**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

EXXON MOBIL CORPORATION,
Plaintiff-Respondent,

v.

CORPORACIÓN CIMEX, S.A. (PANAMA)

and

UNIÓN CUBA-PETRÓLEO
Defendants-Petitioners.

---

# PETITIONERS CORPORACIÓN CIMEX, S.A. (PANAMA) AND UNIÓN CUBA-PETRÓLEO'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

Michael Krinsky
Lindsey Frank
Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C
320 West 85th Street
New York, New York 10024
(212) 254-1111
mkrinsky@rbskl.com
lfrank@rbskl.com
*Counsel for Defendants-Petitioners Corporación CIMEX, S.A. (Panama) and Unión Cuba-Petróleo*

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Cases**.....**Page**

**Statutes**



**Rules**



**Treaties and International Sources**

Pursuant to 28 U.S.C. § 1292(b), Corporación CIMEX, S.A. (Panama) ("CIMEX (Panama)") and Union Cuba-Petróleo ("CUPET") respectfully petition this Court for permission to appeal from the order entered on April 20, 2021 by the United States District Court for the District of Columbia (Mehta, J.) on the defendants' joint motion to dismiss this action for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (April 20, 2021) and its order entertaining but denying their joint motion for reconsideration (October 8, 2021) *insofar* as the District Court ruled that the Foreign Sovereign Immunities Act's expropriation exception, 28 U.S.C. § 1605(a)(3), does not alone control Plaintiff's action, so that its requirements need not be satisfied for there to be subject-matter jurisdiction.

On November 23, 2021, the District Court issued a Memorandum Opinion and Order pursuant to 28 U.S.C. § 1292(b) certifying that ruling for this Court's review.

The parties have agreed that Plaintiff will not object to grant of the instant Petition, and that Defendants will not object to the Cross-Petition for permission to appeal to be filed by Plaintiff on the question certified by the District Court at its request, in the interest of judicial economy and avoiding piecemeal appeals, without prejudice to their respective positions that there is not a substantial ground for difference of opinion on the question to be presented by the opposing party.

The District Court's April 20, 2021 Memorandum Opinion and Order, reported at 2021 WL 1558340, --- F.3d --- (D.D.C.), is attached as Appendix A; its October 8, 2021 Memorandum Opinion and Order, reported at 2021 WL 4709566, --- F.3d --- (D.D.C.), is attached as Appendix B; and its November 23, 2021 Memorandum Opinion and Order is attached as Appendix C.

## QUESTION PRESENTED FOR REVIEW

Whether the Foreign Sovereign Immunities Act's expropriation exception, 28 U.S.C. § 1605(a)(3), alone controls Plaintiff's statutory action for "trafficking" in "confiscated" property, so that its requirements must be satisfied for there to be subject-matter jurisdiction, or whether subject-matter jurisdiction may alternatively be established under the commercial activity exception, 28 U.S.C. § 1605(a)(2).

## RELIEF REQUESTED

Petitioners request permission to appeal the District Court's holding that the expropriation exception of the Foreign Sovereign Immunities Act ("FSIA") does not alone control Plaintiff's action. If review is granted, Petitioners will request reversal of that holding and remand for further proceedings not inconsistent with the Court's opinion.

## INTRODUCTION

The question presented for review—whether the expropriation exception

alone controls this action—is potentially dispositive of the action against Petitioners. The District Court has held that Plaintiff cannot satisfy its requirements, with the result that, if it alone may be invoked, there is no subject-matter jurisdiction under the District Court's ruling.

This same question is already before the Court on the interlocutory appeal as of right by Corporación CIMEX, S.A. (Cuba) ("CIMEX (Cuba)"), the additional defendant sued by Plaintiff. Docket No. 21-7127. After finding that the expropriation exception is not exclusive here, the court below held that CIMEX (Cuba) was subject to FSIA jurisdiction on the basis of the commercial activity exception. It has made no such ruling with respect to CIMEX (Panama) or CUPET. Rather, the court has only allowed Plaintiff to pursue limited jurisdictional discovery from them on whether the commercial activity's requirements are satisfied. The District Court has stayed this discovery pending the outcome of CIMEX (Cuba)'s appeal, regardless of whether the instant Petition is granted.

As the court below found, "unique circumstances" support review: the question before the Court on CIMEX (Cuba)'s appeal presumably will determine whether the action proceeds against Petitioners but would be decided without their participation unless the instant Petition is granted.

Further, as the court below also found, there is a "substantial ground for difference of opinion concerning [its] ruling" that the expropriation exception does

not alone control. It correctly found that this action is the "first-of-its-kind" and that "reasonable jurists might take a different view."

For these and the other reasons set out below, the Petition should be granted. In the event the Petition is granted, the Petitioners will move for their appeals to be consolidated with or heard together with CIMEX (Cuba)'s appeal.

## STATEMENT OF THE CASE

Plaintiff, Exxon Mobil Corporation, has sued two corporations organized under Cuban law, CIMEX (Cuba) and CUPET, and a corporation organized under Panamanian law, CIMEX (Panama), for "trafficking" in "confiscated" property in Cuba under Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, §§ 301–06 (1996), 22 U.S.C. §§ 6023, 6081–6085 ("Title III"). The property at issue—an oil refinery and related facilities, and land on which gas service stations now stand—had been owned by a Panamanian company, Esso Standard Oil, S.A. ("Essosa"), a subsidiary of Plaintiff, not Plaintiff. The property was expropriated by the Republic of Cuba on July 1, 1960 for Essosa's refusal to refine the Cuban State's crude oil.

Plaintiff claims all three defendants are liable under Title III, which provides that "any person that . . . traffics in property which was confiscated by the Cuban Government . . . shall be liable to any United States national who owns the claim to such property." Title III, § 302(a)(1)(A); 22 U.S.C. § 6082(a)(1)(A). Plaintiff

demands damages in a sum treble that of the claimed value of the expropriated property at the time of the expropriation (treble $71,611,002.90), with 60-plus years of pre-judgment interest from the date of expropriation.

Title III defines "traffics" to include "receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property," or "engages in a commercial activity using or otherwise benefitting from confiscated property," "without the authorization" of the U.S. national "who holds a claim to the property." "Confiscated" refers to the "nationalization, expropriation, or other seizure" without "adequate and effective compensation" having been provided. LIBERTAD Act, § 4(4)(A)(i); 22 U.S.C. § 6023(4)(A)(i), and § 4(13)(A)(i)–(ii); 22 U.S.C. § 6023(13)(A)(i)–(ii).

The LIBERTAD Act was enacted in 1996, but every President exercised statutory authority to suspend the right to bring a Title III action, Title III, § 306(c)(1); 22 U.S.C. § 6085(c)(1), until President Trump let the suspension lapse, effective May 2, 2019.

Plaintiff alleges that the Defendants are "agencies or instrumentalities" within the meaning of the FSIA, 28 U.S.C. § 1603. Second Amended Complaint ("SAC") ¶ 9, ECF 33. CUPET, "the Cuban state-owned oil company," with its principal place of business in Cuba, *id.* ¶ 21, is alleged to be liable for trafficking in the refinery and related facilities that had been owned by Essosa, Plaintiff's

Panamanian subsidiary, *id.* ¶¶ 8, 36, 92. CIMEX (Cuba), a "commercial conglomerate" "owned by the government of Cuba," with its principal place of business in Cuba, *id*. ¶¶ 17, 105, is alleged to be trafficking because, among the gas service stations it operates, "some . . . are built on or maintained" on land formerly owned or encumbered with mortgages by Essosa. *Id.* ¶¶ 31, 107. CIMEX (Panama) is allegedly the "alter ego" of CIMEX (Cuba). *Id*. ¶ 3.

On June 16, 2020, the three defendants filed a joint motion to dismiss the Second Amended Complaint with prejudice (ECF 42) pursuant to Fed. R. Civ. P. 12(b)(1) and (2) for:

(a) lack of subject-matter jurisdiction under the FSIA, invoked by Plaintiff;

(b) lack of subject-matter jurisdiction under Title III, invoked by Plaintiff as a jurisdiction-conferring statue, or 28 U.S.C. §1331, also invoked by Plaintiff; and

(c) lack of personal jurisdiction under the Due Process Clause.

Under the Court's Order, entered upon the parties' stipulation, proceedings on the Due Process personal jurisdiction issue have been deferred pending final determination of subject-matter jurisdiction, including the outcome of an interlocutory appeal from any ruling denying defendants' motion dismiss for lack of FSIA subject-matter jurisdiction. App. A at 8. Left undecided is whether, as Plaintiff asserts, the Defendants are to be equated with the Cuban State, so that

they are not entitled to Due Process protections under this Circuit's precedent, and, if not, whether its protections preclude personal jurisdiction.

In its April 20, 2021 Memorandum Opinion and Order, the District Court rejected Plaintiff's contention that Title III itself provides subject-matter jurisdiction and establishes a new exception to the immunity conferred by the FSIA, 28 U.S.C. § 1604. App. A at 9-15. It rejected Plaintiff's reliance on 28 U.S.C. § 1331, holding that the FSIA is the exclusive source of subject-matter jurisdiction here. *Id.* at 9-10.

As to the FSIA, the court held that Plaintiff could not satisfy the expropriation exception's requirement that its action be one "in which rights in property taken in violation of international law are in issue," 28 U.S.C. § 1605(a)(3). Applying this Court's decision in *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 743 F. App'x 442 (D.C. Cir. 2018), the court ruled that "[b]ecause Exxon's claim concerns Essosa's property," not its own, "and Essosa continues to operate as a going concern, Exxon has not established that Cuba's expropriation deprived it of property in violation of international law." The "undisputed evidence" established "Essosa's continued operation even after the confiscation of its Cuban assets," and that it "remains in operation," including operation of numerous fuel stations in Panama. *Id.* at 40. Under *Helmerich*, Plaintiff's "direct rights" as a shareholder in the Panamanian

company had not been taken, and this is not one of the "limited circumstances" where "international law protects a shareholder's indirect interests in its subsidiary's property against an expropriation" because the "entire enterprise" was not taken. App. A at 38-41.

Because of this ruling, the District Court did not reach Defendants' other grounds for why the expropriation exception's requirements were not satisfied. Defendants argued that Plaintiff could not show a violation of international law because: the expropriation was for Essosa's refusal to refine the Cuban State's oil in violation of long-standing Cuban law, and Essosa's refusal was at the United States' request pursuant to its plan to overthrow the Cuban Government that culminated in the Bay of Pigs invasion (as shown by declassified State Department documents); the expropriation was a permissible countermeasure; Cuba had offered, but the United States had refused, to negotiate compensation as part of its continuing effort to overthrow the Cuban Government (also as shown by declassified State Department documents); and the compensation offered by Cuba met international law standards. Defendants also argued, in the alternative, that Plaintiff could not establish a violation of international law because adjudication of several of these issues is barred by the "political question" doctrine. ECF 42 at 25-43.

In addition to arguing that the FSIA expropriation exception's "violation of

international law" requirement was not satisfied, CUPET and CIMEX (Cuba) each argued, independently on the basis of its own distinctive commercial activities, that its nexus requirement had not been satisfied as to it: that the defendant agency or instrumentality "is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). The District Court did not reach the nexus issue. As jurisdiction with respect to CIMEX (Panama) rests "solely" on Plaintiff's *alter ego* allegation, App. A at 6, 35, the unaddressed nexus issue as to CIMEX (Cuba) is also relevant to it.

While holding that Plaintiff had not satisfied the expropriation exception, the District Court rejected the Defendants' argument that the expropriation exception alone controls this action and therefore the action must be dismissed as to all Defendants. App. A at 16. It found that Plaintiff may alternatively seek to ground jurisdiction on the "direct effect" prong of the FSIA's commercial activity exception, *id.* at 16, 18-20: that "the action is based … upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

While acknowledging that "neither side has presented a case squarely on point," App. A at 22, the court held that CIMEX (Cuba)'s use of some service stations on Essosa parcels of land to pay out Western Union ("WU") family

remittances "caused a direct effect in the United States." The court rejected CIMEX (Cuba)'s arguments to the contrary based upon, *inter alia*, the following: the remittances were sent under a WU contract with a different Cuban company appointing it as WU's agent in Cuba; WU was not obligated under that contract to take any actions in the U.S.; neither WU's Cuban counterparty nor CIMEX (Cuba) engaged in any promotions or other actions in the U.S.; and the service stations on Essosa land used to pay our WU remittances were a *de minimis* number of the total number of WU remittance locations. *Id.* at 21-27.

The District Court additionally held that the sale of foodstuffs imported from the U.S. at service stations on former Essosa land satisfied the "direct effect" requirement "at the pleadings stage." App. A at 30. It left open the possibility that "discovery might … shed light on the relationship between CIMEX [(Cuba)] and Alimport [the Cuban company that imports and resells foodstuffs from the U.S.], and thus impact the court's ultimate view on whether CIMEX [(Cuba)]'s purchase of U.S. goods from an intermediary for sale in its stores gives rise to a direct effect in the" U.S. *Id.* at 30 n.4.

Unlike as to CIMEX (Cuba), the District Court did not decide whether the commercial activity exception's requirements had been satisfied as to CUPET. The court held that, "on the present record," "the commercial activity exception does not apply to CUPET." It "relied on" the "representations" in CUPET's declarations

as to the nature and limits of its contacts with the United States "to hold" this, but, in a "close call," concluded that Plaintiff is "entitled to discovery as to those representations." App. A at 43.

As to CIMEX (Panama), the District Court found that Plaintiff's *alter ego* allegation "are sparse to say the least, and they are not sufficient … even at the pleading stage." App. A at 35. Nonetheless, also as a "close call," it allowed "limited jurisdictional discovery into the corporate separateness" of CIMEX (Cuba) and CIMEX (Panama). *Id.* at 43.

Three days later, on April 23, 2021, the District Court, *sua sponte*, ordered the parties to notify it by motion if they believed that this Circuit's decision *Ivanenko v. Yanukovich*, 995 F.3d 232 (D.C. Cir. 2021), issued that day, "impact[ed] this court's" decision. App. B at 1-2. On May 4, 2021, the defendants filed a joint motion for reconsideration of the court's Memorandum Opinion and Order insofar as the court held that the expropriation exception does not alone control, citing *Ivanenko* and advancing additional grounds. On October 8, 2021, the Court issued a Memorandum Opinion and Order entertaining the arguments presented for reconsideration but adhering to its original ruling and denying the motion. *Id.* at 2-13.

On October 31, 2021, CIMEX (Cuba) filed a notice of appeal from the District Court's April 20, 2021 denial of its motion to dismiss the action as to it for

lack of FSIA subject-matter jurisdiction and its October 8, 2021 denial of the defendants' joint motion for reconsideration. (ECF 75, Oct. 31, 2021). No briefing schedule has been set in that appeal.

On November 23, 2021, the District Court issued a Memorandum Opinion and Order granting CIMEX (Panama) and CUPET's joint motion to certify an interlocutory appeal by them pursuant to 28 U.S.C. § 1292(b) on the issue of whether the expropriation exception alone controls. App. C. It found that certification was proper because the orders to be appealed involve a controlling question of law, a substantial ground for difference of opinion concerning the ruling exists, and an immediate appeal would materially advance the litigation, and, further, that CIMEX (Panama) and CUPET had met their burden of showing that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment." *Id.* at 3 (internal quotations omitted).

While opposing certification, Plaintiff requested that, if granted, the court also certify an interlocutory appeal by Plaintiff from the court's ruling under *Helmerich* that the expropriation exception's requirements were not satisfied because the expropriated property was owned by Essosa, not Plaintiff, and Essosa continued in business as a going concern. The Court granted certification in "the interests of juridical economy and avoiding piecemeal litigation." App. C at 7. It is

unclear whether the court made a finding that there was a substantial ground for a difference of opinion on the *Helmerich* issue. Petitioners maintain there is not.

The court also ruled that even if the Circuit does not permit CIMEX (Cuba) and CUPET's interlocutory appeals, it "nevertheless will stay jurisdictional discovery." It found that "[g]iven that resolution of this matter on appeal in favor of CIMEX [(Cuba)] would mean entry of judgment in favor of CUPET and CIMEX (Panama), proceeding with jurisdictional discovery until CIMEX [(Cuba)]'s appeal is resolved is not warranted." App. C at 7.

Appellate decision on the issue presented by CIMEX (Panama) and CUPET potentially would moot extensive and, indeed, torturous litigation on numerous issues. Simply as to jurisdiction, these include, without limitation: the several alternative grounds advanced by Defendants for finding the expropriation exception not satisfied; whether the commercial activity exception's requirements are met as to CUPET; whether CIMEX (Panama) is the *alter ego* of CIMEX (Cuba); and whether CIMEX (Panama) and CUPET are to be equated with the Cuban State and, if not, whether the Due Process requirements for personal jurisdiction are met. Beyond subject-matter and personal jurisdiction, the issues include, without limitation: whether Title III exceeds the Due Process Clause's limitations on exterritorial prescriptive jurisdiction; whether no compensation was "adequate and effective compensation" because of the reasons for the Republic of

Cuba's taking of Essosa's Cuban assets; which service stations operated by CIMEX (Cuba) sit on parcels of land that had been owned or encumbered with mortgages by Essosa 61 years ago; the value of those properties in 1960, the measure of damages asserted by Plaintiff; which, if any, of Essosa's 1960 assets still existed and were used by CUPET in 1996, the start-date for "trafficking" under Title III; and their value in 1960.

## ARGUMENT

The District Court found that certification was proper because the orders to be appealed involve a controlling question of law, a substantial ground for difference of opinion concerning its ruling on that question, and an immediate appeal would materially advance the litigation. It also found that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment." App. C at 3 (internal quotation omitted).

Among the "exceptional circumstances" is that the question to be presented—whether the expropriation exception alone controls here—is already before this Court on the interlocutory appeal by Petitioners' co-defendant, CIMEX (Cuba). The Circuit's ruling on that issue in the CIMEX (Cuba) appeal will, as far as can be foreseen, be applicable to CIMEX (Panama) and CUPET, determining whether Plaintiff's action against them is to be dismissed under the District Court's

*Helmerich* ruling or may continue.

Fairness to CUPET and CIMEX (Panama) compels their participation in a potentially determinative appellate proceeding arising from the action in which they are defendants. Additionally, their participation may be important to the Court in its consideration of the issue to be decided.

Further, if they are not themselves before the Circuit, the Court's ruling, while it presumably would be determinative as authority, would not be binding on Petitioners. *See, e.g., Taylor v. Sturgell*, 553 U.S. 880, 896–98 (2008). They thus would be free to argue that the expropriation exception is exclusive on any appeal they may take from an adverse final judgment (and, if decided adversely to them on appeal, to seek Supreme Court review), even if CIMEX (Cuba) does not prevail on its appeal. Likewise, Petitioners would not be precluded from arguing to the District Circuit whatever distinctions they might find make the Circuit's ruling on the CIMEX (Cuba) appeal inapplicable to Plaintiff's action against them.

Allowing CIMEX (Panama) and CUPET to join CIMEX (Cuba) on appeal would not delay progress on Plaintiff's action against them in the District Court. As noted, the court below has stayed jurisdictional discovery pending the outcome of CIMEX (Cuba)'s appeal.

Combined with the peculiarity of the Circuit's hearing a possibly determinative issue without Petitioners' participation, and the limited reach and

effect of any ruling if it does, is that, as the District Court observed, the issue presented is undoubtedly controlling and its appellate resolution would materially affect the course of litigation. App. C. "If the court was wrong … and only the expropriation exception applies, reversal could mean the end of the case, as the court has found Exxon cannot satisfy the expropriation exception." *Id.* at 4-5.

This consideration takes on still greater force because of what lies ahead if the case against Petitioners does not come to a close on appellate determination of the threshold issue of whether the expropriation exception alone controls. Petitioners have identified above some of the issues that would remain to be litigated. They are numerous, their litigation would require an enormous expenditure of judicial and party resources, most are of first impression and several have potentially significant foreign affairs implications.

The above warrants favorable exercise of the Court's "discretion" under 28 U.S.C. § 1292(b) even apart from the Court's consideration of whether there are substantial grounds for a difference of opinion concerning the lower court's ruling that the expropriation exception does not alone control here.[1] Further, there are such grounds. The District Court expressly so held, App. C at 6, and its conclusion is particularly weighty as the court has considered the issue at some length (App. A

[1] As to the Court's broad discretion under 28 U.S.C. § 1292(b), *see*, *e.g., Kennedy v. Bowser*, 843 F.3d 529, 536 (D.C. Cir. 2016).

16-18; App. B at 1-13). Also importantly, no other case has presented the question of the FSIA's application to a Title III action, making this action, as the District Court observed, the "first-of-its-kind" with room for reasonable differences of opinion. App. C at 6.

Further discussion is perhaps unnecessary to show that there are substantial grounds for a difference of opinion. In any event, even an abbreviated consideration of the issue reinforces the District Court's conclusion that there are.

Two of the factors (among others) that frame the issue make this plain. The first is that, as this Circuit has repeatedly recognized, commercial use by an agency almost always follows expropriation. *Rong v. Liaoning Province Gov't*, 452 F.3d 883, 890 (D.C. Cir. 2006); *Ivanenko*, 995 F.3d at 239. This Court, as well as others, have guarded against invocation of the commercial activity exception on the basis of this inevitable, subsequent commercial activity because it would avoid and eviscerate the distinct limitations of the expropriation exception: that the action put in issue rights in property taken in violation of international law, and that the agency "is engaged in commercial activity in the United States." The commercial activity exception has no violation of international law limitation, and reaches an agency's commercial activity abroad that simply has a "direct effect" in the United States.

As the District Court itself recognized, "a sovereign's subsequent disposition

or commercial use of expropriated property does not open the door to the commercial-activity exception. Were it otherwise, the court explained in *Ivanenko*, 'almost any subsequent disposition of expropriated property could allow the sovereign to be haled into federal court under [the] FSIA,'" App. C at 6, *quoting Ivanenko*, 995 F.3d at 239 (*quoting Rong*, 452 F.3d at 890).

The court below found that *Ivanenko* and *Rong* can be distinguished but correctly concluded that "reasonable jurists might take a different view on the applicability of *Rong* and *Ivanenko*." App. C at 6. It may reasonably be argued, for instance, that there is no meaningful difference between a suit on the expropriation under the commercial activity exception on the rejected theory that the intended commercial use of the property made the expropriation commercial and a suit on the commercial use: expropriation and the agency's commercial use are inextricably intertwined conduct. Indeed, several courts have seen no difference, and have rejected both the plaintiff's claim for the expropriation and its separate claim for subsequent commercial use for failure to satisfy the expropriation exception.[2]

---

[2] *Africa Growth Corp. v. Republic of Angola*, No. 17-cv-2469, 2019 WL 3253367 at *5-6 (D.D.C. July 9, 2019) (Howell, C.J.); *see also id.* Complaint ¶¶ 69–73, 113–115; *Allen v. Russian Fed'n,* 522 F. Supp. 2d 167 (D.D.C. 2007) (Kollar-Kotelly, J.), Amended Complaint (Counts XIV-XV); *Garb v. Republic of Poland*, 207 F. Supp. 2d 16 (E.D.N.Y. 2002), Amended Complaint, ¶¶ 8, 113, 117 ("*trafficking in*, managing, and commercially profiting from the Properties." *Id.* (emphasis added); *Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir. 2006). (cont)

The District Court relied upon *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) and *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015) for their "teach[ing] that the court must separate antecedent conduct that is related to a wrongful act from the conduct that actually forms the 'foundation' of the claim," App. B at 3. Be that as it may, it can be reasonably argued that the relationship between recruitment of a U.S. citizen to work in Saudi Arabia and his torture there in *Saudi Arabia*, and the relationship between sale of a Eurorail pass in the U.S. and the accident in Austria in *Sachs*, bear scant resemblance to the relationship between the expropriation of property that the sovereign intends for an agency to put to commercial use and the agency's commercial use of the property.

A second factor framing the issue presented here is that the expropriation exception, unlike the commercial activity exception, expressly addresses actions against agencies for trafficking in expropriated property. It removes an agency's immunity when expropriated property "is owned or operated by an agency or instrumentality of the foreign state," 28 U.S.C. § 1605(a)(3)—acts at the heart of Title III's definition of "trafficking," 22 U.S.C. § 6023(13)(A), and the very acts alleged by Plaintiff to be the trafficking here. It, however, limits this trafficking exception from immunity to actions that place in issue "rights in property taken in

---

*See also Sequeira v. Republic of Nicaragua*, No. 19-cv-11656, 2020 WL 2499808 (11th Cir. May 14, 2020) (Nicaragua's export of products from expropriated farm does not make commercial activity exception applicable).

violation of international law." Applying the commercial activity exception here does away with the international law limitation the FSIA places upon actions against agencies for owning or operating expropriated property, that is, for trafficking. It may reasonably be argued that this anomalous result is untenable, including as a matter of statutory construction of the FSIA's framework and as a matter of legislative intent.

This is not to say that the commercial activity exception may never be applied to the commercial use of expropriated property. The issue presented here is whether the international law limitation imposed by the FSIA, as found in the expropriation exception, must be applied when the *only* thing that an action presents is an agency's ownership or operation of expropriated property. There is no authority applying the commercial activity exception when there was only an agency's ownership or operation of expropriated property, *simpliciter*, at issue, or even *dictum* to that effect. *Compare de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1103 (D.C. Cir. 2017) (suit was on a bailment contract concerning the expropriated property); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990) (suit for loss of property resulting from agency's use of its voting powers as a shareholder).

The Supreme Court's recent decision in *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021), which this Circuit has yet to consider for its

doctrinal implications, arguably provides further support for considering the issue here as one for which there is substantial grounds for a difference of opinion. In *Philipp*, the Court insisted that, in deciding whether an exemption applies, the FSIA's "framework" be examined, including whether any other exemption expressly addresses the conduct at issue; that consideration be given to whether a claimed exception is "ill-suited" for the "international concerns" presented by the type of action; and that the FSIA must be interpreted "in keeping with 'international law at the time of the FSIA's enactment,'" *Philipp*, 141 S. Ct. at 712.

It may reasonably be argued that the *Philipp* analysis leads to rejection of the commercial activity exception's application here. The "international concern[s]" raised by suits for an agency's commercial ownership or operation of expropriated property, s*impliciter*, are not distinguishable in any meaningful way from the international concerns raised by suits for the expropriation itself, and yet the commercial activity exception is indifferent to them. Under the "framework" of the FSIA, these "international concern[s]" are alone addressed by the expropriation exception, which expressly addresses the precise conduct at issue here and imposes conditions lacking in the commercial activity exception. There is no basis in international law at all, whether in 1976 or now, for applying the "commercial activity" exception simply on account of trafficking in expropriated property. *See* United Nations Convention on Jurisdictional Immunity of States and their

Properties, 2004, A/RES/59, 38 (drafted by International Law Commission and adopted by General Assembly), Art. 10 (commercial activity exception limited to suits arising from commercial transactions between sovereign or its agency and foreign person); European Convention on the Immunity of States, May 16, 1972, 11 I.L.M. 470, Art. 4 (commercial exception limited to breach of contractual obligations).

*Philipp* arguably teaches that the gravamen analysis exclusively employed by the District Court here, but nowhere mentioned in *Philipp*, may not be adequate to honor the FSIA's "reticulated boundaries" between exceptions and its "carefully constructed framework," 141 S. Ct. at 713, 715, that the Court in *Philipp* insisted must be considered and protected.

The foregoing is not intended to be an exhaustive discussion of the issue; far from it. Rather, it is offered to show that the other considerations warranting, in and of themselves, grant of the Petition are supported by there being substantial grounds for a difference of opinion on the issue to be presented.

## CONCLUSION

For the foregoing reasons, the Court should exercise its discretion under 28 U.S.C. § 1292(b) to grant the instant Petition.

Dated: December 3, 2021

Respectfully submitted,

/s/ Michael Krinsky

Michael Krinsky

Lindsey Frank
Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C
320 West 85th Street
New York, NY 10024
(212) 254-1111
mkrinsky@rbskl.com
lfrank@rbskl.com
*Attorneys for Defendants-Petitioners Corporación CIMEX, S.A. (Panama) and Unión Cuba-Petróleo*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This document complies with the word limit of Fed. R. App. P. 5(c)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,060 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word Version 2110 in Times New Roman 14-point font.

Dated: December 3, 2021

Respectfully submitted,

/s/ Michael Krinsky
Michael Krinsky
Lindsey Frank
Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C
320 West 85th Street
New York, NY 10024
(212) 254-1111
mkrinsky@rbskl.com
lfrank@rbskl.com
*Attorneys for Defendants-Petitioners Corporación CIMEX, S.A. (Panama) and Unión Cuba-Petróleo*

# APPENDIX A

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **EXXON MOBIL CORPORATION,** | |
| **Plaintiff,** | |
| **v.** | **Case No. 19-cv-01277 (APM)** |
| **CORPORACIÓN CIMEX S.A. et al.,** | |
| **Defendants.** | |

**MEMORANDUM OPINION AND ORDER**

## I. INTRODUCTION

In 1996, Congress enacted the Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. §§ 6021 *et seq.*, also known as the LIBERTAD, or Helms-Burton, Act. Title III of the LIBERTAD Act creates for U.S. nationals a private right of action against any "person" who traffics in property expropriated by the government of Cuba after January 1, 1959, and defines "person" to include any agency or instrumentality of a foreign state. The Act, however, contains a unique provision that authorizes the President to suspend the private right of action. Every presidential administration since the statute's passage had done just that. But then the Trump Administration announced that it would lift the suspension in May 2019. That action opened the door for this novel lawsuit.

Over sixty years ago, Plaintiff Exxon Mobil Corporation ("Exxon") held an interest in various oil and gas assets located in Cuba that were owned and operated by its wholly owned subsidiaries. The government of Cuba expropriated those assets in 1960. Exxon now seeks compensation under Title III of the LIBERTAD Act from the Cuban state-owned entities that allegedly traffic in its confiscated properties: Defendants Corporación CIMEX S.A. (Cuba)

("CIMEX"), Corporación CIMEX S.A. (Panama) ("CIMEX (Panama)"), and Unión Cuba-Petróleo ("CUPET"). Exxon seeks entry of an actual damages award of over $71 million plus treble damages.

Defendants now move to dismiss Exxon's complaint, arguing that this court lacks subject matter jurisdiction over the dispute. For the reasons that follow, the court denies Defendants' motion to dismiss as to CIMEX, defers ruling as to CUPET and CIMEX (Panama), and allows limited jurisdictional discovery as to CUPET and CIMEX (Panama).

## II. BACKGROUND

### A. Factual Background

#### *1. Exxon's Operations in Cuba*

Until 1960, Exxon, then known as Standard Oil, owned several subsidiaries operating in Cuba. *See* Second Am. Compl., ECF No. 33 [hereinafter SAC], ¶¶ 23–24. One such subsidiary was Esso Standard Oil, S.A. ("Essosa"), a wholly owned Panamanian corporation that operated in the Caribbean Basin and had its headquarters in Havana, Cuba. *Id.* ¶ 24. Exxon also operated Esso Standard (Cuba) Inc. and Esso (Cuba) Inc. (the "Exploration Companies"), which explored for and produced crude oil in Cuba. *Id.*

In October 1959, following the rise of Fidel Castro, the Cuban government arrived at the Exploration Companies' Cuban office and "confiscated and copied all files, maps, and other records of geological exploration." *See id.* ¶ 27. The Exploration Companies subsequently stopped all exploration efforts in Cuba and closed their office on the island. *See id.*

Some months later, in the summer of 1960, the Cuban government issued a series of resolutions that expropriated Essosa's rights to its Cuban property. *Id.* ¶ 28. The resolutions prohibited Essosa "from operating its expanded Belot Refinery," forced the company to "abandon

its Cuban-based marketing operation," and resulted in the closure of Essosa's gasoline service stations in the country. *Id.* ¶ 29. All told, the Cuban government confiscated Essosa's Belot Refinery, multiple bulk products terminals, and more than one hundred service stations. *See id.* ¶ 31. According to Exxon, "Cuba has never paid, and Plaintiff has never received, compensation for the expropriation of" that property. *Id.* ¶ 33.

*2. The Foreign Claims Settlement Commission*

In response to Cuban expropriations, Congress in 1964 established a program pursuant to the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621 *et seq.*, to provide a way for "nationals of the United States" to submit expropriation claims against Cuba to the U.S. Foreign Claims Settlement Commission ("FCSC"). *See* Pub. L. No. 88-666, 78 Stat. 1110 (1964); *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela* (*Helmerich III*), 743 F. App'x 442, 451 (D.C. Cir. 2018). The FCSC was tasked with determining "the amount and validity of claims against the Government of Cuba . . . which have arisen since January 1, 1959, . . . out of nationalization, expropriation, intervention, or other takings of, or special measures directed against, property of nationals of the United States . . . in order to obtain information concerning the total amount of such claims against the Government of Cuba . . . on behalf of nationals of the United States." 22 U.S.C. § 1643.

In 1969, Standard Oil, Exxon's predecessor, submitted a claim to the FCSC. SAC ¶ 34. The FCSC certified that Standard Oil "suffered a loss in the total amount of $71,611,002.90 . . . as a result of the intervention on July 1, 1960, of the Cuban branch of Essosa, a Panamanian corporation wholly owned by claimant." SAC, Ex. 1, ECF No. 33-1 [hereinafter FCSC Claim], at 9. The award also entitled Standard Oil to interest at a rate of 6% per annum from July 1, 1960, to the date of settlement. *Id.* at 10. Exxon "has never settled the outstanding certified claims or

received any payment from any entity with respect to the principal or interest due on its certified claim." SAC ¶ 43.

*3. The LIBERTAD, or Helms-Burton, Act*

In 1996, President Clinton signed into law the LIBERTAD Act, also known as the Helms-Burton Act, Pub. L. No. 104–114, 110 Stat. 785 (1996) (codified at 22 U.S.C. §§ 6021 *et seq.*). Title III of the Act creates for U.S. nationals who owned property in Cuba a private right of action against any "person" that "traffics in property which was confiscated by the Cuban Government on or after January 1, 1959." 22 U.S.C. § 6082(a)(1)(A). The Act defines "person" to include "any agency or instrumentality of a foreign state." *Id.* § 6023(11).

A person engaged in trafficking confiscated property shall be liable to the U.S. national "for money damages." *Id.* § 6082(a)(1)(A). The statute provides multiple ways for computing money damages, one of which is "the amount . . . certified to the claimant by the [FCSC], plus interest." *Id.* § 6082(a)(1)(A)(i)(I). A certified claim from the FCSC creates a rebuttable presumption as to the amount of an award. *Id.* § 6082(a)(2). It also entitles the claimant to receive treble damages from the person trafficking the confiscated property. *Id.* §§ 6082(a)(3)(A), (C)(ii).

Title III, however, contains an important condition on the availability of its private cause of action. No doubt due to the potential foreign policy implications of such claims, Congress authorized the President to suspend Title III's private right of action for sequential periods of up to six months upon notification to Congress that "the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." *Id.* § 6085(b)(2). Since the Act's passage every administration has issued a sequential six-month suspension of the right of action. SAC ¶ 45.

That changed under President Trump. On April 17, 2019, Secretary of State Michael Pompeo announced that the Trump Administration "would no longer suspend the right to bring an action under Title III effective May 2, 2019." U.S. Dep't of State, Cuba: Title III FAQs (LIBERTAD), https://www.state.gov/cuba-title-iii-faqs-libertad/ (last visited Mar. 22, 2021). That announcement opened the door for Exxon to file this action, which it did on May 2, 2019. *See* Compl., ECF No. 1.

*4. Defendants' Alleged Trafficking Activities*

Exxon contends that Defendants have "trafficked" in Essosa's confiscated property for commercial gain.

*CIMEX*. According to Exxon, CIMEX "engages in a variety of foreign commerce across a variety of industries," and, as relevant to Exxon's suit, "operates over 600 service stations that sell gas and consumer goods across Cuba." SAC ¶¶ 105–106. CIMEX, along with CUPET, operates over 300 such service stations under the name "Servi-Cupet." *Id.* ¶ 106. Exxon explains that Servi-Cupets "are the functional equivalent of a 7-Eleven convenience store." *Id.* ¶ 109. The stations sell "a variety of American products, including poultry, cereal, rice, cleaning supplies, frozen vegetables, and alcoholic beverages." *Id.* Some of those service stations are built and maintained on property that formerly belonged to Essosa. *Id.* ¶ 107.

CIMEX also uses its service stations to process remittances, or money transfers. *Id.* ¶ 111. When a remittance is sent to Cuba from the United States, "U.S. dollars are transferred by persons in the United States using agent locations in the United States." *Id.* ¶ 121. Recipients can then collect their remittances at CIMEX's service stations, among other locations in Cuba, and some of the service stations that process remittances are maintained on Essosa's former property. *See id.* ¶¶ 115–116.

Exxon alleges that "Cuba received an estimated $3.6 billion U.S. dollars in 2018 from remittances, and it is estimated that 90% of these remittances come from the United States." *Id.* ¶ 112. Remittances are "the only conduit for persons residing in the United States to transfer U.S. dollars to support family and friends in Cuba." *Id.* ¶ 122. Exxon maintains that the remittance business is crucial to the Cuban economy because it provides U.S. dollars for the Cuban government and financial system, which are strained for hard currency. *See id.* ¶ 121. Cuba channels remittances through FINCIMEX, which has "a license to manage all remittance wire transfers from the United States," and "CIMEX facilitates remittance transactions through its partnership with a U.S.-based remittance provider." *Id.* ¶ 113.

*CIMEX (Panama).* Exxon makes no direct trafficking allegations against CIMEX (Panama). Instead, it claims that CIMEX and CIMEX (Panama) "are alter egos of one another." *Id.* ¶ 3. The two entities, according to Exxon, share "the ultimate same ownership, with the same officers and directors, [and] work[] out of the same office at the same address without any regard for corporate formalities or respecting the separateness of either entity." *Id.*; *see also id.* ¶ 19.

*CUPET.* CUPET is Cuba's state-owned oil company. *Id.* ¶ 91. It operates Essosa's former Belot Refinery, which, following a merger with another refinery, is now known as the Ñicó Lopez Refinery, one of four refineries owned by CUPET. *Id.* ¶¶ 92–93. One of CUPET's "main objectives is to supply the domestic needs for petroleum products, including gasoline, diesel, and fuel oil." *Id.* ¶ 93.

CUPET also allegedly uses Essosa's confiscated property—including its former refinery and "plants, terminals, and infrastructure"—to import and refine crude oil, as well as to explore for and extract oil. *Id.* ¶¶ 97–98. In support of these activities, CUPET engages in business with foreign companies, "allow[ing] CUPET to import crude oil to supply the domestic needs for

petroleum products and engage in joint oil exploration projects in Cuba and the Gulf of Mexico." *Id.* ¶ 99. CUPET provides "offshore exploration opportunities for a range of international companies" and "host[s] annual conferences seeking foreign partners in oil and gas exploration and production." *Id.* ¶ 101(c).

Apart from CUPET's commercial activities, Exxon also contends that CUPET has negligently operated the Ñicó Lopez Refinery and "cause[d] considerable environmental damage to the Florida Straits." *Id.* ¶ 103. The Ñicó Lopez Refinery allegedly "dumps hydrocarbons and industrial waste into Havana Bay," and polluted water has run "northeasterly 40-50 miles" from the refinery, which Exxon contends "bring[s] the pollution at or near the United States-Cuba maritime boundary." *Id.*

**B. Procedural Background**

On May 2, 2019, Exxon filed its initial Complaint in this matter. *See* Compl., ECF No. 1. Thereafter, it filed the Second Amended Complaint, adding CIMEX (Panama) as a defendant. *See* SAC. The Second Amended Complaint is the operative pleading.

Defendants have moved to dismiss the Second Amended Complaint for lack of subject matter and personal jurisdiction. *See* Defs.' Mot. to Dismiss Action with Prejudice, & for Other Relief, ECF No. 42 [hereinafter Defs.' Mot.]. As to subject matter jurisdiction, Defendants assert that: (1) they are agencies or instrumentalities of a foreign sovereign, Cuba, and thus are immune from suit pursuant to the Foreign Sovereign Immunities Act ("FSIA"), and (2) Exxon lacks Article III standing. *See* Defs.' Mot., Defs.' Mem. of P. & A. in Supp. of Mot. to Dismiss with Prejudice & for Other Relief, ECF No. 42-3 [hereinafter Defs.' Br.]. As to personal jurisdiction, Defendants contend that, as agents or instrumentalities of a foreign sovereign, they enjoy

protection under the Due Process Clause and lack the requisite minimum contacts with the United States to be subject to suit here. *Id.* at 47–60.

The court heard oral argument on March 10, 2021. *See* Minute Entry, Mar. 10, 2021. Following the hearing, the parties agreed to defer their dispute over personal jurisdiction until after the question of subject matter jurisdiction is resolved, including possible interlocutory appellate review. *See* Stip. & Order, ECF No. 59. Therefore, the court in this decision focuses only on its subject matter jurisdiction and does not consider the parties' positions on personal jurisdiction.

## II. LEGAL STANDARD

Defendants have asserted immunity from suit under the FSIA, and so "the court's focus shifts to the exceptions to immunity laid out in 28 U.S.C. §§ 1604, 1605, and 1607." *Phx. Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). "[T]he foreign-state defendant bears the burden of establishing the affirmative defense of immunity" and must prove "that the plaintiff's allegations do not bring its case within a statutory exception to immunity." *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 894 F.3d 339, 344–45 (D.C. Cir. 2018).

In moving to dismiss, a foreign-state defendant may challenge either the legal or factual sufficiency underpinning an exception. *See Phx. Consulting*, 216 F.3d at 40. Defendants here have taken the latter approach. They have submitted voluminous evidence, including multiple sworn declarations, contesting the jurisdictional facts alleged by Exxon and giving rise to mixed questions of law and fact. *See id.* "When the defendant has thus challenged the factual basis of the court's jurisdiction, the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff and disputed by the defendant." *Id.* Rather, "the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Id.* The court retains "considerable latitude" in how it

will "ferret out the facts pertinent to jurisdiction," including ordering jurisdictional discovery. *Id.* (quoting *Prakash v. Am. Univ.*, 727 F.2d 1174, 1179–80 (D.C. Cir. 1984)).

## IV. DISCUSSION

The parties agree that Cuba wholly owns Defendants CIMEX, CIMEX (Panama), and CUPET, and therefore Defendants are presumptively immune from suit in U.S. courts as agencies or instrumentalities of a foreign state. *See* 28 U.S.C. § 1604 (stating "a foreign state" is immune from suit in the courts of the United States, unless a statutory exception applies); *id.* § 1603(a) (defining "foreign state" to include "an agency or instrumentality of a foreign state"); SAC ¶ 9 (alleging Defendants to be "agencies or instrumentalities of a foreign state").

Exxon nevertheless argues that this court has jurisdiction over Defendants because Congress abrogated their sovereign immunity in three statutory provisions: (1) Title III of the LIBERTAD Act, (2) the FSIA's commercial activity exception, and (3) the FSIA's expropriation exception. *See* Pl.'s Mem. of Law in Opp'n to Mot. to Dismiss the Action & for a Partial Stay, ECF No. 47 [hereinafter Pl.'s Br.], at 2–3. Short of a finding that Defendants are not immune to suit, Exxon has also requested limited jurisdictional discovery. *Id.* at 33–34. Defendants counter that none of the cited grounds to abrogate immunity apply and that jurisdictional discovery is unwarranted; they also argue that Exxon lacks standing. *See* Defs.' Br. at 2–4, 45–46.

The court first turns to Exxon's reliance on Title III as a source for abrogating immunity, then addresses the immunity exceptions under the FSIA, and concludes with a discussion of standing.

### A. Title III of the LIBERTAD Act

Exxon's opening salvo is unusual. It has been a common refrain since the Supreme Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.* that "the FSIA [is] *the sole basis*

for obtaining jurisdiction over a foreign state in our courts." 488 U.S. 428, 434 (1989) (emphasis added); *see also OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 393 (2015). Yet, Exxon here urges an end run of the FSIA, and asks the court to find an exception to foreign sovereign immunity in Title III. *See* Pl.'s Br. at 12–15. The court declines Exxon's novel invitation.

Exxon's argument proceeds as follows. Title III permits actions against "any person" trafficking in confiscated property, 22 U.S.C. § 6082(a)(1)(A), and the term "person" is defined to include "any agency or instrumentality of a foreign state," *id.* § 6023(11). Title III further provides that, "[e]xcept as provided in this subchapter, the provisions of Title 28 . . . apply to actions under this section to the same extent as such provisions and rules apply to any other action brought under section 1331 of Title 28." *Id.* § 6082(c)(1). The FSIA, Exxon points out, is contained in Title 28. Key to Exxon's reading is the clause "except as provided in this subchapter," *id.* According to Exxon, by including the clause "except as provided in this subchapter" in Title III, Congress intended to take Title III cases outside the strictures of the FSIA. *See* Pl.'s Br. at 13. More pointedly, Exxon maintains that "the FSIA applies only so long as it does not conflict with Title III, in which case Title III must control as Congress directed." *Id.* Such a conflict exists between the FSIA's immunity provisions and Title III, according to Exxon. Requiring a Title III plaintiff to satisfy an immunity exception under the FSIA would frustrate Congress's purpose in creating a private right of action that includes actions against an agency or instrumentality of a foreign state. Title III, Exxon urges, therefore obviates the need to satisfy an FSIA immunity exception. Exxon's logic, though not without superficial appeal, ultimately fails.

To begin, the court looks to the FSIA. Congress used its power to determine "the exact degrees and character" of "the subject-matter jurisdiction of the lower federal courts" to create in the FSIA a presumption of immunity for foreign sovereigns. *Amerada Hess*, 488 U.S. at 433

(internal quotation marks omitted). The FSIA thus provides that "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Section 1604 of the FSIA thus (1) establishes the presumption of foreign state immunity in U.S. courts ("a foreign state shall be immune") and (2) identifies where the exceptions to that immunity can be found ("existing international agreements" and "except as provided in sections 1605 to 1607 of this chapter"). *See Sachs*, 136 S. Ct. at 393–94; *see also Amerada Hess*, 488 U.S. at 434 ("§ 1604 bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to immunity."). The FSIA "comprehensively regulat[es] the amenability of foreign nations to suit in the United States." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). Thus, the Supreme Court has instructed that "the FSIA '*must* be applied by the district courts in *every action* against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the *specified* exceptions to foreign sovereign immunity." *Amerada Hess*, 488 U.S. at 434–45 (emphasis added) (quoting *Verlinden*, 461 U.S. at 493).

Title III of the LIBERTAD Act, codified at 22 U.S.C. § 6082, is not among the listed exceptions in the FSIA. Moreover, Title III does not mention sovereign immunity. That is because Title III does no more than create a private right of action and is not an exception to sovereign immunity. Exxon's argument boils down to a contention that Title III's private right of action conflicts with the FSIA and therefore the private right of action waives sovereign immunity, but the D.C. Circuit has been clear that private rights of action and exceptions to sovereign immunity

are two entirely different species. In *Cicippio-Puleo v. Islamic Republic of Iran*, the court considered Congress's efforts to legislate liability against foreign state sponsors of terrorism. *See* 353 F.3d 1024 (D.C. Cir. 2004), *superseded by statute*, 28 U.S.C. § 1605A. There, while Congress had abrogated foreign sovereign immunity for foreign states that participated in terrorism, it had not created a private right of action for suits on those grounds. *See id.* at 1032–33. The D.C. Circuit concluded that the terrorism exception to the FSIA was "merely a jurisdiction conferring provision that d[id] not otherwise provide a cause of action against a foreign state or its agents." *Id.* at 1032. At the root of its decision was the "clearly settled distinction in federal law between statutory provisions that waive sovereign immunity and those that create a cause of action." *Id.* at 1033.

The same "clearly settled distinction" defeats Exxon's argument here. While Title III provides Exxon with a cause of action against Cuba, it is silent as to sovereign immunity. Just as the existence of a waiver of sovereign immunity did not establish a private right of action in *Cicippio-Puleo*, the converse must also be true: the existence of a private right of action cannot establish a waiver of foreign sovereign immunity. Title III's private right of action therefore cannot be construed to create a conflict with the FSIA's sovereign immunity provisions, and Exxon's jurisdictional theory fails.

Furthermore, as written, Title III does not reflect an intention to waive sovereign immunity. The court must presume that Congress was aware of the Supreme Court's sovereign immunity jurisprudence when it passed the LIBERTAD Act in 1996, *see Nat'l Ass'n of Mfrs. v. Dep't of Lab.*, 159 F.3d 597, 601 (D.C. Cir. 1998), and that if Congress intended to deviate from the FSIA, it would have done so explicitly. As noted, ever since *Amerada Hess*, the Supreme Court has said that "the FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in our courts." 488

U.S. at 434. The Supreme Court re-affirmed that principle twice in the five years preceding the passage of the LIBERTAD Act: first in 1992 in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992), and again the following year in *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Title III, however, is wholly silent with respect to sovereign immunity. The vague phrase "[e]xcept as provided in this subchapter," 22 U.S.C. § 6082(c)(1), cannot overcome Congress's silence in the face of clear Supreme Court precedent.

Congress's silence as to immunity is amplified by other provisions of Title III that make explicit reference to the FSIA. Subsection (c)(2), which immediately follows the provision on which Exxon relies, explicitly mentions the FSIA, providing that "service of process . . . shall be made in accordance with section 1608 of Title 28." 22 U.S.C. § 6082(c)(2). Given that Congress knew how to refer to a provision of the FSIA when it wanted to, the court doubts that Congress would have cavalierly jettisoned for Title III actions the comprehensive scheme that the FSIA creates simply by stating in subsection (c)(1) that Title 28 applies "[e]xcept as provided in this subchapter," *id.* § 6082(c)(1). *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (noting courts generally presume that "Congress . . . does not . . . hide elephants in mouseholes"); *cf. Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, 714 (2021) ("We interpret the FSIA as we do other statutes affecting international relations: to avoid, where possible, producing friction in our relations with other nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation." (cleaned up)).

In addition, Congress was careful to anticipate and explicitly provide instructions for instances in which Title III was in tension with existing doctrines, suggesting that Congress would have explicitly stated the FSIA did not apply to Title III if that were its intention. For example, Congress provided that a court may not invoke the "act of state doctrine"—which "precludes the

courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964), *superseded by statute*, 22 U.S.C. § 2370(e)(2)—to "decline . . . to make a determination on the merits in an action" brought pursuant to Title III, 22 U.S.C. § 6082(a)(6). Similarly, Congress also anticipated that Title III might someday create tension with a democratically elected government in Cuba. Title III therefore explicitly provides that "any judgment against an agency or instrumentality of the Cuban Government shall not be enforceable against an agency or instrumentality of either a transition government in Cuba or a democratically elected government in Cuba." 22 U.S.C. § 6082(d). Despite these instances in which Congress took pains to explicitly define how Title III would interact with existing doctrines, Congress said nothing with respect to foreign sovereign immunity. It would therefore be inconsistent with the comprehensive scheme Congress drafted in Title III for the court to interpret Congress's statement that Title 28 applies "[e]xcept as provided in this subchapter" to quietly abrogate foreign sovereign immunity.

Beyond the text of Title III, the court's conclusion is bolstered by the fact that when Congress has devised new exceptions to the presumption of sovereign immunity in the past, it has amended the FSIA in plain and certain terms. For example, in 1996, Congress passed the Antiterrorism and Effective Death Penalty Act, which introduced a new exception to sovereign immunity for state acts of terrorism. Pub. L. No. 104-132, 110 Stat. 1214 (1996); *see also Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017), *vacated & remanded on other grounds sub nom. Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020). The "terrorism exception" explicitly abrogates foreign sovereign immunity. *See* 28 U.S.C. 1605A(a)(1); *see also Owens*, 864 F.3d at 765 ("The new exception withdrew immunity, granted jurisdiction, and authorized suits against

state sponsors of terrorism for 'personal injury or death' arising from [certain] predicate acts . . . ."). Title III's silence on sovereign immunity stands in stark contrast to Congress's abrogation of sovereign immunity in the terrorism exception. The court again finds it quite improbable that Congress would delineate the terrorism exception to sovereign immunity in incontrovertible terms but subtly dispatch the FSIA in Title III.

Finally, as a matter of textual interpretation, the "[e]xcept as provided in this subchapter" clause bears a straightforward reading that does not require the court to upend the FSIA's sovereign immunity scheme. The clause is most naturally understood to mean 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. And certain provisions of Title III do conflict with Title 28. For example, Title III creates a $50,000 amount-in-controversy requirement, 22 U.S.C. § 6082(b), whereas under the FSIA, federal district courts have original jurisdiction over foreign states "without regard to amount in controversy," 28 U.S.C. § 1330(a). For suits brought pursuant to Title III, then, the $50,000 amount-in-controversy trumps the FSIA. No similar provision expressly abrogates sovereign immunity. Had Congress intended to create a special immunity waiver for Title III actions that avoids the FSIA's strictures, the court would have expected Congress to do so clearly, as it did in other instances when Congress set rules specific to Title III actions.

**B. The FSIA**

Having determined that Title III does not supply the waiver of sovereign immunity needed to advance Exxon's case, the court turns to the FSIA's immunity exceptions. Two are relevant here: the commercial activity exception and the expropriation exception.

*1. Which Exceptions Can Apply*

At the outset, the parties clash over the interplay between the commercial activity and expropriation exceptions. According to Defendants, the expropriation exception in this case fully eclipses the commercial activity exception because Exxon's claim turns on Cuba's "quintessentially sovereign act" of expropriating property. Defs.' Br. at 5–8 (internal quotation marks omitted). Relying on *Rong v. Liaoning Province Government*, 452 F.3d 883 (D.C. Cir. 2006), Defendants contend that because "commercial use almost always follows expropriation, allowing suit on that commercial use under the commercial activity exception would eviscerate the distinct limitations of the expropriation exception." Defs.' Br. at 6.

But this argument runs aground on controlling precedent. The D.C. Circuit has "never held that in order to proceed against a foreign government, a claim must fall into just one FSIA exception." *de Csepel v. Hungary*, 859 F.3d 1094, 1103 (D.C. Cir. 2017). In *de Csepel*, the Circuit rejected the contention that "either the expropriation exception or the commercial activity exception [must apply], not both." *Id.*; *see also Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 450 n.15 (D.C. Cir. 1990) (rejecting argument that the expropriation exception was "the *only* provision in the FSIA which denies to foreign states immunity from suit for the taking of property" because "[i]t is clear that if a proper showing is made, the appellee can rely on the 'commercial activity' exception" as well (cleaned up)). *Rong* and the other cases on which Defendants rely "stand only for the proposition that the activity at issue did not constitute 'commercial activity' under the FSIA." *de Csepel*, 859 F.3d at 1103. Accordingly, the court will analyze whether Exxon's claims fall under both the commercial activity exception and the expropriation exception.

*2. The Commercial Activity Exception*

As relevant here, the commercial activity exception provides that a "foreign state shall not be immune from the jurisdiction of the courts of the United States in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The parties' differences center on two elements of this exception: (1) whether Exxon's claim is "based upon" a "commercial activity" and (2) whether Defendants' alleged commercial activity "causes a direct effect in the United States." The court addresses each element in turn.

a. Commercial activity

The Supreme Court has instructed that the inquiry of whether a suit is "based upon" a "commercial activity" "first requires a court to identify the particular conduct on which the plaintiff's action is 'based.'" *Sachs*, 577 U.S. at 33 (cleaned up) (quoting *Nelson*, 507 U.S. at 356). A court should identify the "particular conduct" at issue "by looking to the 'basis' or 'foundation' for a claim," *id.* (quoting *Nelson*, 507 U.S. at 357)—that is, "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357. The Court's decisions require that more than a single element of a claim involve commercial activity—instead, a court must "zero[] in on the core of the[] suit" and determine whether "the particular conduct that constitutes the gravamen of the suit" is commercial. *Sachs*, 577 U.S. at 35 (internal quotation marks omitted).

Here, the "core" of Exxon's action arises from "trafficking" in expropriated property. Under Title III of the LIBERTAD Act, "any person that . . . traffics in property which was confiscated by the Cuban Government" shall be liable to any U.S. national who owns the claim to

such property. 22 U.S.C. § 6082(a)(1)(A). The statutory text of Title III thus makes clear that trafficking, and not expropriation, is the gravamen of the claim. Defendants are wrong to contend otherwise. *See* Defs.' Br. at 5–8. The Act does not grant a cause of action for the mere expropriation of the property. Rather, liability under the Act attaches only when a U.S. person's property has been confiscated *and* trafficked. To be sure, expropriation, or a showing that the plaintiff's property has been "confiscated," is a necessary element of a trafficking claim, but that element alone would not "entitle a plaintiff to relief," *Sachs*, 577 U.S. at 33 (internal quotation marks omitted). Trafficking in expropriated property is the "gravamen" of a Title III claim, not Cuba's expropriation of the property. *See id.* at 34 (holding that "a one-element approach" is "flatly incompatible" with the Court's precedent).

Having determined that "trafficking" is the "gravamen" of a Title III claim, the court has little trouble concluding that the acts of trafficking alleged here constitute "act[s] . . . in connection with a commercial activity" for purposes of the FSIA. 28 U.S.C. § 1605(a)(2). "[A] state engages in commercial activity . . . where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360 (internal quotation marks omitted). This inquiry focuses on the "'nature'" of the foreign state's act "rather than its 'purpose.'" *Weltover*, 504 U.S. at 614. So, instead of asking "whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," the court must ask "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce." *Id.* (internal quotation marks omitted).

In Title III, Congress selected a decidedly broad definition for the term "traffics" that plainly encompasses the types of actions taken by private citizens acting in trade or commerce. A person "traffics" in confiscated property if that person knowingly and intentionally:

> (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
>
> (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
>
> (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,
>
> without the authorization of any United States national who holds a claim to the property.

22 U.S.C. § 6023(13)(A). The breadth of this definition makes clear that, generally speaking, an act of "trafficking" under the LIBERTAD Act will likely qualify as commercial activity for purposes of the FSIA.

And it does here. Exxon alleges that Defendants have acted as private parties, not sovereign entities, with respect to the confiscated property. Exxon alleges that Defendants traffic in the expropriated property via (1) "commercial activities in the global oil market," including owning and operating refineries, importing and refining crude oil, and conducting exploration and extraction of oil, SAC ¶¶ 91–104; (2) operating service stations "that sell gas and consumer goods" on confiscated property, *id.* ¶¶ 105–110; and (3) processing remittances on confiscated property, *id.* ¶¶ 111–122. Each of these actions is "commercial in nature," *Foremost-McKesson*, 905 F.2d at 450, and could be accomplished by "[a] private party in the market," *Rong*, 452 F.3d at 890.

Exxon's suit is therefore "based on" an "act . . . in connection with a commercial activity," 28 U.S.C. § 1605(a)(2).

Defendants cite the D.C. Circuit's decisions in *Foremost-McKesson* and *Rong*, but their reliance is misplaced. In those cases, the plaintiffs brought claims that were based on the expropriation of their assets. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, No. 82-cv-0220, 1989 WL 44086, at *1 (D.D.C. Apr. 18, 1989) (describing complaint as alleging "a so-called creeping expropriation"); *Rong v. Liaoning Provincial Gov't*, 362 F. Supp. 2d 83, 86 (D.D.C. 2005) (noting Rong asserted claims "for conversion, expropriation, the violation of international law and unjust enrichment"). Here, as discussed, Exxon's suit is based on the *trafficking* of confiscated property rather than the expropriation of that property. Thus, this case concerns commercial activity, not the exercise of a power unique to sovereigns.

b. Direct effects

The commercial activity exception also requires that the "act . . . in connection with a commercial activity" "cause[] a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The Supreme Court has explained that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." *Weltover*, 504 U.S. at 618 (alteration omitted) (internal quotation marks omitted); *see also EIG Energy Fund XIV*, 894 F.3d at 345. "A 'direct effect' . . . is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994) (internal quotation marks omitted). The commercial activity exception's direct-effect requirement does not "contain[] any unexpressed requirement of 'substantiality' or 'foreseeability'" but nonetheless "may not be predicated on purely trivial effects in the United States." *Weltover*, 504 U.S. at 618; *see also EIG Energy Fund XIV*, 894 F.3d at 345.

Exxon alleges that Defendants' trafficking has had the following direct effects in the United States: (1) CIMEX channels money from U.S. citizens to Cuba through remittances processed at service stations located on former Essosa properties, Pl.'s Br. at 17–21; (2) CIMEX sells food and consumer goods imported from the United States at service stations on confiscated properties, *id.* at 21–22; (3) Defendants deprive Exxon of the use of the confiscated property, *id.* at 23–25; (4) CUPET uses the confiscated property to compete with Exxon in the global oil market, *id.* at 25–27; and (5) CUPET's operation of the confiscated refinery and processing facilities has polluted U.S. waters, *id.* at 27–28.

i. *Remittances*

Starting with remittances, Exxon argues that CIMEX's trafficking has a direct effect in the United States because CIMEX operates on confiscated property service stations that process remittances sent by individuals in the United States to recipients in Cuba.[1] According to Exxon, "[t]he 'immediate consequence' of opening these channels is that they create a market for remittances to flow from the U.S. to Cuba and enable these transactions to occur." Pl.'s Br. at 18. The court agrees.

It is clear from Defendants' own description of CIMEX's remittance business that CIMEX uses confiscated property to engage in continuous commerce with the United States. According to Defendants' declarant, Mali Suris Valmaña, the legal director of CIMEX, certain of CIMEX's service stations process remittances sent from the United States via Western Union. Defs.' Mot.,

[1] Defendants have submitted a declaration stating that "[n]either CUPET, nor any of the *empresas* or mercantile societies that are integrated with it has any involvement in the money transfer (remittance) business." Defs.' Mot., Second Decl. of Roberto Suárez Sotolongo, ECF No. 42-7, ¶ 10. Exxon offers no evidence to dispute CUPET's claimed non-involvement in the remittance business, despite allegations suggesting otherwise in the Second Amended Complaint, *see* SAC ¶¶ 115–116. Having failed to contradict the evidence CUPET presents, the court at this juncture finds that CUPET is not involved in the remittance business, and thus considers whether remittances have a direct effect in the United States only as to CIMEX.

Decl. of Mali Suris Valmaña, ECF No. 42-4 [hereinafter Valmaña Decl.], ¶ 6. A remittance is initiated when a U.S. resident designates a recipient in Cuba for a transfer of money and makes payment to Western Union. *Id.* ¶¶ 13(a)–(b). The U.S. resident receives a "Unique Code" identifying the particular remittance, which she then shares with the intended recipient in Cuba. *Id.* ¶¶ 13(b)–(c). The recipient can select any of 502 Western Union locations in Cuba, present the Unique Code and appropriate identification, and collect an amount in Cuban convertible pesos, or "CUCs," equal to the original remittance amount. *Id.* ¶¶ 13(d)–(e), (i). Defendants concede that between four and ten of CIMEX's properties that have Western Union locations operate on property connected to Essosa. *Id.* ¶ 12.

In arguing whether CIMEX's processing of remittances constitutes a direct effect in the United States, neither side has presented a case squarely on point. The Supreme Court and the D.C. Circuit have held, however, that the direct effect requirement is met in cases involving commercial transactions that contemplate contract performance or designate a place of payment in the United States. *See, e.g.*, *Weltover*, 504 U.S. at 618–19 (finding direct effect where "Respondents had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments"); *de Csepel v. Republic of Hungary*, 714 F.3d 591, 601 (D.C. Cir. 2013) (finding direct effect where bailment contract provided for "return . . . to be directed to" individuals "Hungary knew to be residing in the United States"); *Cruise Connections Charter Mgmt. 1, LP v. Atty. Gen. of Can.*, 600 F.3d 661, 664–65 (D.C. Cir. 2010) (finding direct effect where, due to termination of contract, "revenues that would otherwise have been generated in the United States were not forthcoming" (internal quotation marks omitted)). The "direct effect" here is similar. Remittances are sent from the United States and received in Cuba, causing an outflow of money from the United

States. Such an outflow creates a "direct effect" in the United States much like the failure to transmit payment to the United States. In both scenarios there is an "immediate" negative economic impact on the domestic economy. *See Weltover*, 504 U.S. at 618–19 (finding a "direct effect" where "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming").

Defendants raise a number of objections to this conclusion. First, they argue that, under *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988), Exxon must identify a legally significant act—that is, an act that forms the basis of an element of Exxon's claim—that occurred in the United States and that CIMEX's remittance business is not a legally significant act. *See* Defs.' Br. at 12–13. Neither the Supreme Court nor the D.C. Circuit have applied such an exacting requirement in determining whether a foreign defendant's actions have had a direct effect in the United States. *Weltover*, which post-dates *Zedan*, makes no mention of any requirement that a direct effect be legally significant, and instead instructs that the focus of the direct-effect analysis is on whether the effect is more than "purely trivial," *see* 504 U.S. at 618—a standard that is decidedly less rigorous than whether the effect results from a legally significant act. And while the D.C. Circuit in *Zedan* made a passing mention that in other direct-effect cases courts had found "something legally significant actually happened in the United States," it did not articulate a freestanding requirement that a direct effect be a legally significant act. *Zedan*, 849 F.2d at 1515. Moreover, the D.C. Circuit's post-*Weltover* decisions do not apply or even reference the legally significant act test. *See, e.g.*, *Princz*, 26 F.3d at 1172–73 (applying *Weltover*'s "purely trivial" standard (internal quotation marks omitted)); *EIG Energy Fund XIV*, 894 F.3d at 345–46 (similar); *see also Global Index, Inc. v. Mkapa*, 290 F. Supp. 2d 108, 113 (D.D.C. 2003) (noting the D.C. Circuit has not "expressly adopted or rejected the 'legally significant act' test," but instead

follows the "more general approach set forth in *Weltover*"). Accordingly, the court concludes that Exxon is not required to demonstrate that a legally significant act occurred in the United States so long as it identifies a direct effect from Defendants' alleged trafficking that is not "purely trivial." *Weltover*, 504 U.S. at 618.

Defendants take up the mantle of triviality as well, arguing that the processing of remittances on expropriated property generates a "trivial" effect in the United States because CIMEX operates remittance locations on only four to ten of the confiscated properties. Defs.' Br. at 15. The court rejects this argument at this juncture because the number of former Essosa locations processing remittances in *Cuba* says nothing of the effect in the *United States*. Defendants have not, for instance, supplied any facts establishing the actual volume of remittances processed at those locations or their dollar value. Absent such evidence, Defendants cannot carry their burden of establishing that the effect in the United States is "trivial."

Defendants next insist that CIMEX's processing of remittances cannot cause a direct effect in the United States because the "locus of the tort" is in Cuba. *See* Defs.' Br. at 13. This argument gains no traction because the D.C. Circuit has held that "a foreign locus does not always mean that a tort causes no 'direct effect' in the United States." *EIG Energy Fund XIV*, 894 F.3d at 347. Accordingly, even if Cuba were the locus of the tort, that does not foreclose the possibility that CIMEX's remittance activity could have a direct effect in the United States.

Additionally, Defendants object that the remittances do not satisfy the direct-effect requirement because they do not cause an injury in the United States. Defs.' Br. at 13. Defendants interpret *Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela* (*Helmerich I*), 784 F.3d 804 (D.C. Cir. 2015), *vacated & remanded*, 137 S. Ct. 1312 (2017), to stand for the proposition that a foreign defendant's actions must cause injury in the United States

to constitute a direct effect. Defs.' Br. at 13. Defendants overread *Helmerich I*. There, Helmerich & Payne argued that Venezuela's expropriation of its oil rigs had a direct effect in the United States because it had "contract[ed] with third-party vendors in the United States" pursuant to its drilling contracts with Venezuela. *Helmerich I*, 784 F.3d at 817. The court found that those contracts did not produce any effect—much less a loss—in the United States because Venezuela's expropriation of Helmerich & Payne's oil rigs had no impact on the contracts: Helmerich & Payne Venezuela "had already performed all of its obligations under the existing third-party contracts." *Id.* Venezuela's conduct therefore had no effect on the already-fulfilled contracts and thus no effect in the United States. *See id. Helmerich* accordingly stands only for the unremarkable proposition that where there is *no effect* in the United States there is no "direct effect." *Id.* (finding that where the alleged direct effect was a loss on contracts, "no losses, and therefore no 'direct effect,' occurred in the United States").

Moreover, there is no support in the text of the FSIA for Defendants' position that a "direct effect" must be an injury. The statute merely requires that the act outside the United States "cause[] a direct effect in the United States." 28 U.S.C. § 1605(a)(2). It notably does not require a direct *injury*. Indeed, the D.C. Circuit has previously held that "[n]othing in the FSIA requires that the 'direct effect in the United States' harm the plaintiff." *Cruise Connections*, 600 F.3d at 666 (quoting 28 U.S.C. § 1605(a)(2)). Thus, the court concludes that the direct effect of CIMEX's trafficking need not cause an injury in the United States to satisfy the commercial activity exception.

Defendants also argue that, even if CIMEX's remittance business can be said to have an effect in the United States, that effect is not direct. *See* Defs.' Br. at 14. According to Defendants, the effect of CIMEX's remittance business depends on the decisions of independent third parties:

"[p]ersons in the United States must decide to send remittances; they must decide to use [Western Union], not other companies; and the recipients must decide to collect the remittance at one of a handful of locations situated on former Essosa land from among over 500 available [Western Union] locations." *Id.* The court is unconvinced. The effect of CIMEX's remittance business in the United States is not rendered indirect simply because third parties make choices about the origination and collection points for remittances. Defendants concede that "only remittances generated in the U.S. are currently being paid out in Cuba" and that CIMEX is prohibited "from collecting money in Cuba to be paid out in the United States or in any other country." Valmaña Decl. ¶¶ 14–15. Thus, CIMEX's entire remittance business is aimed at bringing money from the United States into Cuba. Those money transfers are direct, without any intermediary. CIMEX cannot hide behind the decisions of third parties to sever the directness of the effect when the very business line it operates is exclusively designed for U.S. residents to send money to Cuba. *Cf. EIG Energy Fund XIV*, 894 F.3d at 348 (finding a direct effect where the plaintiff "allege[d] that its United States presence was not mere happenstance to [defendants], but that [defendants] 'targeted' U.S. investors").

Defendants lodge two final objections. They contend that, under the commercial activity exception, "the act upon which Plaintiff's action is 'based' . . . must cause[] [the] direct effect in the United States," and because Exxon's action is not "based upon" CIMEX's remittance business, the remittances cannot be the cause of the requisite direct effect. Defs.' Br. at 14 (quoting 28 U.S.C. § 1605(a)(2)). It is not entirely clear what Defendants contend Exxon's action *is* based upon, but the court has little doubt that CIMEX's use of confiscated property to participate in the remittance business is an "act . . . in connection with a commercial activity," as required by section 1605(a)(2). Relatedly, Defendants assert that even if CIMEX's processing of remittances qualifies

as a direct effect, the processing of remittances provides the court with jurisdiction over only that portion of Exxon's claim that concerns the specific CIMEX service stations that process remittances. *See* Defs.' Br. at 14–15. In so arguing, Defendants seem to suggest that the court's jurisdiction as to Exxon's single Title III claim against CIMEX is divisible based on the properties that do and do not cause the direct effect. Defendants cite no authority for this novel proposition, and the court declines to adopt such a jurisdiction-parsing approach.

ii. *Sale of Imported U.S. Food and Consumer Goods*

Exxon next argues that CIMEX's sale of imported U.S. goods at the former Essosa service stations has a direct effect in the United States.[2] Pl.'s Br. at 22–23. Defendants counter that this activity does not cause a direct effect in the United States because CIMEX itself does not import goods from the United States. Defs.' Reply Mem. of P. & A. in Supp. of Mot. to Dismiss & for Other Relief, ECF No. 49 [hereinafter Defs.' Reply Br.], at 6–7. Instead, it purchases U.S. goods through another Cuban company, Alimport, thereby causing its sales of U.S. goods to have, at most, an indirect effect in the United States. *Id.*

Defendants' argument overlooks two critical facts not in dispute. The first is that CIMEX exercises some degree of discretion in carrying U.S. goods for sale in its convenience stores; CIMEX does not contend that it is compelled to offer U.S. goods. Although CIMEX purports not to instruct Alimport on "the country from where the products should be sourced," CIMEX and Alimport have a supply contract pursuant to which CIMEX specifies "the products and their amounts that CIMEX-Cuba will purchase from Alimport for the next calendar year." Second Decl.

[2] Exxon alleges in the Second Amended Complaint that both "CIMEX and CUPET use Confiscated Property to sell American goods to Cuban consumers." SAC ¶ 109. In its briefing, however, Exxon argues only that CIMEX sells American goods at service stations. *See* Pl.'s Br. at 21–22; *see also* Pl.'s Br., Decl. of Jared R. Butcher, ECF No. 47-2, ¶¶ 22–28 (providing evidence related to CIMEX's involvement in imports but not CUPET's involvement). Accordingly, the court considers whether importing American goods constitutes a direct effect as to CIMEX only.

of Mali Suris Valmaña, ECF No. 53 [hereinafter Second Valmaña Decl.], ¶ 6. Thus, American products reach CIMEX's shelves only when CIMEX has placed an order for goods. Alimport in turn buys some of the goods CIMEX has ordered from the United States, and CIMEX makes a business decision to carry them. As such, CIMEX has a decisional role in marketing U.S. goods from its convenience stores.

The second is that CIMEX's sale of U.S. goods generates demand for U.S. goods. Although Valmaña says that "CIMEX-Cuba does not give any direction to Alimport about the country from where the products should be sourced, the companies from which the products should be purchased, or the brands of a product," and that "Alimport decides all this on its own," *id.*, such explanation defies basic economics. If CIMEX opted not to carry U.S. goods, Alimport would not purchase them, or at the very least would not purchase them in the same quantities. Put differently, CIMEX's purchase of U.S. goods through Alimport creates demand for goods from the United States, and such demand constitutes a direct effect in the United States. Though the exact dollar amount of U.S. goods sold by CIMEX is unclear, the court safely can say it is valued in the millions annually; even Defendants do not seriously suggest it is a "trivial" amount.[3] Exxon therefore has established a prima facie case that CIMEX's sale of U.S. goods has a direct effect on U.S. markets. *See EIG Energy Fund XIV*, 894 F.3d at 345 (finding prima facie case where plaintiff had "alleg[ed] that [defendant] specifically targeted U.S. investors"); *see also Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 110 (2d Cir. 2016) (finding prima facie direct

[3] Exxon contends that "CIMEX imports hundreds of millions of dollars' worth of food and consumer goods from the U.S.," Pl.'s Br. at 21, but the State Department fact sheet Exxon cites refers to the export value of all U.S. goods to Cuba, not just those sold by CIMEX, Bureau of W. Hemisphere Affs., U.S. Dep't of State, U.S. Relations with Cuba, Bilateral Relations Fact Sheet (Nov. 22, 2019), https://www.state.gov/u-s-relations-with-cuba/. As a result, the exact dollar value of CIMEX's sale of U.S. goods is not established on this record.

effect where plaintiffs showed that defendant "contemplated investment by United States persons" and such investment actually occurred (internal quotation marks omitted)).

Defendants disclaim that Alimport is acting as CIMEX's agent when it purchases goods in the United States, *see* Second Valmaña Decl. ¶ 6, but even if no agency relationship actually exists, the fact that CIMEX affects U.S. markets through a third party does not render its buying and selling of U.S. goods an indirect effect. *Cf. EIG Energy Fund XIV*, 894 F.3d at 346 (rejecting "a highly restrictive causation requirement under which contributing factors readily and predictably caused by the defendant's same act would preclude jurisdiction"). That is especially true here where "Alimport is the *exclusive* importer [in Cuba] of foodstuffs from the United States." Second Valmaña Decl. ¶ 6 (emphasis added); *see also* Pl.'s Br., Decl. of Jared R. Butcher, Ex. 195, ECF No. 47-5, at 131 ("In May of 2002, the Cuban government designated Alimport as the exclusive purchasing agent for U.S. based companies that want to export food products direct from the United States to Cuba."). CIMEX cannot import goods from the United States itself, and so its procurement and sale of U.S. products must be accomplished through Alimport, the sole source authorized under Cuban law to purchase such goods. Alimport's role as exclusive importer of U.S. goods into Cuba is not the kind of "intervening element" that breaks or attenuates the causative chain. *See Princz*, 26 F.3d at 1172 (finding "[m]any events and actors necessarily intervened between" work the plaintiff performed as a slave in Nazi Germany for "firms directly supporting the Nazi war effort against the United States . . . and any effect felt in the United States"); *see also Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1185–86 (D.C. Cir. 2013) (rejecting theory that Iran's manufacture of a helicopter that resembled the helicopters the plaintiff manufactured created a disincentive for plaintiff "to create quality products" because such an "incentive-based theory would require the intervention of a host of

actors"). CIMEX's purchase and sale of imported U.S. goods from Essosa's confiscated property therefore satisfies, at the pleadings stage, the direct-effect requirement.[4]

iii. *Continued Use of the Confiscated Property*

Exxon next asserts that Defendants' unauthorized use of confiscated property causes a direct effect in the United States because it harms Exxon, a U.S. citizen. Pl.'s Br. at 23–25. Exxon adds that "Defendants' trafficking . . . cuts off a flow of capital, personnel, data, equipment, and materials to the U.S., including compensation that should be made to Plaintiff in the U.S." *Id.* at 24.

Exxon's argument is squarely foreclosed by *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175. In *Bell*, the D.C. Circuit explained that "[i]nterference with a property right does not necessarily demonstrate a 'direct effect' under the FSIA." *Id.* at 1184. Where "[a]ll of the tortious acts occurred outside of the United States[,] . . . [t]he fact that an American individual or firm suffers some financial loss from a foreign tort, cannot, standing alone, suffice to trigger the exception to immunity." *Id.* (internal quotation marks omitted); *see also Valambhia v. United Republic of Tanzania*, 964 F.3d 1135, 1142 (D.C. Cir. 2020) ("We have squarely held that 'harm to a U.S. citizen, in and of itself, cannot satisfy the direct effect requirement.'" (quoting *Cruise Connections*, 600 F.3d at 665)); *Allen v. Russian Federation*, 522 F. Supp. 2d 167, 189 (D.D.C. 2007) ("[A] mere financial loss to United States residents, without more, is not a direct effect in the United States." (internal quotation marks omitted)). The mere financial loss that Exxon arguably has sustained in the United States as a consequence of

[4] None of the foregoing is meant to suggest that discovery might not shed further light on the relationship between CIMEX and Alimport, and thus impact the court's ultimate view on whether CIMEX's purchase of U.S. goods from an intermediary for sale in its stores gives rise to a direct effect in the United States.

Defendants' trafficking in confiscated property thus does not constitute a direct effect for purposes of the commercial activity exception.

Exxon's contention that Defendants' conduct has "cut[] off a flow of capital, personnel, data, equipment, and materials in the U.S.," Pl.'s Br. at 24, fares no better. In so claiming, Exxon compares Defendants' alleged trafficking to the joint venture at issue in *Foremost-McKesson*, 905 F.2d 438. *See* Pl.'s Br. at 23–25. That analogy is a weak one, however, for Exxon's claim of domestic harm is entirely unsubstantiated even at the pleadings stage. In *Foremost-McKesson*, Iranian agencies and instrumentalities had entered into a joint venture with the plaintiff. *See* 905 F.2d at 440–41. Through the joint venture, Foremost assisted in establishing a dairy in Iran by "provid[ing] the top management for the dairy and controll[ing] its Board of Directors." *Id.* at 440–41. "[T]here was a constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging between the United States and Iran to support the operation of [the] Dairy." *Id.* at 451.

In contrast, Exxon has not alleged *any* flow of capital, personnel, or materials between the United States and Cuba. If anything, Exxon's allegations suggest that Standard Oil set up largely self-sufficient subsidiary operations in the Cuban market. For example, Exxon alleges that Standard Oil established a Panamanian subsidiary that had "responsibility for operations in the Caribbean Basin and headquarter[s] in Havana" and two exploration companies that were "qualified to do business in Cuba for exploring for and producing crude oil," maintained "an office in Cuba for geological studies[,] and owned assets incident to the functioning of the office." SAC ¶¶ 24, 26. Exxon makes no allegation that there was a steady flow of capital, management, or materials between Standard Oil and its subsidiaries in Cuba. Accordingly, Exxon has not

established a direct effect in the United States from Defendants' mere commercial use of confiscated assets.

iv. *Competition in the global oil market*

The court now turns its focus to CUPET. Exxon argues that CUPET's trafficking in confiscated property has had a direct effect in the United States because CUPET uses such property to compete with Exxon in the global oil market. *See* Pl.'s Br. at 25–27. Specifically, Exxon points to a number of joint ventures that CUPET has entered with Exxon's competitors that involve the use of Essosa's confiscated property, in particular the Ñicó Lopez Refinery. *Id.* at 26.

This argument is simply another version of Exxon's contention that it has been harmed by Defendants' continued use of confiscated property. It, too, fails to make out a direct effect. The court assumes for present purposes, without deciding, that trafficking in confiscated property could have a direct effect in the United States on the rightful owner's competitive position. But Exxon has alleged no such direct effect here. At most, it makes generalized allegations of competitive harm, which are not enough. Nowhere, for example, does Exxon allege that it actually has competed, domestically or internationally, against any joint venture involving CUPET. Nor has Exxon alleged that any other U.S. company has done so. Moreover, at least two of the joint ventures that Exxon cites—with Melbana Energy and Castrol, B.V.—involve exploration of Cuba's oil fields or production for the Cuban *domestic* market. *See id.* Exxon has not shown how it or any U.S. company could have competed in either marketplace given the U.S. sanctions regime against Cuba.

Exxon points to Congress's finding when passing the LIBERTAD Act that traffickers "profit[] from economically exploiting Castro's wrongful seizures" and have refused to pay the appropriate compensation. *See id.* at 27 (quoting 22 U.S.C. § 6081(11)). A congressional finding

is of course owed due consideration. But untethered from any real-world facts particular to the plaintiff before the court, such a finding cannot by itself establish a prima facie case for jurisdiction.

The cases on which Exxon relies to establish that anticompetitive effects constitute a direct effect are inapposite. In *WMW Machinery*, the court did not find that the foreign defendant's actions had a direct effect in the United States merely by harming the plaintiff's competitive advantage, as Exxon claims, *id.*; instead, the court found a direct effect where a joint venture agreement and agency contract created an obligation to export certain machine tools to the plaintiff in the United States. *WMW Machinery, Inc. v. Werkzeugmaschinehandel GmbH IM Aufbau*, 960 F. Supp. 734, 741 (S.D.N.Y. 1997) (holding "[t]he financial loss sustained by WMW was an 'immediate consequence' of the nonperformance of . . . contractual obligations" that required the export of "machine tools to WMW in the United States"). And in *American Bonded Warehouse Corp. v. Compagnie Nationale Air France*, the court found jurisdiction based on the defendant's alleged anticompetitive activities *in the United States* and thus did not need to consider whether activity outside the United States had a direct effect there. *See* 653 F. Supp. 861, 863–64 (N.D. Ill. 1987) (concluding the court had subject matter jurisdiction where defendant sought to eliminate competition in "an industry of freight forwarders specializing in consolidating shipments from people residing in America to their relatives and friends in Vietnam").

v. *CUPET's pollution of U.S. waters*

Exxon next claims that CUPET's operation of the confiscated refinery and processing facilities has polluted the Gulf of Mexico, constituting a direct effect in the United States. Pl.'s Br. at 27. Exxon also alleges that CUPET has participated in "lobbying and industry meetings" as a consequence of this polluting activity and that such participation independently causes a direct

effect in the United States. *Id.* at 27–28. Defendants respond that any pollution from the confiscated refinery has not passed through the boundary of U.S. territorial waters and therefore is beyond the United States for purposes of the FSIA. Defs.' Br. at 16. They further dispute that CUPET representatives participated in lobbying and industry meetings and argue that such meetings in any event are too trivial to constitute a direct effect. Defs.' Reply at 3–4.

CUPET's asserted pollution of the Gulf of Mexico does not constitute a direct effect in the United States on the present record because Exxon has failed to show that any such pollution has reached the territorial waters of the United States. For purposes of the FSIA, the "United States" is defined to "include[] all territory and waters, continental or insular, subject to the jurisdiction of the United States." 28 U.S.C. § 1603(c). The Supreme Court has interpreted that definition to refer exclusively to "the territorial jurisdiction of the United States," *Amerada Hess*, 488 U.S. at 441, which extends "12 nautical miles from the baselines of the United States determined in accordance with international law," Presidential Proclamation No. 5928, Territorial Sea of the United States of America, 54 Fed. Reg. 777, 777 (Dec. 27, 1988). Exxon alleges that CUPET's pollution extends "40-50 miles" from Cuba's shore, bringing it "at or near the United States-Cuba maritime boundary." SAC ¶ 103. The U.S.-Cuba maritime boundary, however, is farther ashore than the U.S. territorial boundary. *See* Office of Coast Survey, Nat'l Oceanic & Atmospheric Admin., U.S. Dep't of Commerce, U.S. Maritime Limits & Boundaries, https://nauticalcharts.noaa.gov/data/us-maritime-limits-and-boundaries.html (last visited Apr. 7, 2021) (delineating both the U.S. maritime boundary and the U.S. territorial boundary). Exxon therefore has not shown that CUPET's alleged pollution penetrates the U.S. territorial boundary, and thus has not established that pollution from the refinery has a direct effect in the United States.

Nor does the fact that CUPET representatives attended a handful of one-off meetings in the United States constitute a direct effect, at least on the present record. CUPET has disclosed five meetings concerning ecology that a single representative attended in the United States between November 2016 and March 2019, and Exxon points to those meetings as evidence of a direct effect. *See* Pl.'s Br. at 27 (citing Defs.' Mot., Second Decl. of Roberto Suárez Sotolongo, ECF No. 42-7 [hereinafter Second Sotolongo Decl.], ¶ 16). But these brief meetings did not "amount[] to more than transitory and insubstantial contact for purposes of the Act," and therefore cannot constitute a direct effect in the United States. *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1109 (D.C. Cir. 1982) (internal quotation marks omitted) (finding "two isolated meetings" did not support jurisdiction under first clause of commercial activity exception).

vi. *CIMEX (Panama)*

Exxon does not allege that CIMEX (Panama) has itself engaged in commercial activity that has a direct effect in the United States; rather, it seeks to secure jurisdiction based solely on the contention that CIMEX (Panama) is the alter ego of Cuban CIMEX. *See* Pl.'s Br. at 29, 60; SAC ¶ 3. In support, Exxon claims that CIMEX and CIMEX (Panama) "shar[e] the ultimate same ownership, with the same officers and directors, working out of the same office at the same address without any regard for corporate formalities or respecting the separateness of either entity." SAC ¶ 3. These allegations are sparse to say the least, and they are not sufficient to overcome CIMEX (Panama)'s presumed immunity, even at the pleadings stage. *See McWilliams Ballard, Inc. v. Broadway Mgmt. Co.*, 636 F. Supp. 2d 1, 7 (D.D.C. 2009) (noting veil piercing is appropriate only "upon proof, that there is (1) unity of ownership and interest, and (2) use of the corporate form to perpetrate fraud or wrong, or other considerations of justice and equity justify it" (internal quotation marks omitted) (quoting *Estate of Raleigh v. Mitchell*, 947 A.2d 464, 470 (D.C. 2008)).

* * *

In sum, with respect to the requirement of direct effects in the United States, the court concludes: (1) CIMEX's processing of remittances and its purchase and sale of goods imported from the United States have a direct effect in the United States; (2) Defendants' use of Exxon's confiscated property and CUPET's competition in the global oil market, alleged pollution, and participation in a handful of meetings in the United States have not caused a direct effect in the United States; and (3) no acts of CIMEX (Panama), directly or as an alter ego of CIMEX, have been shown to have a direct effect in the United States.

*3. The Expropriation Exception*

Exxon also argues that the court has subject matter jurisdiction over this dispute under the FSIA's expropriation exception. *See* Pl.'s Br. at 34. As relevant to Exxon's claims, the expropriation exception strips a foreign state's immunity in any case:

> in which rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3). "For the exception to apply, . . . the court must find that: (1) rights in property are at issue; (2) those rights were taken in violation of international law; and (3) a jurisdictional nexus exists between the expropriation and the United States." *Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 475 (D.C. Cir. 2007) (cleaned up). The parties lodge numerous arguments about the expropriation exception's applicability, but the court finds that whether Exxon has identified a property right recognized by international law is dispositive of their dispute. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.* (*Helmerich II*), 137 S. Ct. 1312, 1319 (2017) (explaining "whether the rights asserted are rights of

a certain kind, namely, rights in 'property taken in violation of international law,' is a jurisdictional matter").

Exxon alleges that its rights in property were taken when Cuba nationalized the assets of its subsidiary Essosa. *See* SAC ¶¶ 28–31, 92–101, 107–110, 116. Defendants argue that Exxon does not have a property right in the assets of its subsidiary under international law because, while a parent company has an *interest* in the rights of its subsidiary's property, only the subsidiary has rights in its property. *See* Defs.' Br. at 21–25. As Defendants see the matter, a parent's property rights in its subsidiary are not in issue unless the state takes over the subsidiary's entire enterprise, and Cuba has not taken over Essosa's entire enterprise. *See id.* at 23–25. Relying on decisions of the Iran-United States Claims Tribunal and a number of arbitration rulings, Exxon responds that it does not need to show that Essosa's entire enterprise was taken over in order to establish a property right recognized by international law. Pl.'s Br. at 42–45.

To determine whether Exxon has a property right that was taken in violation of international law, the court looks to customary international law.[5] *See Philipp*, 141 S. Ct. at 715 ("[T]he phrase 'rights in property taken in violation of international law,' as used in the FSIA's expropriation exception, refers to violations of the international law of expropriation."); *Helmerich III*, 743 F. App'x at 449 (noting that where an "express international agreement, such as a treaty" does not control, the court looks to "customary international law"). Customary international law refers to "the 'general and consistent practice' that states follow out of 'a sense of legal obligation' to the international community." *Helmerich III*, 743 F. App'x at 449 (quoting *Restatement (Third) of the Foreign Relations Law of the United States* § 102(2)).

[5] Exxon initially argued that "U.S. cases interpreting the expropriation exception's elements control over international law." Pl.'s Br. at 42. Following the Supreme Court's decision in *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, however, Exxon abandoned that argument. *See* Pl.'s Notice of Suppl. Authority, ECF No. 55, at 2 n.1.

The D.C. Circuit in *Helmerich III* explained the state of customary international law with respect to the property rights at issue here: that of a shareholder in the expropriated assets of a wholly owned subsidiary. *See id.* at 454 ("Our question, therefore, is whether H&P-IDC [the parent] has adequately alleged that Venezuela and [its state-owned entities] expropriated H&P-V [the subsidiary] itself in violation of international law."). The court there observed that "[i]nternational law undisputedly protects the 'direct rights' shareholders enjoy in connection with corporate ownership, including 'the right to any declared dividend, the right to attend and vote at general meetings, [and] the right to share in the residual assets of the company on liquidation.'" *Id.* (quoting *Barcelona Traction, Light & Power Co.* (Belg. v. Spain), Judgment, 1970 I.C.J. 3, 36 ¶ 47 (Feb. 5)). Furthermore, "[i]t is also well established that a state violates international law if it takes 'measures that have an effect equivalent to a formal expropriation of [a foreign] shareholder's own property rights,' even if the state does not formally divest the shareholder of its shares." *Id.* (quoting Suppl. Br. for the U.S. as Amicus Curiae at 10, *Helmerich III*, 743 F. App'x 442 (No. 13-7169), 2018 WL 2981075, at *10 [hereinafter U.S. Suppl. Br.]). But "not every state action that has a detrimental impact on a shareholder's interests amounts to an indirect expropriation of the shareholder's ownership rights." *Id.* Only "where state action 'is aimed at the direct rights of the shareholder as such,'" can the action "form the basis for an international expropriation claim." *Id.* (quoting *Barcelona Traction*, 1970 I.C.J. at 36, ¶ 47). Quoting from an amicus brief submitted by the United States, the Circuit detailed:

> [W]hen a state permanently takes over management and control of [a foreign shareholder's] business, completely destroying the beneficial and productive value of the shareholder's ownership of their company, and leaving the shareholder with shares that have been rendered useless, it has indirectly expropriated the ownership

> of that business and has responsibility under customary international law to provide just compensation to the shareholder.

*Id.* (quoting U.S. Suppl. Br. at 12). On the other hand, "a state's expropriation of a corporation's property that does not result in the expropriation of the entire enterprise is not an indirect expropriation of foreign shareholders' direct rights under customary international law, even if it reduces the value of the shares to zero." U.S. Suppl. Br. at 10.

Exxon urges that international law states just the opposite. Relying on decisions of the Iran-United States Claims Tribunal and investor-state arbitration rulings as evidence of customary international law, Exxon argues that customary international law permits a parent company to bring a claim based on its indirect interest in its subsidiary's property. *See* Pl.'s Br. at 43–44. But Exxon's reliance on the decisions of the Iran-United States Claims Tribunal is misplaced. That Tribunal's decisions reflect the application of a specific agreement between Iran and the United States. *See* Office of the Assistant Legal Adviser for Int'l Claims & Inv. Disputes, U.S. Dep't of State, Iran-U.S. Claims Tribunal, https://www.state.gov/iran-u-s-claims-tribunal/ (last visited Mar. 23, 2021). "[S]pecific, bargained-for agreements between nations . . . offer little evidence that the signatories would perceive 'a sense of legal obligation' to follow the same rules under international custom absent a negotiated treaty." *Helmerich III*, 743 F. App'x at 452 (quoting *Restatement (Third) of the Foreign Relations Law of the United States* § 102(2)). Nor can the handful of investor-state arbitration decisions on which Exxon relies overcome the contrary view of the International Court of Justice, which is "accorded great weight" in determining customary international law, *see Restatement (Third) of the Foreign Relations Law of the United States* § 103 cmt. b. Put simply, Exxon has not marshalled enough evidence from reputable sources of customary international law to support its position that, as a general and consistent practice of

states, a parent holds property rights in the assets of its subsidiary whose value has not been entirely destroyed by an expropriation. *See Helmerich III*, 743 F. App'x at 449.

The question before the court therefore is whether Cuba's expropriation of Essosa's Cuban property "completely destroy[ed] the beneficial and productive value of [Exxon's] ownership of" Essosa, effectively rendering Exxon's shares "useless." *Id.* at 455. The undisputed evidence is that Cuba's expropriation did not have such effect. Defendants have presented substantial evidence of Essosa's continued operation even after the confiscation of its Cuban assets. *See* Defs.' Mot., Decl. of Lindsey Frank, ECF No. 42-10, ¶¶ 2–19. They have (1) identified deeds filed with the Public Registry in Panama showing that Essosa has consistently held annual shareholders meetings and that Essosa held Board of Directors meetings as recently as 2019, *id.* ¶¶ 2–5; (2) produced a 2011 court decision noting that Essosa operated at least 40 fuel stations at the time, *id.* ¶ 11; and (3) submitted public records showing that Essosa began operating as Puma Energy Standard Oil, S.A. in 2012 and is currently listed as a company in good standing in the Public Registry of Panama, *id.* ¶¶ 6, 18–19. While Exxon does not explicitly concede that Essosa remains in operation, it has not challenged the voluminous evidence Defendants have produced; its only argument on this score is that it does not need to show that Essosa is defunct. *Cf.* Pl.'s Br. at 42–43 (arguing that it "need not demonstrate that Essosa dissolved"). Because Exxon's claim concerns Essosa's property and Essosa continues to operate as a going concern, Exxon has not established that Cuba's expropriation deprived it of property in violation of international law.

Exxon resists this conclusion by arguing that this court "must presumptively accept Plaintiff's certified claim [from the FCSC] as conclusive proof of Plaintiff's ownership interest in the property at issue." Pl.'s Br. at 40–41. But that argument suffers from two problems. First, the FCSC's certification of a claim at most creates a property right under domestic law, not

international law. And second, the FCSC certifies claims for ownership interests that are broader than the property rights recognized under customary international law. The FCSC has jurisdiction to adjudicate "any rights *or interests* . . . owned wholly or partially, directly *or indirectly* . . . by nationals of the United States." 22 U.S.C § 1643b(a) (emphasis added). By contrast, the expropriation exception requires the plaintiff to identify "rights in property" that have been "taken in violation of international law," 28 U.S.C. § 1605(a)(3); *see also Helmerich II*, 137 S. Ct. at 1319 ("[W]hether the rights asserted are rights of a certain kind, namely, rights in 'property taken in violation of international law,' is a jurisdictional matter . . . ."), and as discussed, international law protects a shareholder's indirect interests in its subsidiary's property against an expropriation only in limited circumstances not applicable here, *see Barcelona Traction*, 1970 I.C.J. at 36, ¶ 44 (noting "a shareholder's interests" may be "harmed by an act done to the company," but "it is only one entity"—the company—"whose rights have been infringed"). Thus, Exxon's FCSC claim does not create a presumption that Exxon has a property right that has been taken in violation of international law, and the expropriation exception does not apply.[6]

[6] Exxon's contention that *Garcia-Bengochea v. Carnival Corp.*, 407 F. Supp. 3d 1281 (S.D. Fla. 2019), supports the proposition that "indirect ownership is permissible" under the expropriation exception is frankly baffling. *Garcia-Bengochea* did not address the expropriation exception. Exxon's citations supporting its claim that "the ultimate owner of an expropriated corporate interest may pursue a claim for expropriation" are likewise inapposite. *See* Pl.'s Br. at 41. The D.C. Circuit's vacated decision in *Helmerich I*, 784 F.3d 804, cannot trump the court's pronouncement on remand that "not every state action that has a detrimental impact on a shareholder's interests amounts to an indirect expropriation of the shareholder's ownership rights," *Helmerich III*, 743 F. App'x at 454. And Exxon's cherry-picked quote from *Nemariam*, 491 F.3d at 478, that "a controlling interest in the corporation's stock [is] no different from the corporation's physical assets under section 1605(a)(3)" is unhelpful because the D.C. Circuit there merely held that the expropriation exception extended to both tangible and intangible property rights, *id.* at 479–80 ("The plain language of section 1605(a)(3) . . . does not limit its application to tangible property.").

### C. Jurisdictional Discovery

To recap, the court has found that the commercial activity exception reaches Exxon's Title III claim against CIMEX, but not against CUPET or CIMEX (Panama). The court also has concluded that the expropriation exception cannot sustain a claim against any Defendant.

Instead of dismissing aspects of its claim that fall short under the FSIA immunity exceptions, Exxon asks the court to order jurisdictional discovery. Pl.'s Br. at 33–34. Specifically, as relevant to CUPET and CIMEX (Panama), Exxon asks for "discovery to test Defendants' declarations" concerning (1) "[t]he overlapping relationships and operations of CUPET, CIMEX-Cuba, and CIMEX-Panama, and the Cuban State's influence and control over each of their operations," (2) "[t]he lack of independence of Defendants' divisions and *empresas*, including their failure to observe corporate formalities, the extent of Defendants' control over them, and their contacts with the U.S. while acting as agents of Defendants," and (3) "[t]he nature, purpose, and extent of Defendants' admitted contacts with various U.S. government officials and private companies, including during travel to the U.S." *Id.* at 34.

In the context of the FSIA, the D.C. Circuit has said that trial courts "*must* give the plaintiff '*ample opportunity* to secure and present evidence,'" but that "[i]n order to avoid burdening a sovereign that proves to be immune from suit . . . jurisdictional discovery should be carefully controlled and limited." *Phx. Consulting*, 216 F.3d at 40 (emphasis added) (quoting *Prakash*, 727 F.2d at 1179–80); *see also Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 281 (D.C. Cir. 2014) ("[D]iscovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." (quoting *First City, Tex.-Hous., N.A. v. Rafidian Bank*, 150 F.3d 172, 176 (2d Cir. 1998))). Assertions amounting to "mere conjecture and surmise" "cannot

provide sufficient support to justify jurisdictional discovery." *Nyambal*, 772 F.3d at 281 (internal quotation marks omitted).

Though the court thinks it is a close call, it will permit limited jurisdictional discovery into the topics identified by Exxon concerning CUPET's and CIMEX (Panama)'s trafficking activities that may have caused direct effects in the United States. Such discovery is limited to the three topics the court has identified. *See supra* pp. 42 (identifying these topics). With respect to CUPET, Defendants have downplayed the significance of CUPET's contacts with the United States, *see* Second Sotolongo Decl. ¶¶ 16–17, and the court has relied on those representations to hold, on the present record, that the commercial activity exception does not apply to CUPET, *see supra* pp. 35. Exxon is entitled to discovery as to those representations. As for CIMEX (Panama), its status as a defendant rests on its relationship with CIMEX, which Exxon contends is one of alter ego. "Our courts have ordered discovery to illuminate alter ego disputes before deciding dispositive motions which asserted lack of jurisdiction over the alleged alter ego." *Material Supply Int'l, Inc. v. Sunmatch Indus. Co.*, 62 F. Supp. 2d 13, 23 (D.D.C. 1999); *see also Melikian v. Corradetti*, 791 F.2d 274, 281–82 (3d Cir. 1986) (ordering discovery on corporate veil piercing because "[t]he issue of whether the corporate veil . . . can be pierced is primarily a question of fact"); *Edgar v. Fred Jones Lincoln-Mercury of Okla. City, Inc.*, 524 F.2d 162, 166–67 (10th Cir. 1975) (permitting discovery on whether to pierce the corporate veil even though it was "clear that the plaintiff's allegations concerning stock ownership and interlocking directors were insufficient standing alone to justify disregard of the corporate entity"). The court therefore will allow limited jurisdictional discovery into the corporate separateness of CIMEX and CIMEX (Panama).

**D. Standing**

In addition to their sovereign immunity defense, Defendants argue that Exxon lacks standing to bring this action. Defs.' Br. at 45–46. Specifically, Defendants argue that Exxon's only injury is the loss of Essosa's property due to Cuba's expropriation of that property and Defendants' alleged trafficking has not injured Exxon. *See id.* at 46. Exxon responds that it suffered and continues to suffer an invasion of its interests because "Defendants have not compensated Plaintiff or obtained Plaintiff's authorization for use of the Confiscated Property, as Congress required." *See* Pl.'s Br. at 9–11.

A plaintiff has standing if she has "suffered an injury in fact" that is both causally connected to "the conduct complained of" and can "be redressed by a favorable decision" from the court. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (internal quotation marks omitted).

The Supreme Court recognized in *Spokeo* that "Congress may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,'" *id.* at 1549 (quoting *Lujan*, 504 U.S. at 578), and "'has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,'" *id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)). Thus, Congress may identify a harm that constitutes an injury in fact, so long as that injury is sufficiently "concrete." *See id.*; *see also Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016) ("[W]hile a legislature may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously

inadequate in the law, the legislature cannot dispense with the constitutional baseline of a concrete injury in fact." (internal quotation marks omitted)).

Here, there can be no question that Congress legislated an injury in fact in Title III. Pursuant to section 6082, "any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property." 22 U.S.C. § 6082(a)(1)(A). In so legislating, Congress recognized that U.S. nationals with claims to trafficked confiscated property have suffered an injury. Exxon has asserted just such an injury. *See* SAC ¶ 131 ("CIMEX Cuba, CIMEX Panama, and/or CUPET have and continue to traffic in the Confiscated Property to which Plaintiff owns the claim . . . .").

And Exxon's injury is concrete. *See Spokeo*, 136 S. Ct. at 1549. "A 'concrete' injury must be '*de facto*'; that is, it must actually exist," *id.* at 1548 (quoting Black's Law Dictionary 479 (9th ed. 2009)), and an injury is concrete if it is "real, and not abstract," *id.* (internal quotation marks omitted). Exxon possesses a claim from the FCSC certifying that it "suffered a loss in the total amount of $71,611,002.90." FCSC Claim at 9. Quite plainly, a loss totaling almost $72 million constitutes a real and not abstract injury, and Exxon has sufficiently satisfied the concreteness element of standing.

Defendants next argue that there is no causal connection between their unlawful conduct and Exxon's injury. Defs.' Br. at 46. Defendants again miss the mark by characterizing Exxon's injury as the expropriation of Essosa's property. *See id.* Congress has defined Exxon's injury in terms of the effects of trafficking in the confiscated property, and that injury is plainly "fairly traceable" to Defendants' alleged trafficking—"not the result of the independent action of some third party not before the court." *See Lujan*, 504 U.S. at 560 (cleaned up).

Finally, although Defendants do not challenge the redressability of Exxon's injury, it is clear that, if Defendants are found liable in this action, Title III provides for Exxon to receive "the amount, if any, certified to [it] by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, plus interest." 22 U.S.C. § 6082(a)(1)(A)(i)(I). A favorable decision would therefore redress Exxon's injury. *See Lujan*, 504 U.S. at 561.

The court concludes that Exxon has Article III standing to bring a claim under Title III of the LIBERTAD Act.

## V. CONCLUSION AND ORDER

For the foregoing reasons, the court grants in part and defers in part Defendants' Motion to Dismiss. The court denies Defendants' Motion to Dismiss as to CIMEX and orders limited jurisdictional discovery as to CUPET and CIMEX (Panama). The parties shall meet and confer and propose to the court by May 4, 2021, a schedule for discovery that is consistent with the limited scope of discovery described in this Memorandum Opinion and Order.

Dated: April 20, 2021

Amit P. Mehta
United States District Court Judge

# APPENDIX B

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| **EXXON MOBIL CORPORATION,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Case No. 19-cv-1277 (APM)** |
| | ) | |
| **CORPORACIÓN CIMEX S.A. et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |
| | ) | |

**MEMORANDUM OPINION AND ORDER**

Plaintiff Exxon Mobil Corporation brought this action under Title III of the Cuban Liberty and Democratic Solidarity Act of 1996 (LIBERTAD), 22 U.S.C. § 6082(a)(1)(A), to recover money damages arising from the trafficking of confiscated property by various Defendants who are instrumentalities of the Cuban government. On April 20, 2021, the court held that it has subject matter jurisdiction over one such instrumentality, Defendant Corporación Cimex (S.A.) ("CIMEX"), under the commercial activity exception to the Foreign Sovereign Immunities Act ("FSIA"). *Exxon Mobil Corp. v. Corporación CIMEX S.A.*, No. 19-cv-1277 (APM), 2021 WL 1558340, at *17 (D.D.C. Apr. 20, 2021). It also ordered limited jurisdictional discovery as to two other instrumentalities, Defendants Unión Cuba-Petróleo and Corporación CIMEX S.A. (Panama). *Id.* at *20. A central issue before the court was whether it could exercise subject matter jurisdiction pursuant to the commercial activity exception or whether the expropriation exception alone applied. *Id.* at *8. The court held that it could consider jurisdiction under both exceptions and ultimately found only the commercial activity exception was satisfied. *Id.* at *8–19.

Just three days after issuing its decision, the D.C. Circuit decided *Ivanenko v. Yanukovich*, which also considered the interaction of the expropriation and commercial activity exceptions. *See*

995 F.3d 232, 234 (D.C. Cir. 2021). To ensure that its decision was consistent with current D.C. Circuit precedent, the court ordered the parties to notify it if they "believe[d] that the *Ivanenko* decision impact[ed] this court's" prior decision. Minute Order, Apr. 23, 2021.

Defendants took the court up on its invitation. They filed a motion for reconsideration that is ostensibly based on the D.C. Circuit's decision in *Ivanenko*. *See* Defs.' Mot. Pursuant to the Court's Apr. 23, 2021 Minute Order, ECF No. 66 [hereinafter Defs.' Mot.]. It suffices to say that Defendants' motion argues more than just the applicability of *Ivanenko*. Although perhaps more than it bargained for, the court nonetheless has exercised its discretion to consider Defendants' additional arguments regarding the applicability of the commercial activity exception. For the reasons that follow, the court denies Defendants' motion for reconsideration.

**I.**

In *Ivanenko v. Yanukovich*, the D.C. Circuit held that Ukraine was flexing "quintessentially sovereign" powers when it seized the plaintiffs' property via "an exercise of eminent domain." 995 F.3d at 239 (quoting *Rong v. Liaoning Province Gov't*, 452 F.3d 883, 890 (D.C. Cir. 2006)). The D.C. Circuit found that Ukraine's confiscation of the plaintiffs' property "could not have been carried out by a private participant in the marketplace," and regardless of Ukraine's "motives" in confiscating the property and "subsequent use" of the plaintiffs' property as a golf course and sports facility, its exercise of sovereign powers precluded application of the commercial activity exception. *Id.* The court cautioned that a foreign sovereign's "'subsequent acts' with [a plaintiff's] property" do not necessarily "'transform the expropriation into commercial activity.'" *Id.* (alteration omitted) (quoting *Rong*, 452 F.3d at 890). Otherwise, the court reasoned, "'almost any subsequent disposition of expropriated property could allow the sovereign to be haled into federal court under FSIA.'" *Id.* (quoting *Rong*, 452 F.3d at 890).

This potential to end-run the expropriation exception by relying on the commercial activity exception is at the heart of Defendants' motion for reconsideration. They argue that, even if the commercial activity exception can be read literally to apply to claims related to expropriated property (that is, to claims like Exxon's trafficking claim), the court should refrain from applying the commercial activity exception because to do so would allow plaintiffs to sue foreign sovereigns for expropriation without satisfying the expropriation exception's requirement that the expropriation violate international law. *See* Defs.' Mot., Defs.' Mem. of P. & A. in Supp. of Defs.' Mot. Pursuant to Court's April 23, 2021 Minute Order, ECF No. 66-2 [hereinafter Defs.' Br.], at 2–7. With careful pleading, Defendants urge, any claim for expropriation could be rewritten as a claim for trafficking. *See id.* The court rejects these concerns as applied to this case.

The Supreme Court's decisions in *Saudi Arabia v. Nelson* and *OBB Personenverkehr AG v. Sachs* teach that the court must separate antecedent conduct that is related to a wrongful act from the conduct that actually forms the "foundation" of the claim. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 36 (2015); *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993). In *Nelson*, the Court refused to apply the commercial activity exception to claims of personal injury that arose from plaintiff Scott Nelson's performance of an employment contract with Saudi Arabia. 507 U.S. at 358. Saudi Arabia's recruitment and employment of Nelson "alone," the Supreme Court explained, "entitle[d] the Nelsons to nothing under their theory of the case." *Id.* Rather, the Nelsons' claim concerned "personal injuries caused by [Saudi Arabia's] intentional wrongs and by [Saudi Arabia's] negligent failure to warn Scott Nelson that [it] might commit those wrongs." *Id.* The Court concluded that "[t]hose torts, and not the arguably commercial activities that *preceded* their commission, form[ed] the basis for the Nelsons' suit." *Id.* (emphasis added). Likewise, in *Sachs*, the Supreme Court explained that it lacked jurisdiction over the plaintiff's

claims for "traumatic personal injuries [sustained] when she fell onto the tracks at the Innsbruck, Austria, train station." *Sachs*, 577 U.S. at 29, 36. Even though the plaintiff had purchased a Eurail pass in the United States to board the train, the antecedent commercial activity of selling the Eurail pass did not give rise to liability on plaintiff's claims "[w]ithout the existence of the unsafe boarding conditions in Innsbruck." *Id.* at 35. Therefore, the Court held, "the incident in Innsbruck" was the "foundation" of plaintiff's claim, not the U.S. ticket sale. *Id.* at 35–36.

Here, the "foundation" of Exxon's Title III claim is a private commercial act, and not the antecedent sovereign act of expropriation. A sovereign is not immune for the former type of act but remains immune with respect to the latter. *See Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, 713 (2021) (stating that, under the "restrictive view" of sovereign immunity embodied in the FSIA, "immunity extends to a sovereign's public but not its private acts," and that the commercial activity exception "comport[s] with the overarching framework of the restrictive theory"); *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017) ("[W]e . . . began to limit our recognition of sovereign immunity, denying that immunity in cases 'arising out of a foreign state's strictly commercial acts,' but continuing to apply that doctrine in 'suits involving the foreign sovereign's *public acts*,'" (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983))). Title III creates liability for "any person that . . . traffics" in "property confiscated by the Cuban government on or after January 1, 1959." 22 U.S.C. § 6082(a)(1)(A). The term "traffics" is defined in purely commercial terms. It encompasses, broadly speaking, the use or disposition of the confiscated property.[1] The original

[1] A person "'traffics' in confiscated property if that person knowingly and intentionally –

> (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,

public act of confiscation by the sovereign alone does not constitute "trafficking." Confiscation without trafficking is therefore *not* actionable under Title III. *See Exxon Mobil Corp.*, 2021 WL 1558340, at *9 (observing that "liability under the Act attaches only when a U.S. person's property has been confiscated *and* trafficked"). The definition of "person" further underscores that the "foundation" of a Title III claim is a commercial act, and not a sovereign one. "Person" is defined to mean "any person or entity, *including* any agency or instrumentality of a foreign state." 22 U.S.C. § 6023(11) (emphasis added). So, Title III makes any subsequent user of confiscated property, and not just an "agency or instrumentality" of Cuba, liable for trafficking in such property. These statutory definitions thus make clear that private commercial activity, and not the sovereign act of expropriation, is at the heart of Exxon's claim under Title III. Evaluating a "trafficking" claim under the commercial activity exception, as the court did here, naturally follows from that conclusion.

This straightforward reading of Title III should settle the matter, but Defendants argue that more is necessary. They urge that, "when, as here, there are FSIA provisions that more explicitly and precisely address the particular activity at hand, and with restrictions not found in the commercial activity exception," the Supreme Court's decision in *Federal Republic of Germany v. Philipp* "teaches that an additional analysis must be undertaken." Defs.' Reply Mem. of P. & A. in Supp. of Mot. Pursuant to the Court's Apr. 23, 2021 Minute Order & For Recons., ECF No. 69,

---

> (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
> (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,
>
> without the authorization of any United States national who holds a claim to the property."

22 U.S.C. § 6023(13).

at 8. In *Philipp*, the Supreme Court declined to apply the expropriation exception to a plaintiff's claims that Germany had expropriated an art collection from Jewish citizens during the Holocaust. *See* 141 S. Ct. at 708–09. The would-be heirs of the art collection argued that the Court had jurisdiction over the dispute under the expropriation exception to the FSIA—which applies to "property taken in violation of international law," 28 U.S.C. § 1605(a)(3)—because "Germany's purchase of the [art] was an act of genocide and the taking therefore violated the international law of genocide." *Philipp*, 141 S. Ct. at 709. The Supreme Court disagreed. "[T]he expropriation exception," it explained, "is best read as referencing the international law of expropriation rather than of human rights." *Id.* at 712. In so holding, the Supreme Court noted that the expropriation exception was not the best vehicle for claims based on human rights abuses because "[w]here Congress did target injuries associated with such acts, including torture or death, it did so explicitly and with precision." *Id.* at 713. Those provisions targeting human rights abuses and the restrictions on jurisdiction they incorporated, the Court reasoned, "would be of little consequence if human rights abuses could be packaged as violations of property rights and thereby brought within the expropriation exception to sovereign immunity." *Id.* at 714.

Defendants hang their hats on that final passage of *Philipp*. They argue that *Philipp* stands for the proposition that even though an exception, "when read literally," can apply to a given situation, it should not be applied where a more obvious exception could also apply. *See* Defs.' Br. at 5–7. And here, they suggest, the expropriation exception is the better fit.

Defendants' attempt to wring a new analytical framework from *Philipp* is unavailing. There, the Supreme Court relied on the "legal and historical backdrop" in which Congress drafted the expropriation exception to conclude that the phrase "rights in property taken in violation of international law," 28 U.S.C. § 1605(a)(3), is "best read as referencing the international law of

expropriation rather than of human rights." *Philipp*, 141 S. Ct. at 712. The Supreme Court thus never held that the expropriation exception could "literally" apply to property taken in violation of the international law of genocide at all.

Nor does the court read *Philipp* to subtly require a court to determine in all cases whether another exception "more explicitly and precisely address[es] the particular activity at hand" before finding conduct fits under a given FSIA exception. *See* Defs.' Reply at 8. *Philipp* referred to the provisions of the FSIA that explicitly address human rights to explain how Congress's approach to codifying exceptions for human rights abuses differs from Congress's approach in the expropriation context, not to mandate that courts apply only the FSIA exception best suited for a claim. *See* 141 S. Ct. at 713–14. The Court considered the expropriation exception a poor fit for the plaintiffs' claims because the expropriation exception does not bear the restrictive hallmarks of other FSIA exceptions based on human rights and because there was "no reason to suppose Congress thought acts of genocide or other human rights violations to be especially deserving of redress only when accompanied by infringement of property rights." *Id.* at 714. The Court was not, however, requiring lower courts to apply the best fitting FSIA exception—and only the best fitting FSIA exception—in all cases. In fact, later in the opinion, the Court noted that "[c]laims concerning Nazi-era art takings could be brought under the expropriation exception" so long as the property was taken in violation of the international law of expropriation. *Id.* at 715. Far from a wide-ranging instruction that only the most plainly applicable FSIA exception can be invoked for a claim, the Court was simply instructing that the conduct complained of must fit the exception.[2]

[2] Defendants also appear to suggest that *Philipp* did away with the requirement that the court look to the "gravamen" of the plaintiff's claim in determining whether the commercial activity exception applies, arguing that "[t]he gravamen

Defendants further protest that applying the commercial activity exception to property that was also expropriated would ruffle foreign feathers because it would permit claims based on takings that were not committed in violation of international property law. Defs.' Br. at 5–6. But Congress had to consider the effect on international relations of *every* exception to foreign sovereign immunity, including the commercial activity exception, in drafting the FSIA. Defendants have given the court no reason to believe that Congress thought that the restrictions in the commercial activity exception—all of which limit jurisdiction to claims with some connection to commerce in the United States, *see* 28 U.S.C. § 1605(a)(3)—were insufficient to preserve international relations while prosecuting offensive conduct. And, importantly in this case, Congress knew that the private cause of action it had created likely would lead to confrontation with Cuba. That is surely why Congress empowered the President to suspend Title III's private right of action for sequential periods of up to six months upon notification to Congress that "the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." *Id.* § 6085(b)(2). Thus, Defendants' concern that relying on the commercial activity exception here might "produc[e] friction in our relations" with Cuba is a consequence that Congress already considered and embraced. *Helmerich & Payne*, 137 S. Ct. at 1322.[3]

Nor can the court agree, as Defendants argue, that "Congress has addressed the immunity of agencies that are engaged in the commercial use of expropriated property" only in the expropriation exception. Defs.' Br. at 6 (emphasis omitted). Despite Defendants' repeated

---

analysis may not always be the best tool to respect and implement the FSIA's purpose and framework." Defs.' Br. at 7. But nothing in *Philipp* suggests any divergence from the "gravamen" analysis required by *Nelson* and *Sachs*.

[3] The court has been given no reason to believe that any nation other than Cuba could be subject to a Title III claim. Neither party has identified any instance in which Cuba has sold expropriated property to another sovereign that now "traffics" in that property.

insistence, neither the Supreme Court nor the D.C. Circuit has instructed that only one FSIA exception may apply to a given claim, even if the case involves expropriated property. Indeed, the D.C. Circuit has "never held that in order to proceed against a foreign government, a claim must fall into just one FSIA exception." *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1103 (D.C. Cir. 2017). To the extent Defendants suggest that *Philipp* altered that holding, it is not this court's place to so hold. *See United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) ("[D]istrict judges, like panels of this court, are obligated to follow controlling circuit precedent until either we, sitting en banc, or the Supreme Court, overrule it."); *Nat'l Wildlife Fed'n, Inc. v. U.S. Army Corps of Eng'rs*, 314 F. Supp. 3d 126, 130 (D.D.C. 2018) ("[T]his Court is not free to ignore binding circuit precedent because of a possible inconsistency with an intervening decision of the Supreme Court.").

Finally, Defendants assert without citation or explanation that "there is no basis in international law at all, whether in 1976 or now, for applying the 'commercial activity' exception on the basis of the commercial use of expropriated property." Defs.' Br. at 6. It is frankly unclear what Defendants meant for the court to take away from this passing remark. Regardless, they cite no authority—international or domestic—for the proposition that a case involving confiscated property categorically must satisfy the expropriation exception and can qualify under no other exception.

**II.**

Next, Defendants grapple with the fact that the D.C. Circuit has twice applied the commercial activity exception in cases involving expropriated property, first in *Foremost-McKesson v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 2017), and then in *de Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017). Defendants contend that in those cases the

"proper showing" of commercial activity was made because, unlike here, the parties had a relationship outside the expropriation of property. Defs.' Br. at 7–8. In contrast, they argue, in cases, like this one, where there was no contractual or commercial relationship between the parties other than the expropriation, the D.C. Circuit has found the commercial activity exception inapplicable. Defs.' Br. at 8 (citing *Rong*, 452 F.3d at 889–90).

The touchstone of the commercial activity exception, however, is not the parties' relationship to one another. Rather, it is whether commercial activity forms "the 'basis' or 'foundation' for a claim"; whether commercial activity gives rise to the "'elements . . . that if, proven, would entitle a plaintiff to relief'"; and whether "'the gravamen of the complaint'" sounds in commercial activity. *Sachs*, 577 U.S. at 33–34 (quoting *Nelson*, 507 U.S. at 357). Thus, while Defendants have identified a feature of *Foremost-McKesson* and *de Csepel* that is not present here, they have not established that *Foremost-McKesson* and *de Csepel* compel this court to apply an inquiry beyond the one the Supreme Court articulated in *Sachs* and *Nelson*.

Moreover, this case is different from those like *Rong* and *Ivanenko*, in which the expropriation itself gave rise to the claim and caused the harm sought to be remedied, and the plaintiff relied on subsequent commercial acts to secure jurisdiction under the commercial activity exception. *See Ivanenko*, 995 F.3d at 236 (noting the Ivanenkos brought claims under the Racketeer Influenced and Corrupt Organizations Act and for "wrongful expropriation, fraud, abuse of process, and conversion"); *Rong v. Liaoning Provincial Gov't*, 362 F. Supp. 2d 83, 86 (D.D.C. 2005) (noting Rong asserted claims "for conversion, expropriation, the violation of international law and unjust enrichment"). Here, the core of a Title III claim is "trafficking," which is quintessentially a commercial act. It is the trafficking of expropriated property that gives rise to the injury and the cause of action that Congress defined, not the original expropriation itself. Thus,

unlike in *Rong* and *Ivanenko*, the court does not need to stretch the original confiscation of property to implicate the commercial activity exception.

**III.**

Finally, Defendants point to three other cases to support their position, but none persuades the court to change course. Defendants first cite to *Garb v. Republic of Poland*, where the Second Circuit reasoned "that subsequent commercial transactions involving expropriated property do not give rise to subject matter jurisdiction over claims arising from the original expropriation." 440 F.3d 579, 587 (2d. Cir. 2006). There, the Second Circuit accepted the district court's conclusion that "Plaintiffs' claims—alleging a violation of customary international law, conversion, constructive trust, and seeking equitable accounting as well as restitution—are 'based upon' the manner in which the property was obtained, not its subsequent management." *Garb v. Republic of Poland*, 207 F. Supp. 2d 16, 31 (E.D.N.Y. 2002). The same cannot be said here. Again, under Title III, liability attaches only if the person "traffics in" confiscated property. 22 U.S.C. § 6082(a)(1)(A). The "subsequent management" of the property is thus pivotal to Exxon's ability to make out a claim—if the property is not used commercially, then Exxon has no cause of action. Accordingly, unlike in *Garb*, the commercial use of Exxon's confiscated property is not "too attenuated" or "not substantive enough" to satisfy the commercial activity exception. 440 F.3d at 578.

Defendants next point to *Africa Growth Corp. v. Republic of Angola*, where the court concluded that the "gravamen" of the plaintiffs' claims was "that Angola permitted the [defendants] to utilize their official titles and ranks to effect the unlawful taking of [the plaintiff's] assets, and that [the plaintiff] has been denied fair and due process of law in Angola." No. 17-cv-2469 (BAH), 2019 WL 3253367, at *4 (D.D.C. July 19, 2019) (cleaned up). The district court

there found it dispositive that the plaintiff was attempting to prosecute Angola's "failure to regulate effectively the exercise of government agents' power and to provide due process of law, which," the court concluded, constituted "quintessentially sovereign conduct." *Id.* at *5 (cleaned up). Likewise, in the third case on which Defendants rely, *Allen v. Russian Federation*, the court refused to apply the commercial activity exception to sovereign conduct. *See* 522 F. Supp. 2d 167, 187–88 (D.D.C. 2007). The *Allen* plaintiffs attempted to invoke the commercial activity exception where the Russian Federation had arrested a corporation's owners, executives, and counsel; investigated the corporation; seized the corporation's stock; initiated tax proceedings and assessed tax penalties on the corporation; and auctioned off the corporation's subsidiary and largest asset to pay the corporation's tax assessments. *Id.* As in *Africa Growth Corp.*, the *Allen* court concluded that the commercial activity exception was inapplicable because the "activities undertaken . . . could not be undertaken by private citizens." *Id.*

In contrast, a claim for trafficking under the LIBERTAD Act can be brought against "*any person*" that is trafficking in confiscated property. 22 U.S.C. § 6082(a)(1)(A) (emphasis added). Put differently, the trafficking penalized under section 6082(a)(1)(A) need not be carried out by a sovereign. Exxon's claim runs to the trafficker of the property and therefore targets private conduct. In this case, that private conduct happens to be Cuba's. In *Africa Growth Corp.* and *Allen*, the plaintiffs' claims, no matter how artfully pled, could not have been brought against a nongovernment actor. *See Africa Growth Corp.*, 2019 WL 3253367, at *5; *Allen*, 522 F. Supp. 2d at 187–88. The linchpin of a Title III claim is the subsequent commercial activity to which the expropriated property is put to use, and that places Exxon's claim in a meaningfully different posture from the claims at issue in *Africa Growth Corp.* and *Allen*.

## IV.

For the foregoing reasons, Defendants' Motion Pursuant to the Court's April 23, 2021 Minute Order, ECF No. 66, is denied.

Dated: October 8, 2021

Amit P. Mehta
United States District Court Judge

# APPENDIX C

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **EXXON MOBIL CORPORATION,** | |
| **Plaintiff,** | |
| **v.** | **Case No. 19-cv-1277 (APM)** |
| **CORPORACIÓN CIMEX S.A. et al.,** | |
| **Defendants.** | |

**MEMORANDUM OPINION AND ORDER**

The motion before the court seeking interlocutory review comes in a unique procedural posture. All three Defendants are "instrumentalities" of a foreign sovereign, Cuba. One of the three Defendants—Defendant Corporación CIMEX S.A. (Cuba) ("CIMEX")—is already before the D.C. Circuit, having taken an appeal as a matter of right from this court's ruling that the Foreign Sovereign Immunities Act ("FSIA")'s commercial-activity exception abrogated CIMEX's sovereign immunity. With respect to the other two Defendants—Corporación CIMEX S.A. (Panama) ("CIMEX (Panama)") and Union Cuba-Petróleo (CUPET)—the court held that the commercial-activity exception *might* apply to them but determined that jurisdictional discovery was needed to reach a final conclusion. Those two Defendants now seek interlocutory review so that they can raise on appeal the same issues that CIMEX is contesting before the D.C. Circuit. Ordinarily, the court likely would not certify an order for jurisdictional discovery for interlocutory review. But in these unique circumstances, considerations of judicial economy and avoiding piecemeal litigation on a jurisdictional question warrant certification. For those same reasons, it is appropriate to certify for review the court's ruling that the FSIA's expropriation exception is not available to any Defendant.

## I.

First, a brief history. Plaintiff Exxon Mobil Corporation sued all Defendants under Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. § 6082(a)(1)(A). Compl., ECF No. 1, ¶ 1. The Act creates a private right of action for U.S. nationals—including corporations—against any "person" that "traffics in property which was confiscated by the Cuban Government on or after January 1, 1959[.]" 22 U.S.C. § 6082(a)(1)(A). As instrumentalities of Cuba, each Defendant qualifies as a "person" under the Act. *See id.* § 6023(11) (defining "person" to include "any agency or instrumentality of a foreign state").

Each Defendant then moved to dismiss, asserting sovereign immunity. Defs.' Mot. to Dismiss Action with Prejudice, and for Other Relief, ECF No. 42, at 1. The court's jurisdictional verdict was mixed. The court held that it had jurisdiction with respect to CIMEX under the commercial-activity exception of the FSIA. *Exxon Mobil Corp. v. Corporación CIMEX S.A.*, No. 19-cv-1277 (APM), 2021 WL 1558340, at *10–13, 17 (D.D.C. Apr. 20, 2021) [hereinafter *Exxon I*]. As to CUPET and CIMEX (Panama), the court was unconvinced that the pleaded and record facts supported application of the commercial-activity exception as to them but permitted Exxon to take limited jurisdictional discovery regarding (1) whether CUPET's economic activities had a "direct effect" in the United States and (2) whether CIMEX (Panama) is an alter ego of CIMEX. *See id.* at *19–20. The court also held that the FSIA's expropriation exception did not apply because Exxon lacked a property interest recognized by international law in the expropriated assets, as required under that exception. *See id.* at *17–19.

Defendants then sought reconsideration of the court's rulings, *see* Defs.' Mot. Pursuant to the Court's Apr. 23, 2021 Minute Order, ECF No. 66, and the parties stipulated to a schedule for jurisdictional discovery, Stipulation and [Proposed] Order, ECF No. 65. Defendants later asked

the court to stay discovery, and CUPET and Cimex (Panama) brought the instant petition for interlocutory review. Defs.' Mot. to Stay Disc. and to Certify Interlocutory Appeals or, Alternatively, for Protective Order, ECF No. 71 [hereinafter Defs.' Mot.].[1] They propose for review the same two issues that CIMEX will raise in its appeal as of right: (1) "whether the expropriation exception alone controls this action" and (2) "whether Plaintiff has satisfied the commercial activity/direct effect exception as to CIMEX." Defs.' Mot., Mem. of P. & A. in Supp. of Defs.' Mot., ECF No. 71-4 [hereinafter Defs.' Mem.], at 3.

Exxon opposed the motion but asked that if the court decided to certify an interlocutory appeal, it also certify the court's ruling rejecting applicability of the expropriation exception. Pl.'s Opp'n to Defs.' Mot., ECF No. 72 [hereinafter Pl.'s Opp'n], at 25. The court then denied the motion for reconsideration, *Exxon Mobil Corp. v. Corporación Cimex S.A.*, No. 19-cv-1277 (APM), 2021 WL 4709566 (D.D.C. Oct. 8, 2021) (*Exxon II*), prompting CIMEX to appeal the court's rejection of its sovereign immunity defense, Notice of Appeal, ECF No. 75. Neither CUPET nor CIMEX (Panama) has filed a notice of appeal.

**II.**

Pursuant to 28 U.S.C. § 1292(b), courts may certify an order for interlocutory appeal when "(1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the ruling exists; and (3) an immediate appeal would materially advance the litigation." *Molock v. Whole Foods Mkt. Grp., Inc.*, 317 F. Supp. 3d 1, 4 (D.D.C. 2018) (internal quotation marks omitted). The party moving for interlocutory review "bears the burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Virtual Def. & Dev. Int'l Inc. v. Republic of*

[1] Defendants also sought a protective order limiting the scope of discovery. *See* Defs.' Mot. That request is moot by virtue of the court's certification for interlocutory review.

*Moldova*, 133 F. Supp. 2d 9, 22 (D.D.C. 2001) (internal quotation marks omitted). Given the "strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals," certification is only appropriate in the court's discretion and upon satisfaction of the elements of section 1292(b). *Jud. Watch, Inc. v. Nat'l Energy Pol'y Dev. Grp.*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002) (quoting *United States v. Nixon*, 418 U.S. 683, 690 (1974)).

**A.**

There is no genuine dispute here that the first and third elements are readily satisfied: (1) the court's denial of sovereign immunity involves "a controlling question of law," and (3) an immediate appeal "would materially advance" the litigation. A question of law is "controlling" if it "would require reversal if decided incorrectly or [] could materially affect the course of litigation with resulting savings of the court's or the parties' resources." *Jud. Watch, Inc.*, 233 F. Supp. 2d at 19 (quoting *In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2000 WL 673936, at *2 (D.D.C. Jan. 27, 2000). And an immediate appeal "materially advance[s]" the litigation if "reversal would hasten or at least simplify the litigation in some material way, such as by significantly narrowing the issues, conserving judicial resources, or saving the parties from needless expense." *Molock*, 317 F. Supp. 3d at 6. Here, Defendants primarily intend to argue on appeal that, on the facts as alleged, Exxon can rely only on the expropriation exception under the FSIA to abrogate their sovereign immunity. Defs.' Mem. at 3. The court concluded otherwise, finding that Exxon could rely on either exception. *See Exxon I*, 2021 WL 1558340, at *8; *Exxon II*, 2021 WL 4709566, at *2–4. If the court was wrong, however, and only the expropriation exception applies, reversal

could mean the end of the case, as the court has found Exxon cannot satisfy the expropriation exception. *See Exxon I*, 2021 WL 1558340, at *17–18.[2]

Exxon contends that there is "no question of law *at all* at this time," pointing out that the court has only ordered jurisdictional discovery as to CUPET and CIMEX (Panama) and has not reached a conclusion on the commercial-activity exception's applicability as to them. Pl.'s Opp'n at 23–24. That is true enough, but it is equally true that the court's order of jurisdictional discovery is premised on the determination that (1) the expropriation exception is not controlling and (2) CIMEX (Panama) may be subject to the court's jurisdiction on an alter-ego theory based on the commercial-activity exception applying to CIMEX. If the court is wrong about the commercial-activity exception's applicability in this case, there would be no grounds for jurisdictional discovery, and the court would be required to enter judgment in favor of all three Defendants.

**B.**

The main impediment to interlocutory review is the second element: whether there is "a substantial ground for difference of opinion concerning the ruling." As Exxon points out, Pl.'s Opp'n at 23, and this court held, "the D.C. Circuit has 'never held that in order to proceed against a foreign government, a claim must fall into just one FSIA exception.'" *Exxon I*, 2021 WL 1558340, at *8 (quoting *de Csepel v. Hungary*, 859 F.3d 1094, 1103 (D.C. Cir. 2017) (rejecting the argument that "either the expropriation exception or the commercial activity exception" applies)); *see also Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 450 n.15 (D.C. Cir. 1990) (rejecting proposition that the FSIA's expropriation exception was "the *only* provision . . . which denies to foreign states immunity from suit for the taking of property" because

[2] A reversal "could," but does not necessarily, mean the end of the case: in theory, the D.C. Circuit could hold that the expropriation exception *does* apply, in which case the matter would not be dismissed.

"[i]t is clear that if a proper showing is made, the appellee can rely on the 'commercial activity' exception" as well (cleaned up)). That would seem to end the matter.

But the court is mindful that the D.C. Circuit has twice before ruled that only the expropriation exception applies in cases where suit is premised on the "quintessentially sovereign" power of confiscating property. In both *Rong v. Liaoning Province Government*, 452 F.3d 883, 890 (D.C. Cir. 2006), and *Ivanenko v. Yanukovich*. 995 F.3d 232, 239 (D.C. Cir. 2021), the D.C. Circuit held that a sovereign's subsequent disposition or commercial use of expropriated property does not open the door to the commercial-activity exception. Were it otherwise, the court explained in *Ivanenko*, "'almost any subsequent disposition of expropriated property could allow the sovereign to be haled into federal court under FSIA.'" *Id.* (quoting *Rong*, 452 F.3d at 890). This court considered *Rong* and *Ivanenko* but found them inapposite. *See Exxon II*, 2021 WL 4709566, at *5 (reasoning that this "case is different from those like *Rong* and *Ivanenko*, in which the expropriation itself gave rise to the claim and caused the harm sought to be remedied, and the plaintiff relied on subsequent commercial acts to secure jurisdiction under the commercial activity exception"). The court, however, recognizes that this is a first-of-its-kind case arising under Title III of the LIBERTAD Act, and reasonable jurists might take a different view on the applicability of *Rong* and *Ivanenko* and find that Exxon cannot rely on the commercial-activity exception to maintain this action. And, importantly, given that CIMEX will already be raising this very question before the D.C. Circuit, judicial economy and avoidance of piecemeal litigation favor granting CUPET and CIMEX (Panama)'s request to join in that appellate review. The court therefore finds that there is "substantial ground for difference of opinion" concerning its ruling.

## III.

The court also finds that the standard for interlocutory review is met on the issue of whether the FSIA's expropriation exception is available to Exxon. Pl.'s Opp'n at 25. *Exxon I*, 2021 WL 1558340, at *19.[3] That question is a "controlling question of law" with respect to which "an immediate appeal from the order may materially advance the litigation." *Jud. Watch, Inc.*, 233 F. Supp. 2d at 19. Specifically, if the D.C. Circuit were to hold the court incorrectly decided the expropriation exception, this case would proceed, regardless of the commercial-activity exception's applicability. And, although the court stands by its conclusion that Exxon cannot satisfy the expropriation exception, the interests of juridical economy and avoiding piecemeal litigation favor consideration of all jurisdictional questions in a single appeal.

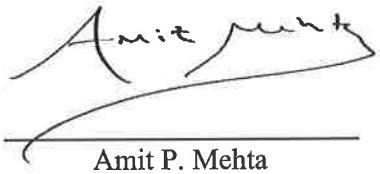
## IV.

In the event the D.C. Circuit disagrees with the court's certification for interlocutory review, the court nevertheless will stay jurisdictional discovery. Given that resolution of this matter on appeal in favor of CIMEX would mean entry of judgment in favor of CUPET and CIMEX (Panama), proceeding with jurisdictional discovery until CIMEX's appeal is resolved is not warranted. If CIMEX's appeal fails, the court will consolidate jurisdictional discovery with discovery on the merits.

[3] It is not clear whether the court needs to certify the expropriation-exception issue for interlocutory review, as presumably Exxon could raise it as an alternative ground for affirmance in CIMEX's appeal. *See Worldwide Moving & Storage, Inc. v. Dist. of Columbia*, 445 F.3d 422, 423 (D.C. Cir. 2006). The court nevertheless does so out of an abundance of caution.

## V.

For the foregoing reasons, Defendants' Motion to Stay Discovery and to Certify Interlocutory Appeals or, Alternatively, for a Protective Order, ECF No. 71, is granted. This matter is hereby stayed until disposition of this matter by the D.C. Circuit.



Dated: November 23, 2021

Amit P. Mehta
United States District Court Judge

# APPENDIX D

## CERTIFICATE AS TO PARTIES, AMICI CURIAE, DISCLOSURE STATEMENT, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Circuit Local Rule 5(a), Petitioners Corporación CIMEX, S.A. (Panama) ("CIMEX (Panama)") and Union Cuba-Petróleo ("CUPET") certify the following:

### A. Parties, Amici Curiae and Disclosure Statement

The following is a list of all parties, intervenors, and amici who have appeared before the district court in the proceeding below, and all persons who are parties, intervenors, or amici in this Court, as well as the disclosure for CIMEX (Panama) and CUPET required by Fed. R. App. P. 26.1 and Circuit Rule 26.1:

1. Petitioners CIMEX (Panama) and CUPET are defendants in the proceeding below. I, the undersigned, their counsel of record, certify that to the best of my knowledge and belief: there are no parent companies, subsidiaries, affiliates or companies which own at least 10% of the stock of CIMEX (Panama) or CUPET which have any outstanding securities in the hands of the public.

2. The other defendant in the proceeding below is Corporación CIMEX, S.A. (Cuba) ("CIMEX (Cuba)").

3. Exxon Mobil Corporation is the plaintiff in proceedings below.

4. No *amicus curiae* appeared in the district court proceedings below, nor so far in this Court during the present petition.

**B. Rulings Under Review**

CIMEX (Panama) and CUPET seek review of the District Court's: 1) Memorandum Opinion and Order of April 20, 2021 (ECF 64) on Defendants' motion to dismiss Plaintiff's Second Amended Complaint, and 2) Memorandum Opinion and Order of October 8, 2021 (ECF 74) denying Defendants' motion for reconsideration of its April 20, 2021 Memorandum Opinion and Order, *insofar* as the District Court ruled that that the Foreign Sovereign Immunities Act's expropriation exception, 28 U.S.C. § 1605(a)(3), does not alone control Plaintiff's action. On November 23, 2021, the District Court issued a Memorandum Opinion and Order pursuant to 28 U.S.C. § 1292(b) certifying that ruling for this Court's review.

**C. Related Cases**

The pending appeal by CIMEX (Cuba), a defendant in the same action, *Exxon Mobil Corporation v. Corporacion CIMEX, S.A. (Cuba), et al*, No. 21-7127 (D.C. Cir.), is a related case. If the present petition is granted, the Petitioners will move that their appeal be heard or consolidated with Case No. 21-7127.

Dated: December 3, 2021

Respectfully submitted,

/s/ Michael Krinsky
Michael Krinsky
Lindsey Frank
Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C

320 West 85th Street
New York, NY 10024
(212) 254-1111
mkrinsky@rbskl.com
lfrank@rbskl.com
*Attorneys for Defendants-Petitioners Corporación CIMEX, S.A. (Panama) and Unión Cuba-Petróleo*

## CERTIFICATE OF SERVICE

This is to certify that on December 3, 2021, I caused the foregoing to be served, on written consent of Plaintiff-Respondent Exxon Mobil Corporation pursuant to Fed. R. App. P. 25(c)(2)(B), by electronic mail upon the following.

Steven K. Davidson
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
SDavidson@steptoe.com

*Counsel for Plaintiff-Respondent Exxon Mobil Corporation*

/s/ Michael Krinsky
Michael Krinsky