lawrence J. Lau, *The China–US Trade War and Future Economic Relations* 1–32 (Lau Chor Tak Inst. Glob. Econ. & Fin., Chinese Univ. H.K., Working Paper No. 72, 2019), http://www.igef.cuhk.edu.hk/igef_media/working-paper/IGEF/igef%20working%20paper%20no.%2072%20english%20version.pdf (according to Lau's analysis, the trade war is caused by "the economic and technological competition between the two economies," implying "the rise of populism, isolationism, nationalism and protectionism.")

58 *A Quick Guide to the U.S.–China Trade War*, BBC (Jan. 16, 2020), <https://www.bbc.com/news/business-45899310>.

59 Don Lee, *For the U.S. and China, It's Not a Trade War Anymore—It's Something Worse*, L.A. TIMES (May 31, 2019, 7:00 AM), <https://www.latimes.com/politics/la-na-pol-us-china-trade-stalemate-20190531-story.html>.

60 Evelyn Cheng, *U.S.–China Trade Tensions Won't Be Going Away Under Biden's Administration*, CNBC (Nov. 9, 2019, 12:50 AM), <https://www.cnbc.com/2020/11/09/us-china-trade-tensions-wont-be-going-away-under-bidens-administration.html>.

61 *Id.*; Eamon Barrett, *Why a Biden Presidency Won't End the U.S.–China Trade War*, FORTUNE (Nov. 9, 2019, 12:40 AM), <https://fortune.com/2020/11/09/joe-biden-us-china-trade-war/>.

62 Enda Curran, *Tariffs to Talks: The U.S.–China Trade War, Explained*, BLOOMBERG (Dec. 12, 2019, 4:49 AM), <https://www.bloombergquint.com/business/how-the-u-s-china-trade-war-got-to-this-point-quicktake>.

and China.⁶³ Since the trade war began, the U.S. has placed more than \$360 billion in tariffs on Chinese products, and China has retaliated with \$110 billion in tariffs. On February 14, 2020, phase one deals between the two countries were implemented.⁶⁴ In the phase one agreement, the Trump administration agreed to cut some U.S. tariffs on Chinese products in exchange for the Chinese government's commitment to purchase an additional \$200 billion worth of U.S. goods and promised to protect foreign intellectual property.⁶⁵ After implementation, the average U.S. tariffs on Chinese goods remain at 19.3%, which is over six times higher than before the trade war.⁶⁶

The trade war has caused significant impacts on both countries' economies. Research shows that a 25% tariff on Chinese furniture alone might cause U.S. consumers to pay an extra \$4.6 billion.⁶⁷ Exports from the U.S. have fallen significantly due to Chinese retaliatory tariffs and U.S. companies have thus lost about \$46 billion.⁶⁸ Not only big companies, but U.S. farmers have also suffered a great amount of loss from China's retaliation. The agricultural products, including pork, soybeans, and wheat, that are exported from the U.S. to China have fallen from \$24 billion in 2014 to \$9.1 billion in 2018.⁶⁹ On the other side, China's economic growth has also slowed partly from the trade war.⁷⁰ However, there is an increase in China's share of exports in the world.⁷¹ Despite President Trump's purpose to decrease the trade deficit, the 2018 U.S. trade deficit reached \$621 billion,

63 Lee, *supra* note 59.

64 Chad P. Bown, *US-China Trade War Tariffs: An Up-to-Date Chart*, PIIE (Feb. 14, 2020), <https://www.piie.com/research/piie-charts/us-china-trade-war-tariffs-date-chart>.

65 *What's in the U.S.-China Phase 1 Trade Deal*, REUTERS (Jan. 15, 2020, 12:16 PM), <https://www.reuters.com/article/us-usa-trade-china-details-factbox/whats-in-the-u-s-china-phase-1-trade-deal-idUSKBN1ZE2IF>.

66 Brown, *supra* note 64.

67 *Id.*

68 REUTERS, *Donald Trump's Tariffs Cost US Companies US\$46 Billion to Date, Trade War Data Shows*, S. CHINA MORNING POST (Jan. 10, 2020, 3:45 AM), <https://www.scmp.com/news/world/united-states-canada/article/3045460/trumps-tariffs-cost-us-companies-us46-billion-date>.

69 Kevin Breuninger & John W. Schoen, *U.S.-China Trade War Is Hurting Farmers, But They're Sticking with Trump*, CNBC (Aug. 8, 2019, 3:29 PM), <https://www.cnbc.com/2019/08/07/us-china-trade-war-is-hurting-farmers-but-theyre-sticking-with-trump.html>.

70 Lau, *supra* note 57.

71 Yusuf Khan, *China Is Blunting the Blows of Trump's Trade War and Just Grabbed an Even Bigger Share of Global Exports*, MKTS. INSIDER (Aug. 29, 2019, 6:24 AM), <https://markets.businessinsider.com/news/stocks/china-exports-share-gains-on-weak-renminbi-asia-shipments-blunt-trump-tariffs-1028483675>.

which is an unprecedented record since 2008.⁷² The trade war has also negatively affected global economic growth.⁷³ The cost of the U.S.–China trade war is estimated by Bloomberg economists to reach \$1.2 trillion by 2021.⁷⁴ The trade war has also weakened global investment since the worldwide economic growth is expected to decrease.⁷⁵ The world economy has become even worse due to COVID-19 pandemic. According to the World Bank, in 2020, there was at least a 5.2% contraction in global GDP.⁷⁶ This pandemic crisis is also expected to cause long term damage to the world's potential output and productivity growth.⁷⁷

Unlike tariffs imposed on Mexico due to immigration, the U.S.–China trade war has escalated to a new stage with President Trump's threat to order all U.S. companies out of China. Due to the broad language of IEEPA, there have been many academic debates about whether IEEPA could be applied in the world trade situations.⁷⁸

72 Katia Dmitrieva, *U.S. Trade Gap Surged to \$621 Billion in 2018, 10-Year High*, BLOOMBERG (March 6, 2019, 7:30 AM), <https://www.bloomberg.com/news/articles/2019-03-06/u-s-trade-gap-surged-to-621-billion-in-2018-highest-in-decade>.

73 INT'L MONETARY FUND, *WORLD ECONOMIC OUTLOOK, GROWTH SLOWDOWN, PRECARIOUS RECOVERY* 119 (2019), <https://www.imf.org/en/Publications/WEO/Issues/2019/03/28/world-economic-outlook-april-2019>.

74 Curran, *supra* note 62.

75 INT'L MONETARY FUND, *supra* note 73, at 7 (according to IMF, the global economic growth was forecasted to slow from 3.6% in 2018 to 3.3% in 2019).

76 *The Global Economic Outlook During the COVID-19 Pandemic: A Changed World*, WORLD BANK (June 8, 2020), <https://www.worldbank.org/en/news/feature/2020/06/08/the-global-economic-outlook-during-the-covid-19-pandemic-a-changed-world>.

77 *Id.*

78 See Jennifer Hillman, *Can Presidents Block Investment in China?*, COUNCIL ON FOREIGN RELS. (Sept. 5, 2019), <https://www.cfr.org/in-brief/can-presidents-block-investment-china>; Robert Kim, *ANALYSIS: The Tweets of August—IEEPA and the US–China Trade War*, BLOOMBERG L. (Oct. 10, 2019, 11:59 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-the-tweets-of-august-iecepa-and-the-us-china-trade-war>; see also Jerry Lambe, *Legal Experts Worry Trump Doesn't Understand His Own Threat to China*, L. & CRIME (Aug. 24, 2019, 11:47 AM), <https://lawandcrime.com/high-profile/legal-experts-worry-trump-doesnt-understand-his-own-threat-to-china/>.

THEORETICAL APPLICATION

IEEPA does not specifically authorize the President to order U.S. firms to leave China or shut down operations there. However, the law does give the nation's chief executive broad "blocking" authority that can be used to effectively deny U.S. firms and their foreign branches and subsidiaries the ability to effectively operate in China or expand their investments there.⁷⁹ As the Supreme Court noted, "[t]he language of IEEPA is sweeping and unqualified."⁸⁰ The multiple uses of the word "any" also indicates the broad power of the President under IEEPA.⁸¹

Specifically, to justify the President's order to stop all U.S. companies' businesses in China, several sections of IEEPA could be invoked. Section 1702(a)(1)(A) regulates future transactions involving foreign currency, which may block future transfers of funds to Chinese companies or individuals.⁸² The President may issue a further executive order to prohibit the transactions of U.S. companies using Chinese currency. It is more likely and straightforward that the President's administration could invoke Section 1702 (a)(1)(B), regarding asset freezing, to support the order. Under the asset freezing provision, the government has the power to block or freeze the exclusively domestic assets of a U.S. company in which a foreign national has any interest.⁸³ Through this provision, the U.S. government could freeze or block U.S. companies' domestic assets, to force U.S. companies to follow the President's order. Also, the U.S. government could terminate U.S. companies' contracts, including leasing agreements, merchandise contracts, or sale contracts, thus forcing U.S. companies to

79 Jeffrey P. Bialos, *The President's Ability to Block US Business from China*, LAW360 (Aug. 26, 2019, 11:28 AM), <https://us.eversheds-sutherland.com/NewsCommentary/Articles/223929/The-Presidents-ability-to-block-US-business-from-China>.

80 *Dames & Moore v. Regan*, 453 U.S. 654, 671 (1981) (quoting *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 807 (1st Cir. 1981)).

81 See 50 U.S.C. §1702 (a)(1) ("any transaction" and "any property"). See also the tweet posted by Harvard Law professor Jack Goldsmith, who placed the blame squarely on Congress for enacting a statute giving the President such broad and unchecked authority: "Read those astonishingly broad and all-encompassing words carefully and imagine what it might mean in Trump's hands. Pay attention especially to the word 'any,' which is used dozens of times in [the statute]." Jack Goldsmith (@jackgoldsmith), TWITTER (Aug. 24, 2019, 5:51 AM), <https://twitter.com/jackgoldsmith/status/1165215063105556480>.

82 50 U.S.C. §1702 (a)(1)(A).

83 *Id.* §1702 (a)(1)(B).

move out of China.⁸⁴ The U.S. government could limit or even prevent business travel to China to serve the purpose of the order.⁸⁵ Above all, since the President could issue regulations necessary for the exercise of these authorities, the President would have remarkable flexibility to issue regulations to move U.S. companies out of China.⁸⁶

Before invoking specific sections of IEEPA to justify his order, there are some prerequisites that the President need meet to exercise his power under IEEPA.⁸⁷ The President need first declare a national emergency by finding that there is an “unusual and extraordinary” foreign threat to national security.⁸⁸ Also, the President need consult with and report to Congress before exercising the authorities.⁸⁹ By establishing such restrictions, the Supreme Court allowed the executive to retain the power necessary to address national emergencies while ensuring that Congress retained its “essential legislative function” and would have some ability to curtail unrestricted use of that power.⁹⁰

But there are no definitions of “national emergency” in either the NEA or IEEPA.⁹¹ There are also no specific guidelines or definitions of “unusual and extraordinary threat” in IEEPA. Congress could refine the meanings of these two limits through statute if it wanted to.⁹² Also, Congress could require a court to conduct factual findings before or after the exercise of any authority to provide guidelines in the precedents.⁹³ Without taking any of

84 *Id.*; see *Chang v. United States*, 859 F.2d 893, 898 (Fed. Cir. 1988) (holding that the imposition of sanctions against Libya under IEEPA, which resulted in the termination of contracts between the plaintiff petroleum engineers and a Libyan corporation, did not constitute a Fifth Amendment taking of private property).

85 See *Regan v. Wald*, 468 U.S. at 243–44 (holding that a Treasury Department regulation, which was authorized under the grandfather clause of IEEPA and imposed travel ban to Cuba, did not violate the freedom to travel protected by the Due Process Clause).

86 50 U.S.C. §1704.

87 *Id.* §1703.

88 *Id.* §1701.

89 *Id.* §1703.

90 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935) (holding that Congress is not permitted to abdicate or transfer to others the essential legislative functions, vested by Article I of the Constitution).

91 50 U.S.C. § 1701(a).

92 See *CASEY ET AL.*, *supra* note 14, at 44.

93 Using the judiciary to determine whether an emergency authority can be exercised by the executive has been common. See *CASEY ET AL.*, *supra* note 14, at 44 n.287 (“Using a court to determine

these actions, Congress may want to keep the ambiguity under IEEPA to provide the President with the “flexibility necessary to address national emergencies with the requisite dispatch.”⁹⁴ The previous application also shows that the undefined interpretation may leave broad room for the President to declare a threat as “unusual” or “extraordinary.”⁹⁵ This ambiguity may uphold that the president’s judgment in declaring an emergency under IEEPA probably cannot be second-guessed.⁹⁶

Here, whether the President could execute the authority depends on whether the U.S.–China trade war is such an unusual and extraordinary circumstance that it is a national emergency. Since there are no exact definitions of such threats, it is up for interpretation.⁹⁷ The extremely large amounts of the tariffs that are involved in this trade war and the underlying dominance battle may support the President’s declaration that the U.S.–China trade war is an unusual threat to the economy of the U.S.⁹⁸ During a G-7 leaders meeting, President Trump also referred to intellectual property theft as the reason for a potential national emergency.⁹⁹ According to the U.S. trade representative’s Section 301 report of the Trade Act of 1974, China is described as a strategic competitor.¹⁰⁰ Based on the results of the investigation of Section 301(b)(1), it is reasonably straightforward that the President could support the order by arguing that the Chinese theft of U.S. intellectual property constitutes a national emergency.¹⁰¹ Previously, given

whether an emergency existed and whether an action was necessary was also the method favored by . . . Francis Lieber, who argued that the acts of officials in states of emergency should be adjudged in court ‘to be necessary in the judgment of a moderate and reasonable man.’”); *see also* 50 U.S.C. §§ 1803–1805.

94 *See* CASEY ET AL., *supra* note 14, at 44.

95 50 U.S.C. §1701(a).

96 Bialos, *supra* note 79.

97 Arnold, *supra* note 26.

98 Lau, *supra* note 57.

99 *See* Amanda Macias, *Trump on US–China Trade War: ‘I Could Declare a National Emergency’*, CNBC (Aug. 25, 2019, 4:45 AM), <https://www.cnbc.com/2019/08/25/trump-on-us-china-trade-war-i-could-declare-a-national-emergency.html> (At the G-7 leaders meeting, President Trump made the following statements about the US–China trade war, “In many ways this is an emergency . . . I could declare a national emergency, I think when they steal and take out and intellectual property theft anywhere from \$300 billion to \$500 billion a year and when we have a total lost of almost a trillion dollars a year for many years.”).

100 Zable, *supra* note 30; *see also* OFF. OF U.S. TRADE REPRESENTATIVE, *supra* note 7.

101 *Explainer: What Tools Could Trump Use to Get U.S. Firms to Quit China?*, REUTERS (Aug. 23, 2019, 7:24 PM), <https://www.reuters.com/article/us-usa-china-trade-options-explainer/explainer->

a policy gap in the relevant legislation, Congress was not able to fully address the issue of foreign investment and export control and the U.S. government may have had to choose between inaction or improperly applying IEEPA.¹⁰² However, on September 15, 2020, the Treasury Department published the anticipated final rule regarding the export filing requirement of critical technology.¹⁰³ Thereafter, to invoke intellectual property theft as the emergency cause, the President would be obligated to explain why the modified foreign investment restrictions are not sufficient.¹⁰⁴

Even assuming the President could properly invoke IEEPA in the U.S.–China trade war, there are still some procedural checks that the President should meet. IEEPA requires the President to consult Congress before exercising the authorities, and it also requires the President to make reports to Congress after exercising the authorities.¹⁰⁵ However, practically, these procedural checks are generally powerless.¹⁰⁶ The weakness of these procedural checks has been caused by “intervening Supreme Court rulings, disuse and the hyper-partisan nature of today’s politics.”¹⁰⁷

Although the procedural checks of consultation and periodic reporting probably do not bar the President from issuing the executive order, congressional review might be another procedural check. Congress has the authority under IEEPA to override the President’s declaration of

what-tools-could-trump-use-to-get-u-s-firms-to-quit-china-idUSKCN1VE00X; see also Nancy A. Fischer, Christopher R. Wall & Matthew R. Rabinowitz, *Trump Administration Considering Use of IEEPA To Restrict U.S. Technology Transfer to China*, GLOB. TRADE & SANCTIONS L. (Apr. 12, 2018), <https://www.globaltradeandsanctionslaw.com/trump-administration-considering-use-of-ieepa-to-restrict-u-s-technology-transfer-to-china/> (“It is possible that President Trump could use the results of the 301 investigation as the basis for determining that there is a ‘national emergency’ with respect to Chinese acquisition of U.S. critical technology.”).

102 See Derek Scissors, Opinion, *Why the China Trade War Is Justified*, HILL (Sept. 3, 2019, 4:00 PM), <https://thehill.com/opinion/international/459767-why-the-china-trade-war-is-justified> (“[T]here is a gap in American policies that Congress partly addressed by upgrading the review process for inbound foreign investment and export controls in the 2018 National Defense Authorization Act.”).

103 Rod Hunter, Sylwia A. Lis & Callie Lefevre, *CFIUS Issues Final Rule Aligning Critical Technologies Mandatory Filing Requirement with US Export Controls*, BAKER MCKENZIE (Sept. 21, 2020), <https://sanctionsnews.bakermckenzie.com/cfius-issues-final-rule-aligning-critical-technologies-mandatory-filing-requirement-with-us-export-controls/>.

104 Thomas J. McCarthy, James Tysse & Caroline Wolverton, *Challenging Executive Actions Under IEEPA*, NAT’L L.J. (2018), <https://www.akingump.com/a/web/80382/aojiQ/updated-nlj-reprint-ieepa.pdf>.

105 50 U.S.C. §1703.

106 Harrell, *supra* note 24.

107 *Id.*

emergency.¹⁰⁸ However, as mentioned before, the legislative veto was found unconstitutional by *Chadha*.¹⁰⁹ As a result, while IEEPA's drafters assumed that a simple majority of Congress could overrule a presidential action under IEEPA, following *Chadha*, Congress must muster the votes needed to overrule a presidential veto—an extremely high bar for action.¹¹⁰

As the Supreme Court held in *United States v. Curtiss-Wright Export Corp.*, the President has a much broader scope of discretion in foreign affairs because “the President alone has the power to speak or listen as a representative of the nation.”¹¹¹ Similarly, the broad and ambiguous language of IEEPA and the relatively weak procedural checks together may reveal a belief that, during a time-sensitive emergency involving foreign affairs, the President is better situated to make a decision than Congress.¹¹²

Legislative Purpose

The legislative purposes of IEEPA may also help justify its application in the U.S.–China trade war. Although IEEPA was passed to limit the presidential power under TWEA, the drafters still gave the president broad grants of discretion.¹¹³ According to the Supreme Court, allowing the President to freeze foreign assets is to let the President control these assets.¹¹⁴ These executive orders could help the President negotiate a resolution during a national emergency.¹¹⁵ Namely, the President could take the foreign assets at hand as a “bargaining chip” in time-sensitive and hostile situations.¹¹⁶ And it could also be used by the President to avoid a situation

108 Bialos, *supra* note 79 (this action is possible because of “the enormous economic consequences for U.S. firms operating in China and the skepticism that many members of Congress have about engaging in this type of wholesale U.S. economic disengagement with China”).

109 *Cf. Chadha*, 462 U.S. at 959; CASEY ET AL., *supra* note 14, at 34.

110 Harrell, *supra* note 24.

111 *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (“The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success.”).

112 See Veronica Stracqualursi, *Trump Claims He Has ‘Absolute Right’ to Order U.S. Companies out of China Under 1977 Law*, CNN (Aug. 24, 2019, 12:17 PM), <https://www.cnn.com/2019/08/24/politics/trump-china-trade-war-emergency-economic-powers-act/index.html>.

113 CASEY ET AL., *supra* note 14, at 43; see also *Dames & Moore*, 453 U.S. at 672-673.

114 *Propper v. Clark*, 337 U.S. 472, 493 (1949) (holding that allowing the President to freeze assets of foreign government is “to put control of foreign assets in the hands of the President . . .”)

115 See, e.g., *Dames & Moore*, 453 U.S. at 673.

116 *Id.*

where hostile countries could use these assets to perform activities inimical to the interests of the U.S.¹¹⁷ IEEPA could also deny hostile nations access to funds they could use to promote activities harmful to the U.S.¹¹⁸ By intervening in the profitable businesses of the target country, economic sanctions are frequently used by the President to put economic pressure on hostile nations.¹¹⁹ Based on these purposes, the President could reasonably apply IEEPA to order U.S. companies out of China to put economic pressure on China and protect the intellectual property interests of the U.S.

The broad language and legislative purpose of IEEPA seem to allow the President to justify his order. But whether the President could force U.S. companies out of China also depends on whether the administration could handle the potential legal problems and its economic effects in the real world.

PRACTICAL APPLICATION

A. *Legal Challenges*

Although the broad language of IEEPA might allow the President to order U.S. companies to move their business out of China, this action may not go unchallenged. Admittedly, there is a long line of cases indicating that such discretionary presidential determinations are not judicially reviewable.¹²⁰ Courts have also deferred to presidential exercises of authority under IEEPA, especially for global issues.¹²¹ However, the President's declarations under IEEPA are not specifically exempt from judicial review.¹²² Also, President Trump's order in moving U.S. companies

¹¹⁷ *Propper*, 337 U.S. 472 (The presidential authority under IEEPA could deprive "enemies, actual or potential, of the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States or its citizens through the use of assets that happened to be in this country.").

¹¹⁸ *Miranda v. Sec'y of the Treasury*, 766 F.2d 1, 5 (1st Cir. 1985).

¹¹⁹ *Cf. Milena Ship Mgmt. Co. v. Newcomb*, 995 F.2d 620, 625 (5th Cir. 1993) (observing that "the purpose of economic sanctions . . . is to exert economic pressure on the offending government, not to mitigate it").

¹²⁰ *See United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940) ("No question of law is raised when the exercise of [the President's] discretion is challenged."); *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 184, 187 (1919) (holding that a claim is "beyond the sphere of judicial authority" when it is premised on an abuse of governmental discretion).

¹²¹ *See e.g., Dames & Moore*, 453 U.S. at 674; *United States v. Dhafir*, 461 F.3d 211, 217 (2d Cir. 2006).

¹²² *Zable*, *supra* note 30; *see also Milena Ship Mgmt. Co. v. Newcomb*, 804 F. Supp. 846, 850 (E.D. La. 1992).

out of China was not in accordance with specific congressional authorization. Therefore, it does not have the strongest legal presumptions and would be subject to less deferential judicial review.¹²³ If the President later declares a national emergency and enacts an executive order directing U.S. companies to move their business out of China, this action would doubtless cause legal challenges.¹²⁴ The specific legal challenges and their prospects would depend on the particulars of the executive order and any implementing regulations.¹²⁵

The first possible challenge might be that the ban exceeds IEEPA's authority. Unlike the statute's past uses like in cases of terrorism or violation of human rights, the President's use of IEEPA would be based on the current U.S.–China trade war, which may not suffice to constitute an “unusual and extraordinary threat.”¹²⁶ However, as argued in the theoretical application above, the undefined and broad term might grant the President authority to make such an order. Indeed, the Obama administration also invoked IEEPA to address malicious cyber activity and misappropriation of trade secrets.¹²⁷ Under the same rationale, the President might also refer to the theft of intellectual property as a national emergency and apply IEEPA in the U.S.–China trade war.

There could also be challenges to the constitutionality of the President's sweeping authority under IEEPA. However, many challenges asking whether Congress unconstitutionally delegated too much power to the president under IEEPA have already failed.¹²⁸ The Fourth Circuit concluded that the President's authority is “explicitly defined and circumscribed” since

123 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (Jackson, J., concurring) (reasoning that only laws that have specific congressional authorization could be “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it”).

124 Karp et al., *supra* note 28.

125 *Id.*

126 50 U.S.C. §1701.

127 Exec. Order No. 13,694, § 1(a)(i)(D), 3 C.F.R. 13,694 (2015) (The Obama government cited the “misappropriation of funds or economic resources, trade secrets, personal identifiers, or financial information for commercial or competitive advantage or private financial gain” to support the executive order under IEEPA.).

128 *Amimazmi*, 645 F.3d at 576 (upholding IEEPA's delegation of authority to the President); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1092–94 (4th Cir. 1993) (same); *United States v. Mirza*, 454 F. App'x 249, 256 (5th Cir. 2011) (same); *see also* *Clancy v. Off. of Foreign Assets Control*, No. 05–C–580, 2007 WL 1051767, at *20–21 (E.D. Wis. Mar. 31, 2007), *aff'd*, 559 F.3d 595 (7th Cir. 2009).

it has “constraining factors” sufficient to match *Touby v. United States*.¹²⁹ Following the Fourth Circuit’s reasoning, the Second Circuit concluded the authorities under IEEPA are “defined and limited,” which may be more constrained than the standard of *Touby*.¹³⁰ The Supreme Court found that, with the extra procedural limitation placed on the President’s authorities, Congress reaffirmed its “essential legislative function.”¹³¹ Therefore, based on the court’s decision, the President’s power under IEEPA is not unconstitutionally broad since there are meaningful constraints that could limit the President’s discretion.¹³²

Assuming the President’s tweet can serve as an executive order, a claim may be that the executive order is unconstitutionally vague.¹³³ The Supreme Court has held that whether an executive order is definite enough depends on whether ordinary people could understand the prohibitions and whether it could cause arbitrary enforcement.¹³⁴ However, an executive order is unconstitutionally vague only if it creates “some risk or detriment without giving fair warning of the nature of the proscribed conduct” to potential

129 See *Touby v. United States*, 500 U.S. 160, 165 (1991) (The Court held that “the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches. Thus, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors”); *Arch Trading Co.*, 987 F.2d at 1093.

130 See *Dhafir*, 461 F.3d at 217; see also *Regan v. Wald*, 468 U.S. at 249 (Blackmun, J., dissenting) (In effecting the shift of peacetime authority from the TWEA to IEEPA, “Congress placed several procedural restrictions on the President’s exercise of the national-emergency powers, including congressional consultation, review, and termination.”).

131 See *A. L. A. Schechter Poultry Corp.*, 295 U.S. at 530.

132 See *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *Amirnazmi*, 645 F.3d at 577 (citation omitted) (“In so doing, Congress reaffirmed its ‘essential legislative function,’ and struck a careful balance between affording the President a degree of authority to address the exigencies of national emergencies and restraining his ability to perpetuate emergency situations indefinitely by creating more opportunities for congressional input.”).

133 Although the tweet content has not been confirmed by the White House, it was supported as an order by President Trump’s using the word “order” in the initial tweet and saying “case closed” in the subsequent tweet. See Donald Trump (@realDonaldTrump), *supra* note 2. Also, the Second Circuit has confirmed that President Trump is a “government actor” by using his personal Twitter account since he has consistently used his Twitter account “as an important tool of governance and executive outreach.” *Knight First Amendment Inst. at Colum. Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019).

134 *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”); see also *United States v. Hescorp, Heavy Equip. Sales Corp.*, 801 F.2d 70, 77 (2d Cir. 1986) (alterations in original) (“That the government ‘might, without difficulty, have chosen ‘[c]learer and more precise language’ equally capable of achieving the end which it sought does not mean that the [regulations] which it in fact drafted [are] unconstitutionally vague.’”).

defendants.¹³⁵ Under IEEPA, only the person who willfully violates the order would be seen as conducting a criminal offense.¹³⁶ Here, because the order is only a social media post, many aspects remain unclear. For example, it is not clear whether only U.S. companies need to move out of China or the U.S.–China partnership companies also need to stop business. It is also unclear whether the U.S. companies need to move out within a specific deadline. Without any supplemental regulations, the boundary of this order may be seen as vague.

The tweet might also involve Bill of Rights claims, including a claim that the order constitutes an uncompensated taking under the Fifth Amendment and an unreasonable search under the Fourth Amendment.¹³⁷ The Supreme Court upheld a broad range of measures taken by the President under IEEPA in the wake of the Iran Hostage Crisis, but it left open the question whether impacted U.S. parties could bring a takings claim for just compensation.¹³⁸ The analysis of any takings claims would turn on the particular facts and circumstances including whether the plaintiff enjoyed legitimate investment-backed expectations.¹³⁹

However, takings challenges in the context of sanctions have generally been rejected in the past.¹⁴⁰ The Supreme Court has held that the nullification of prejudgment attachments due to IEEPA sanctions could not be seen as an unconstitutional taking due to the contingent nature of the licenses.¹⁴¹ Following the Supreme Court's decision in *Dames & Moore*, some Courts of Appeal also held that the extinguishment of contractual rights because of IEEPA is not a regulatory taking that requires Fifth

135 *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 740 (1970).

136 50 U.S.C. §1705(b).

137 Karp et al., *supra* note 28; CASEY ET AL., *supra* note 14, at 37; *see also* U.S. CONST. amends. IV–V.

138 *Dames & Moore*, 453 U.S. at 688–89.

139 *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).

140 *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).

141 *Dames & Moore*, 453 U.S. at 673 n.6 (emphasis in original) (noting that “an American claimant may not use an attachment that is subject to a revocable license and that has been obtained after the entry of a freeze order to limit in any way the actions the *President* may take” under IEEPA).

Amendment compensation.¹⁴² Therefore, there is a very low likelihood for the people who are harmed by the sanctions to bring a successful takings claim.¹⁴³ But some authorities have held that allegations by an entity that the government entered the entity's premises and removed property without a warrant, pursuant to the government's designation of the entity as a terrorist organization under IEEPA, were sufficient to state a claim for unreasonable search and seizure under the Fourth Amendment.¹⁴⁴ Therefore, if the government later invoked IEEPA and seized the U.S. companies' domestic assets to force the companies to move out of China, these companies may bring a Fourth Amendment claim.

Besides the U.S. constitutional claims, the order could also be challenged at the World Trade Organization ("WTO").¹⁴⁵ WTO rules generally prohibit member states from imposing sanctions or "retaliation" against one another unless such measures involve "essential security interests."¹⁴⁶ China may argue that President Trump's order is rooted in economic interests, not national security. However, the WTO has traditionally been hesitant to second guess member countries' use of the national security exemption, and many WTO member countries, including the U.S. and Russia, take the position that the invocation of the exemption is a matter of unilateral discretion that cannot be reviewed by the WTO.¹⁴⁷ However, a WTO panel on April 5, 2019, ruled for the first time that it has jurisdiction to review certain aspects of a member country's invocation of the national security exemption.¹⁴⁸ On February 4, 2020, the WTO reached a final ruling and recommended that Russia end the import blocking of Ukrainian railway

142 767 Third Ave. Assocs. v. United States, 48 F.3d 1575, 1581 (Fed. Cir. 1995) (landlord leasing office space to a foreign government "did so against the backdrop of the government's foreign policy power" and did not have "reasonable investment-backed expectation" that its contract would be fulfilled); Chang, 859 F.2d at 897 (citing Chang v. United States, 13 Cl. Ct. 555, 559-60 (1987)) ("[T]hose who enter into employment contracts overseas do so in light of one salient fact of economic life: that their ability to perform and compel performance is contingent upon the continuation of friendly relations between nations.").

143 CASEY ET AL., *supra* note 14, at 37.

144 See Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57 (D.D.C. 2002).

145 Karp et al., *supra* note 28.

146 *Id.*

147 See Panel Report, *Russia—Measures Concerning Traffic in Transit* 29, 119, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter *Measures Concerning Traffic in Transit*].

148 On April 5, 2019, a WTO dispute settlement panel issued a landmark ruling in a dispute between Russia and Ukraine in which Russia claimed it had taken trade-restrictive measures to protect its national security. Russia invoked the national security exception to justify its measures to block trade. See *id.*, at 18.

equipment since Russia's measures were inconsistent with global trading rules.¹⁴⁹ This ruling may be able to provide insight into how WTO panels would address similar disputes about the national security exemption.¹⁵⁰ Moreover, according to the Russia–Ukraine panel, the economic difference among countries could not rise to an emergency.¹⁵¹ Therefore, the U.S. government might not be able to base the “emergency in international relations” on the trade war.¹⁵² On September 15, 2020, a WTO panel ruled that the U.S. broke the international trade rules by imposing tariffs on Chinese goods during the U.S.–China trade war.¹⁵³ Similarly, if a national emergency is declared and all the business in China is stopped, these measures might be reviewed by the WTO panel as inconsistent with trade rules.¹⁵⁴ However, even such a ruling might not have any practical effects since the U.S. effectively “decimated the W.T.O. appellate body” by blocking needed appointments.¹⁵⁵

There are also scholars and legislators calling for a reform of IEEPA, which could affect the application of IEEPA as well. On the one side, it is suggested by some scholars that Congress should place a stricter standard on the current procedural requirements and should require an affirmative congressional vote to uphold the sanctions.¹⁵⁶ Also, it is proposed that the President should be required to submit to Congress “rigorous, public analysis of goals, costs and benefits” reports on the implementation of the order.¹⁵⁷ On the other side, there are some proposals for a more substantive reform of IEEPA. For example, on July 24, 2019, the Senate Homeland Security and Governmental Affairs Committee moved forward an

149 Emma Farge, Philip Blenkinsop & Riham Alkousaa, *WTO Issues Mixed Ruling in Russia, Ukraine Rail Dispute* (Feb. 4, 2020, 11:10 AM), <https://www.reuters.com/article/us-trade-wto/wto-issues-mixed-ruling-in-russia-ukraine-railway-dispute-idUSKBN1ZY28Z>.

150 William Alan Reinsch & Jack Caporal, *The WTO's First Ruling on National Security: What Does It Mean for the United States?*, CTR. FOR STRATEGIC & INT'L STUD. (Apr. 5, 2019), <https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states>.

151 Measures Concerning Traffic in Transit, *supra* note 147, at 41–42 (adding “political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii)”).

152 General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194.

153 Ana Swanson, *W.T.O. Says American Tariffs on China Broke Global Trade Rules*, N.Y. TIMES (Nov. 16, 2020), <https://www.nytimes.com/2020/09/15/business/economy/wto-trade-china-trump.html>.

154 Farge et al., *supra* note 149.

155 Swanson, *supra* note 153.

156 Harrell, *supra* note 24.

157 *Id.*

emergency-powers reform bill, Senator Mike Lee's (R-Utah) ARTICLE ONE Act.¹⁵⁸ The bill is meant to avoid abuse of IEEPA by giving Congress the power to check the President's actions under the NEA and IEEPA.¹⁵⁹ This bill also proposes limits to the President's application of IEEPA on tariffs since it does not include tariff duties in the statute.¹⁶⁰

B. Economic Impacts

The current trade war has already caused significant negative impacts on the global economy and investment environment and also would pose a significant threat to global economic recovery from the current recession due to COVID-19.¹⁶¹ Ordering U.S. companies to move out of China could have worse and longer-term effects.¹⁶² Before making or implementing the executive order, the President should consider China's potential retaliation and its effects on U.S. companies.¹⁶³ By linking economic interest with national security, President Trump's tweet may further deteriorate the relationship of the two largest economies and promote a bipolar world.¹⁶⁴

In 2015, the Chinese State Council released the Made in China 2025 policy, which aims to make China a center for high-end manufacturing.¹⁶⁵ Similar to Germany's Industry 4.0, this policy plans to upgrade China's manufacturing capabilities by investing billions of dollars.¹⁶⁶ But this

158 Healy, *supra* note 52.

159 *Id.*; see also Harrell, *supra* note 24 ("Sen. Mike Lee of Utah has introduced a bill that would automatically end actions taken pursuant to the National Emergencies Act, including actions pursuant to IEEPA, unless Congress voted in favor of them within 30 days.").

160 Healy, *supra* note 52 (quoting S. 2413, 116th Cong. (2019)) (IEEPA "does not include the authority to impose duties or tariff-rate quotas or . . . other quotas on articles entering the United States").

161 Laura He, *A US-China Trade War Is the Last Thing the World Economy Needs Now*, CNN BUS. (May 19, 2020, 7:11 AM), <https://www.cnn.com/2020/05/19/economy/us-china-trade-war-resume-coronavirus-intl-hnk/index.html>.

162 Lambe, *supra* note 78.

163 *Explainer: What Tools Could Trump Use to Get U.S. Firms to Quit China?*, *supra* note 101.

164 Paola Subacchi, Opinion, *Locking China Out of the Dollar System Could Backfire on America*, MKT. WATCH (Oct. 23, 2019, 3:13 PM), <https://www.marketwatch.com/story/locking-china-out-of-the-dollar-system-could-backfire-on-america-2019-10-22> ("Trump is encouraging the decoupling of the world's two largest economies and the emergence of a bipolar world order led by rival hegemons.").

165 Eamon Barrett, *Manufacturers Are Considering Leaving China. But It Isn't All Because of the Trade War*, FORTUNE (June 7, 2019, 2:00 AM), <https://fortune.com/2019/06/07/us-china-trade-war-manufacturers-leaving/>.

166 *Id.*

upgrade depends partially on partnerships with U.S. companies.¹⁶⁷ Therefore, moving U.S. companies out of China would have a great impact on the production chain revolution of the Chinese market. Meanwhile, as China's consumer markets keep growing, the Chinese market would be a significant draw for U.S. companies.¹⁶⁸ Among the Chinese goods exported to the United States, about half of them are produced by wholly-foreign owned companies or joint ventures with Americans.¹⁶⁹ Also, many U.S. companies cooperate with Chinese companies by outsourcing or producing components in China as part of their production chain.¹⁷⁰ Therefore, stopping U.S. companies operating in China may not help protect the alleged theft of intellectual property or stop the alleged unfair trade practices.

In fact, due to the lower birthrate and higher labor costs in China, as well as the trade war, U.S. companies have found China less attractive for manufacturing, and therefore some have pulled or are considering pulling production out of China.¹⁷¹ To avoid the high tariffs on exports from China, a lot of U.S. companies including Google and Dell are moving their manufacturing out of China.¹⁷² However, they are not going back to the U.S., as President Trump urged.¹⁷³ These companies are trying to rebuild foreign supply chains in Southeast Asia.¹⁷⁴ Based on the current reactions from the U.S. companies, President Trump's order may not serve his

167 *Id.* (Hannah Anderson, a global market strategist at J.P. Morgan Asset Management, stated: "A lot of the ways that China is moving up the production chain is through partnerships with U.S. companies and through making specific components of an end product that a U.S. company retails.")

168 *Id.* (Li Chen, a professor of Chinese business studies at Chinese University Hong Kong, stated: "As China's consumer market continues to grow, it's going to become increasingly important. That's something that the U.S.–China trade war is not going to fundamentally change . . . [b]ut the trade war is going to accelerate the balkanization of supply chains.")

169 Kenneth Rapoza, *More U.S. Companies Seen Leaving China After September*, FORBES (Aug. 8, 2019, 10:13 AM), <https://www.forbes.com/sites/kenrapoza/2019/08/08/more-us-companies-seen-leaving-china-after-september/#2d683cbe2b33>.

170 *Id.*

171 Taylor Telford, *More than 50 Major Companies, from Google to Nintendo, Pull Production from China Because of the Trade War*, WASH. POST (July 19, 2019, 4:57 PM), <https://www.washingtonpost.com/business/2019/07/18/more-than-major-companies-apple-nintendo-pull-production-china-because-trade-war/>.

172 *Id.*

173 *Id.*

174 *Id.*

purposes and could even cause significant negative effects on these giant U.S. companies that enjoy the advantage of a global supply chain.

CONCLUSION

Although IEEPA does not have a specific provision that authorizes the President to order U.S. companies to move out of China, it does grant the President a broad “blocking” authority that can be used to effectively justify the order by asset freezing or prohibiting further investment. However, the application of IEEPA, in this case, would face a dozen legal challenges and have significant negative effects on the U.S., Chinese and even the global economies. Considering that President Trump has left office, it is unlikely for him to exercise an order any more. But it is unclear how President-Elect Biden would treat this threatened order. Therefore, the case is not yet closed.

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