UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EXXON MOBIL CORPORATION Plaintiff, v. CORPORACIÓN CIMEX S.A. (Cuba); CORPORACIÓN CIMEX S.A. (Panama); and UNIÓN CUBA-PETRÓLEO Defendants.	)))))))))))	Case No. 19-cv-1277-APM

DEFENDANTS CORPORACIÓN CIMEX, S.A. (CUBA), CORPORACIÓN CIMEX, S.A. (PANAMA) AND UNIÓN CUBA-PETRÓLEO'S NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOTION TO DISMISS AND FOR OTHER RELIEF

Defendants respectfully submit this Notice of Supplemental Authority to bring *Federal Republic of Germany v. Philipp*, -- S. Ct. --, 2021 WL 357254 (No. 19-351, February 3, 2021) to the court's attention.

In *Philipp*, the Supreme Court held that the Foreign Sovereign Immunities Act's "expropriation exception," 28 U.S.C. § 1605(a)(3), must be applied according to the "international law of expropriation," *Philipp*, at *6–*7. It further held that the expropriation exception is to be interpreted "in keeping" with the international law of expropriation as it existed at the time of the FSIA's enactment in 1976. *Id*. at *6.

The Court's ruling is dispositive of Plaintiff's reliance on the expropriation exception. Defendants have shown that a parent company did not have rights in the expropriated property of its third-country subsidiary under the international law of expropriation as that law existed in 1976, and that it has no such rights under that body of law as it exists now. The exceptions were

and remain limited, and, on the undisputed facts, are not applicable here. *See* D. Mem. (ECF 42-3) 21–25; D. Reply Mem. (ECF 49) 13–14. Consequently, under *Philipp* (as well as the controlling Circuit authority), Plaintiff, the parent company of the Panamanian subsidiary (Esso Standard Oil, S.A.) whose Cuban property was expropriated, cannot satisfy the expropriation exception: under the applicable body of law, it had no "rights in" the expropriated property, as the FSIA requires.

In confining the expropriation exception to its intended, limited scope, the Court stressed the need to protect "the [FSIA's] general effort to preserve a dichotomy between private and public acts," and reject "bypass[es]" that would "subject all manner of sovereign public acts to judicial scrutiny," contrary to the FSIA's "design." *Id.* at *7–*8, *10. *Philipp* thus provides additional support for Defendants' showing that the expropriation exception but not the commercial activity exception is applicable here. *See* D. Mem. 5–8; D. Reply Mem. 1–2. The Court's rejection of laws that "do not speak to sovereign immunity" as irrelevant to immunity, which is the "province of the FSIA," supports Defendants' position that Title III does not override the FSIA. *See* D. Mem. at 43–45; D. Reply Mem. at 26–27.

Philipp supports Defendants in additional respects. The Court reiterated that the international law of expropriation, like customary international law generally, "concerns relations among sovereign states," *id*. at *4, further supporting Defendants' position that, contrary to Plaintiff's suggestion, the lawfulness *vel non* of the Essosa expropriation under international law turns on the rights and obligations of Cuba and the United States vis-à-vis each other. *See* D. Mem. 25–40; D. Reply. Mem. 16–24. The Court held that international human rights law is not relevant to the FSIA's expropriation exception, foreclosing Plaintiff's reliance (already contrary to controlling authority) on that body of law. *See* D. Reply Mem. 24. Its

discussion of the disagreement among States at the time of the Essosa expropriation on whether international law imposed an obligation of compensation, *id*. at *5, supports Defendants' argument that a general and consistent State practice followed out of a sense of legal obligation, which is required to form a rule of customary international law, was lacking. *See* D. Mem. 31–32; D. Reply Mem. 20.

Dated: February 8, 2021

Respectfully submitted,

/s/ Michael Krinsky

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was electronically filed with the Clerk of Court using the CM/ECF system that will automatically send email notification of such filing to all counsel of record.

/s/ Michael Krinsky_____

Michael Krinsky