

**THE NEW COLD WAR: A NOVEL
REGULATORY TAKINGS THEORY ON
ECONOMIC SANCTIONS AGAINST
EXPLORATION AND PRODUCTION IN
RUSSIA**

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I. INTRODUCTION

“Western sanctions against Russia are costing America’s most powerful company a few hundred million bucks. A billion to be

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exact.”¹ Historically, sanctions have been considered one of the least effective methods for inciting change.² Why, then, have sanctions increasingly been an foreign policy tool of choice in the face of a slow American economy and an ever-competitive oil and gas market?

This Comment will focus on the primary issues arising out of the use of targeted economic sanctions and how a novel regulatory takings claim would work to counteract the negative effects of sanctioning regimes. The first section provides background information on the purpose and process of economic sanctions. The second section discusses the most recent economic sanctions imposed against Russia in response to its illegal annexation of Crimea in 2014. The third section explains foundational regulatory takings jurisprudence and applies it to a novel regulatory takings claim. A case study on ExxonMobil is used to illustrate how national corporations with business in Russia could be justly compensated for regulatory takings as a result of economic sanctions.

II. ECONOMIC SANCTIONS

Economic sanctions are “deliberate government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations.”³ They are imposed for reasons ranging from stopping nuclear proliferations to promoting peaceful and democratic change.⁴ Currently, Western sanctions against Russia aim to punish the participants of a militarized dispute—that is,

1. Kenneth Rapoza, *Here's what Exxon 'Lost' from Russia Sanctions*, FORBES (Feb. 27, 2015, 1:32 PM), <http://www.forbes.com/sites/kenrapoza/2015/02/27/heres-what-exxons-lost-from-russia-sanctions/> [http://perma.cc/36R6-3VHU].

2. See generally GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED (3d ed. 2007) (examining if sanctions are truly effective and if the costs of sanctions are worth the benefits derived).

3. *Id.* at 3; see also Sarabeth Egle, *The Learning Curve of Sanctions—Have Three Decades of Sanctions Reform Taught Us Anything?*, 19 CURRENTS: INT'L TRADE L.J. 34, 34 (2011) (“Sanctioning is defined . . . as a ‘coercive response to an internationally wrongful act authorized by a competent social organ.’”).

4. RICHARD N. HAASS, ECONOMIC SANCTIONS: TOO MUCH OF A BAD THING (1998), <https://www.brookings.edu/research/economic-sanctions-too-much-of-a-bad-thing> [http://perma.cc/ZX7K-GGB5]; e.g., Zimbabwe Democracy and Economic Recovery Act of 2001, 22 U.S.C. § 2151 note (2012); S.C. Res. 661, ¶¶ 1-4 (Aug. 6, 1990).

the hostile takeover of Crimea from the sovereign Ukraine.⁵

A. *Historical Background*

Sanctions are not a modern invention. As far back as the fifth century, the ancient Greeks enacted a variety of sanction-like activities on their enemies, using coercive government action in lieu of military force to facilitate favorable results.⁶ While this sanctioning method typically involved taking hostages and other similar tactics, the idea of coercive diplomacy was already in place for a number of civilizations between the ancient Greeks and modern society.⁷

By the end of the 19th century, coercive strategies were the norm in foreign policy, as “classic international law recognised the right of states to employ such coercive measures in certain circumstances.”⁸ The rise of coercive measures led to the creation of the League of Nations and the United Nations, although the League was the first international organization to set forth a true sanctions provision.⁹ The Covenant of the League of Nations, drafted in 1919, provided for “sanctions against any state party resorting to aggressive war in violation of the Articles.”¹⁰ The

5. Press Release, Office of the Press Sec’y, Background Briefing by Senior Administration Officials on Ukraine (Mar. 17, 2014), <https://www.whitehouse.gov/the-press-office/2014/03/17/background-briefing-senior-administration-officials-ukraine> [<http://perma.cc/NT4N-Y7MH>]; Edward Christie, *Sanctions After Crimea: Have They Worked?*, NATO REV., <http://www.nato.int/docu/review/2015/Russia/sanctions-after-crimea-have-they-worked/EN/index.htm> [<http://perma.cc/T33J-YGQ2>] (last visited Dec. 16, 2016).

6. JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 45-46 (2007).

7. See, e.g., THUCYDIDES, THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 79-80 (Robert B. Strassler ed., Richard Crawley trans., 1996); Dick A. Leurdijk, *Kosovo: A Case of ‘Coercive Diplomacy’*, 10 HELSINKI MONITOR, no. 2, 1999, at 8, 17-18; Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions Against the Military Government of Burma/Myanmar*, 7 WASH. U. GLOBAL STUD. L. REV. 455, 461 (2008); see also M.J. Bonn, *How Sanctions Failed*, 15 FOREIGN AFF. 350, 350-51 (1937) (discussing whether economic pressure can work as a substitute for, and not as a complement to, military action).

8. FARRALL, *supra* note 6, at 47.

9. *Id.* at 45, 47-48; League of Nations Covenant art. 16, ¶ 1.

10. GARY D. SOLIS, THE LAW OF ARMED CONFLICT, INTERNATIONAL HUMANITARIAN LAW IN WAR 76 (2010); see League of Nations Covenant art. 16.

United States, along with other nations, did not ratify the Covenant; thus, the dissolution of the League was inevitable.¹¹ The United Nations Charter, which followed in 1945, however, established a sounder foundation for international law.¹²

The United States played a vital role in the development of international sanctions law. The earliest example of U.S. sanctions was against Great Britain during the Revolutionary War when the colonists imposed a boycott on English goods, ultimately leading to the Boston Tea Party.¹³ Since then, sanctions have remained an important component of U.S. foreign policy, though the reasons for enacting sanctions have varied.¹⁴ With the growth of media outlets leading to increased public knowledge of foreign policy, it has been argued that politicians have been forced to use sanctions as a public relations tool “to appease public demand for a U.S. response.”¹⁵ Sanctions, now more than ever, are “a highly politicized foreign policy instrument . . . utilized through any international crisis.”¹⁶ Moreover, the use of sanctions by the United States has helped assert its leadership in world affairs, and countries often look to the United States’ use of sanctions to demonstrate its international commitments.¹⁷ Yet, due to the large number of sanctions implemented, the United States is seen as a “bully” nation attempting to impose and enforce its own standards on weaker states with backgrounds perceived as aberrant or anomalous to U.S. interests.¹⁸ Consequently, “[t]his type of

11. F.S. NORTHEGE, *THE LEAGUE OF NATIONS: ITS LIFE AND TIMES 1920–1946*, at 276 (1986).

12. *See id.* at 278 (noting that the ideological division between the East and West after World War II would not interfere with the formation of the United Nations Security Council).

13. KERN ALEXANDER, *ECONOMIC SANCTIONS: LAW AND PUBLIC POLICY* 12-13 (2009).

14. Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 *CAL. L. REV.* 1162, 1168-69 & n. 19 (1987); *see also* ALEXANDER, *supra* note 13, at 13 (discussing the use of sanctions by the U.S. government during times of war, such as the Spanish-American War and the Civil War).

15. Egle, *supra* note 3, at 38; Sarah P. Schuette, Note, *U.S. Economic Sanctions Regarding the Proliferation of Nuclear Weapons: A Call for Reform of the Arms Export Control Act Sanctions*, 35 *CORNELL INT’L L.J.* 231, 237 (2001).

16. Egle, *supra* note 3, at 38.

17. HUFBAUER ET AL., *supra* note 2, at 5-6.

18. Egle, *supra* note 3, at 39.

collective community criticism has led to an overall distrust and ignorance of sanctioning protocol within the international community.”¹⁹

B. Legal Procedure & Executive Authority

Sanctions, in theory, are simple: sanctioned countries (“targets”) suffer costs from actions taken by sanctioning countries (“senders”).²⁰ Targets avoid the costs of sanctions by modifying their behavior in accordance with the sender’s objectives.²¹ The sanctions are then lifted when the goals of the sanctions have been met or when the countries come to a resolve.²² Targeted sanctions, or “smart sanctions,” have started holding individual leaders criminally culpable, rather than enacting general economic sanctions against the entire nation.²³ Targeted sanctions allow the sending country the opportunity to focus on specific individuals and financially cripple the regime itself, deferring unintended side effects from the general population towards the regime instead.²⁴

In the international community, the U.N. Security Council has long been in charge of determining when sanctions are necessary to maintain international peace and security, and requiring member states to adopt the resolutions it issues.²⁵ Although the U.N. Charter does not specifically define sanctioning, it does refer to coercive responses that act like sanctions, such as “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”²⁶ Articles 39 and 41 of the Charter require a threat to

19. *Id.*

20. Ioana M. Petrescu, Rethinking Economic Sanction Success: Sanctions as Deterrents 1 (Dec. 2010) (draft paper), <https://pdfs.semanticscholar.org/974d/a7f099124e7bda4bde73b10d86c1a5841aea.pdf> [http://perma.cc/993L-RTK9].

21. *Id.*

22. *Id.* at 7.

23. Egle, *supra* note 3, at 37.

24. *Id.*

25. See FARRALL, *supra* note 6, at i (“The United Nations Security Council has increasingly resorted to sanctions as part of its efforts to prevent and resolve conflict.”).

26. U.N. Charter art. 41.

or a breach of the peace in order for sanctions to be implemented.²⁷ However, what is written in the Charter and what actions member countries take can differ vastly due to ambiguity in interpreting a “threat to the peace.”²⁸

The U.S. legal structure governing economic sanctions is more muddled and arguably more ambiguous. The Office of Foreign Assets Control (OFAC), part of the Department of the Treasury, is responsible for administering and enforcing sanctions.²⁹ Sanctions, according to OFAC, are defined as the “blocking of assets and trade restriction to accomplish foreign policy and national security goals.”³⁰ “The power of OFAC is based on presidential national emergency powers and special legislation authority, which impose controls on assets and the freezing of assets under U.S. jurisdiction,”³¹ namely through the Trading with the Enemy Act, the National Emergencies Act, and the International Emergency Economic Powers Act.³²

Since 1917, the Trading with the Enemy Act (TWEA)³³ has historically been the President’s main source of power to “regulate commerce between enemy nations or their nationals and any person within the United States during wartime.”³⁴ The statute was amended and expanded in 1933 by the Emergency Banking Act to allow the President to exercise power “[d]uring time of war **or** during any other period of national emergency declared by the

27. U.N. Charter arts. 39, 41; FARRALL, *supra* note 6, at 64-65.

28. FARRALL, *supra* note 6, at 63-64; *see* U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

29. *About: Office of Foreign Assets Control*, U.S. DEP’T OF TREASURY, <http://www.treas.gov/offices/enforcement/ofac/> [<http://perma.cc/NZS4-BL5E>] (last updated Apr. 20, 2017, 10:15 AM); Egle, *supra* note 3, at 35.

30. Egle, *supra* note 3, at 35; *OFAC FAQs: General Questions*, U.S. DEP’T OF TREASURY, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic [<http://perma.cc/783U-P2CA>] (last updated Mar. 14, 2017, 3:29 PM).

31. Egle, *supra* note 3, at 35.

32. U.S. DEP’T OF TREASURY, OFAC REGULATIONS FOR THE FINANCIAL COMMUNITY 10 (2012).

33. 50 U.S.C. §§ 1-44 (2012).

34. Bethany Kohl Hipp, Comment, *Defending Expanded Presidential Authority to Regulate Foreign Assets and Transactions*, 17 EMORY INT’L L. REV. 1311, 1317 (2003).

President,” which would include a national emergency during peacetime.³⁵ Decades later in the early 1970s, “[c]oncerned about the bloated power of the Executive under TWEA,” the Senate appointed a committee to re-examine executive authority when declaring peacetime emergencies.³⁶ The working committee “sought to limit the President’s power under Section 5(b) of TWEA for two reasons. First, the use of Section 5(b) did not provide for any congressional review of the President’s actions under TWEA, including any peacetime declarations of national emergencies. Second, TWEA lacked any procedures to determine the expiration of a national emergency.”³⁷

The National Emergencies Act (NEA) was created to address these problems.³⁸ NEA, enacted in 1976, serves as a formalized process that enables Congress to check the President’s emergency declaration powers.³⁹ “Specifically, NEA require[s] the President to: (1) specify the provision of law under which he acts; (2) maintain a record of significant executive orders pursuant to the declared national emergency . . . (3) report his actions and findings to Congress”; and (4) “renew future national emergencies every year” as each emergency declaration faces an annual expiration.⁴⁰

A year later, Congress passed the International Emergency Economic Powers Act (IEEPA) in 1977 to delineate the President’s power to regulate commerce during a national emergency.⁴¹ Both NEA and IEEPA have statutorily eliminated the applicability of TWEA to national emergencies, tailoring it back for use only in times of war.⁴² Before exercising executive authority under IEEPA, the President must declare a national

35. Emergency Banking Relief Act, Pub. L. No. 1, § 1(b), 48 Stat. 1, 1 (1933) (emphasis added).

36. Hipp, *supra* note 34, at 1335; S. REP. NO. 94-1168, at 2 (1976).

37. Hipp, *supra* note 34, at 1336 (footnotes omitted).

38. 50 U.S.C. §§ 1601-51 (2012)

39. *See id.* § 1621; Hipp, *supra* note 34, at 1337-38.

40. Hipp, *supra* note 34, at 1338 (citing 50 U.S.C. §§ 1622, 1631, 1641) (footnotes omitted).

41. 50 U.S.C. §§ 1701-06 (2012); Hipp, *supra* note 34, at 1340-41.

42. MARK K. NEVILLE, JR., INTERNATIONAL TRADE LAWS OF THE UNITED STATES ¶ 17.03[1] & n.34 (2015).

emergency under NEA.⁴³ The national emergency must pertain to “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.”⁴⁴ After declaring a national emergency and following all procedures under NEA, the President is then legally authorized to, among other things, investigate, regulate, 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” . . . subject to the jurisdiction of the United States.”⁴⁵

IEEPA is commonly invoked to promote U.S. national security interests by freezing or blocking assets of hostile foreign governments or foreign nationals abroad. Shortly after the September 11 terrorist attack, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“Patriot Act”).⁴⁶ Section 106 amended IEEPA to expand presidential authority, granting the President the authority to block transactions during the pendency of an investigation and to confiscate assets of foreign individuals, organizations, or countries that he determined to have “planned, authorized, aided, or engaged in” armed hostilities against the United States.⁴⁷ Simply put, the President’s powers to regulate foreign transactions during a national emergency are vastly broad.

III. ECONOMIC SANCTIONS ON RUSSIA

On March 6, 2014, in response to Russia’s illegal annexation of Crimea, President Barack Obama, acting under IEEPA, declared a national emergency, blocked specific Russian nationals

43. 50 U.S.C. § 1701(b) (2012).

44. *Id.* § 1701(a).

45. *Id.* § 1702(a)(1)(A)-(B).

46. Hipp, *supra* note 34, at 1353-55; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272.

47. 50 U.S.C. § 1702(a)(1)(C), *amended by* USA PATRIOT Act § 106; Hipp, *supra* note 34, at 1313.

from transferring their respective property and interests in property subject to the jurisdiction of the United States, and authorized the Secretary of the Treasury to promulgate regulations carrying out Executive Order 13360.⁴⁸ As support for his Order, President Obama cited the “actions and policies of persons . . . who have asserted governmental authority in the Crimean region without the authorization of the Government of Ukraine,” which “undermin[ed] democratic processes” and “threaten[ed] [Ukraine’s] peace, security, stability, sovereignty, and territorial integrity.”⁴⁹ Effective on May 8, 2014, the Secretary issued the Ukraine-Related Sanctions Regulations, which prohibits all transactions defined by Executive Orders 13660, 13661, and 13662, and mandates that any U.S. person holding targeted funds place such funds “in a blocked interest-bearing account located in the United States.”⁵⁰ The European Union, United Nations, and several other countries followed suit and implemented their own sanctioning regimes.⁵¹

The conflict in Ukraine is rooted in Slavic history and ongoing sociopolitical turmoil. Even before the Crimean annexation, Ukraine has been plagued by a cultural divide between the northern region, anchored by the westernized city of Kiev, and the southeastern region, which is predominately populated by ethnic Russians.⁵² After years of corruption, slow economic growth, and

48. Exec. Order No. 13660, 79 Fed. Reg. 13,493 (Mar. 10, 2014).

49. *Id.*

50. 31 C.F.R. § 589.201, .203(a) (2014).

51. *Canadian Sanctions Related to Russia*, GLOBAL AFF. CAN., <http://www.international.gc.ca/sanctions/countries-pays/russia-russie.aspx?lang=eng> [<http://perma.cc/76RE-SDK3>] (last modified Mar. 18, 2016); *EU Sanctions Against Russia Over Ukraine Crisis*, EUROPA, https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-ukraine-crisis_en [<http://perma.cc/ZWH5-HXP6>] (last visited Apr. 29, 2017); Imogen Foulkes, *Swiss Sanctions Dilemma Over Russia*, BBC NEWS (Aug. 19, 2014), <http://www.bbc.com/news/business-28833360> [<http://perma.cc/D3QX-TD7U>]; *Japan Steps Up Sanctions as Tensions Rise with Russia*, BBC NEWS (Sept. 24, 2014), <http://www.bbc.com/news/world-asia-29345451> [<http://perma.cc/ET5J-NJJN>]; Balazs Koranyi, *Norway to Sign Up to EU Sanctions Against Russia*, REUTERS (July 30, 2014, 9:30 AM), <http://www.reuters.com/article/ukraine-crisis-sanctions-norway-idUSL6N0Q54OY20140730> [<http://perma.cc/BV6F-DQQK>]; *Sanctions Regimes: Russia*, AUSTRALIAN DEP’T OF FOREIGN AFF. & TRADE, <http://dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/Pages/russia.aspx> [<http://perma.cc/ESR8-ZZ7H>] (last visited Apr. 29, 2017).

52. *Ukraine’s Sharp Divisions*, BBC NEWS (Apr. 23, 2014), <http://www.bbc.com/>

a struggle to be more closely aligned with the European Union, Ukrainian government officials sought out an EU Association Agreement that would establish a political and economic association between the parties, securing judicial and financial reforms for Ukraine and ensuring natural gas imports to the greater European Union.⁵³

The city of Kiev erupted in protests after now-former Ukrainian President Viktor Yanukovich refused to sign the Agreement and instead signed a treaty and multi-billion-dollar loan with long-time friend, President Vladimir Putin.⁵⁴ The protests grew into what is now named the Ukrainian Revolution, or “Euromaidan,” resulting in violent clashes between law enforcement and protestors in sub-zero temperatures.⁵⁵ After several days of protesting, Ukrainians effectively ousted Yanukovich, who fled the country to Russia and has not since returned.⁵⁶ Soon thereafter, the newly appointed interim government signed the Association Agreement in exchange for committing to adopt broad reforms.⁵⁷

In response to the Ukrainian Revolution, pro-Russian demonstrations were held in the southeastern city of Sevastopol.⁵⁸ The pro-Russian demonstrations culminated in the Russian takeover of the Supreme Council of Crimea, the capture

news/world-europe-26387353 [http://perma.cc/6QT6-V96D].

53. Association Agreement between the European Union and Ukraine, May 29, 2014, 2014 O.J. (L 161) 3.

54. Nadia Diuk, *Euromaidan: Ukraine's Self-Organizing Revolution*, WORLD AFF., Mar./Apr. 2014, <http://www.worldaffairsjournal.org/article/euromaidan-ukraine%E2%80%99s-self-organizing-revolution> [http://perma.cc/RK76-R835]. Under this deal, “Moscow would buy \$15 billion in Ukrainian debt by investing in its national welfare fund.” Laura Smith-Spark et al., *Ukraine, Russia Sign Economic Deal Despite Protests*, CNN (Jan. 23, 2014, 11:43 AM), <http://www.cnn.com/2013/12/17/world/europe/ukraine-protests/> [http://perma.cc/TN4X-WV45].

55. Diuk, *supra* note 54. For more information on the events of the Ukrainian Revolution, see WINTER ON FIRE: UKRAINE'S FIGHT FOR FREEDOM (Netflix 2015).

56. *Profile: Ukraine's Ousted President Viktor Yanukovich*, BBC NEWS (Feb. 28, 2014), <http://www.bbc.com/news/world-europe-25182830> [http://perma.cc/6CAU-SWCH].

57. Adrian Croft, *European Union Signs Landmark Association Agreement with Ukraine*, REUTERS (Mar. 21, 2014, 6:26 AM), <http://www.reuters.com/article/us-ukraine-crisis-eu-agreement-idUSBREA2K0JY20140321> [http://perma.cc/BQH8-BN3W].

58. Howard Amos, *Ukraine Crisis Fuels Secession Calls in Pro-Russian South*, GUARDIAN (Feb. 23, 2014, 2:01 PM), <https://www.theguardian.com/world/2014/feb/23/ukraine-crisis-secession-russian-crimea> [http://perma.cc/R7VJ-633H].

of several strategic sites across Crimea, and ultimately the annexation of the Republic of Crimea and the city of Sevastopol.⁵⁹ The Western world has refused to recognize the annexation of Crimea.⁶⁰

The U.S. government immediately responded to the annexation with sanctions. On March 6, 2014, President Obama signed Executive Order 13660, authorizing sanctions on individuals and entities responsible for violating the sovereignty and territorial integrity of Ukraine, or for stealing the assets of Ukrainian people.⁶¹ On April 28, 2014, the United States imposed a second round of sanctions, banning seven Russian officials—including Igor Sechin, the executive chairman of Rosneft, Russia’s leading petroleum company—from conducting business transactions with U.S. persons or within the United States.⁶² On July 16, 2014, the United States further extended sanctions to ban Russian energy firms Rosneft and Novatek, as well as two banks, Gazprombank and Vnesheconombank (VEB).⁶³ The fourth round of sanctions, administered on September 11, 2014, directly targeted Russia’s financial, energy, and defense sectors.⁶⁴

59. Alissa de Carbonnel, *How the Separatists Delivered Crimea to Moscow*, REUTERS (Mar. 12, 2014, 2:39 PM), <http://www.reuters.com/article/us-ukraine-crisis-russia-aksonov-insigh-idUSBREA2B13M20140312> [<http://perma.cc/4DWY-3CPG>].

60. See Anders Fogh Rasmussen, Sec’y Gen., NATO, Statesman’s Forum Address at the Center on the United States and Europe: The Future of the Alliance: Revitalizing NATO for a Changing World (Mar. 19, 2004), https://www.brookings.edu/wp-content/uploads/2014/03/20140319_nato_transcript.pdf [<http://perma.cc/233W-JL4M>] (“The annexation of Crimea through a so-called referendum held at gunpoint is illegal and illegitimate . . . This is a wake-up call for the Euro-Atlantic Community, for NATO, and for all those committed to a Europe whole, free and at peace.”).

61. Exec. Order No. 13660, 79 Fed. Reg. 13,493 (Mar. 10, 2014).

62. Press Release, U.S. Dep’t of the Treasury, Announcement of Additional Treasury Sanctions on Russian Government Officials and Entities (Apr. 28, 2014), <https://www.treasury.gov/press-center/press-releases/Pages/jl2369.aspx> [<http://perma.cc/UT4Z-ZSNJ>].

63. Press Release, U.S. Dep’t of the Treasury, Announcement of Treasury Sanctions on Entities Within the Financial Services and Energy Sectors of Russia, Against Arms or Related Materiel Entities, and Those Undermining Ukraine’s Sovereignty (July 16, 2014), <https://www.treasury.gov/press-center/press-releases/Pages/jl2572.aspx> [<http://perma.cc/5JTU-GYQW>].

64. Press Release, Office of the Press Sec’y, Statement by the President on New Sanctions Related to Russia (Sept. 11, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/11/statement-president-new-sanctions-related-russia> [<http://perma.cc/NP8S-H3E2>].

In short, “[n]o U.S. oil company can do business with Russia,” no U.S. companies can “sell drilling technology [to Russia] to access oil and gas reserves,” and no U.S. banks can “issue long-term loans to Russian businesses for energy-focused projects.”⁶⁵ “By targeting individuals and companies in oil field services, the sanctions could slow capital investments in Russia’s oil sector and affect future output.”⁶⁶ This would have a larger impact for the U.S. oil and gas industry over the long-term, as “Russia produces some 10 million of the about 90 million barrels of oil pumped daily around the world.”⁶⁷ To put this into perspective, “[i]f oil and natural gas are considered together, Russia is the world’s largest energy-exporting country, surpassing even Saudi Arabia.”⁶⁸

The goal of these sanctions is to weaken Russia’s economy “in hopes the pressure will entice Putin, over time, to reverse his annexation of Crimea and to withdraw Russian troops and its support of rebels in eastern Ukraine.”⁶⁹ Recently, however, Secretary of State (and former CEO of ExxonMobil) Rex Tillerson said that U.S. sanctions imposed against Russia will “remain in place until Russia returns control of the peninsula to Ukraine.”⁷⁰ Ultimately, as will be further explained in the following section, the executive branch must delicately balance the sanctions regime against the effect on a sluggish oil and gas industry and a dependence on “imported energy in spite of rising domestic output.”⁷¹

65. Terrell Jermaine Starr, *The American Sanctions Against Russia, Explained*, JALOPNIK, (Feb. 3, 2017, 1:10 PM), <http://foxtrotalpha.jalopnik.com/the-american-sanctions-against-russia-explained-1791938454> [http://perma.cc/QA2E-3YCR].

66. Andrew E. Kramer, *Sanctions Over Ukraine Cause Headaches in the Energy Sector*, N.Y. TIMES (Apr. 28, 2014), <https://www.nytimes.com/2014/04/29/business/international/sanctions-over-ukraine-cause-headaches-in-the-energy-sector.html> [http://perma.cc/UHU2-EEB9].

67. *Id.*

68. *Id.*

69. Starr, *supra* note 65.

70. Rebecca Shabad, *Rex Tillerson Says U.S. Sanctions Against Russia to Remain in Place*, CBS NEWS (Mar. 31, 2017, 12:41 PM), <http://www.cbsnews.com/news/rex-tillerson-says-u-s-sanctions-against-russia-will-remain-in-place-until-it-returns-crimea/> [http://perma.cc/ME8F-Q9HM].

71. Kramer, *supra* note 66.

IV. TAKINGS JURISPRUDENCE

Economic sanctions, a form of executive regulation, preclude American corporations from profit opportunities in sanctioned countries.⁷² As a result of the economic sanctions on Russia, U.S. corporations are prohibited from “supplying any technology or equipment for joint ventures in deep water, offshore, or shale projects.”⁷³ The general effect of the economic sanctions on specific corporations could be viewed as a regulatory taking under the Fifth Amendment Takings Clause of the U.S. Constitution, which provides that private property shall not “be taken for public use, without just compensation.”⁷⁴

In the landmark regulatory takings case *Penn Central Transportation Co. v. New York City*, the Court laid out the seminal structure for regulatory takings jurisprudence.⁷⁵ The *Penn Central* doctrine is a three-factor inquiry that looks to: (1) the “economic impact of the regulation,” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) “the character of the governmental action.”⁷⁶ This ad hoc inquiry has become the foundation for regulatory takings determinations and will be the lens through which the novel takings claim is explored.

“[T]he first step in any property rights analysis . . . is to understand and define the property right at issue.”⁷⁷ For the ExxonMobil case study, there are a number of ways the property

72. See Robert W. McGee, *Legal Ethics, Business Ethics and International Trade: Some Neglected Issues*, 10 CARDOZO J. INT'L & COMP. L. 109, 139-42 (2002) (observing that corporations, like Boeing and Caterpillar, have lost substantial business revenue and long-term contracts due to U.S. economic sanctions); USA ENGAGE, THE HIGH COSTS OF UNILATERAL SANCTIONS, <http://archives.usaengage.org/archives/studies/costs.html> (last visited Apr. 29, 2017) (looking at both long-term and short-term costs of sanctions for U.S. companies).

73. Rapoza, *supra* note 1.

74. U.S. CONST. amend. V.

75. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The facts of this case are well-documented and will not be reviewed for the sake of brevity. *E.g.*, Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 605-07 (2014).

76. *Penn Cent.*, 438 U.S. at 124.

77. James S. Burling, *Novel Takings Theories: Testing the Boundaries of Property Rights Claims*, 4 PROP. RTS. CONF. J. 39, 48 (2015).

interest could be defined. The most simplistic option would be to define the property subject to the takings claim as money.⁷⁸ A second method would be to evaluate the takings claim from the standpoint of lost profits or a diminished short term investment.⁷⁹ A third, and more complicated takings theory, would define the property as terminated contracts.⁸⁰ For the sake of example and ease, the property interest in the case study will be defined as money.

A. *Economic Impact of Regulation*

“The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.”⁸¹ Evaluating the economic impact of regulation on property—tangible or intangible—is tricky because “it is unclear what burdens can be considered.”⁸² In *Penn Central*, the focus was on whether the takings claimant “was allowed a ‘reasonable return’ on its investment.”⁸³ However, courts have measured economic impact in other ways, like the difference in value before and after the regulation on general profitability, as well as the owner’s potential to recoup on investment.⁸⁴ The most straightforward way “to determine the impact of the regulation subtracts the value of [the property] with the regulation in place from the value of the [property] without the regulation.”⁸⁵ Here, ExxonMobil, the world’s third largest publicly traded oil and gas company,⁸⁶ has felt the effects of such economic sanctions to the

78. *Id.* at 50.

79. *See* CCA Assocs. v. United States, 667 F.3d 1239, 1244 (Fed. Cir. 2011).

80. *See* Chang v. United States, 859 F.2d 893, 895-96 (Fed. Cir. 1988).

81. Penn. Cent., 438 U.S. at 124.

82. Eagle, *supra* note 75, at 617.

83. *Id.* at 617-18.

84. *See, e.g.*, Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 497 (1987); Walcek v. United States, 49 Fed. Cl. 248, 266 (Fed. Cl. 2001), *aff’d*, 303 F.3d 1349 (2002).

85. Steven J. Eagle, “Economic Impact” in *Regulatory Takings Law*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 407, 420 (2013).

86. Robert Rapier, *The 25 Biggest Oil and Gas Companies in the World*, FORBES (Mar. 30, 2016, 11:05 AM), <http://www.forbes.com/sites/rrapier/2016/03/30/the-worlds-largest-public-oil-and-gas-companies/#780c51126cf1> [<http://perma.cc/3MQ6-YXJN>].

tune of \$1 billion in potential losses.⁸⁷

B. Investment-Backed Expectations

A statute that “substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”⁸⁸ Again, there is little clarity in how the Court has defined “distinct investment-backed expectations.”⁸⁹ To add to the confusion, a year after handing down the *Penn Central* test, the Court modified the second prong to “reasonable investment-backed expectations.”⁹⁰ It would seem that the evaluation in its most current form is oriented towards an objective, rather than subjective, viewpoint to determine whether the plaintiff’s expectations, “in light of the law and perhaps even legal trends,” were reasonable.⁹¹ For example, “the regulatory regime in place at the time” [the property was acquired] “helps to shape the reasonableness of those expectations.”⁹²

Here, ExxonMobil’s “reasonable investment-backed expectations” are based on several proposed and contracted-for projects in the Black Sea.⁹³ The Sakhalin Consortium, of which ExxonMobil is one of the largest stakeholders, was established in 1996 “to explore for hydrocarbons in Russian sub-Arctic waters.”⁹⁴ At the time ExxonMobil invested in the Sakhalin project, there were no sanctions in effect against Russia, and two of the three fields in Sakhalin-1 began production in 2005 and 2010.⁹⁵ The

87. ExxonMobil Corp., 2014 Annual Report (Form 10-K) (Feb. 25, 2015) (“In 2014, the European Union and United States imposed sanctions relating to the Russian energy sector. In compliance with the sanctions and all general and specific licenses, prohibited activities involving offshore Russia in the Black Sea, Arctic regions, and onshore western Siberia have been wound down. The Corporation’s maximum exposure to loss from these joint ventures as of December 31, 2014, is \$1.0 billion.”).

88. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) (citing *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

89. *Eagle*, *supra* note 75, at 620.

90. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

91. *Eagle*, *supra* note 75, at 620.

92. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring).

93. *Rapoza*, *supra* note 1.

94. ExxonMobil owns 30 percent of Sakhalin-1. *Id.*

95. News Release, ExxonMobil, ExxonMobil Begins Production at the Sakhalin-1

Consortium sank \$10 to 12 billion into the Berkut project, the third field, building the world's biggest oil platform with expected production at 12,000 tons of oil per day, or about 4.5 million tons annually.⁹⁶ Production in the final Sakhalin field began in 2016; however, "Exxon is unable to collect revenues from the facility so long as sanctions are in place."⁹⁷ In sum, because ExxonMobil was fully invested in the Sakhalin project before the sanctions and is no longer able to collect revenue due to the Ukraine-Related Sanctions, it could be found that the sanctions have completely devalued ExxonMobil's reasonable investment-backed expectations to recoup profit in the Sakhalin project.

C. Character

Finally, when looking to the character prong of the *Penn Central* test, the courts should weigh several factors in their analysis, like the regulation's purpose; the regulation's effectiveness; and how the burden of the regulation is allocated, effectively balancing the public interest against the private harm.⁹⁸

Courts that have addressed takings challenges under IEEPA have focused solely on the executive branch's authority to promote U.S. national security interests.⁹⁹ If viewed through the

Arkutun-Dagi Field (Jan. 19, 2015), <http://news.exxonmobil.com/press-release/exxonmobil-begins-production-sakhalin-1-arkutun-dagi-field> [<http://perma.cc/N6TL-QP9V>].

96. *Biggest Oil Rig Ever: 200K-ton Sakhalin Giant Begins Production*, RT NEWS (Jan. 22, 2015, 8:10 AM), <https://www.rt.com/news/224371-oil-rig-berkut-extraction/> [<http://perma.cc/9A3U-JHTD>].

97. See Rapoza, *supra* note 1.

98. Michael Lewyn, *Character Counts: The "Character of the Government Action" in Regulatory Takings Actions*, 40 SEATON HALL L. REV. 597, 636 (2010).

99. See, e.g., *Islamic Am. Relief Agency v. Unidentified F.B.I. Agents*, 394 F. Supp. 2d 34, 51 (D.D.C. 2005) ("[T]o the extent that the plaintiff seeks to challenge the blocking of assets pursuant to an Executive Order, such an order is not, as a matter of law, a taking within the meaning of the Fifth Amendment."); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 78 (D.D.C. 2002) ("The case law is clear that blockings under Executive Orders are temporary deprivations that do not vest the assets in the Government. Therefore, blockings do not, as a matter of law, constitute takings within the meaning of the Fifth Amendment . . . [C]ourts have consistently rejected these claims in the IEEPA and TWEA context."); see also *Nielsen v. Sec'y of the Treasury*, 424 F.2d 833, 844 (D.C. Cir. 1970) ("The temporary blocking or freezing of the accounts of aliens within

lens of a *Penn Central* analysis, though not applied by the courts, this reasoning employs an abrogated constitutional standard in takings jurisprudence. Until *Agins v. City of Tiburon* was overturned in 2005, the Court interpreted takings claims under a theory of due process.¹⁰⁰ “[U]nder the *Agins* ‘substantially advance’ test, the constitutionality of a government regulation rest[ed] *solely* on its rationality, regardless of its impact on private property owners.”¹⁰¹ In effect, there was no valid takings claim if the regulation “substantially advance[d] legitimate state interest.”¹⁰²

Lingle v. Chevron U.S.A. overturned *Agins* principally because due process “has no proper place in our takings jurisprudence.”¹⁰³ Furthermore, *Agins* failed to reveal anything about “the *magnitude or character of the burden* a particular regulation imposes upon private property rights” and provided no information “about how any regulatory burden is *distributed* among property owners.”¹⁰⁴ The evaluation under the character prong in the *Penn Central* test resulted in the public interest/private harm balancing test that is currently used.¹⁰⁵ One hypothetical drives home the distinction between the two standards: if “the government has an excellent reason to enact a regulation that reduces the value of a landowner’s property by ninety percent,” the government will automatically win under *Agin*’s “substantially advance” test because it “had a substantial basis for its decision. By contrast, under [*Penn Central*’s] ‘private harm/public interest’ balancing test, the government’s excellent reason would be balanced against the burden it imposes on the plaintiff, which means that the government might actually lose the case.”¹⁰⁶

the territory of a state, suspending the right of withdrawal but not affecting ownership, does not appear to have been regarded as a taking of property.”).

100. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005).

101. Lewyn, *supra* note 98, at 616.

102. *Lingle*, 544 U.S. at 540.

103. *Id.*

104. *Id.* at 542.

105. *Id.* at 540.

106. Lewyn, *supra* note 98, at 616.

1. Purpose

The balancing tests first looks to the purpose of the regulation at issue. “The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis . . . Regulatory takings cases ‘necessarily entail[l] complex factual assessments of the purposes and economic effects of government actions.’”¹⁰⁷

As previously discussed, IEEPA states that the President’s authority under the Act “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.”¹⁰⁸ President Obama initiated sanctions against Russia in response to the illegal annexation of Crimea from the sovereign Ukraine, which was found to have “undermin[ed] democratic processes” and “threaten[ed] [Ukraine’s] peace, security, stability, sovereignty, and territorial integrity.”¹⁰⁹ As stated previously, the goal is to weaken Russia’s economy “in hopes the pressure will entice Putin, over time, to reverse his annexation of Crimea and to withdraw Russian troops and its support of rebels in eastern Ukraine.”¹¹⁰

Though the threat is clearly tied to U.S. foreign policy, the threat seems less direct—and maybe even less threatening—than previous actions taken pursuant to IEEPA. For example, in 1979, President Carter declared a national emergency in direct response to the Iran Hostage Crisis, where 52 American diplomats were held hostage in the U.S. Embassy in Tehran for 444 days.¹¹¹ President Carter called the hostages “victims of terrorism and anarchy,” adding that “the United States will not yield to blackmail.”¹¹² However, in the case of the 2014 Russian sanctions, President Obama declared a national emergency in

107. *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (O’Connor, J., concurring) (quoting *Yee v. Escondido*, 503 U.S. 519, 523 (1992)).

108. 50 U.S.C. § 1701(a) (2012).

109. Exec. Order No. 13660, 79 Fed. Reg. 13,493 (Mar. 10, 2014).

110. Starr, *supra* note 65.

111. MARK BOWDEN, GUESTS OF THE AYATOLLAH: THE FIRST BATTLE IN AMERICA’S WAR WITH MILITANT ISLAM 151, app. (2006).

112. President Jimmy Carter, State of the Union Address (Jan. 23, 1980).

Executive Order 13660, many days after Russian troops occupied government buildings in Sevastopol, Crimea.¹¹³ The threat has been characterized as a threat to global democracy.¹¹⁴ Some argue that the unusual and extraordinary threat to the United States remains to be seen.¹¹⁵

The United States is not in a war with Russia,¹¹⁶ like it was with Iraq when President George W. Bush first issued sanctions in 2003,¹¹⁷ nor in a demonstrated hostile situation like it was with Iran and their proliferation of nuclear power.¹¹⁸ Economic sanctions against Russia are arguably more about the feared reunification of a Soviet bloc regime and trying to strong-arm President Putin.¹¹⁹ Since the initial writing of this Comment, a report by the U.S. Intelligence Community has suggested with high confidence that Russian President Vladimir Putin “ordered an influence campaign in 2016 aimed at the U.S. presidential election.”¹²⁰ Strikingly similar to the support for the

113. See Diuk, *supra* note 54.

114. See Exec. Order No. 13660, 79 Fed. Reg. 13,493 (Mar. 10, 2014).

115. See, e.g., John J.A. Burke, Comment, *Economic Sanctions Against the Russian Federation Are Illegal Under Public International Law*, 3 RUSSIAN L.J. 127, 135 (2015) (explaining that Russia has not committed violations that merit sanctions on behalf of the United States, and that such sanctions could potentially be in violation of international law).

116. Russia is not one of the three areas designated as a combat zone, and there are currently only 19 active duty and reserve service officers in Russia as of December 31, 2016. *Combat Zones Approved for Tax Benefits*, IRS, <https://www.irs.gov/individuals/military/combat-zones> [<http://perma.cc/8FR3-XKKE>] (last updated Nov. 18, 2016); *DoD Personnel, Workforce Reports & Publications*, DMDC, https://www.dmde.osd.mil/appj/dwp/dwp_reports.jsp [<http://perma.cc/3AK9-V6U6>] (last visited Apr. 29, 2017).

117. Exec. Order No. 13290, 68 Fed. Reg. 14,307 (Mar. 24, 2003).

118. KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS 24-26 (2014) (finding that while sanctions against Iran have been ongoing in different forms since 1979 after the Iran Hostage Crisis, sanctions were toughened significantly in 2013 for refusal to cease the enrichment of uranium).

119. European Council Press Release EUCO 158/14, Statement by the President of the European Council Herman Van Rompuy and the President of the European Commission in the Name of the European Union on the Agreed Additional Restrictive Measures Against Russia (July 29, 2014) (arguing that Russia is deliberately destabilizing a neighboring sovereign country and sending arms and fighters to Ukraine—a situation that “cannot be accepted in 21st century Europe”).

120. U.S. INTELLIGENCE COMMUNITY, ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS ii (2017). This report also makes clear, however, that it “did not make an assessment of the impact that Russian activities

Ukraine-Related Sanctions, the intelligence assessment found that “Russia’s goals were to undermine public faith in the US democratic process,” in addition to diminishing Hillary Clinton’s electability.¹²¹ While the judgments from this report have not been included in this analysis of the novel takings claim, the report would greatly support not finding a taking because the public interest in protecting against interference in U.S. democratic elections would be unquestionably outweighed by the private harm of prohibiting corporate investment in Russia.

2. Effectiveness

The purpose of the sanctions regulations should be weighed against the effectiveness of the regulation. That is, “the extent to which the precise action taken by the government furthered the stated public purpose” must also be examined.¹²²

Generally, sanctions are widely viewed as ineffective.¹²³ Hufbauer, Schott, and Elliot examined 204 cases of sanctions and found them to be at least partially successful in 34 percent of their documented cases.¹²⁴ Sanctions programs with “narrow policy goals (for example, the release of hostages), succeeded half the time, while sanctions involving attempts to change regimes only succeeded 30 percent of the time.”¹²⁵

Several high-level explanations for why sanctions are ineffective have been proposed. First, “[s]anctions alone are unlikely to achieve desired results if the aims are large or time is short.”¹²⁶ Additionally, “[s]anctions are blunt instruments that often produce unintended and undesirable consequences.”¹²⁷ When the sanctions are not targeted against the hostile regime, sanctions affect the general population and “can have the

had on the outcome of the 2016 election. *Id.* at i.

121. *Id.* at ii.

122. Lewyn, *supra* note 98, at 634.

123. Egle, *supra* note 3, at 47; *see generally* HAASS, *supra* note 4 (“Yet all too often sanctions turn out to be little more than expressions of U.S. preferences that hurt American economic interests without changing the target’s behavior for the better.”).

124. HUFBAUER ET AL., *supra* note 2, at 158.

125. Egle, *supra* note 3, at 46 (citing HUFBAUER ET AL., *supra* note 2, at 158).

126. HAASS, *supra* note 4.

127. *Id.*

perverse effect of bolstering authoritarian, statist societies.”¹²⁸ While the sanctions against Russia began as targeted sanctions, the Executive Orders and corresponding regulations from the Department of Treasury have gradually become broader—first targeting Special Designated Nationals (SDNs) and then entire sectors of the Russian economy.¹²⁹ Finally, and most relevant to the takings analysis, “[s]anctions can be expensive for American business . . . by reducing revenues of U.S. companies.”¹³⁰

A more structured level of analysis is needed to evaluate the effectiveness of the Ukraine-Related Sanctions. Robert Pape explains that

economic sanctions should be credited with success if they meet three criteria: (1) the target state conceded to a significant part of the coercer’s demands; (2) economic sanctions were threatened or actually applied before the target changed its behavior; and (3) no more-credible explanation exists for the target’s change of behavior.¹³¹

The simplest way to evaluate the effectiveness under Pape’s structure is to argue that Russia has not—and will not—concede to U.S. demands to restore Crimea to Ukraine.¹³² Even looking past the more obvious goal, it is still not clear whether there has been any successful behavior modification as a result of the sanctions, though it may be too early to tell.

Others would argue, however, that sanctions are generally ineffective and are especially ineffective in the case against Russia.¹³³ Drawing parallels to sanctions against Cuba is useful to illustrate why. While this Comment does not purport to review the amalgam of literature evaluating the effectiveness of the U.S. sanctions on Cuba, the mass of evidence suggests that

128. *Id.*

129. See Christie, *supra* note 5.

130. HAASS, *supra* note 4.

131. Robert A. Pape, *Why Economic Sanctions Do Not Work*, INT’L SECURITY, Fall 1997, at 90, 97 (footnote omitted).

132. Andrew Osborn, *Russia Tells White House It will not Return Crimea to Ukraine*, REUTERS (Feb. 15, 2017, 5:59 AM), <http://www.reuters.com/article/us-usa-trump-russia-ukraine-idUSKBN15U0U0> [<http://perma.cc/ZF79-MX5Y>].

133. E.g., Mergen Doraev, *The “Memory Effect” of Economic Sanctions Against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again*, 37 U. PA. J. INT’L L. 355, 373, 417-18 (2015).

punishment has not caused Cuba to change.¹³⁴ Rather, it has given Cuba's regime a plausible excuse for further repressing the liberties of individual Cubans.¹³⁵ It is important to understand the context in which the economic sanctions, or negative incentives, are imposed.¹³⁶ Cubans, like Russians, do not have a democratic tradition to which they long to return.¹³⁷ Also, both populations traditionally did not have access to economic opportunity or to the markets.¹³⁸ Therefore, the "punishment" of not interacting with the United States may not seem overwhelmingly burdensome after all.¹³⁹

On the other hand, lack of interaction with sanctioning nations, namely the United States and the European Union, may push Russia to interact with non-sanctioning nations, such as

134. *E.g.*, Daniel Griswold, Remarks at the James A. Baker III Institute, Cuba and the United States in the 21st Century: Four Decades of Failure: The U.S. Embargo Against Cuba (Oct. 12, 2005), <https://www.cato.org/publications/speeches/four-decades-failure-us-embargo-against-cuba> [<http://perma.cc/D2QX-CW86>] ("If the goal of U.S. policy toward Cuba is to help its people achieve freedom and a better life, the economic embargo has completely failed."); Sven Kühn von Burgsdorff, *The Effectiveness of Economic Sanctions: The Case of Cuba*, 4 INTERCULTURAL HUM. RTS. L. REV. 31, 48-51 (2009) ("[T]he economic sanctions not only failed in attaining their intended purposes, but also proved to be counterproductive in all respects and at all levels.").

135. *See* James M. Cooper, *Creative Problem Solving and the Castro Conundrum*, 28 CAL. W. INT'L L.J. 391, 421 (1998).

136. *See* Michael P. Malloy, *Où Est Votre Chapeau? Economic Sanctions and Trade Regulation*, 4 CHI. J. INT'L L. 371, 371-73 (2003) (explaining the significance of unrelated international events to specific situations where sanctions are considered).

137. George F. Will, *Is There a Cure for Cuba?*, WASH. POST (Mar. 9, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/07/AR2008030702838.html> [<http://perma.cc/7XW7-WDHA>]; *see also* Felix K. Chang, *Economic Sanctions Reconsidered: U.S. Sanctions Against Cuba and Russia*, Foreign Policy Research Institute, FOREIGN POL'Y RES. INST. (Dec. 23 2014), http://www.fpri.org/docs/chang_-_us_sanctions_again_cuba_russia.pdf [<http://perma.cc/3J2V-MCLL>] ("From a political standpoint, economic sanctions did not elicit changes in Cuban or Russian (so far) behavior that the United States had desired."); Michael P. Malloy, *Are the U.S. Treasury's Assets Control Regulations a Fair and Effective Tool of U.S. Foreign Policy? The Case of Cuba*, 79 AM. SOC'Y INT'L L. PROC. 169, 169 (1985) (explaining the impact of Communism on the Cuban economy).

138. *See* Chang, *supra* note 137 (comparing the deterioration of both Cuba and Russia's economy after the initiation of sanctions, but the underwhelming effect due to an already instable economy and the low value of currency).

139. *See id.*

China.¹⁴⁰ Major players in the oil and gas industry are already seeing this happen. It does not help that “[d]emand for energy in Asia is projected to grow at an annual rate of two and a half percent through 2035, a level that is almost double that of the rest of the world.”¹⁴¹ To sweeten the deal, China is “willing to provide loans or make prepayments that provide Russia’s often debt-ridden energy companies with ready cash to start building pipelines and modernize their production at low financial risk.”¹⁴² An agreement between China National Petroleum Corporation (CNPC) and Gazprom, securing “a thirty-year, \$400 billion deal that will result in up to thirty-eight billion cubic meters (bcm) of Russian gas going to China annually,” is the kind of thing that diminishes any remaining value for U.S. players.¹⁴³

Finding alternative outlets or turning to new markets also occurred when Western sanctions were levied on Cuba, which became a close ally and client of the Soviet Union, acting in accordance with the Soviet Union’s wishes rather than its own.¹⁴⁴ This would suggest that economic sanction regimes do not encourage positive change, but instead discourage or preclude it.¹⁴⁵ While it is true, as Andrea Ovan suggests in her recent

140. *Id.*; James Ellingworth, *Here’s How Western Sanctions Have Affected Russia One Year Out*, BUS. INSIDER (Apr. 1, 2015, 6:23 AM), <http://www.businessinsider.com/heres-how-western-sanctions-have-affected-russia-one-year-out-2015-4> [<http://perma.cc/UV39-YD6X>] (“While the Ukraine crisis has taken the U.S. government’s attention away from its ‘pivot to Asia’ strategy, it has had the opposite effect in Russia, forcing the government to seek new partnerships. The centerpiece is a 30-year, \$400 billion gas deal with China . . . accompanied by various other deals with Asian and Middle Eastern nations.”).

141. Richard Weitz, *The Russia-China Gas Deal: Implications and Ramifications*, WORLD AFF., Sept./Oct. 2014, <http://www.worldaffairsjournal.org/article/russia-china-gas-deal-implications-and-ramifications> [<http://perma.cc/QZ9H-XCJL>].

142. *Id.*

143. *Id.*

144. Colin Crawford, *Environmental Justice in Cuba: Capital Needs, Developing a Tourist Infrastructure, and Liberty of Access to National Resources*, 14 TRANSNAT’L L. & CONTEMP. PROBS. 55, 55-56 (2004); see also Lawrence H. Theriot & JeNelle Matheson, *Soviet Economic Relations with the Non-European CMEA: Cuba, Vietnam, and Mongolia*, 21 SOVIET & E. EUROPEAN FOREIGN TRADE 144, 145 (1985) (“[E]xtensively isolated from the noncommunist trading community, a small nation’s economic dependence on a major power like the USSR inevitably grows; its autonomy in foreign policy is reduced, and some degree of subservience to Soviet global interests becomes unavoidable.”).

145. See Philip M. Nichols, *Using Sociological Theories of Isomorphism to Evaluate*

article in the *Harvard Business Review*, that “trade war is better than a nuclear war,”¹⁴⁶ some argue that “sanctions still have a long way to go in becoming an overtly successful foreign policy tool.”¹⁴⁷

3. Allocation of Burden

The Takings Clause is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁴⁸ ExxonMobil has not borne the burden of economic sanctions on its own—the effects of sanctions are felt by many American businesses that operate in the international economy.¹⁴⁹ But it may be true that ExxonMobil has felt the burden of sanctions more than the average American business.

When looking at each prong under *Penn Central* and weighing the factors, a case can be made that a regulatory taking has occurred: ExxonMobil has lost about \$1 billion as a result of the Ukraine-Related Sanctions, which were designed to protect global democracy, but have instead proven ineffective and fallen disproportionately on American citizens.

Some may balk at the idea of the federal government compensating corporations for the diminished value of their assets as a result of foreign policy. But under a strict interpretation of the Takings Clause, the concept of temporary partial regulatory takings is still consistent with the underlying constitutional goals. For example, the most common application of the Takings Clause is seen in eminent domain: when the

the Possibility of Regime Change through Trade Sanctions, 30 U. PA. J. INT'L L. 753, 780-81 (finding that sanctions seeking to change behavior through coercive isomorphism, or forcing institutions to change through negative incentives, produce the opposite of the desired outcome); Petrescu, *supra* note 20, at 3 (“[E]conomic sanctions decrease the probability that [a target country] will participate in another dispute by 8% if the sender is a large country or a large coalition of countries.”).

146. Andrea Ovans, *Embargoes Work – Just Not the Way We’d Hope*, HARV. BUS. REV. (Aug. 26, 2014), <https://hbr.org/2014/08/embargoes-work-just-not-the-way-wed-hope> [<http://perma.cc/DD39-PJ2D>].

147. Egle, *supra* note 3, at 46.

148. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 48 (1960)).

149. See Nicholas Colby Watson Wolfe, *Nuclear Chain Reaction: Why Economic Sanctions Are Not Worth the Public Costs*, 27 FLA. J. INT'L L. 1, 10 (2015).

government physically takes your land to build or expand a highway. Your home (private property) is taken for public use (building a highway), and thus you are constitutionally entitled to compensation for the taking.¹⁵⁰ With temporary partial regulatory takings, the idea is the same—the government executes a regulation for some public interest. Here, the economic sanctions against Russia were executed to protect global democracy. The regulation renders corporate assets (private property) effectively valueless. In specific cases, even though the regulatory taking is temporary, the effects of the taking are permanent due to lost opportunity costs. Assuming the claim endures a *Penn Central* analysis (and that is, admittedly, a big assumption), the injured party, the corporation, is still constitutionally entitled to compensation.

The problem, and why this Comment deems it a “novel” takings claim, is that courts have historically bypassed the *Penn Central* analysis. Instead, courts that have addressed Fifth Amendment takings challenges under IEEPA either: (1) forego any analysis, but hold that blockings do not, as a matter of law, constitute a taking within the meaning of the Fifth Amendment;¹⁵¹ or (2) apply a quasi-*Agins*, due process-type analysis, where sanctions are found to serve an important national security interest but no balancing test is applied.¹⁵² Moreover, to support the rationale that takings claims in the context of IEEPA or foreign policy can never survive, courts have frequently cited or quoted the century-old *Knox v. Lee* case, which poetically states:

A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render

150. Eminent domain and partial regulatory takings are treated differently by courts due to the difference in losing physical property versus losing the ability to exploit property to its full economic potential. The difference is managed by what legal tests apply, but the concepts are both governed by the Takings Clause. See Lewyn, *supra* note 98, at 624-25.

151. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 77-78 (D.D.C. 2002).

152. See *Paradissiotis v. United States*, 304 F.3d 1271, 1272 (Fed. Cir. 2002) (finding that Libyan Sanction Regulations (LSRs) served important national security interests by, in part, putting pressure on the target government by preventing its representative from engaging in profitable economic activity).

valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? . . . [W]as it ever imagined this was taking private property without compensation or without due process of law?¹⁵³

After all, the rationale makes sense—“governance inherently affects property to some extent and could not function” if every government regulation resulting in the diminution of private property value was grounds for a takings claim.¹⁵⁴

When the type of takings claim proposed here is taken to its fullest extent, the reality of the federal government paying a mega-corporation \$1 billion is bleak—and borderline hysterical. But the theory behind the hyperbolic takings claim is not. Partial regulatory takings claims have been a way to check executive branch power for decades—takings claims force the government to evaluate the purpose and effectiveness of its regulations or pay the price. The thought that goes in to economic sanctions should be no different.

When courts rely on stale sanctions jurisprudence, there is little to no consideration of the long term effects and loss of economic revenue that could marginalize American industries and jobs, as seen historically in the sanctions against China and India.¹⁵⁵ The President’s calculation and consideration of economic sanctions should balance the actual threat to the American people and national security against the potential losses to the American economy rather than relying on an overly broad use of power for the sake of implementing questionable foreign policy.

153. Knox v. Lee, 79 U.S. 457, 551 (1871).

154. Eagle, *supra* note 75, at 627.

155. Jiawen Yang et al., *US Economic Sanctions Against China: Who Gets Hurt?*, 27 WORLD ECON. 1047, 1069 (2004); Overview and Analysis of the Economic Impact of U.S. Sanctions with Respect to India and Pakistan, Inv. No. 332-406, USITC Pub. 3236 (Sept. 1999) (Final).

V. CONCLUSION

With the growing data on the ineffectiveness of economic sanctions and yet another multinational corporation losing market share to foreign companies, it may be time to reconsider the vast breadth of executive authority in times where there is no danger to the American people, and thus no “public necessity.” The proposed novel takings claim introduces a creative and constitutional basis for sharing the costs of public policy through more fair and equitable means.