

**NO. 21-8010**

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

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EXXON MOBIL CORPORATION,  
Plaintiff-Respondent/Cross-  
Petitioner,

v.

CORPORACIÓN CIMEX, S.A. (PANAMA)

and

UNIÓN CUBA-PETRÓLEO  
Defendants-Petitioners/Cross-  
Respondents.

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**PETITIONERS/CROSS-RESPONDENTS CORPORACIÓN CIMEX, S.A.  
(PANAMA) AND UNIÓN CUBA-PETRÓLEO'S RESPONSE TO  
CONDITIONAL CROSS-PETITION AND REPLY**

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Corporación CIMEX, S.A. (Panama) (“CIMEX (Panama)”) and Unión Cuba-Petróleo (“CUPET”), Defendants-Petitioners/Cross-Respondents, respectfully submit this Response to Exxon Mobil Corporation’s Conditional Cross-Petition to Appeal Pursuant to 28 U.S.C. § 1292(b) (“Conditional Cross-Petition”). They also reply to Exxon Mobil’s response to their section 1292(b) petition for permission to appeal (“Response”).

**Response to Exxon Mobil Corporation’s Conditional Cross-Petition to Appeal Pursuant to 28 U.S.C. § 1292(b)**

As stated in CIMEX (Panama) and CUPET’s Petition, and as confirmed by Exxon Mobil Corporation (“Exxon”), the parties have agreed that Plaintiff will not object to the grant of CIMEX (Panama) and CUPET’s Petition, and that Defendants will not object to the Cross-Petition for permission to appeal to be filed by Exxon on the question certified by the District Court at Plaintiff’s 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.

While CIMEX (Panama) and CUPET thus do not oppose Exxon’s Conditional Cross-Petition, its framing of the issue presented for review, and certain of its assertions, require brief comment.

1. As framed in the Conditional Cross-Petition, the issue presented for review may be read to be broader than the issue ruled upon by the District Court

and which, if so read, would include issues not yet appropriate for review. This may well have been inadvertent but, for the sake of clarity and out of caution, CIMEX (Panama) and CUPET request that, in the event the Conditional Cross-Petition is granted, review be limited to the lower court's ruling.

The issue posited in the Conditional Cross-Petition is stated to be as follows:

Whether the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), applies to Exxon Mobil's allegations that Defendants trafficked in Exxon Mobil's property confiscated by the Cuban Government?

Response and Conditional Cross-Petition, at 7.

As the District Court stated, "the parties lodge[d] numerous arguments about the expropriation exception's applicability," but it "[found] that whether Exxon has identified a property right recognized by international law is dispositive of their dispute" as to whether Exxon may rely on the expropriation exception and did not reach Defendants' other, "numerous arguments." April 20, 2021 Memorandum Opinion and Order (App. A. to Petition, "App. A"), at 36.

On whether "Exxon has identified a property right recognized by international law," the District Court, 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), held that it did not. "Because 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. App. A, at 40. Under *Helmerich*, Plaintiff’s “direct rights” as a shareholder in the Panamanian company (Essosa) had not been taken, and, also under *Helmerich*, 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.

It is this, the *Helmerich* issue, that the District Court alone ruled on and subsequently certified under 28 U.S.C. § 1292(b). Nov. 23, 2021 Memorandum Opinion and Order (App. C to Petition, “App. C”), at 7.

Because of this ruling, the District Court did not reach the other grounds asserted by Defendants to make the expropriation exception inapplicable. Defendants argued that Plaintiff could not show a violation of international law, as required for the expropriation exception to apply, *Helmerich*, 743 F. App’x at 447, because: the expropriation was for Essosa’s refusal in 1960 to refine the Cuban State’s oil in violation of long-standing Cuban law (as shown by Defendants’ proof) and Essosa acted at the United States Government’s request pursuant to the U.S. plan to overthrow the Cuban Government that culminated in the Bay of Pigs invasion (as confirmed by declassified U.S. State Department documents

introduced by Defendants); the expropriation was a permissible countermeasure under customary international law in the circumstances; Cuba offered to negotiate compensation but the United States refused negotiations as part of its continuing effort to overthrow the Cuban Government (also as confirmed by declassified U.S. State Department documents introduced by Defendants); and the compensation offered by Cuba met international law standards (as shown by proof introduced by Defendants). 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. *See* ECF 42-3, at 25–43.

In addition to arguing that the FSIA expropriation exception’s “violation of international law” requirement was not satisfied, Defendants CUPET and Corporación CIMEX, S.A. (Cuba) (“CIMEX (Cuba)”) each argued, independently on the basis of its own distinctive commercial activities, that the exception’s 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.

Accordingly, in the event Exxon’s Conditional Cross-Petition is granted,

review should be limited to the *Helmerich* issue. It alone is the issue on the expropriation exception's applicability reached by the District Court and it alone was certified by the court. Further, the other grounds asserted by Defendants for why the expropriation exception is inapplicable here are not yet appropriate for review given that the District Court has not reached them and they may be mooted by this Court's decision on the *Helmerich* issue.

2. In arguing for grant of its Conditional Cross-Petition, Exxon states that a "ruling for Exxon Mobil as a matter of law would obviate the need for any further jurisdictional discovery as to the Petitioning Defendants, and the parties could proceed to litigating the merits of the dispute." Response and Conditional Cross-Petition, at 8. In so asserting, Exxon ignores that the District Court has not reached the other grounds on which the Defendants maintain that the expropriation exception is inapplicable (noted above); that the District Court has not decided whether CIMEX (Panama) is the *alter ego* of CIMEX (Cuba) and thus has not decided whether its finding of jurisdiction with respect to CIMEX (Cuba) under the commercial activity exception applies to it; has not decided whether the commercial activity exception is satisfied with respect to CUPET; and has not decided Due Process personal jurisdiction. *See* Petition, Statement of the Case, at 13–14.

3. In support of its Conditional Cross-Petition, Exxon asserts that it can



properly raise the *Helmerich* issue in the interlocutory appeal as of right taken by CIMEX (Cuba), Case No. 21-7127. Response and Conditional Cross-Petition, at 7–8. Although not opposing the Conditional Cross-Petition, CIMEX (Panama) and CUPET reserve their position on that assertion.

4. Simply citing its briefs below, Exxon asserts that there are substantial grounds for a difference of opinion on whether the District Court was correct in finding that Exxon had not identified a property right of its own which was recognized by international law. Response and Conditional Cross-Petition, at 9. Even though they do not oppose the Conditional Cross-Petition in the interest of judicial economy and avoiding piecemeal appeals, CIMEX (Panama) and CUPET, as they explained in their Petition, do not agree. Exxon correctly does not assert that the District Court found there were substantial grounds for a difference of opinion on his ruling. Response and Conditional Cross-Petition, at 9.

**Reply to Exxon Mobil Corporation’s Response to CIMEX (Panama) and CUPET’s 28 U.S.C. § 1292(b) Petition**

As Exxon does not oppose grant of CIMEX (Panama) and CUPET’s Petition, only one short point of clarification need be made.

Exxon states that the District Court “rejected Defendants’ argument that, in cases involving expropriated property, the expropriation exception precludes the consideration and application of any and all other FSIA exceptions.” Response and Conditional Cross-Petition, at 3. As is apparent from even the abbreviated

discussion in the Petition, the Defendants did not make any argument even remotely as broad as this. Rather, they argued that the expropriation alone controls *this*, distinctive lawsuit, *not* any and all cases “involving expropriated property.”

In that regard, Defendants emphasized, *inter alia*, that the issue presented by Exxon’s action is whether the “violation of international law” and nexus limitations of the expropriation exception must be applied when, as here, the action is based simply, without anything more at all, on an agency’s owning or using the expropriated property—conduct that is inseparable from the sovereign act of expropriation, as such is the sovereign’s purpose and intent in expropriating the property; that is the conduct that the expropriation exception alone expressly and precisely addresses (subjecting an agency or instrumentality to suit if expropriated property “is owned or operated” by it, 28 U.S.C. § 1605(a)(3)); and that has never been considered to fall within the commercial activity exception under customary international law. There is nothing comparable here, for example, to the bailment contract for expropriated property in *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1103 (D.C. Cir. 2017), a case “involving expropriated property” but where the commercial activity exception applied because the agency, unlike here, had entered into a contractual relationship with the plaintiff. *See* Petition, at 20.

## CONCLUSION

In the event that the Court grants their 28 U.S.C. § 1292(b) Petition, CIMEX

(Panama) and CUPET do not oppose grant of Exxon's Conditional Cross-Petition in the interests of judicial economy and avoiding piecemeal appeals. They do so while maintaining their position that there are not substantial grounds for a difference of opinion on the District Court's ruling which Exxon seeks to present for review. In the event that the Conditional Cross-Petition is granted, review should be limited to the grounds for rejecting application of the FSIA's expropriation exception reached by the District Court.

For the reasons stated therein, and as it is unopposed by Exxon, CIMEX (Panama) and CUPET's Petition should be granted.

Dated: December 16, 2021

Respectfully submitted,

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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 1,721 words.

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**CERTIFICATE OF SERVICE**

I certify that on December 16, 2021, I caused the foregoing document to be filed via the appellate CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Krinsky

Michael Krinsky