ORAL ARGUMENT NOT YET SCHEDULED

No. 21-7127

(CONSOLIDATED WITH NO. 22-7019 AND NO. 22-7020)

IN THE

United States Court of Appeals for the District of Columbia Circuit

EXXON MOBIL CORPORATION,

Plaintiff/Appellee/Cross-Appellant,

v.

CORPORACIÓN CIMEX (CUBA),
CORPORACIÓN CIMEX (PANAMA), AND
UNIÓN CUBA-PETRÓLEO

Defendants/Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CASE NO. 19-CV-1277, DISTRICT JUDGE AMIT P. MEHTA

CORRECTED REPLY AND RESPONSE BRIEF FOR DEFENDANTS/APPELLANTS/CROSS-APPELLEES

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January 3, 2023

Certificate as to Parties, Rulings and Related Cases

Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Opening Brief for Defendants/Appellants/Cross-Appellees: EarthRights International is an *amicus curiae* and has submitted a brief in support of Exxon Mobil Corporation in accordance with the Court's August 11, 2022 Order.

Rulings Under Review

References to the rulings at issue appear in the Opening Brief for Defendants/Appellants/Cross-Appellees.

Related Cases

The case under review has not previously been before this or any other court. There are no related currently pending cases in this or any other court of which counsel is aware.

Statement Regarding Oral Argument

Defendants/Appellants/Cross-Appellees Unión Cuba-Petróleo, Corporación CIMEX, S.A. (Cuba) and Corporación CIMEX, S.A. (Panama) request oral argument, believing it will assist in the resolution of their consolidated appeals.

Statutes

All applicable statutes are contained in the Opening Brief for Defendants /Appellants/Cross-Appellees and Appellee and Cross-Appellant Exxon Mobil Corporation's Principal and Response Brief.

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Glossary

CIMEX	Corporación CIMEX, S.A. (Cuba)
CIMEX (Panama)	Corporación CIMEX, S.A. (Panama)
CUPET	Unión Cuba-Petróleo
Essosa	Esso Standard Oil, S.A., a Panamanian company
Exxon	Exxon Mobil Corporation
FCSC	Foreign Claims Settlement Commission
First U.S.* Helmerich *Amicus	*Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 743 F.App'x 442, 2018 WL 460639, U.S. Brief as Amicus Curiae (Jan. 17, 2018)
FSIA	Foreign Sovereign Immunities Act, 28 U.S.C §§1330, 1602 *et seq.*
ICJ	International Court of Justice
Helms-Burton Act	Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, §§1-5, 301-306, 22 U.S.C. §§6021-6024, 6081-6085
LIBERTAD	Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L 104-114, §§1-5, 301-306; 22 U.S.C. §§6021-24, 6081-6085
SAC	Second Amended Complaint
Second U.S.* Helmerich *Amicus	*Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 743 F.App'x 442, 2018 WL 2981075, U.S. Supplemental Brief as Amicus Curiae (June 13, 2018)

Standard Oil	Standard Oil Company
Title III	Title III of LIBERTAD, Pub. L 104-114, §§301-306; 22 U.S.C. §§6081-6085
WU	Western Union

Citations to Record

Citations to the record are in brackets. The docket entry in the district court for the document is cited first, followed by a pin cite to an ECF page number. For example, "[64:5-7]" refers to Docket Entry 64 in the district court, ECF pages 5-7.

Corporación CIMEX, S.A. (Cuba) ("CIMEX"), Corporación CIMEX, S.A. (Panama) ("CIMEX (Panama)") and Unión Cuba-Petróleo ("CUPET") respectfully submit this Reply (Points II & III) in further support of their appeals and Response (Points I & IV) to Exxon Mobil Corporation ("Exxon")'s cross-appeal.

Jurisdictional Statement

Jurisdiction is lacking as to Exxon's argument that 28 U.S.C. §1605(a)(3)'s nexus requirement is satisfied. The district court did not rule upon or certify that issue, and it was not presented by Exxon's 28 U.S.C. §1292(b) cross-petition.

Issues Presented for Review on Exxon's Cross-Appeal

1. Whether this action puts "rights in property" in issue, 28 U.S.C. §1605(a)(3), where only the property of Essosa, a Panamanian company, not its shareholder, Exxon, was expropriated, and where Essosa continued in existence and operation with its non-Cuban assets.

2. Whether the expropriation without compensation was a "violation of international law," §1605(a)(3), when Essosa and Exxon acted with the United States to overthrow the Cuban Government, and when the expropriation was for violation of Cuban law, or, alternatively, whether the political question doctrine bars adjudication of these issues, precluding jurisdiction.

3. Whether the expropriation was a "violation of international law" when the United States decided not to negotiate compensation with Cuba but to await better terms from a successor regime.

4. Whether there was no "violation of international law" because Cuba's offer of compensation fit within customary international law's standards, assuming any obligation of compensation, and whether customary international law imposed a compensation obligation.

5. Whether Title III of LIBERTAD provides an independent grant of subject-matter jurisdiction and overrides the FSIA in the absence of any language addressing jurisdiction or immunity.

Statement of the Case

Exxon's Statement is inaccurate in multiple respects. The Court is referred to the Defendants' Statement in their Opening Brief, and *infra*.

Summary of Argument

I. *The FSIA's Expropriation Exception Does Not Provide Jurisdiction*

1. The district court correctly held the action does not put "in issue" "*rights in property* taken in violation of international law," 28 U.S.C. §1605(a)(3) (emphasis added), because it was the property of Essosa, a Panamanian corporation, not Exxon, its shareholder, that was expropriated. Under Panamanian law, a shareholder has no rights in the corporation's property. Customary

international law, on which Exxon primarily relies, does not provide a shareholder with rights in the property of the corporation. The only exception is when the *entire corporation* is expropriated, but Essosa continued to exist and operate with its non-Cuban assets after expropriation.

Exxon also relies on the Foreign Claims Settlement Commission's certification of its claim under the International Claims Settlement Act to the Secretary of State for negotiation purposes. It neither conferred upon Exxon any rights in Essosa's property, nor recognized it to have had any such rights: it only certified that Exxon suffered a "loss" from the expropriation due to having an "indirect" "interest" in Essosa's property.

2. State Department and CIA documents, and Exxon's own testimony elsewhere, establish that Essosa, on instructions from Exxon, acted with the United States to overthrow the Cuban Government. Consequently, Exxon cannot establish a taking "in violation of international law," §1605(a)(3). Customary international law supports Cuba's exercise of sovereign authority to take Essosa's property without compensation in these circumstances, and also because Cuba, in addition to expropriating Essosa's property to meet a grave threat to its security, expropriated the property for violation of Cuban law. Alternatively, Exxon cannot establish a "violation of international law" because the political question doctrine bars adjudication of these issues. Although advanced below, the district court did

not reach this ground for holding that the expropriation exception does not provide jurisdiction.

3. Exxon cannot satisfy the "violation of international law" requirement for additional reasons not reached below:

a. The United States violated its obligations under customary international law by, as established by State Department documents, not negotiating compensation in order to await better terms from a new regime, despite recognizing Cuba's willingness to negotiate. Alternatively, the political question bars adjudication of this issue.

b. The compensation terms offered by Cuba to the United States for expropriations met international law standards.

c. Contemporaneous state practice was insufficient to establish an obligation to provide compensation.

II. *The Expropriation Exception Alone Controls, Requiring Dismissal*

As there is no jurisdiction under the expropriation exception, dismissal is required because it alone controls. Application of the commercial activity exception would eviscerate the expropriation exception. Exxon's response that this does not matter is contrary to the imperatives for construing statutes and the FSIA in particular. So too is Exxon's resting on hypothetical, aberrant and unspecified

circumstances within the expropriation but not reached by the commercial exception.

An agency's Title III "trafficking" in expropriated property by "receiv[ing]," "possess[ing]," or "hold[ing]" an interest in expropriated property, or putting the property to commercial "use[]," is part of an integrated exercise of sovereign authority to determine who, with what property, is permitted to participate in Cuba's economy, and who is to be entrusted with property owned by the Cuban State. They do not concern, as Exxon asserts in the hope of placing its action within the commercial activity exception, *how* an agency participates in the market. Exxon's Title III action challenges sovereign authority, a challenge permitted only on the terms specified in the expropriation exception.

The gravamen of the action is not putting the expropriated property to commercial use, as Exxon asserts, because "receiv[ing]," "possess[ing]," or "hold[ing]" an interest in the expropriated property are necessarily antecedent acts that fully establish Title III liability. Even if it were the gravamen, the result would be the same: putting expropriated property to commercial use is part of the exercise of sovereign authority.

III. *The FSIA's Commercial Activity Exception Does Not Provide Jurisdiction*

The exception's "direct effect" requirement is not met if, as is demonstrated, CIMEX's receipt, possession or holding an interest in Essosa's auto stations is the

gravamen. Even if commercial use of the stations were the gravamen, Exxon does not dispute the circumstances that place finding "direct effect" based on their use for remittances or foodstuffs beyond Circuit precedent or that the standards that have emerged from the caselaw for "direct effect" have not been met.

Rather, like the district court, Exxon principally rests on the notion that CIMEX's use of service stations makes it *possible* to send remittances and foodstuffs to Cuba. This is not so, and even if it were, making possible the acts of third-parties in the U.S. (families and Western Union sending remittances; the Cuban importer, Alimport, independently deciding to buy foodstuffs from the U.S. without any instruction or request by CIMEX to do so) is different than "proximate cause," which is required. It also fundamentally departs from the requirement that the "effect" be the "immediate consequence," "with no intervening element," of the foreign act.

Exxon's response to CIMEX's showing that international law does not support application of the commercial activity exception simply ignores international law's territorial nexus requirement, which, CIMEX has shown, is not met. This is fatal, as the FSIA must be construed consistent with international law.

IV. *Title III Does Not Provide Jurisdiction*

The district court correctly rejected Exxon's argument that Title III grants subject-matter jurisdiction and overrides the FSIA. The statute's silence as to

immunity controls because of the presumption against enactments by implication; Congress having discarded provisions in Title III to abrogate immunity; and Congress always amending the FSIA expressly. Nothing in Title III overcomes this result, including Title III's making agencies liable for trafficking.

ARGUMENT

I. The FSIA's Expropriation Exception Does Not Provide Jurisdiction

A. The District Court Correctly Held the Action Does Not, As Required, Put "Rights in Property" in Issue

The district court correctly held that Exxon's action does not satisfy §1605(a)(3)'s requirement that it put "in issue" "*rights in property* taken in violation of international law," 28 U.S.C. §1605(a)(3) (emphasis added), because, as the district court found, it was the property of Essosa, a Panamanian company, not the property of its shareholder (Standard Oil Company, now Exxon) that was expropriated, JA2084-86, and Essosa continued to exist and operate with its non-Cuban assets after expropriation.

Essosa was incorporated in Panama and operated throughout the Caribbean. JA22(SAC:¶24). On July 1, 1960, Essosa's Cuban assets were "expropriated." JA22-23(SAC:¶28). After the expropriation, Essosa continued to exist and own and operate a network of auto service stations in Panama, JA2086, as well as assets in additional countries. JA323-32. Exxon retained all the shares in Essosa, which continued to hold shareholder meetings, and, with Exxon appointing the directors,

board of directors' meetings, for six decades. *Id*.; JA2086. In 2012, Exxon sold its shares. Essosa continues in existence and operation. JA326-28;JA332-33. "Exxon's claim concerns Essosa's property and Essosa continues to operate as a going concern." JA2086.

Under Panamanian law, "[p]arents and subsidiary companies, as well as their assets, are separate and independent of each other," and subsidiaries retain the exclusive rights in their assets "until they are dissolved." JA652-53. Lacking rights in Essosa's property under the law of the place of incorporation, which normally governs shareholder rights, Exxon primarily relies on customary international law, but it fails to show what is necessary under §1605(a)(3): "that a certain kind of right is at issue (*property* rights)." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S.Ct. 1312, 1316 (2017) (emphasis in original).

1. *Asserted "Indirect Rights" Under Customary International Law in Essosa's Property*. Exxon argues that customary international law recognizes a shareholder's "indirect rights" in a corporation's assets even where the corporation continues to exist and operate. P.Br.50. Overwhelming authority—including two International Court of Justice ("ICJ") decisions, which are "accorded great weight" in determining customary international law, Restatement (Third) of the Foreign Relations Law §103 cmt. b (1987); this Court's decision in *Helmerich & Payne Int'l Drilling v. Bolivarian Republic of Venezuela*, 743 F.App'x 442 (D.C. Cir.

2018) applying customary international law in accord with the ICJ; and the consistent position and practice of the United States—conclusively establishes the opposite. Exxon's argument that this authority is inapplicable both misreads the authority and fails to meet Exxon's burden to show that it had rights under customary international law in the taken property. *Helmerich*, 137 S.Ct. at 1316.

In *Barcelona Traction*, the ICJ held that customary international law applies "a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between the company and the shareholder is an important manifestation of this distinction." *Barcelona Traction, Light & Power (Belg. v. Spain)*, Judgment, 1970 I.C.J. Rep. 3, ¶41 (Feb. 5). Whereas a shareholder might suffer damage to its "*interests*" "by an act" (such as expropriation of assets) "done to the company," it is *only* the company "whose *rights* have been infringed." *Id.* ¶44 (emphasis added). The ICJ recently reaffirmed this holding and reiterated its basis: "international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders." *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 2010 I.C.J. 639, ¶¶155-56 (Nov. 30) (*quoting Barcelona Traction*). *Helmerich* applied *Barcelona Traction* and affirmed the separation of legal personality—and rights—of a corporation from its shareholder. *Helmerich*, 743 F.App'x at 447, 454.

Exxon's argument that *Barcelona Traction* applies only to diplomatic protection, P.Br.58,62, is untenable: the ICJ expressly says the opposite.[1] The United States has repeatedly asserted that the *Barcelona Traction* principle applies to any investor claim: under "customary international law [] shareholders may assert claims only for *direct* injuries to their rights;" "where the injury is to an enterprise or an asset held by that enterprise … *Barcelona Traction* precludes a [shareholder] claim." *Carlyle Group v. Kingdom of Morocco*, ICSID Case No. ARB/18/29, Submission of the United States of America ¶7 (Dec. 4, 2020) ("U.S. Carlyle Submission") (emphasis in original).[2] U.S. treaty practice incorporates "existing principles of customary international law" by recognizing shareholder rights are "discrete and non-overlapping" from a corporation's rights in its assets, and by allowing shareholder claims for injury to its corporation only in express

[1] *Barcelona Traction, Light & Power (Belg. v. Spain)*, Preliminary Objections, 1964 I.C.J. Rep. 6, 45 (July 24) ("[T]he question of the *jus standi* of a government to protect the interests of shareholders as such, is itself merely a reflection, or consequence, of the antecedent question of what is the juridical situation in respect of shareholding interests, as recognized by international law.").

[2] *See also Helmerich*, 743 F.App'x 442, 2018 WL 2981075, U.S. Supplemental Brief as Amicus Curiae, at *2-*3 (June 13, 2018) ("Second U.S. *Helmerich* Amicus") ("States owe no responsibility towards the shareholders" for "losses" from "acts directed against and infringing only the company's rights") (quotation omitted); *GAMI Invs. v. Mexico*, UNCITRAL, Submission of the United States of America, ¶9 (June 30, 2003) ("Under customary international law, no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation …").

derogation from customary international law. *Id.* at ¶¶2-5.[3] International tribunals and scholarly authority—subsidiary sources to determine customary international law, *see* ICJ Statute Art. 38(1)—are in accord.[4]

In arguing that *Helmerich* has no bearing on its indirect rights argument, P.Br.51-52, Exxon misses that the "domestic-takings rule" applied there is derivative of customary international law's recognition of the principle that a subsidiary has "a legal identity distinct from that of its shareholders," *Helmerich*, 743 F.App'x at 447-48, expressly recognized in reliance on *Barcelona Traction*. That principle compels the conclusion reached by *Helmerich*, in accord with the ICJ and the United States, that only the corporation and not its shareholder has

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[3] *See also Methanex v. United States*, UNCITRAL, Respondent's Memorial on Jurisdiction and Admissibility 30, 69 (Nov. 13, 2000) (same under NAFTA); *Lopez-Goyne Family Trust v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Submission of the United States of America ¶¶29-30 (Sept. 28, 2021) (same under CAFTA-DR).

The U.S. Model BIT Art. 6, cited by Exxon, P.Br.57 n.23, addresses what constitutes expropriation, *not* shareholder rights in expropriated property. The United States has explained that the Model BIT incorporates *Barcelona Traction*. U.S. Carlyle Submission, at ¶¶2 n.2,3.

[4] *See, e.g.*, *Perozo et al. v. Venezuela*, Inter-Am. Ct. Hum. Rts. Ser. C. No. 195, ¶¶400-02 (Jan. 28, 2009) (applying this principle to deny shareholder claim); *Agrotexim et al. v. Greece*, 330 Eur. Ct. H.R. (ser. A), ¶¶64-68 (1995) (same); ZACHARY DOUGLAS, INTERNATIONAL LAW OF INVESTMENT CLAIMS ¶771 (2009) ("the basic principles governing the approach of international law to the limited liability company [] were articulated in *Barcelona Traction*").

rights in its property under customary international law. *Barcelona Traction*, at ¶41; Second U.S. *Helmerich* Amicus at *2-*3.

Exxon would have the Court ignore the ICJ, *Helmerich*, and the United States to follow decisions applying treaty provisions that afford shareholders greater protection than customary international law. It relies on Iran-U.S. Claims Tribunal decisions applying Article IV(2) of the Treaty of Amity, P.Br.54-56, but, in *Sedco*, cited by Exxon, the Tribunal explained that Article IV(2) protects not only "[p]roperty," but also "interests in property," and that the State Department specifically bargained for "[c]overage of indirect interest" in this provision, which it regarded as "essential" so as not to "neglect U.S. investors." *Sedco v. Nat'l Iranian Oil Co. & Islamic Republic of Iran*, Award No. 309-129-3, 15 Iran-U.S. Cl. Trib. Rep. 23, 1987 WL 503885, at *8 n.9 (July 7, 1987). Exxon's lead case makes clear that "interests in property" are "covered by the Treaty of Amity," but *not* covered under customary international law. *Id.*

Still other Iran-U.S. Claims Tribunal decisions explain that treaties allowing "claims … owned indirectly … through ownership of capital stock" "constitute[] an exception to the normal rule of international law that shareholders may not bring the claims of the corporation." *Richard D. Harza v. Islamic Republic of Iran*, Award No. 232-97-2, 11 Iran-U.S. Cl. Trib. Rep. 76, 1986 WL 424329, at *8-*9

(May 2, 1986).[5] The "normal rule" applies, as Exxon cannot rely on the *lex specialis* of treaties to which Cuba is not a party.[6] *See also Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 2007 I.C.J. 542, ¶90 (May 24) (investment treaties have not "changed [] customary rules" on shareholder rights).

Exxon's suggestion that the Iran-U.S. Claims Tribunal's decisions "must" reflect customary international law because the Treaty of Amity includes a provision that the Treaty affords protection "in no case less than that required by international law," P.Br.54, both contradicts those decisions and rests upon faulty logic: this provision merely sets a floor which may be exceeded by other treaty provisions.

Arbitral awards that, unlike those cited by Exxon, concern customary international law repeatedly find shareholders cannot assert a claim for acts against

[5] *Harza* construed Claims Settlement Declaration Article VII(2), *id.* at *9, permitting shareholders to bring claims "owned indirectly" before the Tribunal, which corresponded to the "interests in property" provision of the Treaty of Amity. *Amoco Int'l Fin. v. Islamic Republic of Iran*, Award No. 310-56-3, 15 Iran-U.S. Cl. Trib. Rep. 189, 1987 WL 503881, at *24 (July 14, 1987) (analogizing the two provisions and noting Article IV(2) is "*lex specialis*" "supersed[ing] … customary international law").

[6] Exxon also cites Tribunal language equating the *standard of compensation* under customary international law and the Treaty of Amity, P.Br.54 (quoting *Sedco*). This is irrelevant to shareholder property rights.

a subsidiary's assets and that such a claim can only be asserted under a treaty's *lex specialis*. *See, e.g.*, *Poštová Banka v. Greece*, ICSID Case No. ARB/13/8, Award ¶¶229-31 (Apr. 9, 2015) (rejecting shareholder argument that investment regime changed customary international law and concluding "an investor has no enforceable right in arbitration over the assets … belonging to the company"); *HICEE B.V. v. Slovak Republic*, UNCITRAL, Case No. 2009-11, Partial Award ¶147 (May 23, 2011) ("default position in international law" bars shareholder claims for act targeting corporate assets). The two ICSID awards Exxon relies on expressly *contrast* the result under treaty from that under customary international law. *Total v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction ¶¶78, 80 (Aug. 25, 2006) ("Argentina is misplaced when it relies on the *Barcelona Traction* case … [O]nly the protection of foreign shareholders under customary international law was at issue in that dispute. … Total['s] claims … fall under the definition of investments under the BIT.").[7]

[7] *See also von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award ¶¶ 319, 326 (July 28, 2015) (acknowledging "international law traditionally tended to look unfavourably on shareholders bringing claims for investments which they did not directly own," but holding "the Tribunal finds that it has jurisdiction … under the ICSID Convention, and the relevant BIT's [*sic*]").

The 1998 award cited by Exxon, *Sedelmayer v. Russia*, SCC Case No. 106/1998, Award, 52, 57 (July 7, 1998)—which purports to find "growing support" for the permissibility of shareholder claims—hinges on misreading ICJ authority, a reading repudiated by the ICJ in *Diallo*, *Helmerich*, and the consistent United

2. Asserted "Direct" Rights Under Customary International Law in Essosa's Property. Exxon's argument that its direct ownership rights are "in issue" fails because, as the district court found, Exxon cannot meet *Barcelona Traction*'s "entire enterprise" exception, which was defined and endorsed by the United States as *amicus* and recognized by this Court in *Helmerich*. The expropriation of Essosa's Cuban assets did not, as required by that exception, either destroy Essosa's "legal existence," *Barcelona Traction*, at ¶66, or "completely destroy[] the beneficial and productive value of Exxon's ownership of Essosa, effectively rendering Exxon's shares useless," JA2084-85, *quoting Helmerich*, 743 F.App'x at 455; Second U.S. *Helmerich* Amicus at *12 (same).

Exxon argues that its direct rights are "in issue" because all of its subsidiary's assets *in one country* were taken, P.Br.61. Despite having the burden to show this is a rule of customary international law, *Helmerich*, 137 S.Ct. at 1316, Exxon fatally fails to cite State practice or a single authority supporting its position. It blatantly misreads *Helmerich* by claiming it found the shareholder's direct rights were taken on "indistinguishable" facts. P.Br.59. In *Helmerich*, the

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States practice and position. Without any footing to start with, the posited principle, as the subsequent authority made clear, never took hold.

Exxon's citation to the broader definition of property rights in a draft OECD treaty from 1967, P.Br.57, amounts to nothing: it predates *Barcelona Traction* and is irrelevant (and unadopted) *lex specialis*.

subsidiary was incorporated in the expropriating state, and the expropriation caused a "total loss of control of [the] subsidiary," which "ceased operating as an ongoing enterprise," *Helmerich & Payne Int'l Drilling v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 816 (D.C. Cir. 2015), *vacated on other grounds*, 137 S.Ct. 1312 (2017), in contrast to here.[8]

Moreover, Exxon's argument cannot be reconciled with *Barcelona Traction*, *Helmerich*, and the United States recognizing the distinction between taking a corporation's assets and interfering with the shareholder's "bundle of rights," such as to "declared dividends, to attend and vote at general meetings, [and] to share in the residual assets of the company on liquidation." Second U.S. *Helmerich* Amicus at *8, *quoting Barcelona Traction*. Absent interference with those shareholder rights, *not* alleged here, *Barcelona Transaction*, *Helmerich* and the United States establish that a state does not deprive a shareholder of rights unless, unlike here, an expropriation ended the legal existence of the corporation or rendered shares in the corporation "useless." JA2084-85; *see supra* pp.15-16.

[8] Exxon relies, P.Br.61, on *Helmerich*'s citation of *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award ¶100 (June 26, 2000), but the cited passage discussed circumstances, unlike those here, where an *entire corporation* (the "Investment," *see id.* ¶2) is taken over, such that the shareholder can no longer exercise rights over the *corporation*. *Id.* ¶100.

Exxon's claimed shareholder right of "ownership and control" of its subsidiary's operations in one country, P.Br.61, is nothing more than a repackaging of its assertion of indirect rights. It is foreclosed by the international law principle that shareholder and corporate rights are "discrete and non-overlapping," such that the "determinative" question is whether the "right that has been infringed belongs to the shareholder or the corporation." U.S. Carlyle Submission, ¶¶2-4, and rests upon the proposition firmly rejected by international law that diminution in the value of the shareholder's shares in the corporation is sufficient. *Helmerich*, 743 F.App'x 442, 2018 WL 460639, U.S. Brief as Amicus Curiae, at *12-*13 (Jan. 17, 2018) ("First U.S. *Helmerich* Amicus").

Bizarrely citing *Helmerich*, Exxon argues that expropriating a subsidiary's assets satisfies the "rights in property" requirement if the expropriation discriminated against corporations owned by foreigners or the nationals of a particular country. P.Br.60-61. *Helmerich*, however, rejected this very argument, holding that the separation between the rights in property of the corporation and the shareholder under customary international law continues to apply in such situations, *Helmerich*, 743 F.App'x 449-53, a position also taken by the United States. First U.S. *Helmerich* Amicus, at *9-*10 ("Customary international law does not ignore the nationality of a corporation even when it is alleged that the state's expropriation of a domestically incorporated company was motivated by

discrimination against foreign shareholders."). *See also*, in accord, LUKAS VANHONNAEKER, SHAREHOLDERS' CLAIMS FOR REFLECTIVE LOSS IN INTERNATIONAL INVESTMENT LAW 118 (2020); *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶¶38, 80 (Apr. 29, 2004).[9] Additionally, the taking here was not discriminatory because, as shown *infra* pp.23-26, it was for Essosa's refusal to refine the Cuban State's imported Soviet oil and Cuba took a U.K.-owned subsidiary's refinery at the same time.

3. *The Foreign Claims Settlement Commission's Certification of Standard Oil's Claim Under the International Claims Settlement Act*. Finally, Exxon perfunctorily asserts that it satisfies §1605(a)(3) because of the FCSC's certification of Standard Oil's claim under the International Claims Settlement Act. P.Br.58-59. However, the FCSC only certified that Standard Oil "suffered a *loss* as a result of actions of the Cuban Government" taking Essosa's property. JA54;JA61 (emphasis added). It did so pursuant to a broad statutory mandate that reached "*losses* resulting from" Cuba's expropriations "directed against property, including

[9] In *Methanex*, cited by Exxon, P.Br.60, Methanex's U.S. assets were protected by a treaty provision that went beyond customary international law, *Methanex v. United States*, Partial Award ¶¶42-43, UNCITRAL (Aug. 7, 2002); the alleged discrimination was preferential treatment of domestic entities in violation of the treaty's "national treatment" requirements, *Methanex v. United States*, Final Award of the Tribunal on Jurisdiction & Merits Part IV.C, ¶¶11-12, UNCITRAL (Aug. 3, 2005); and customary international law was held not to bar such preferential treatment. *Id.* at Part IV.C, ¶¶6,14.

any rights or interests therein owned … directly or *indirectly* at the time by [U.S.] nationals," 22 U.S.C. §1643b(a) (emphasis added), and, specifically, such claims for "losses" by the U.S. parent corporations of non-U.S. corporations. 22 U.S.C. §1643d(b) (emphasis added). Further, FCSC certifications were simply to the Secretary of State for discretionary use in eventual settlement negotiations with Cuba. *Helmerich*, 743 F.App'x at 451-52. Thus, the FCSC certification neither recognized Standard Oil to have "rights in [Essosa's] property" nor created any rights, let alone property rights in Essosa's property. In the case of Exxon, that Title III provides certified claims are "conclusive proof of ownership of an interest in property," 22 U.S.C. §6083(a), only establishes that it had an indirect interest in the Essosa property, not "rights in [Essosa's] property," as required.

The FCSC did not consider its statutory instruction to apply "applicable substantive law, including international law," cited by Exxon, P.Br.59, to condition its express statutory mandate—to certify claims by shareholders for the losses they suffered from the expropriation of their subsidiary's assets—on finding that such shareholder claims were supported by customary international law. Given its mandate, the FCSC did not even discuss the issue. Moreover, the United States' position on shareholder claims is directly contrary to the position Exxon would incorrectly attribute to the FCSC (a component of the Department of Justice), as is the authority shown above.

Exxon asserts that "rights in property" are in issue because Title III "recognizes Exxon's standing, as owner of the expropriation claim certified by the [FCSC], to assert a claim for trafficking in *Essosa's* property." P.Br.49 (emphasis added). The assertion, made without any coherent (or other) explanation or authority, fails for three independently sufficient reasons.

First, §1605(a)(3) requires that the *plaintiff's* rights be in issue. It is satisfied "only if [courts] find that the property *in which the party claims to hold rights*" was taken, *Helmerich*, 137 S.Ct. at 1316 (emphasis added); that plaintiff's allegations are sufficient to establish "that *the plaintiff has rights in the relevant property*, and the plaintiff seeks some form of relief on the ground that those rights have not been vindicated." *Helmerich*, 137 S.Ct. 1312 (2017), 2016 WL 4524346, Brief for the United States as Amicus Curiae Supporting Petitioners at *16 (Aug. 26, 2016) (emphasis added) (internal quotations omitted).

If it were otherwise, the *Barcelona Traction-Helmerich* rule would be upended by a shareholder simply asserting the rights of the corporation whose property was taken, notwithstanding that, by using the language "rights in property," Congress adhered to customary international law's distinction, as found by the ICJ just six years earlier, between "property rights" on the one hand, and "interests" or "financial losses" on the other. *Barcelona Traction*, at ¶¶41, 46-47. In providing for the United States alone to abrogate immunity for expropriations,

Congress, as the Supreme Court has emphasized, sought to "conform fairly closely to [] accepted international standards." *Helmerich*, 137 S.Ct. at 1320-21, not disregard them.[10]

Second, Title III does not provide the "standing" claimed by Exxon. 22 U.S.C. §6082(a) makes a person who "traffics in property" liable *only* to the person who "owns the claim to such property;" Essosa, not Exxon, "owns the claim to" the property. It is the "former owners of confiscated property" who may bring Title III claims. *Glen v. Club Mediterranee*, 450 F.3d 1251, 1255 (11th Cir. 2006).[11] Title III's "Findings" justify the newly-created cause of action on the need to protect the "rightful owners of the property," 22 U.S.C. §6081(8); the Conference Report explains that "this right of action is a unique but proportionate remedy for U.S. nationals who were targeted by the Castro regime when *their* property was wrongfully confiscated." H.R. REP. NO. 104-468, at 58 (1996) (Conf.

[10] The State Department, which "helped to draft the FSIA's language," meriting "special attention" to its views, *id.* at 1320, was undoubtedly alert, particularly in light of *Barcelona Traction*, to the significance of using "rights in property" in the statutory language.

[11] Since the confiscations ended their title to or other rights in the property, "the Helms-Burton Act refers to the property interest the former owners now have as ownership of a 'claim to such property.'" *Glen*, 450 F.3d at 1255.

Rep.), *reprinted in* 1996 U.S.C.C.A.N. 558 (emphasis added). Exxon is not the "former owner" of the Essosa property; "their property" was not taken.[12]

Third, even if Title III established a cause of action on behalf of a shareholder whose indirect loss had been certified by the FCSC, that would be of no aid to Exxon. The action Exxon could bring as a certified claim-holder—like the certification itself—would be based upon "losses" to its "indirect" interests, not upon its or a third-party's property rights. §1605(a)(3) is not satisfied by entitlement to compensation for "losses" to "indirect" interests.

Having failed to establish this action puts in issue "rights in property" under Panamanian law, customary international law or U.S. law, Exxon cannot proceed under §1605(a)(3).

B. The Exception's "Violation of International Law" Requirement Is Not Satisfied Because Essosa and Exxon Acted with the United States to Overthrow the Cuban Government; Alternatively, the Political Question Doctrine Precludes Reliance on the Exception

Although the district court did not reach Defendants' argument that the Essosa property was not, as required, "taken in violation of international law," its ruling that the expropriation exception does not provide jurisdiction may be affirmed on that ground. *Heath v. AT&T*, 791 F.3d 112, 123 (D.C. Cir. 2015).

[12] Exxon is not in the position under Title III of the shareholder of an expropriated Cuban corporation; that shareholder, but not Exxon, can argue that it can bring a Title III action because its shareholder right to own the *corporation* was taken, the corporation ceased to exist, and/or *all* its assets were taken.

State Department and CIA documents, and Plaintiff's own testimony elsewhere, attached to and detailed at JA665-1346;JA2012-32, establish that Essosa, on instructions from Standard Oil, acted with the United States to overthrow the Cuban Government. Exxon did not contest this showing.

On March 17, 1960, President Eisenhower approved a plan to overthrow the Cuban Government by a combination of military action and economic pressure that culminated in the Bay of Pigs invasion in April 1961 by over 1,500 armed forces. JA672-76. To further this plan, President Eisenhower asked Standard Oil and Texaco, and had the UK Prime Minister ask Shell, to have their subsidiaries refuse to refine crude oil imported by the Cuban State from the U.S.S.R. JA670;JA680-84.

Standard Oil had no commercial objections to its subsidiary refining the Soviet oil. JA670-71;JA677. However, and even though both it and the United States understood refusal would lead to seizure of Essosa's properties, Standard Oil, as "good [U.S.] citizens" JA669-70, agreed to President Eisenhower's request, as did the other two companies. JA669-71;JA678-81;JA685-87. On June 6, 1960, Essosa and the others informed Cuba that they would not refine the Soviet oil. JA668;JA682;JA685-86. Standard Oil, Texaco and Shell, which dominated regional crude supply, JA668, had ended shipments to Cuba, and the country was soon to run out of non-Soviet crude oil. JA670-71;JA692.

On June 10, Cuba's Prime Minister, Fidel Castro Ruz, publicly called the refineries' refusal "the first specific act of aggression," "a plan to leave the country without fuel" that "would paralyze everything;" "they could in a very simple fashion achieve what they cannot achieve in any [other] way," collapse of the Government. JA682. He called on the refineries to reconsider. JA1528-29. When they refused to accept Soviet oil proffered by the State late in June, Cuba seized the Texaco subsidiary' refinery on June 29 and the Essosa and Shell subsidiaries' refineries on July 1, 1960. JA668-69.

On July 9, Prime Minister Castro charged that the U.S. has "done all they can to remove the revolutionary government." After recounting other U.S. "aggressions," he continued:

> Then came the oil battle. They conceived the plot of leaving us without fuel … The result of this is that we have taken over the refineries.

JA689.

Both before and contemporaneous with its taking the refineries, Cuba stated its well-founded fear that a U.S. armed attack was being planned. JA693-94;JA2013-18. At the United Nations Security Council, convened at Cuba's July 11 request, JA692, Cuba stated its "grave[] concern[]" about the threat of "armed

aggression." JA693. It quoted the U.S.S.R.'s "staggering warning" of a missile attack in response. JA2018.[13]

At the Security Council, Cuba placed the refineries' refusal to refine the State's Soviet oil at the heart of U.S. aggression that combined both military and economic elements. JA692-95. It charged that Standard Oil, Texaco and Shell had "prepare[d] a new type of economic aggression with consequences far more serious than the [U.S. decision to eliminate Cuba's] sugar quota," "a plot to deprive Cuba of fuel and paralyse [sic] its vital economic machinery," a plot that "emanat[ed] directly from the [U.S.] Government." JA694-95. With "[f]uel stocks declin[ing] at an alarming rate," "the Revolutionary Government, exercising its authority and powers … gave [the refineries] the alternative of refining the crude oil acquired by the Cuban state … or fac[e] the consequences. ... [T]he Revolutionary Government had to choose one of two courses: it could either … abdicate the exercise of sovereignty or take legal action against [the refineries]." *Id*.

"Essosa's property rights were expropriated … pursuant to Resolution No. 33 [July 1, 1960] …, which was issued pursuant to Resolution No. 190 [June 30,

[13] At the U.N. and elsewhere, Cuba identified numerous U.S. acts such as light aircraft bombing sugar mills and plantations and firing on civilians; sabotage of arms shipments, with loss of life; and enlisting Guatemala as a cover for a U.S. invasion. JA2013-17.

1960]" JA22-23 (Second Amended Complaint ("SAC"):¶28). Resolution No. 190 expressly exercised the "powers which are inherent to the Government." JA666-67. In its Whereas clause, it also cited violation of the 1938 Law of Combustible Minerals, which provided that "[p]etroleum refineries" "shall be obliged to refine petroleum belonging to the State[.]" JA666-67. Responding to Essosa's formal protest, the Cuban authorities additionally cited the Fundamental Law of 1959, which provided for confiscation of the property of those "responsible for crimes against the national economy," as well as for "urgent national necessity." JA1842-43. Responding to the State Department's protest, Cuba stated that the oil companies "have not only violated the [Law on Combustible Minerals] ... but also committed the crime of boycott against the Cuban State and people." JA1878.

1. Because Essosa used its property to aid a hostile power's effort to overthrow its government, international law unequivocally supported Cuba's sovereign authority to confiscate that property without compensation. Settled customary international law allows taking, without compensation, the property of a foreign national when its use of the property threatens peace, security, and public order. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW

624 (8th ed. 2012) ("measures of defence against external threats" are not subject to any requirement of compensation).[14]

The Supreme Court has repeatedly recognized that States may confiscate property used on behalf of a hostile foreign power. *See The Paquete Habana*, 175 U.S. 677, 708 (1900) (international law limits on confiscation "do[] not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy"); *U.S. v. Chem. Found.*, 272 U.S. 1, 11–13 (1926) (upholding confiscation of property that "brought profit and advantage to the enemy"); *Nat'l Bd. of YMCA v. U.S.*, 396 F.2d 467, 472 (Ct. Cl. 1968), *aff'd*, 395 U.S. 85 (1969) (upholding confiscation to prevent property "falling into enemy hands").

[14] *See also, e.g.*, John Herz, *Expropriation of Foreign Property*, 35 AM. J. INT'L L. 243, 251-52 (1941) (taking does "not ... entail[] an obligation to pay compensation" if "necessary [] to safeguard public welfare: *e.g.*, ... for the protection of public health or security against internal or external danger;" "recognized by state practice" and "almost unanimous opinion of theorists"); EDWARD RE, FOREIGN CONFISCATIONS 12 (1951) ("inherent power" of states "to protect and secure the life, health, safety and morals of its citizens," even if it causes "total destruction" of "rights in property"); James Gathii, *Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context*, 25(2) U. PENN. J. INT'L ECON. L. 491, 504 (2004) (resources "applied towards aiding the enemy ... automatically acquire an enemy character and become subject to confiscation").

The United States has a longstanding practice, under the Trading with the Enemy Act and other legislation,[15] of confiscating property to eliminate threats from enemy-controlled businesses. Exec. Order No. 9193, 7 Fed. Reg. 5205 (July 9, 1942) (subjecting to uncompensated vesting businesses "controlled by or acting for or on behalf of … a designated enemy country or [] person[.]"); Nicholas Mulder, *The Trading with the Enemy Acts in the Age of Expropriation, 1914-49*, 15(1) J. GLOB. HIST. 81, 88-92 (2020) (detailing largescale U.S. confiscations in W.W. I and W.W. II); *see also* Joseph W. Bishop, Jr., *Judicial Construction of the Trading with the Enemy Act*, 62 HARV. L. REV. 721, 743 (1949) ("There is no doubt that the seizure and use of enemy property in the United States is sanctioned ... by international law"), extending to post-war refusal to return the shares of seized companies, which the U.S. defended as lawful under customary international law. *Interhandel Case (Switzerland v. U.S.)*, 1959 I.C.J. 6 (Mar. 21); *id.*, U.S. Preliminary Objections at Ex. 23 (Oct. 11, 1957); *see also* K.R. Simmonds, *The* Interhandel *Case*, 10 INT'L & COMP. L. Q. 3, 495, 496 (1961).

The practice of other States is parallel. *See* Mulder, *supra*, at 83-86, 94-98 (England, India, Pakistan, and Israel); TWEA, §§1(1)–2, 7, 2 & 3 Geo. 6, Ch. 89

[15] For non-TWEA U.S. practice, see International Emergency Economic Powers Act, 50 U.S.C. §1702(a)(1)(C) (U.S. may "confiscate any property ... of any foreign person ... that [the President] determines ... has ... aided ... hostilities or attacks against the United States").

(Sep. 5, 1939), *amended* (1943) (Eng.); Regulations Respecting Trading with the Enemy, §§21-23, 62-63, Order in Council P.C. 3959 (Aug. 21, 1940) (Can.); TWEA, No. 14 of 1939, §5, *amended* (Sept. 9, 1939) (Aust.); *Final Act of the Inter-American Conference on Systems of Economic and Financial Control*, Washington, D.C., July 10, 1942, §VII, Art. 1(a); *Naim Molvan v. Attorney-General for Palestine*, 15 ANN. DIG. 115, 125 (Privy Council 1948) (Eng.) (no authority that confiscation of foreigners' boats for "prevent[ive]" national security reasons violates international law).[16]

2. Separately sufficient to preclude a "violation of international law" is that Cuba, in addition to exercising its "inherent" sovereign authority to meet grave threats, Resolution No. 190, exercised its sovereign authority to seize Essosa's property for violation of national law—Cuba's 1938 Law of Combustible Minerals and Fundamental Law of 1959—also a settled basis for confiscation under

[16] Exxon's position below that a formal state of war is necessary lacks any support in state practice or commentary. J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 351 (4th ed., 1958) ("States [] apply most of the rules governing a war *stricto sensu* to 'non-war' hostilities."); *see also* Curtis Bradley & Trevor Morrison, *Historical Gloss and the Separation of Powers*, 126(2) HARV. L. REV. 411, 464 (2014) ("In the late eighteenth century, declarations of war served specific purposes under international law .... But that specific role has largely disappeared[.];" declarations of war are obsolete); RICHARD F. GRIMMETT, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2010 (Cong. Research Serv., March 10, 2011) (discussing hundreds of U.S. conflicts, only five with declarations of war).

international law. CRAWFORD, BROWNLIE'S PRINCIPLES, at 624 (no compensation required where taking is "exercise of police powers" or "penalty for crimes"); *see also* B.A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 42 (1959) (police power permits seizure without compensation for violation of law); GILLIAN WHITE, NATIONALISATION OF FOREIGN PROPERTY 41-42 (1961) (same).

This settled principle is supported by and reflected in state practice, including forfeitures, as here, for violations of national security, foreign relations or economic emergency regulations. TWEA provides that "any property that is the subject of a violation" of TWEA regulations "shall … be forfeited[.]" Ch. 106, §16(2), 40 Stat. 411 (1917), *as amended*, Pub. L. 73-1, 48 Stat. 1 (1933) (making TWEA applicable to peacetime emergencies); *see also* Pub. L. 95-223, §101(b), 91 Stat. 1625 (1977). Other U.S. laws provide for forfeiture for both criminal and civil law violations. *See, e.g.*, 18 U.S.C. §981(a)(1)(c) (property linked to civil "export control violations" under 18 U.S.C. §1956(c)(7)); 19 U.S.C. §§1581 *et seq.* (vessels for customs violations).

Other States likewise provide for forfeiture for violation of law related to vital national interests.[17] International tribunals have rejected challenges to such

[17] *See, e.g.*, Criminal Justice (Terrorism and Conspiracy) Act of 1998, ch. 40, §4 (U.K.); Northern Ireland (Emergency Provisions) Act, 1973, 21 & 22, ch. 53, §§11(3), 19(2) (U.K.); Act No. 12 of 1995 as amended, §94.1 (articles involved in espionage) (Australia); Criminal Code of Canada, R.S.C., c. C-46, §83.14 (1985)

measures based on customary international law.[18]

Exxon argued below that the taking violated Cuba's domestic law, but violation of *national* law does not meet the FSIA requirement of a "violation of international law."[19] Further, Defendants' uncontroverted expert declaration, JA1836-1942, establishes that Essosa violated Cuban law, which authorized forfeiture for the violation.

Exxon cannot sidestep Cuba's exercise of sovereign authority under customary international law for Essosa's refusal to refine Soviet oil by amalgamating the taking of the Essosa and other refineries to the later, August 6, 1960, assertedly "discriminatory" nationalizations decreed by Resolution No. 1,

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(property owned by or used for a terrorist group); Criminal Code of Canada, R.S.C., c. C-46, §490.2 (1985) (forfeiture of "offence-related property" for corruption of foreign public officials); Criminal Justice Act of 1988, ch. 33, §69 (U.K.); Single Convention on Narcotic Drugs, 1961, art. 37, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151 (entered into force Dec. 13, 1964) (forfeiture of property used in drug offenses).

[18] *Gogitidze et al. v. Georgia*, App. No. 36862/05 at ¶ 105, Eur. Ct. H.R. (12 May 2015) ("common European and even universal legal standards can be said to exist which encourage, firstly, the confiscation of property linked to serious criminal offences such as corruption, money laundering, drug offences and so on, without the prior existence of a criminal conviction.").

[19] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 86 (2002) ("[A]n act … cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law.").

issued pursuant to Law No. 851 of 1960. P.Br.60. The SAC, JA22-23(¶28), alleges that "On *July 1*, *1960*, Essosa's property rights were *expropriated* in violation of international law *pursuant to Resolution No. 33* … which was issued pursuant to Resolution No. 190 of June 30, 1960" (emphasis added). The district court proceeded on the basis of this allegation. JA2048. Exxon repeats it in its opening paragraph here.[20] Because seizure of the refineries was for their refusal to refine Soviet oil, and also because one of the three refineries was owned by a U.K.-

[20] The United States understood the refineries to have been expropriated on June 30-July 1. On July 18 at the Security Council, before issuance of Resolution No. 1, it stated that "the Cuban action in seizing these companies without compensation was arbitrary and illegal;" "the property [was] taken away" from them without their being "reimbursed." JA696. "It is an established principle of international law that an act of expropriation does not require a formal decree of nationalization," *Sedco v. Nat'l Iranian Oil Co. & Islamic Republic of Iran*, Award No. 55-129-3, 9 Iran-U.S. Cl. Trib. Rep. 248, 1985 WL 324069, at *19 (Oct. 24, 1985); *Tidewater v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award at ¶104 (Mar. 3 2015) ("well accepted in international law that expropriation need not involve a taking of legal title to property"). There is a "taking" where the "investor has no reasonable prospect of regaining management and control," *Elettronica Sicula, S.p.A. (U.S. v. Italy)*, ICJ, Memorial of the United States of America at 91-92 (May 15, 1987); *Sedco*, 1985 WL 324069 at *22 (taking when "no reasonable prospect of return").

In including Essosa in the list of 26 companies whose Cuban properties were subject to its provisions, Resolution No. 1 referred back to the events of June 1960, reciting that the "petroleum companies" had "ignored the laws of the nation and hatched a criminal scheme to boycott our country." JA697-98. Inclusion of Essosa in Resolution No. 1 made Law No. 851's compensation provisions (discussed *infra* pp.36-38) applicable to it.

company's subsidiary, Exxon cannot establish that the taking was "discriminatory."

The doctrine of countermeasures also precludes finding a "violation of international law." The U.S.'s effort to overthrow the Cuban Government through economic pressure and armed force violated Articles 15 and 16 of the O.A.S. Charter, 2 U.S.T. 2394, T.I.A.S. 2361, 119 U.N.T.S. 3 (April 10, 1948),[21] invoked by Cuba at the Security Council, JA693-94, and the U.N. Charter's prohibition against the use of force. Art. 2(4), 1 U.N.T.S. XVI (also invoked by Cuba). Under customary international law, a state may respond to the wrongful act of another state with a measure that would otherwise be wrongful, provided the countermeasure is proportionate and meant to induce discontinuance of the wrongful act or obtain reparations. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, ILC Y.B. Vol. II, Pt. II at 129-30 (2001). Resort to the doctrine is unnecessary, as Cuba's taking the refineries was not wrongful, but its standards, in any event, are met: the United

[21] Article 15: "No State … has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat[.]"

Article 16 provides: "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State[.]"

States' acts were wrongful and of the utmost gravity, and Cuba linked compensation to the cessation of those wrongful acts (*infra* pp.36-38).

3. Exxon must prevail on the above issues to satisfy the expropriation exception. However, it cannot do so without adjudication of non-justiciable, political questions, an alternative reason why the expropriation exception cannot provide jurisdiction.

In *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), this Court held that the political question doctrine barred a damages action for the 1970 assassination of a Chilean General seen as an impediment to the U.S.'s efforts to prevent Salvador Allende taking office as president of Chile. The action would require the courts "determin[ing] whether ... at the height of the Cold War between the United States and the western powers on the one hand and the expanding communist empire on the other, it was proper for an Executive Branch official ... to support covert actions against a committed Marxist [President-elect Allende] who was set to take power." *Id.,* at 196-97 (internal quotations omitted).

For the same, overriding concerns for the "separation of powers" in the conduct of foreign affairs, *Schneider*, *id.* at 193 (quoting *Baker v. Carr*, 369 U.S. 186, 210 (1962)), and in remarkably similar circumstances, *Schneider* compels application of the political question doctrine: the courts would have to determine whether it was "proper" under customary international law for the Executive to

have attempted the overthrow of the Cuban Government at the height of Cold War and to request the oil companies to aid it in that endeavor, and, relatedly, whether the national security and foreign policy decisions of the two sovereigns justified their actions. *See also, e.g.*, *Reno v. Am.-Arab Anti-Discrim. Comm*. 525 U.S. 471, 490-91 (1999) (courts not "to assess the[] adequacy" of "reasons for deeming [foreign] nationals ... a special threat"); *El-Shifa Pharm. Indus. Co v. U.S.,* 607 F.3d 836, 844-45 (D.C. Cir. 2010) (*en banc*) (political question bars assessing whether international law required compensation for property destruction because it would require determining whether U.S. attack was "justified").

C. There Was No "Violation of International Law" for Additional Reasons

1. Even assuming an obligation to provide compensation, Exxon cannot show a "violation of international law" because, as established by State Department documents, the United States decided not to negotiate compensation with Cuba but to await better terms, including possible return of industrial properties, from the "successor regime" that would follow its overthrow of the "Castro" regime, despite recognizing Cuba's willingness to negotiate U.S. expropriation claims. JA1207-09;JA1212-13;JA1215-16. This contravened the "obligation to negotiate" that "underlies all international relations," *North Sea Continental Shelf (F.R.G. v. Den. & Neth.)*, 1969 I.C.J. 3, ¶¶85-86 (Feb. 20); *Fisheries Jurisdiction Case (U.K. & N. Ireland v. Iceland)*, 1974 I.C.J. 3, ¶¶73-75 (July 25), which "transform[s] [general

obligations] into specific obligations," *Case Concerning Gabcíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. Rep. 7, ¶112 (Sept. 25), as was required here. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 324 (1991) (The prevailing customary international law standard "leaves considerable latitude to the parties in negotiation") Alternatively, determining whether the Executive's decision not to negotiate was justifiable under customary international law presents a non-justiciable, political question, precluding jurisdiction under the expropriation exception.

2. Assuming an obligation to provide compensation, Exxon cannot establish a "violation of international law" because the compensation offered under Law No. 851 met customary international law standards. It provided for payment in 30-year bonds with interest. JA1122-25(Art. 5). While providing for a sinking fund capitalized from sugar sales to the U.S., Law No. 851 did not unambiguously condition payment of the bonds' principal on resumption of those exports, Cuba's principal source of foreign exchange, which the Eisenhower Administration had ended. *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 862 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964). Defendants showed without rebuttal that, if sugar sales to the U.S. had been restored, the sinking fund would have yielded an amount, approximately $1,533,000,000, JA246-60;JA272-84, close to the total $1,851,000,000 value found *ex parte* by the FCSC,

www.justice.gov/fcsc/claims-against-cuba, which was well in excess of actual value. *See Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 887-93 (2d Cir. 1981) (FCSC overvalued property by ignoring depression in values due to post-Revolution events); JA285-322;JA557 (same error made in at least 700 FCSC decisions). The Second Circuit was wrong when, in 1962, it found that the minimum volume and prices set by Law No. 851 for the sinking fund made the fund "illusory," *Sabbatino*, 307 F.2d at 862.

Law No. 851's terms easily fit within contemporaneous state practice. The definitive study of "lump sum" settlement agreements, the paramount post-War II state practice, RICHARD LILLICH AND BURNS WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, PART I: THE COMMENTARY (1975), showed that:

(a) the median time from taking to completion of payments was 20 years and often longer than 30. *Id*. at 211-12;

(b) no settlements but one provided interest. *Id*. at 239;

(c) trade agreements negotiated in tandem were "common" and "frequently" their "*sine qua non*." *Id*. at 233-34. Exports to the claimant state under those agreements or otherwise generally funded compensation; some settlements restricted compensation to these export earnings in excess of a fixed sum. *Id*. at 234-35; and

(d) typically, only "partial" compensation was provided. *Id*. at 218.

3. Even aside from the circumstances of Cuba's taking the Essosa property, Exxon cannot meet its burden to establish a compensation obligation. In *Sabbatino*, 376 U.S. at 428-30, the Court found in 1964 that there are "few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." Yet, a rule of customary international law can only be established by the "general and consistent practice that states follow[ed] out of a sense of legal obligation." *Helmerich*, 743 F.App'x at 449-50 (internal quotations omitted), a "settled practice," "both extensive and virtually uniform," "widespread ... as well as consistent," and "representative [of] the various interests at stake and/or the various geographical regions." International Law Commission, Draft Conclusions on Identification of Customary International Law with Commentaries, ILC Y.B., Vol. II, Pt. II at 135-36 and n.716 (2018).

Given the sharp international divide, the Second Circuit went only so far in *Sabbatino* as to find that a discriminatory and retaliatory taking without compensation violated international law. 307 F.2d at 862. There can be no such finding here: the SAC only alleges failure to pay compensation, JA24(SAC:¶33); the refineries were taken for their refusal to refine Soviet oil; one of three was owned by a U.K. company's subsidiary.

D. The Exception's Nexus Requirement Is Not Before the Court

Exxon argues that §1605(a)(3)'s nexus requirement (the agency "is engaged in a commercial activity in the United States") is satisfied as to CUPET, P.Br.63-65. The issue is not before the Court. The district court did not rule on or certify the nexus issue. JA2082-87;JA2123. In its §1292(b) cross-petition, Exxon *only* sought review of the "ruling" below that the expropriation exception could not provide jurisdiction because it was Essosa's property that was taken, *id.*, at 1,4,7-9, No. 21-8010 (D.C. Cir. Dec. 10, 2021); argued that leave should be granted because *that* issue was included in the order under appeal by *CIMEX*; and represented that the issue to be presented was "purely one of law," *id.* at 7-8, unlike the nexus requirement, which is contested on the facts as well as the law.

The nexus requirement as to CIMEX is likewise not before the Court. It was not ruled upon or certified below; not an issue presented by Exxon in its cross-petition to this Court; is not fairly encompassed within the lower court's order that there is subject-matter jurisdiction as to CIMEX under the commercial activity exception; and not a pure question of law. The same necessarily holds true for CIMEX (Panama): the district court found "its status as a defendant rests on its relationship with CIMEX," JA2089, and the complaint's *alter-ego* allegations were insufficient. JA2081.

Out of an abundance of caution, Defendants nonetheless show that, if

considered on the present record without district court findings, nexus must be resolved in their favor.

As to CUPET: both its alleged activities, P.Br.63-64 and those actually shown in the record do not satisfy the requirement because, occurring more than two years before this action's commencement, they are not "recent or ongoing" activity. *Schubarth v. Fed. Republic of Germany*, 220 F. Supp. 3d 111, 115 (D.D.C. 2016), *aff'd in part*, 891 F.3d 392, 399 n.4 (D.C. Cir. 2018) (Circuit endorsing reasoning); §1605(a)(3) ("*is* engaged …") (emphasis added); *Taylor v. Kingdom of Sweden*, No. 18-cv-1133, 2019 WL 3536599, at *5 n.6 (D.D.C. Aug. 2, 2019) (three years too remote). *See* JA1557-60;JA265-66;JA268-69;JA1539-40. Further, they would not otherwise satisfy the nexus requirement. *See* JA264-68;JA1809-14;JA1828-35 (travel to U.S. as part of official Government delegation for non-commercial activities); JA1814-17 (cited advertisement not CUPET's; conferences held in Cuba); JA268-69 (confidentiality agreement was with separate, CUPET majority-owned subsidiary; no resulting commercial relationship);[22]

[22] Commercial discussions do not satisfy the requirement, as they are "merely precursors to commercial transactions," *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988). *See also Lempert v. Republic of Kazakstan, Ministry of Justice*, 223 F. Supp. 2d 200, 203 (D.D.C. 2002), *aff'd*, 62 F.App'x 355 (D.C. Cir. 2003); *Gerding v. France*, 943 F.2d 521, 527 (4th Cir. 1991). Even contracts with a U.S. party would not be sufficient unless there was to be performance by or on behalf of CUPET in the U.S. *Infra* p.42.

JA1817 (fuel sales to U.S aircraft were in Cuba).

As to CIMEX: FINCIMEX's remittances activities, including its contract with Western Union ("WU"), cannot be attributed to it, as Exxon has neither alleged nor shown that FINCIMEX is CIMEX's *alter-ego* or agent, [42-3:19-20];[49:10-12];JA200-01; further, FINCIMEX carries out no activities in the U.S. but is WU's agent in Cuba. JA193-99. Similarly, CIMEX's Cubapack division only delivers in Cuba packages sent by U.S. companies for their customers. JA205-07;JA1993-98;JA2043-44. The nexus requirement demands more than an agency's performance abroad under a contract with a U.S. party. *Idas Res. N.V. v. Empresa Nacional De Diamantes De Angola E.P.*, No. 06-cv-00570, 2006 WL 3060017, at *5–6 (D.D.C. Oct. 26, 2006). CIMEX does not export coffee to the U.S. under the registered trademark cited by Exxon, JA2043; its obtaining and defending a trademark registration is only an insufficient precursor to future commercial activity. CIMEX does not operate aisremesascuba.com or related social media accounts, P.Br.64-65;JA203-04; further, they are not jurisdictionally significant because they are not targeted at the U.S. JA1988-93;JA2041-42. *Schubarth*, 220 F. Supp. 3d at 115-16 (worldwide website not linked to U.S. is insufficient). Nor is CIMEX's owning the domain name, registered with non-U.S. registrars, JA2041. *Am. Online v. Aol.Org*, 259 F. Supp. 2d 449, 451 (E.D. Va. 2003). *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1032 (9th Cir. 2010) provides no support to

Exxon: the defendants bought and sold products, as well as engaged in other commercial activities, in the U.S.

II. The Expropriation Exception Alone Controls, Requiring Dismissal

As there is no jurisdiction under §1605(a)(3), dismissal is required if it alone controls. Exxon has done nothing to overcome Defendants' arguments that the expropriation exception, which expressly and with precision addresses the conduct establishing Title III liability, cannot be displaced in favor of the generic commercial activity exception. D.Br.11-38.

(a) By including an agency that "own[s] or operate[s]" expropriated property within its ambit, the expropriation exception aims at agencies that own or operate expropriated property in connection with commercial activities. That, after all, is the archetypal (all but invariable) activity for which agencies own or operate expropriated property, and an agency's commercial use of property almost always follows its expropriation. Consequently, application of the commercial activity exception would swallow up the expropriation exception, making its distinctive requirements a dead letter, in this case and generally. D.Br.11-17.

Exxon, like the district court, offers little in response other than it does not matter. This is untenable under the rules of statutory construction and because of the Supreme Court's command that the FSIA be construed according to its "carefully constructed framework" and "reticulated boundaries." D.Br.12-16,20-21

(quoting *Fed. Republic of Germany v. Philipp*, 141 S.Ct. 703, 713, 715 (2021) and citing additional authority).

(b) As this Court has expressly held, the State's expropriation of property *and its transfer of that property to an agency for commercial use* are integrated exercises of sovereign authority, D.Br.14-18; so, therefore, must be the other end of the transfer here: the agency's "trafficking" in expropriated property by "receiv[ing]," "possess[ing]," or "hold[ing] an interest" in the expropriated property, LIBERTAD, 22 U.S.C. §6023(13), or putting the property to commercial "use[]," *id*., as the State intended it to do. The expropriation exception must therefore alone apply, as it alone abrogates immunity for claims based on the exercise of sovereign authority. D.Br.14-18.

Without any effect, Exxon argues that the inquiry should focus upon Defendants' putting the property to commercial use to the exclusion of their receiving, possessing or holding an interest in the expropriated property. First, putting the expropriated property to commercial use is part of the exercise of sovereign authority. Second, even if it were not, the agency's receiving, possessing or holding an interest in the expropriated property—each part of the exercise of sovereign authority—establishes liability even before the agency's putting the property to commercial use is reached.

(c) Exxon's claim necessarily challenges sovereignty: *inter alia*, it negates what has been done in the exercise of sovereign authority by demanding compensation for the value of property expropriated without compensation. However, the restrictive theory of immunity is premised upon and was accepted internationally, including by the United States, precisely because claims within its reach do *not* challenge sovereignty. D.Br.22-25. The commercial activity exception enacts the restrictive theory, and must be construed in accordance with it, with the result that the exception is inapplicable. Congress departed from the restrictive theory in the expropriation exception, such that it alone applies where, as here, the action challenges sovereign authority. D.Br.22-25.

The United States alone abrogates immunity for claims based on an agency's owning or operating expropriated property. To moderate that deviation, the FSIA seeks to "conform fairly closely to [] accepted international standards" "by requiring [in the expropriation exception] not only a commercial connection with the United States but also a taking of property '*in violation of international law*.'" D.Br.21-22 (quoting *Helmerich*, 137 S.Ct. at 1320-21 (emphasis in original)). Application of the commercial activity exception would overturn that Congressional decision.

Exxon has no response to either of these points except, like the district court, to say that Congress took foreign relations into account in every FSIA exception.

P.Br.42. This is no answer at all. In the commercial activity exception, Congress took into account that actions within its scope would not challenge sovereignty and abrogating immunity for them would be consistent with international practice. In the expropriation exception, Congress took into account that actions within its scope would challenge sovereignty and abrogating immunity would be out of line with international practice. This case falls only within the latter.

(d) Receiving, possessing or holding an interest in expropriated property, and putting it to commercial use, are all part of the State's exercising "authoritative control over commerce [that] cannot be exercised by a private party," *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992)—that is, to determine who can participate in the country's commerce and with what property, and that Cuba's is to be a socialist economy. D.Br.17-19,33. Viewing these acts, including putting the property to commercial use, in any other way is myopic, D.Br.20, and fundamentally misreads *Weltover* and the other cited authority: they concerned claims based on *how* market participants conducted commercial activities (such as issuing bonds in *Weltover*), not over the exercise of sovereign authority to determine who participates in commerce with what property.

Likewise, the sovereign character of "trafficking" here, including putting the expropriated property to commercial use, does not rest, contrary to Exxon, P.Br.19, upon "purpose" (*e.g.*, to meet a country's financial crisis by issuing the bonds in

Weltover) but upon the "nature" of the act—the exercise of sovereign authority to determine who, with what property, can engage in the country's commerce. D.Br.18-19,37.

Moreover, under Cuban law, title to real property, including property "attached to" real property or "permanently joined to" it for its "exploitation or utilization," and thus Essosa property, remains exclusively in the State. JA208-09;JA234(Civil Code, at Art. 46.2). The State may only grant a "right of [the property's] administration and use," and it retains the right to cancel that right and grant a new one. JA208-09,211;JA1951-52. Exxon's expert did not dispute this. JA1951-52. Exxon alleges that it was the Council of Ministers that decided upon the "transfer" of the Essosa property to CUPET and CIMEX, JA31(SAC:¶68); grants of the right of administration and use for key industries and infrastructure require approval at that high level. JA1951-52. Consequently, Exxon's trafficking claim, including for the defendant agencies' putting the Essosa property to commercial use, not only challenges Cuba's exercise of sovereign authority to determine who participates in the country's commerce with what property, but to determine who may use the State's own property—also an exercise of sovereign authority. *See Turan Petroleum Inc. v. Ministry of Oil & Gas of Kazakhstan*, No. 21-7023, 2022 WL 893011 at *8 (D.C. Cir. Mar. 25, 2022); D.Br.37.

(e) As shown, even if the agencies' putting the expropriated property to commercial use were the gravamen, the commercial activity exception would not apply. Moreover, it is not the gravamen. Liability is fully established by each of the necessarily *antecedent* acts of Defendants' receiving, possessing or holding an interest in the expropriated property. D.Br.33-34. Consequently, putting the property to commercial use is not, as it must to be the gravamen, an essential element of Exxon's claim for "trafficking" in "confiscated" property, JA16-17(SAC:¶1), "a fact without which [] Plaintiff will lose." D.Br.33-34 (quoting authority).

That receipt, possession or holding an interest, but not commercial use, are the gravamen reflects that the "crux" "of the plaintiff's complaint, setting aside any attempts at artful pleading," "[w]hat matters," is the property being taken away from Essosa and someone else having it. D.Br.34 (quoting authority).

Exxon gives the game away when it says its claim is the same as one for "stolen" property against the party to whom the thief passed the property, P.Br.15 n.6: the "crux" of such a claim, "what matters," is that the plaintiff lost its property and defendant has it, not that the defendant is using it or how. While the crux is the same, its nature is not: when the State steals by law and gives by law the stolen property to an agency (to use Exxon's pejorative terms), it is exercising sovereign authority. Further, the Defendants are not "purchasers" of the property, *id.*: they do

not own the property and their "right of administration and use" was granted by government decree, not commercial sale.

de Csepel v. Republic of Hungary, 714 F.3d 591 (D.C. Cir. 2013), P.Br.15, cited by Exxon, provides it with no support. There, the court looked to the "claim[] [that the plaintiff] actually brings"—alleged breach of a bailment agreement—to determine whether the commercial activity exception applied, refusing to consider instead a claim that could have but was not brought—for the original expropriation of the bailed property in violation of customary international law. *Id.* at 598. Here, the issue is what is the gravamen of the claim Exxon "actually brings:" for "trafficking in" confiscated property, JA16-17(SAC:¶1), under a statute that provides for liability against a party that "traffics" in confiscated property. JA18(SAC:¶6).

It is for the court, not Exxon as the "master[]" of what claim it chooses to bring, *de Csepel*, *ibid*., quoted at P.Br.14, to decide the gravamen of the claim Exxon has brought, no matter which of Defendants' acts of "traffic[king]" and which theory of trafficking liability it chooses to invoke (putting property to commercial use versus receiving, possessing or holding an interest in property). *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015) makes that clear. *See also*, *e.g., Jam v. Int'l Fin. Corp.*, 3 F.4th 405 (D.C. Cir. 2021), *cert. denied*, 142 S.Ct. 2668 (2022). Further, Exxon elides its own pleading by suggesting it is for

commercial use of the property: its complaint demands relief for "trafficking," JA16-17(SAC:¶1), *see also* JA47 (single count for "Trafficking in Confiscated Property") and, further, alleges the whole litany of acts that constitute Title III trafficking, including expressly "possess[ing]" and "hold[ing]" the expropriated property. JA46-48(SAC:¶¶125,133).

Exxon attacks a strawman in arguing that the expropriation cannot be the gravamen because its claim is for Defendants' acts. P.Br.38-39. Defendants have no need to assert that the expropriation is the gravamen, as their own alleged acts are part of the exercise of sovereign authority. Exxon stresses that the "act" of the Defendants upon which its claim is based is "in connection with commercial activity," P.Br.17-18, but the "act" itself cannot be sovereign for the commercial activity to apply. D.Br.33.

Exxon argues that it makes a difference that the expropriation took place long before the Defendants received the property. P.Br.39. However, the State's transferring the expropriated property from the agencies originally granted rights of administration and use to others granted the same right is part of the State's exercise of sovereign authority to determine who can participate in the country's economy with expropriated property, and who can possess, hold an interest in or use the State's property.

Exxon also appears to argue that its claim cannot be based upon the agencies' receipt of the property because that occurred prior to Title III's enactment. Even if this were so,[23] a party "traffics" if it "possesses" or "holds an interest" in the property, and Defendants are alleged to do that post-enactment and currently.

Exxon suggests that Defendants do not apply the gravamen analysis. To the contrary, Defendants argued in their opening brief, D.Br.32-38, and argue here, *supra*, that the gravamen analysis fully supports its position that the expropriation exception alone controls.

(f) Exxon argues that the expropriation and commercial activity exceptions "apply to different circumstances" because the expropriation exception "on its face" is not "necessarily" addressed to the agency owning or operating expropriated property for commercial activities. P.Br.37-38. Any circumstances within the expropriation exception not reached by the commercial activity exception would be aberrant and marginal. This Circuit has twice stressed, along with other courts, that commercial use almost always follows expropriation; further, the expropriation exception on its face requires the agency to be engaged

[23] CIMEX (Cuba) was established in August 1995. JA1401, only six months before Title III's enactment. The earliest indication in the record of when it took possession of Essosa service stations is 2006, after Title III's enactment. JA1533. The Essosa refinery and related property was transferred to CUPET in 1992. JA65.

in commercial activity (as it otherwise could not meet the exception's nexus requirements, which require commercial activity in the U.S.).[24] What is left is something as unlikely and implausible as a foreign state's giving an agency that is engaged in commerce expropriated land to operate, for example, as a fire station, instead of giving that land to the fire department. Exxon offers no real-life or even hypothetical examples.

Such circumstances have nothing to do with this case, where Exxon argues that the commercial activity exception reaches conduct of the Defendants that is within the expropriation exception's scope. Even aside from this, Exxon's hypothesized, aberrant circumstances do not blunt Defendants' arguments. To preserve the FSIA's "carefully constructed framework" and "reticulated boundaries," the Supreme Court in *Philipp*, 141 S.Ct. at 713, 715, rejected application of an FSIA provision when it would make another "of *little*"—not without any possible, aberrant—"consequence," *id.* at 714 (emphasis added). Even outside of the FSIA, it is not enough to "generate some role" for a statutory provision by a "scenario" that is not "likely to occur outside the realm of theory"

[24] Additionally, *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234-35 (D.C. Cir. 2003) requires that, to be considered an agency rather than part of the State itself, an entity's "core functions" cannot be governmental.

rather than the "usual circumstance." *TRW Inc. v. Andrews*, 534 U.S. 19, 29-30 (2001).[25]

The imperative of not supplanting an FSIA provision with another on account of circumstances not at hand and only an aberrant possibility takes on added force because of the gravity of the United States' assertion of jurisdiction over another sovereign's agency for owning or operating expropriated property, and this being a departure from international practice. Congress' effort to "conform fairly closely to [] accepted international standards" by imposing a "violation of international law" requirement, *Helmerich*, 137 S.Ct. at 1320-21, is at stake.

So too are the distinctive nexus requirements likewise fashioned to bolster the justification for the United States alone asserting jurisdiction over such actions. They require a tighter nexus between the claim and U.S. territory, or, alternatively, the agency and U.S. commerce, than the commercial activity exception: in contrast to simply requiring that an agency's ownership or operation of expropriated property have a "direct effect" in U.S. territory, the expropriation exception requires that the expropriated property (or property exchanged for it) be "present in

[25] *See also*, *e.g.*, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (more than "legal imagination" is demanded; "a realistic probability," "not a theoretical possibility" is "require[d]"); *City of Chicago v. Fulton*, 141 S.Ct. 585, 591 (2021) (rejecting construction that would result in a provision being left with only a "small amount of work").

the United States in connection with a commercial activity carried on in the United States by the foreign state" (which includes an agency, 28 U.S.C. §1603(a)), or that the agency "is engaged in a commercial activity in the United States."

(g) Exxon relies on Circuit authority that did *not* hold that claims for an agency putting expropriated property to commercial use, *simpliciter*, can be brought under the commercial activity exception. P.Br.5,9,34-36; D.Br.31,33. Moreover, application of the commercial activity exception for such a claim cannot be reconciled with what that authority does establish: that, since commercial use almost always follows expropriation, allowing suit because of such use under the commercial activity exception would impermissibly eviscerate the expropriation exception. D.Br.14-15,31-32.[26]

(h) Defendants carefully demonstrated that application of the commercial activity exception would deny the immunity recognized in customary international law contemporaneous with the FSIA's enactment. D.Br.25-31. In responding, astonishingly, that this of no moment, P.Br.42, Exxon ignores controlling authority

[26] Exxon's reliance on *Gibbons v. Udaras na Gaeltachta,* 549 F. Supp. 1094 (S.D.N.Y. 1982), P.Br.38, is also misplaced: the (confused) claim found to come within the commercial activity as well as expropriation exception was for the taking of property in violation of international law, *id.* at 1111 & n.7, and so did not raise the issue presented here, where application of the commercial activity exception would bypass the expropriation exception's "violation of international law" requirement.

that the FSIA exceptions *must* be construed in accordance with customary international law. D.Br.25-26.

Instead of attempting to show that customary international law denied immunity for an agency's commercial ownership or operation of expropriated property, Exxon simply attacks in a footnote, P.Br.43, n.19, the authority discussed in detail by Defendants, D.Br.26-30, as only involving "challenges [to] *expropriations*." P.Br.42-43 (emphasis in original). In addition to misreading the authority, Exxon misses that the restrictive theory was a limited derogation from absolute immunity. D.Br.25-26. To show that international law lifted immunity for suits that, as here, challenge commercial ownership or operation following expropriation, *Exxon* would need to show that state practice *opinio juris* established an expansion of the restrictive theory's derogation of immunity to reach such circumstances, which it does not even attempt, notwithstanding that this is its burden under the Supreme Court's decision in *Helmerich*.

Further, contrary to Exxon, each authority it attacks concerned not only a state's expropriation but also *commercial ownership or operation by the party to whom the expropriated property was transferred*. In *Société Algerienne de Commerce Alco v. Sempac*, plaintiffs sued *only* the state enterprise "entrusted" with the property's "operation and management," not the expropriating state, 65 I.L.R. 73, 74 (Court of Cassation 1978) (France), making it on all fours with

Exxon's action here. Despite plaintiff suing only the state enterprise, the court emphasized the "circumstances" of its receipt of the property in determining the suit implicated a "sovereign act," such that immunity applied. *Id.* at 75. Similarly, plaintiff in *Arab Republic of Libya v. SpA Mprese Marittime Frassinetti*, 78 I.L.R. 90, 92 (Court of Cassation 1979) (Italy), while naming the state as defendant, sought return of property that had been transferred to a third-party company, and thus challenged the allegedly wrongful use of the property post-expropriation, as did *The Ditta Pomante v. Fed. Republic of Germany*, in which plaintiff sought compensation, *inter alia,* for post-expropriation operation of his sawmill for Germany's benefit. 40 I.L.R. 64, 66, 68 (Civil Court of L'Aquila 1960).

Contrary to Exxon's waiver argument, P.Br.41, the Defendants argued below, at length, that application of the commercial activity exception would not be "in keeping with international law" and represent "a radical departure from the restrictive theory of immunity," which is part of the international law of immunity. JA2098-99;JA2093-96. Defendants cited international law sources in support, such as the U.N. Convention on Jurisdictional Immunity, and relied upon *Dunhill*'s exposition of the restrictive theory, which the *Dunhill* Court identified as part of the international law of immunity. *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 701-05 & App. 2 (1976). *See* JA187-90;JA2095-96;JA2099-100. On the basis of this exposition (not out of the blue, as the district court mistakenly

understood, JA2110), Defendants asserted that application of the commercial activity exception here would have "no basis in international law," JA2096, and, consistent with its fully argued position that a plaintiff must demonstrate support for its action in international law's limitations on immunity, JA191, Exxon had failed to provide such support. JA2099.

Even if Defendants had not argued international law below, reliance on it would be proper as additional authority for the position advanced below that the expropriation, not the commercial activity, exception controls. *See U.S. v. Rapone*, 131 F.3d 188, 196-97 (D.C. Cir. 1997). If, as in *Rapone*, a party may rely on a *source* for an asserted right different than argued below (a statutory, not only a constitutional, right to a jury trial), it can advance on appeal an additional reason for the same construction of a provision urged below. Even if seen as a newly presented "issue," the importance of Defendants' international law argument warrants its being considered, particularly as it does not depend on additional facts, *Time Warner Entertainment v. F.C.C.*, 93 F.3d 957, 974-75 (D.C. Cir. 1996) (*per curiam*): at issue is construing FSIA exceptions properly, and so as not to conflict with international law, in a case, moreover, of significant foreign relations implications.

EarthRights International's *amicus* brief expressly takes no position "to the extent that CIMEX is arguing which of its own acts constitute the gravamen, and

the nature of those acts," *Amicus* Br.2-3. That is precisely what the Defendants' arguments concern. EarthRights recognizes that the question it posits and addresses is different—whether the acts of a different party can ever be the gravamen of a claim against a defendant. EarthRights' discussion of the implications of a decision on *that* question for a variety of actions (such as that in *Jam*), are of no concern here.

Even if it were necessary for Defendants to rely on the Cuban State's acts as the gravamen, which it is not, Defendants could do so. *Jam* rejected EarthRights' "categorical" position on the issue it posits, *id*., 3 F.4th at 410, expressly addressing each argument that EarthRights (counsel in *Jam*) makes here.

EarthRights argues that *Rodriguez v. Pan Am. Health Org*., 29 F.4th 706 (D.C. Cir. 2022) conflicts with *Jam,* Amicus Br.18-19, but this was the centerpiece of the *Jam* plaintiffs' rejected Petition for Rehearing and Rehearing *En Banc* in *Jam* (at 9-10, 13, Nos. 20-7092, 20-7097 (D.C. Cir. Aug. 5, 2021)) and subsequent Motion to Recall the Mandate and Petition for Rehearing or Rehearing *En Banc*, *id.* at 2, 7-11 (D.C. Cir. May 3, 2022). Further, it would be more than surprising that a decision issued within months of *Jam* by an overlapping panel *sub silentio* repudiated *Jam*. Far from doing so, *Rodriguez* expressly endorses and rests on *Jam*. *Id.*, 29 F.4th at 715-16. *See also* D.Br.38 (distinguishing this action from *Rodriguez*).

III. The FSIA's Commercial Activity Exception Does Not Provide Jurisdiction with Respect to CIMEX

1. *Receipt, Possession or Holding an Interest in Essosa's Property*

The exception's "direct effect" requirement cannot be met if, as argued, the gravamen is CIMEX's "recei[pt]," "possess[ion]" or "hold[ing] an interest in" the expropriated property: they do not cause, or are argued to have, any U.S. effect at all.

2. *Remittances*

Exxon does not dispute the circumstances that place finding a "direct effect" based on Western Union ("WU") remittances well-beyond Circuit precedent, D.Br.39-43, and cites no case finding "direct effect" in comparable circumstances.

Rather, Exxon urges that: (a) "contemplate[ion]" to perform or (b) a "'negative economic impact'" in the U.S. is sufficient. P.Br.23-24 (*quoting* JA2068-69). However, *Weltover* and the other cited authority, P.Br.22-24, involved plaintiff's commercial dealings with defendant linked to U.S. territory, one of the parties' *obligation* to perform in the U.S., *and* a breach of that obligation causing injury in U.S.—*none* of which are present here.[27] *See also* D.Br.48-49

[27] In *Foremost-McKesson v. Islamic Republic of Iran*, defendants violated an "agreement" for U.S. plaintiff to provide capital, personnel, services and equipment.905 F.2d 438, 451 (D.C. Cir. 1990); *see also id.*, Complaint, at ¶¶17, 30-31, No. 82-cv-220, 1982 WL 895387 (D.D.C. Jan. 22, 1982). In *Cruise Connection Charter Mgmt. 1 v. Attorney-Gen. of Canada*, defendant violated a

(performance without obligation is insufficient); *Gulf Res. America v. Republic of Congo*, 276 F. Supp. 2d 20, 27 (D.D.C. 2003) (adverse economic impact in U.S. insufficient), *rev'd on other grounds*, 370 F.3d 65 (D.C. Cir. 2004).

CIMEX identified several standards that have emerged from the caselaw to cabin "direct effect" within appropriate limits. D.Br.42,47-49. None are met, nor does Exxon assert they are. Whether requirements or benchmarks, they are important because interpreting "direct effect" is "fraught with artifice," *Int'l Hous. Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 12 (2d Cir. 1989) (internal quotation omitted). Each ensures that, at a minimum, the "effect" is related to the claim.

a. Exxon neither contests that there are no legally significant acts in the U.S., nor identifies precedent finding "direct effect" without one. D.Br.47-48; P.Br.31.

b. Exxon does not contest that the locus of the tort is in Cuba. D.Br.48. It argues *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro,* 894 F.3d 339 (D.C. Cir. 2018), "rejected a 'locus of the tort' standard," P.Br.31; however, *EIG* did not consider locus irrelevant, only not necessarily determinative in a case concerning commercial dealings between the parties when defendant took some tortious acts in

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contract requiring plaintiff to subcontract with U.S. companies. 600 F.3d 661,662 (D.C. Cir. 2010). In *de Csepel v. Republic of Hungary*, the court found there was no obligation to perform in the U.S. 169 F. Supp. 3d 143, 161 (D.D.C. 2016), *aff'd in part and remanded on other grounds*, 859 F.3d 1094 (D.C. Cir. 2017).

the U.S., unlike here. D.Br.48.

c. Exxon concedes there is no action-related injury in the U.S. *Weltover* and *Cruise Connections* undermine, rather than support, its argument that none is required, P.Br.31 n.14: both involved injury in the U.S.

Exxon does not argue that the 4-10 stations used for WU remittances were a substantial factor in families sending remittances, notwithstanding that, under Circuit precedent, the "proximate cause" standard *must* be met and this requires that defendant's act be at least a "substantial factor in the sequence of events that led to" the effect. D.Br.43-44. Nor does, or could, Exxon argue, that relatives collecting remittances at 4-10 Essosa stations at most, JA194-95, instead of at the 492-498 other WU locations in Cuba, or from the 20 other providers, or informal remittance network (45-50% of the market) unconnected to Essosa property, is anything but a "mere fortuity" and hence insufficient. D.Br.39.[28]

Exxon's argument that "proximate cause" applies only to the terrorism exception ignores that: *EIG* employed "proximate cause;" the terrorism and commercial activity exceptions use the identical word ("cause"), giving rise to the "presumption" that they "carry the same meaning," *Henson v. Santander*

[28] Exxon's suggestion that "[d]iscovery may reveal" more than 4-10 stations, P.Br.23 n.11, is not only contrary to the record, JA194-95, but a red herring: Exxon knows the location of all WU collection points. D.Br.39. Further, this would be at most reason for remand, not affirmance.

Consumer USA Inc., 137 S.Ct. 1718, 1723 (2017) (quotations omitted); and statutory actions are construed to require proximate cause absent clear, contrary indications. *Bank of America v. City of Miami*, 137 S.Ct. 1296, 1305 (2017).[29] *Weltover*, contrary to Exxon, did not address the causation requirement when it held that the "effect" need not be substantial. 504 U.S. at 618.

All that is left is the untenable theory that CIMEX's use of Essosa stations makes it *possible* for WU and U.S. families—"'enables'" them, JA2067-68—to send remittances. CIMEX "'creat[ing] a market for remittances,'" *id.,* is the same notion, as neither CIMEX nor FINCIMEX engages in any activities to promote WU remittances.

This "enabl[ing]" theory need not even be considered as Exxon cannot show, and the district court did not find, that CIMEX's use of 4-10 stations is what made possible WU's and families' sending remittances: WU remitters do not specify the remittance collection location, and there are 502 points for receiving

[29] Congress deliberately required causation, adding the word "cause" to §1605(a)(2) shortly before passage. *Compare* H.R. 3493, 93rd Cong. (1973) *with* 28 U.S.C. §1605(a)(2).

That *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C. Cir. 2004), did not require "but-for" causation in an anti-terrorism case for a joint tortfeasor does not call into question, P.Br.31 n.13, that "proximate cause," including, at a minimum, 'but-for' causation, is otherwise required and should be applied here. D.Br.43-44.

WU remittances, as well as other points and methods of receiving remittances in Cuba. D.Br.39. Exxon only asserts that the *totality* of service stations in Cuba—not the 4-10 Essosa stations operated by CIMEX—"play[s] a central role" in creating a "channel" for remittances. P.Br.22.

Even if considered, the "enabling theory" fails. Neither the district court nor Exxon cites a case where defendant's doing something outside the U.S. making it possible for third-parties (families and WU) to do something in the U.S. is enough. No wonder, as the notion loses sight of the "direct effects"' baseline requirement. Not "immediate consequences," WU's offering remittance services, U.S. families' deciding to send remittances, and their choosing WU from among alternative channels are "intervening elements" without which there would not be a "flow" of remittances from the U.S. to Cuba, the posited "effect" in the U.S., JA2067; D.Br.45-46; *see also, e.g., Frank v. Commonwealth of Antigua & Barbuda*, 842 F.3d 362, 365, 369-70 (5th Cir. 2016) (no "direct effect" despite Antigua's "facilitat[ing]" third-party's "sale" of fraudulent CDs in U.S.).

That the district court and Exxon improperly expanded "direct effect" is further shown through juxtaposition with Due Process and statutory limitations on personal jurisdiction. The "direct effect" requirements and standards identified above closely track the Due Process "arise from or relate to" requirement. Restatement (Third) of Foreign Relations Law ("Restatement") §453 Reporter's

Note 4 (1987) ("direct effect" "embod[ies] concepts and distinctions" of "prevailing standards of due process"); *id.* at Note 3 ("links … required under the FSIA … are analogous" to personal jurisdiction tests); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 90 (D.C. Cir. 2002) ("direct effects … closely resembles" minimum contacts) (internal quotations and citations omitted). Further, Congress "patterned" the immunity exceptions "after the [D.C.] long-arm statute Congress enacted." H.R. Rep. No. 94-1487, at 13 (1976); *accord* Restatement §453 Note 6.

Due Process authority uniformly finds the foreign act's making possible another's act in the U.S. insufficient, and the D.C. long-arm statute does not provide jurisdiction on that basis. *See, e.g.*, *U.S. v. Swiss Am. Bank*, 274 F.3d 610, 615-16, 620-22 (1st Cir. 2001) (no jurisdiction where foreign bank made possible off-shoring of drug trafficker's money); *Charles Schwab v. Bank of Am.*, 883 F.3d 68, 83 (2d Cir. 2018) (forum sales not "suit-related conduct" where banks suppressed LIBOR in London, making possible sales into forum of manipulated instruments); *Paisley Park Enterprises v. Boxill*, 361 F. Supp. 3d 869, 874-75 (D. Minn. 2019) (no jurisdiction over firm circulating opinion letter to co-defendant music companies, enabling them to convince others to sell recordings, including in

forum); Pub. L. No. 91-358, §132(a), 84 Stat. 549.[30]

Additionally, it was FINCIMEX, not CIMEX, that made third-parties' sending remittances possible—it alone contracted with WU and is licensed to process remittances in Cuba. D.Br.39-40; P.Br.2. The district court did not find (nor did Exxon allege) that FINCIMEX was CIMEX's *alter-ego* or agent. D.Br.40. CIMEX only, at most, makes possible another company's, FINCIMEX's, making possible WU and families' sending remittances, stretching "direct effect" further beyond the breaking point.

Citing *EIG* and *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98 (2d Cir. 2016), the district court and Exxon place weight on CIMEX's allegedly "targeting" the U.S. P.Br.22-26; J2072. Those decisions did not look to "targeting" to determine *causation*, the threshold issue Exxon cannot satisfy here, but whether defendants could be held responsible for the U.S. effect proximately caused by the foreign acts. Likewise, CIMEX's "business line" being "exclusively designed for U.S. residents to send money to Cuba," JA2072, even if true, only makes possible remittances to be sent, which, as shown, is not

[30] Exxon's painting a "direct effect" finding as "reasonable" based on the volume of remittances, P.Br.7,22, is a *non-sequitur*, would substitute a standardless inquiry for settled jurisdictional requirements, and ignores that "reasonableness … *limit[s]*"—rather than expands—"the exercise of jurisdiction to adjudicate," Restatement §421 cmt. a (emphasis added).

causation.[31]

Exxon's only response to Defendants' demonstration that finding a "direct effect" goes beyond international law is that the district court applied the restrictive theory's governmental/commercial distinction. P.Br.33-34. Exxon fatally ignores that international law imposes a territorial nexus for commercial acts, D.Br.50-51; *Helmerich*, 137 S.Ct. at 1320-21; HAZEL FOX AND PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 611 (3d ed., 2013), which is not met here. D.Br.50-51. This too is dispositive: the FSIA must be construed consistent with international law. D.Br.25-26. Exxon's assertion that international law should be ignored because CIMEX did not argue the point below is false. [49:18]. *See also supra* pp.55-57 on waiver.

3. *Foodstuffs*

CIMEX argues that the district court erred in finding even a "*prima facie*" case, at the "pleading stage," of "direct effect" based on foodstuffs. If rejected, remand is required for the further factual development. D.Br.51-52.

[31] Exxon cites to no evidence nor is there any district court finding that CIMEX's "structure[s] remittance[] transactions to comply with" U.S. embargo restrictions, precluding receipt of remittances from elsewhere, P.Br.25. Undoubtedly, WU, a U.S. company, follows U.S. regulations, but the WU-FINCIMEX agreement does not require any compliance measures by FINCIMEX or CIMEX, JA2039.

Exxon did not dispute the evidence that Alimport, Cuba's principal food importer: imports from around the world, principally *ex*-U.S., and makes independent decisions whether to buy from the U.S. or elsewhere on the basis of complex, multiple factors, *none* of which relates to CIMEX's or any other customer's directions, requests or preferences (if any) for U.S.-foodstuffs; it is not obligated to supply CIMEX with U.S.-sourced goods; and CIMEX indicates the types of "products and their amounts" it wants, P.Br.29 (quotation omitted), *but not* the source countries or companies. D.Br.52-54;JA2040.[32] CIMEX did not concede that Alimport is CIMEX's "affiliate," P.Br.27-28, *citing* JA2073, let alone CIMEX's agent, nor did the district court find it was either. The uncontested evidence is that Alimport is neither. D.Br.51-52&n.15.

In nonetheless arguing "direct effect," Exxon, with the district court, rests on "basic economics," for which, like the district court, it cites neither legal nor economic authority and ignores established market principles, D.Br.55: that CIMEX's acceptance of U.S. foodstuffs provided by Alimport under a general supply contract "creates demand for [U.S.] goods," leading Alimport to purchase U.S. foodstuffs in greater volume than it would otherwise. JA2074; P.Br.27-30. Exxon follows the district court in radically veering away from the fundamental

[32] Exxon's own evidence shows that U.S.-imports are *not* less expensive, contrary to its assertion, P.Br.28. JA1707;JA1753.

principles governing "direct effect:" Alimport's independent decisions as to which country it sources foodstuffs from, and to whom to supply with what in Cuba, are "intervening elements."

Reflecting the same error, Exxon fails to sustain the district court's related reliance on the proposition that "American products reach CIMEX's shelves only when CIMEX has placed an order for goods," JA2074;P.Br.28. Since, as the district court acknowledges and the record shows, the CIMEX-Alimport supply contract does not obligate Alimport to supply U.S. goods and CIMEX neither requests nor states a preference for U.S. goods, this simply reads "immediate consequence" with "no intervening elements" out of "direct effect."

Likewise, the proposition is irreconcilable with the precedent's insistence that: the effect in the U.S. arise out of an *obligation* to perform in the U.S.; the claim concern commercial dealings between the parties linked to U.S. territory; or there be a legally significant act, locus-of-the-tort or action-related injury in the U.S.—none of which apply here. There is not even "targeting" the U.S. to justify attributing to CIMEX the effects in the U.S. of a third-party's acts. At very most, CIMEX's carrying U.S.-sourced goods supplied by Alimport makes *possible* Alimport's buying in the U.S., which is different than proximate cause, including "substantial factor."

Unlike here, *Ministry of Supply, Cairo v. Universe Tankships*, 708 F.2d 80,

82, 84 (2d Cir. 1983) and *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 709 (9th Cir. 1992), cited by Exxon, rested upon acts in the U.S. by the defendant, and concerned the commercial activity exception's first prong, not "direct effect."

The district court's finding that CIMEX sells "millions annually" in U.S. foodstuffs (not necessarily connected to Essosa stations), JA2074, only addresses whether the "effect" is "trivial," not whether sales at CIMEX's Essosa stations are a "proximate cause" or "substantial factor" in Alimport's purchasing U.S. goods.

Settled limitations on personal jurisdiction underscore that "direct effect" cannot be found based on foodstuffs. In addition to the authority cited *supra* pp.63-64, courts have found that Due Process does not permit the exercise of jurisdiction on the basis of independent third-parties' performing transactions in the forum. *See, e.g.*, *McFadin v. Gerber*, 587 F.3d 753, 760-62 (5th Cir. 2009); *J.S.T. v. Foxconn Interconnect Tech.*, 965 F.3d 571, 578 (7th Cir. 2020).

Exxon's response to CIMEX's showing that international law does not support finding an adequate nexus with the U.S. on the basis of foodstuffs, D.Br.50-51,56, is the same as its response to CIMEX's showing that it does not support finding "direct effect" on the basis of remittances, P.Br.33-34; it is fatally wrong for the same reasons. *Supra* p.65.

If the district court's finding a "*prima facie*" "direct effect" is sustained,

remand for further factual development is required, including, without limitation, to determine: (a) whether *any* U.S. products are sold at Essosa stations;[33] (b) whether CIMEX's sales of U.S. foodstuffs at Essosa stations are a "proximate cause" or "substantial factor" in Alimport's decision to buy foodstuffs from the U.S.; and (c) whether, as the district court simply assumed "prima facie," CIMEX has the "discretion" to refuse U.S. goods from Alimport. JA2073.

4. *Essosa's Parcels Not Used for Remittances or Foodstuffs*

If "direct effect" may be based on use of expropriated property for remittances or foodstuffs, there would be jurisdiction only for trafficking in Essosa parcels used in that way. The gravamen test must be applied *per property*, as there is a separate injury from, and Title III attaches liability separately on account of, trafficking in each individual parcel of land. D.Br.40-41. Far from being a "novel" theory, P.Br.27, CIMEX's position is supported by caselaw that is unaddressed. D.Br.41 n.11. *Sachs*, cited by Exxon, did not concern multiple, separate injuries.

[33] The district court made no findings, and, contrary to Exxon, CIMEX did not concede, that U.S.-imported foodstuffs were sold on expropriated property. JA2074. CIMEX simply noted that, *if* there were such sales, it would have been Alimport that imported the U.S. goods, as it is the exclusive importer from the U.S. JA202;JA2039-41.

IV. Title III Does Not Provide a New Grant of Subject-Matter Jurisdiction

The district court correctly rejected Exxon's argument that Title III itself grants subject-matter jurisdiction and overrides the FSIA. JA2055-61.

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state," *Sachs*, 577 U.S. at 30 (quotation omitted); it provides immunity unless a specified exception applies. §1604. As Title III provides no express exception, Plaintiff must, but cannot, overcome the presumption against enactments by implication, *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018), particularly strong for jurisdictional issues. *Palmore v. Sup. Crt*, 515 F.2d 1294, 1307 (D.C. Cir. 1975), *vacated on other grounds*, 429 U.S. 915 (1976).

Exxon argues the FSIA "conflict[s]" with Title III by establishing "[l]iab[ility]" for "[a]ny person," including agencies. P.Br.45. However, as found below, there is no conflict: Title III is "silent" "as to sovereign immunity." JA2058. LIBERTAD, 22 U.S.C. §6082(c)(1) references neither "jurisdiction," "immunity" or the FSIA. *See U.S. v. Wong*, 575 U.S. 402, 411 n.4 (2015) ("[I]n case after case we have emphasized … that jurisdictional statutes speak about jurisdiction …").

The legislative history is also dispositive: The original bill would have created an FSIA exception for Title III actions, H.R. 927, 104th Cong. §302(c) (as introduced in the House, Feb. 14, 1995), and established exclusive federal

jurisdiction over such actions; these provisions, however, were eliminated.[34] Ignored by Exxon, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded[.]" *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quotations omitted).

As the district court found, "Congress's silence as to immunity is amplified by Title III "mak[ing] explicit reference" to *other* FSIA provisions (*see* §6082(e)); its "explicitly provid[ing] instructions" where "in tension with existing doctrines," such as the act of state doctrine (§6082(a)(6)); and, when Congress has created new immunity exceptions, its amending the FSIA "in plain and certain terms." JA2059-60.

Exxon erroneously "conflates" establishing a cause of action with creating an exception to immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 484 (1994). The "D.C. Circuit" is "clear:" these "are two entirely different species." JA2057-58 (quoting

[34] *See Markup Before the Subcomm. on the Western Hemisphere of the Comm. on Int'l Relations on H.R. 927*, 104th Cong. 1st Sess. 57-58 (March 22, 1995) (Appendix: An Amendment in the Nature of a Substitute to H.R. 927 Offered by Rep. Burton); *Markup Before the Comm. on Int'l Relations on H.R. 927*, 104th Cong. 1st Sess. 172, 232-33 (June 30 and July 13, 1995) (Appendix: Amendment in the Nature of a Substitute to H.R. 927 Offered by Rep. Burton); H.R. REP. NO. 104-468, at 35 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 558; 141 CONG. REC. S15217 (daily ed. Oct. 17, 1995); 141 CONG. REC. S15277-78, 82 (daily ed. Oct. 18, 1995).

Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004)). The controlling presumptions above foreclose Exxon's speculative, inferential leap that Congress *sub silentio* abrogated immunity by creating a cause of action against agencies. P.Br.46. Moreover, the Supreme Court has expressly rejected the same argument in the context of domestic state immunity. *Emps. of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 283-85 (1973).

Contrary to Exxon, P.Br.46, there is nothing nonsensical in creating a cause of action without abrogating the FSIA. Suits against agencies—which, in the case of Title III, include third-country as well as Cuban agencies—raise special international law and foreign policy concerns, which the FSIA addresses with nexus and other requirements. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). Title III suits against agencies that satisfy the FSIA were easily envisioned under the embargo regulations in 1996, which authorized broad U.S.-related categories of transactions, 31 C.F.R. Part 515 (1996); under expanded categories that the President might have authorized under 31 C.F.R. §515.201; or upon normalization, as contemplated by LIBERTAD or otherwise. Exxon argues its suit fits within the FSIA's confines.[35]

[35] While the above is dispositive, it may be noted that leaving the FSIA undisturbed did not deprive of meaning the statutory provision defining "persons" to include agencies. 22 U.S.C. §6023(11). It clarified that agencies were among "persons" subject to liability, a clarification Congress may have considered prudent

As the district court found, LIBERTAD 22 U.S.C. §6082(c)(1)'s introductory clause "mean[s] that where an *express* provision of Title III directly contradicts an *express* provision of Title 28, including the FSIA, the text of Title III governs." JA2061 (citing Title III's jurisdictional amount provision) (emphasis original); *see also, e.g.*, 22 U.S.C. §6083(a)(2) (special masters); §6085 (limitations period); §6082(a)(1)(A)(ii) (costs and fees). It establishes a consistent procedural framework for actions within concurrent state and federal jurisdiction, as do similar provisions in other statutes. *See, e.g.*, 39 U.S.C. §409. The "Procedural Requirements" provision was added only when Congress permitted state-court Title III actions. *See* H.R. REP. NO. 104-468, at 61 (1996) (Conf. Rep.).

Finally, §6082(c)(1)'s heading resolves any remaining doubt. The phrase "procedural requirements" (or a variation) appears dozens of times in Title 28 and the U.S. Code, but never to mean a court's jurisdiction, making applicable the "obligation to maintain the consistent meaning of words in statutory text[.]" *U.S. v. Santos*, 553 U.S. 507, 523 (2008).

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given prevailing uncertainty as to whether "persons" included state agencies. *GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 814 (D.C. Cir. 2012) (noting past decisions expressly "[l]eft open" "whether [state-owned] corporations" are "persons" within Due Process Clause).

Conclusion

For the foregoing and previously stated reasons, the district court's finding that the FSIA's expropriation exception does not provide jurisdiction should be affirmed; its denial of the Defendants' joint motion to dismiss this action should be reversed because the expropriation exception alone controls; if the expropriation exception is held not to alone control, the district court's finding jurisdiction as to CIMEX under the commercial activities exception should be reversed with instructions to dismiss the action as to it and the action remanded for further proceedings under that exception as to CIMEX (Panama) and CUPET; and the district court's finding that Title III does not provide jurisdiction should be affirmed.

Dated: January 3, 2023

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Dated: January 3, 2023

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I certify that on January 3, 2023, I caused the foregoing document to be filed via the appellate CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Krinsky

Michael Krinsky