



KWR Special Report

What's at Stake with President Obama's Decision Whether to Renew Sanctions for Myanmar?

By David Mortlock

Washington (KWR) May 5, 2016 - On May 20, 2016, the national emergency that underpins the remaining U.S. sanctions on Myanmar will expire unless renewed by President Obama. The International Emergency Economic Powers Act ("IEEPA") provides most of the legal authority for U.S. sanctions for Myanmar. The statute grants the President broad authority to regulate transactions subject to U.S. jurisdiction. However, the President must first trigger those authorities by declaring a national emergency with respect to "any unusual and extraordinary threat to the national security, foreign policy, or economy of the United States."

Three presidents have renewed the national emergency 17 times already, suggesting that the 18th would be a fairly routine step to maintain the existing measures. President Clinton declared such a threat for Myanmar in 1997 and determined that the government of Myanmar had committed large-scale repression of the democratic opposition in Myanmar and that the actions and policies of the government of Myanmar constituted an unusual and extraordinary threat. Presidents Bush and Obama subsequently expanded the scope of that national emergency based on the developing situation in Myanmar.

However, allowing the national emergency to lapse would be much more than a symbolic action. The last twelve months were no routine year in Myanmar. In light of the landmark elections last November and the rise to power of Aung Sun Suu Kyi's National League for Democracy ("NLD"), many in Myanmar are speculating whether President Obama will renew the emergency, thereby maintaining the sanctions.

If President Obama were to allow the national emergency to lapse in mid-May, the sanctions that rest on that national emergency and imposed pursuant to those Executive Orders would expire. While that may seem appropriate given the great strides Myanmar has made toward democracy and an open society in the last few years, the decision would have significant practical consequences for Myanmar,

U.S. businesses, and the authority of this Administration as well as the next to shape Myanmar policy. If the national emergency is not renewed, the following restrictions and authorities will evaporate.

- **Reporting requirements for new investments**

A centerpiece of the Administration's initial efforts to ease sanctions on Myanmar in 2012 was the reporting requirements on new investments in the country. While the Administration did not outright lift the ban on new investments in Myanmar, the Department of the Treasury's Office of Foreign Assets Control ("OFAC") issued a general license to allow new investments so long as any U.S. person investing an aggregate of \$500,000 in Myanmar file an annual report with the Department of State. The report must outline a range of policies and procedures with respect to the investment. This includes human rights, labor rights, land rights, community consultations and stakeholder engagement, environmental stewardship, anticorruption, arrangements with security service providers, risk and impact assessment and mitigation, payments to the government, investments with the Myanmar Oil and Gas Enterprise ("MOGE"), and contact with the military or non-state armed groups. In addition, a U.S. person undertaking a new investment pursuant to an agreement with MOGE must notify the Department of State.

The reporting requirements were an unprecedented way to ease sanctions in Myanmar while also promoting transparency and cementing the brand of U.S. companies as transparent and accountable. Over a dozen companies have filed reports. Three years later, these reporting requirements would lapse if the national emergency, and therefore the ban on new investments, were to expire.

- **Individual and entity designations**

A number of the Executive Orders for Myanmar authorize the blocking of individuals and entities designated for certain specified behavior in the country. The Orders designate a number of individuals and entities, and authorize the Secretary of the Treasury to designate further persons who meet the specified criteria. Once designated, any of the person's property that is subject to U.S. jurisdiction is blocked, and U.S. persons are prohibited from engaging in any transaction involving the blocked person. These individuals and entities are placed on OFAC's List of Specially Designated Nationals and Blocked Persons ("SDN list").

The existing criteria for designations cover a continuum of activities from providing support to the government to engaging in human rights abuses in Myanmar. The largest number of blocked individuals and entities fall into the former category.

Approximately a dozen individuals were designated for providing support to the government when it was under the control of the military junta, the so-called "cronies." These individuals tend to be quite wealthy, often from benefitting government contracts, and own a significant number of companies, all of which are subject to the same blocking restrictions. Many state-owned enterprises, including the commercial arms of the military, are under the same restrictions for U.S. persons. Given the vast holdings of these individuals and the military, these designations put much of the Myanmar economy off-limits for U.S. businesses. As a result, Myanmar has faced some significant practical problems, including U.S. banks refusing to process fees for imports to Myanmar because of an SDN's ownership interests in the ports.

The U.S. government has initiated a program for delisting the SDNs and has developed criteria for delisting the cronies as well as separate criteria for the state-owned enterprises. The criteria, like the investment reporting requirements, are intended to encourage reforms for Myanmar, including cutting commercial ties with the military, promoting responsible business conduct, and respecting land rights. If the national emergency is not renewed, the designations will be lifted and the delisting process made moot.

- **Jade and ruby import ban**

In August 2013, the statutory ban on importing Myanmar goods to the United States expired. However, because of the continuing concerns about the state of the jade and ruby mining industries in Myanmar, the President issued an Executive Order to maintain the ban on those minerals pursuant to the national emergency declared under IEEPA. As a result, the jade and ruby import ban would lapse if the President did not renew the national emergency. The Administration continues to have concerns with labor and human rights in the jade and ruby mining industry, and most of these mines are located in areas of Myanmar with long-simmering ethnic tensions.

Conclusion

The President's decision whether to renew the national emergency for Myanmar will have significant consequences, which is likely to weigh heavily against a major shift in the Administration's approach to the national emergency. If the President does renew the national emergency, the Administration is likely to include a package of measures to ease sanctions in recognition of the significant steps taken toward democracy over the past year, and to encourage U.S. business to enter the

Myanmar market. Many in both the United States and Myanmar are eagerly anticipating the President's choice.

David Mortlock is a partner in the Government Relations Group of Willkie Farr & Gallagher in Washington.

Reprinted with permission from [KWR International](#).