

NO. 21-8010

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

EXXON MOBIL CORPORATION,

Plaintiff-Respondent/Cross-Petitioner,

v.

CORPORACIÓN CIMEX, S.A. (PANAMA) and UNIÓN CUBA-PETRÓLEO,

Defendants-Petitioners/Cross-Respondent.

**PLAINTIFF EXXON MOBIL CORPORATION'S RESPONSE TO
PETITIONERS' PETITION FOR PERMISSION TO APPEAL PURSUANT
TO 28 U.S.C. § 1292(b) & CONDITIONAL CROSS-PETITION TO APPEAL
PURSUANT TO 28 U.S.C. § 1292(b)**

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INTRODUCTION

Plaintiff Exxon Mobil Corporation (“Exxon Mobil”) respectfully submits this response to the Petition for Permission to Appeal under 28 U.S.C. § 1292(b) filed by Defendants Corporación CIMEX S.A. (Panama) (“CIMEX Panama”) and Unión Cuba-Petróleo (“CUPET”) (the “Petition”). While preserving its arguments that the Petition does not raise a legal question as to which there are substantial grounds for difference of opinion, Exxon Mobil does not object to the Petition as a matter of judicial economy. The issue presented in the Petition is already before this court in a related appeal as of right by Corporación CIMEX S.A. (Cuba) (“CIMEX Cuba”), which challenges the District Court orders at issue here on the same ground certified by the District Court as to Petitioners. *See* Case No. 21-7217 (filed Oct. 31, 2021).

At the same time, Exxon Mobil conditionally cross-petitions for certification regarding the issue, decided in the same orders that are subject to the Petition, of whether Exxon Mobil’s allegations satisfy the Foreign Sovereign Immunity Act’s expropriation exception, 28 U.S.C. § 1605(a)(3). The District Court certified this issue as part of its § 1292(b) order, and it readily satisfies the standards for interlocutory review. Exxon Mobil does so in an abundance of caution—as the District Court observed, the Cross-Petition simply raises an issue that it is already likely to raise as alternative grounds for affirmance in CIMEX Cuba’s pending

appeal. The Court need only grant the Cross-Petition if it grants the Defendants' Petition.

As Defendants note in their Petition, the parties have conferred regarding their respective requests for relief and have agreed that Exxon Mobil will not object to grant of the Defendants' Petition, and that Defendants will not object to Exxon Mobil's conditional Cross-Petition in the interest of judicial economy and avoiding piecemeal appeals. However, both do so without prejudice to their respective positions that there are no substantial grounds for difference of opinion on the question presented by the opposing party.

BACKGROUND

This action involves the LIBERTAD Act, also known as the Helms Burton Act, which permits civil actions in federal courts against anyone—including state-owned entities—*trafficking* in confiscated property. *See* 22 U.S.C. § 6082(a)(1)(A). Exxon Mobil sued CIMEX Cuba, CIMEX Panama and CUPET—each instrumentalities of Cuba—under the LIBERTAD Act, alleging that their ongoing use of Exxon's confiscated property in their respective businesses violated the Act. Defendants moved to dismiss under the Foreign Sovereign Immunities Act ("FSIA").

In an April 20, 2001 Order (Doc. 64), the District Court decided that Exxon Mobil's allegations against CIMEX (Cuba) were sufficient to meet the FSIA's

commercial activity exception, but that the Court required jurisdictional discovery before it could rule as to CIMEX (Panama) and CUPET. In reaching that conclusion, the 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. Doc. 64 at 16. Instead, the District Court reasoned that 1) while the expropriation exception did not apply because Exxon did not have a property right taken in violation of international law, 2) Exxon was still entitled to argue that the Defendants' purported sovereign immunity is abrogated under the commercial activity exception. *See id.* at 16. After unsuccessfully moving for reconsideration, CIMEX Cuba noticed an appeal as of right under the collateral order doctrine of the District Court's denial of its motion to dismiss.

Defendants later asked the court to stay discovery, and CUPET and CIMEX (Panama) petitioned the District Court for interlocutory review under 28 U.S.C. § 1292(b), seeking to certify the question of whether the FSIA's expropriation exception precluded consideration of any other FSIA exceptions in this case. Exxon Mobil 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. *See* Doc. 77 at 2-3 (district court summary of relevant facts).

In an order dated November 23, 2021, the District Court granted both the Defendants' motion for certification and Exxon Mobil's request that it also certify its related ruling that the expropriation exception did not apply to Exxon Mobil's claim. *Id.* at 3-7. With respect to Exxon Mobil's conditional certification request, the Court concluded that the question of the applicability of the FSIA's expropriation exception to Exxon's claims against Defendants under the LIBERTAD Act is a "controlling question of law" with respect to which "an immediate appeal from the order may materially advance the litigation." Doc. 77 at 7 (citation omitted). "[I]f 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." *Id.* Though noting it was "not clear" whether it needed to certify this issue in light of the fact that Exxon Mobil could already raise it as an alternative ground for affirmance in CIMEX Cuba's appeal, the Court nevertheless certified "out of an abundance of caution" and in the "interests of judicial economy and avoiding piecemeal litigation." *Id.* at 7 & n. 3.

The District Court also stayed discovery in the case, pending the outcome of CIMEX Cuba's appeal and irrespective of the outcome of the Petition under review here. *Id.* at 7.

RESPONSE TO THE PETITION

In light of the unique circumstances of this case, Exxon Mobil does not oppose Defendants' Petition. The issue raised in the Petition—whether the District Court properly held that the Foreign Sovereign Immunity Act's expropriation exception (28 U.S.C. § 1605(a)(3)) is not the only immunity exception potentially available where Exxon Mobil alleges unlawful trafficking in State-confiscated property—is already before this case in an appeal as of right filed by Defendant CIMEX Cuba in Case No. 21-7217 (filed Oct. 31, 2021). In light of that appeal, Exxon Mobil agrees that the most efficient path to resolution of the case under the circumstances is to grant the current Petition to permit all Defendants to address the issue.

While Exxon Mobil opposed § 1292(b) certification below, it did so based on its view that conducting jurisdictional discovery while CIMEX Cuba's appeal was pending would be the most efficient way of resolving the dispute. But its hope for the benefits of expeditious discovery was effectively mooted when the District Court stayed jurisdictional discovery pending CIMEX Cuba's appeal, irrespective of the outcome of the instant Petition. *See* Doc. 77 at 7. Exxon Mobil's non-objection to the Petition now is wholly a matter of judicial efficiency in light of that stay and should not be viewed as a concession on the merits of the issue sought to be appealed.

Exxon Mobil expressly preserves its position below that the issue of whether the FSIA's expropriation exception is the sole grounds for seeking to overcome Cuba's claims of immunity here is not one on which there are substantial grounds for difference of opinion. Suffice it to say that Exxon Mobil vigorously disputes Defendants' reading of relevant case law, and maintains that the District Court correctly held that a finding that the expropriation exception is inapplicable to its LIBERTAD Act claims does not foreclose Exxon Mobil from relying on other FSIA exceptions, especially the commercial exception of 28 U.S.C. § 1605(a)(2).¹ But the District Court certified here in light of the "unique circumstances" (Doc. 77 at 1), where the Petitioners seek to "raise on appeal the same issues that CIMEX is contesting before the D.C. Circuit." *Id.* Thus, granting the Petition will not expand the issues before the Court, and this Court can exercise its broad discretion here for the sake of judicial economy. Exxon Mobil therefore does not separately address Defendants' various arguments regarding the relevant case law, but preserves its arguments to be addressed on the merits of the question presented, should the Court grant the Petition.

¹ Exxon Mobil addressed Petitioners' arguments below in opposition to Defendants' motion for 1292(b) certification and in its opposition to Defendants' motion for reconsideration of the District Court's order regarding sovereign immunity. *See generally* Doc. 68, 72. It incorporates its legal positions by reference here, but as it is not opposing the Defendants' motion, does not respond in kind to Defendants' explication of the case law on the effect of the expropriation exception.

REASONS FOR GRANTING EXXON MOBIL'S CROSS-PETITION

In an abundance of caution, Exxon Mobil also conditionally cross-petitions for permission to appeal the District Court's ruling on the following issue:

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?

This issue was decided by the District Court in the same orders that are subject of the Petition. *See* Doc. 64 at 36-41. Certification of this issue is likely not necessary to allow Exxon Mobil to raise the issue in Petitioners' appeal, for two reasons. First, this Court "may address any issue fairly included within the certified order because 'it is the order that is appealable, and not the controlling question identified by the district court.'" *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996) (citation omitted). Should the Court certify the orders challenged in the Petition, Exxon Mobil should be permitted to raise *any* issue addressed in those orders. That is especially true where, as here, the disputed issue is purely one of law.²

² As the District Court properly noted (Doc. 77 at 7), Exxon Mobil can already raise any issue raised below as an alternative ground for affirming the District Court's ruling that CIMEX Cuba was not protected by sovereign immunity. *See, e.g., Worldwide Moving Storage Inc. v. District of Columbia*, 445 F.3d 422, 423 (D.C. Cir. 2006) (affirming on grounds raised below but not considered by the district court). Thus, Exxon is likely to argue, as it did in the District Court, that the LIBERTAD Act provides an independent basis for subject matter jurisdiction

Second, like the question that is the subject of the Petition, the issue of proper application of the expropriation exception is already part of CIMEX Cuba's pending appeal, since, as the District Court noted, Exxon Mobil can (and will) raise the proper application of the expropriation exception as an alternative ground for affirmance of the District Court's order denying CIMEX Cuba's sovereign immunity claim. *See* Doc. 77 at 7 n.3. The District Court nevertheless certified the issue "out of an abundance of caution." *Id.* And Exxon Mobil seeks to do the same; it simply seeks certainty that it may respond to any appeal by the petitioning Defendants by arguing that the expropriation exception is satisfied against them, as it is with CIMEX Cuba.

This Court can and should exercise its discretion in these unusual circumstances. As the District Court held below, this issue meets the standards for certification under 28 U.S.C. § 1292(b). Doc. 77 at 7. It is a controlling question of law and accepting it for appeal would materially advance the litigation—"if the D.C. Circuit were to hold the court incorrectly decided the expropriation exception, this case would proceed," irrespective of whether any other exceptions apply. *Id.* 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.

against foreign states, irrespective of the FSIA. A ruling on that ground would apply equally to all Defendants.

Finally, there are substantial grounds for difference of opinion on the issue presented by the Cross-Petition. Exxon Mobil argued below that numerous sources of international law that permitted an expropriation suit by a corporate parent such as Exxon for its investment in a subsidiary taken by a foreign government. *See* Doc. 47 at 43-44. The District Court disagreed, but certified because this Court is likely to consider that issue in the context of CIMEX Cuba's appeal. Permitting the appeal is in the interest of judicial economy for the same reasons the Court granted Petitioner's § 1292(b) motion. It would not expand the issues on appeal by simply acknowledging Exxon Mobil's right to make the same argument as to all Defendants and would fully and finally resolve the issues as to all Defendants.

CONCLUSION

For the reasons stated herein, Exxon Mobil does not object to Defendants' Petition, but preserves its arguments on the merits of the issue Defendants seek to appeal. In the event that the Court grants the Petition, it should also make clear that Exxon Mobil is entitled to challenge the District Court's determination that the FSIA's expropriation exception does not apply to Exxon Mobil's LIBERTAD Act claims by granting the Cross-Petition.

Date: December 10, 2021

Respectfully submitted,

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**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 2,090 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 in Times New Roman 14-point font.

Date: December 10, 2021

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CERTIFICATE OF SERVICE

I certify that on December 10, 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/ Steven K. Davidson

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Defendants-Petitioners/Cross-Respondent.

On Appeal from the U.S. District Court for the District of Columbia
Case No. 19-cv-1277-APM (Mehta, J.)

**EXXON MOBIL CORPORATION'S DISCLOSURE STATEMENT
PURSUANT TO D.C. CIRCUIT RULE 26.1**

I, the undersigned, counsel of record for Exxon Mobil Corporation, certify that to the best of my knowledge and belief, Exxon Mobil Corporation is a publicly traded corporation and it has no corporate parent. No publicly held corporation owns ten percent (10%) or more of Exxon Mobil Corporation's stock.

These representations are made in order that the judges of this Court may determine the need for recusal.

Dated: December 10, 2021

Respectfully submitted,

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**PLAINTIFF-APPELLEE EXXON MOBIL CORPORATION'S
CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

Pursuant to D.C. Circuit Local Rule 28(a)(1), Plaintiff-Appellee Exxon
Mobil Corporation certifies the following:

(A) **PARTIES.** The following parties have appeared in this case before
the district court:

- 1) Exxon Mobil Corporation, Plaintiff. Exxon Mobil Corporation is a publicly traded corporation and it has no corporate parent. No publicly held corporation owns 10% percent or more of Exxon Mobil Corporation's stock.
- 2) Corporación CIMEX, S.A. (Cuba), Defendant.
- 3) Corporación CIMEX, S.A. (Panama), Defendant.
- 4) Unión Cuba-Petróleo, Defendant.
- 5) No Amicus Curiae appeared before the district court.

(B) RULINGS UNDER REVIEW. Defendants CIMEX Panama and Unión Cuba-Petróleo seek review of the following orders of the District Court: 1) the Order of April 20, 2021 (ECF 64) on Defendants' motion to dismiss Plaintiff's Second Amended Complaint for lack of subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act, and 2) the October 8, 2021 Order (ECF 74) denying Defendants' motion for reconsideration of the Court's April 20, 2021 Order. Plaintiffs' conditional Cross-Petition relates to the same orders.

(C) RELATED CASES. A notice of appeal of the orders that are subject of the Petition and conditional Cross-Petition was filed by CIMEX S.A. (Cuba) on October 31, 2021, and was docketed in this Court as Case No. 21-7127.

Dated: December 10, 2021

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