No.

In the Supreme Court of the United States

EXXON MOBIL CORPORATION,
PETITIONER,

v.

CORPORACIÓN CIMEX, S.A. (CUBA), ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1960, the Cuban government confiscated the property of American nationals and transferred it to state-owned enterprises. After years without a diplomatic resolution, Congress enacted the Helms-Burton Act, which created a damages action for American nationals against "any person . . . that traffics in" such confiscated property. 22 U.S.C. § 6082(a)(1). The Act defines "person" to include "any agency or instrumentality of a foreign state," *id.* § 6023(11), and expressly contemplates "judgment[s] against an agency or instrumentality of the Cuban Government," *id.* § 6082(d). The question presented is:

Whether the Helms-Burton Act abrogates foreign sovereign immunity in cases against Cuban instrumentalities, or whether parties proceeding under that Act must also satisfy an exception under the Foreign Sovereign Immunities Act.

PARTIES TO THE PROCEEDING

Petitioner is Exxon Mobil Corporation. Respondents are Cuban instrumentalities Corporación Cimex, S.A. (Cuba), Corporación Cimex, S.A. (Panama), and Unión Cuba-Petróleo.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Exxon Mobil Corporation certifies that it is a publicly traded corporation and it has no corporate parent. No publicly held corporation owns 10% or more of Exxon Mobil Corporation's stock.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Exxon Mobil Corp. v. *Corporación Cimex, S.A.*, No. 19-cv-01277 (April 20, 2021)

United States Court of Appeals (D.C. Cir.):

Exxon Mobil Corp. v. *Corporación Cimex, S.A.*, No. 21-7127 (July 30, 2024)

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INTRODUCTION

On January 9, 1959, 32-year-old Fidel Castro rode into an undefended Havana to the celebratory sounds of church bells and gunfire. For a brief time, Castro insisted that his revolutionary government would not be communist. Eighteen months later, his regime had confiscated the assets of all U.S. businesses in Cuba and had transferred many of those assets to state-owned enterprises. One of the victims was Exxon, which lost all its Cuban oil and gas assets—a loss valued at over $70 million (in 1960 dollars) by the U.S. Foreign Claims Settlement Commission. No compensation was ever paid for these unlawful takings.

In 1996, Congress sought to remedy that by enacting the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, also known as the Helms-Burton Act. In legislative findings, Congress criticized "[t]he wrongful confiscation or taking of property belonging to United States nationals by the Cuban government." 22 U.S.C. § 6081(2). It also lamented the absence of "fully effective remedies for the wrongful confiscation of property" and "use of wrongfully confiscated property by governments." *Id.* § 6081(8). To fill that void, Congress enacted Title III, which "endow[s]" U.S. nationals "who were the victims of [Castro's] confiscations" "with a judicial remedy in the courts of the United States." *Id.* § 6081(11).

Title III of the Act thus creates a private right of action allowing the American victims of Castro's confiscations to sue "any person" who "traffics" in confiscated property, including by possessing, using, transferring, or otherwise profiting from it. 22 U.S.C. § 6023(13)(A). Critically, the statute defines covered "person[s]" to include "any agency or instrumentality of a foreign state." *Id.* § 6023(11). And it expressly contemplates suits against Cuban instrumentalities. *See, e.g.*, *id.* § 6082(d) (barring enforcement of "any judgment against an agency or instrumentality of the Cuban Government" if there is a "democratically elected government in Cuba").

Until recently, however, parties like Exxon were unable to bring their Title III claims against the Cuban state-owned companies that continue to hold and profit off their stolen property. That is because the Helms-Burton Act authorizes the President to suspend Title III if he concludes that suspension is "nec-

essary to the national interests of the United States." 22 U.S.C. § 6085(b). From 1996 onward, every President did just that, until President Trump finally allowed the suspensions to lapse on May 2, 2019. Exxon filed this action that same day.

Now another branch of the federal government has put up a new barrier to recovery. Over a dissent by Judge Randolph, the D.C. Circuit held that Title III claims may proceed against Cuban instrumentalities only if the suit falls within one of the exceptions to foreign sovereign immunity contained in the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.* Forcing Helms-Burton Act claims into the FSIA framework will deny many claimants the "judicial remedy" that Congress promised, 22 U.S.C. § 6081(11), because many instances of trafficking by Cuban-owned enterprises may not satisfy any FSIA exception. Even for litigants willing to try, establishing jurisdiction under the FSIA will at a minimum require costly, protracted, and irrelevant discovery, as Exxon's experience in this case demonstrates.

The court of appeals' conclusion that Title III plaintiffs must fit their claims within the FSIA misconstrues the Helms-Burton Act's plain text. Just last Term, this Court explained that a federal statute that "creates a cause of action" and "explicitly authorizes suit against a government on that claim" "effects a clear waiver" of that government's immunity. *Department of Agriculture Rural Development Rural Housing Service* v. *Kirtz*, 601 U.S. 42, 49-50 (2024) (citation omitted). Applying *Kirtz* to the substantively identical text of Title III should lead to the same result: Congress clearly displaced the foreign sover-

eign immunity to which Cuban instrumentalities are generally entitled under the FSIA. Any other result would mean that "Cuban agencies enjoy more protection from lawsuits than agencies of the United States" or of the 50 States. App., *infra*, 48a (Randolph, J., dissenting). That cannot be right.

The D.C. Circuit's error warrants this Court's review. The decision below threatens to close the courthouse doors to many Title III plaintiffs, who among them hold tens of billions in potential Title III claims. That result would overturn the judgment of the legislative and executive branches, which have both concluded that the "United States Government has an obligation to its citizens to provide protection against wrongful confiscations by foreign nations," including through "the provision of private remedies." 22 U.S.C. § 6081(10). And there is no further percolation to be had on this issue because, as a practical matter, the federal venue statute limits Title III claims against Cuban instrumentalities to the District of Columbia. *See* 28 U.S.C. § 1391(f).

Like the thousands of other victims of the Castro regime, Exxon has been waiting since the early 1960s to receive compensation. Congress enacted the Helms-Burton Act to give claimants a path to recovery in federal court, including from Cuban instrumentalities. After decades, the Executive Branch has finally decided that such lawsuits may proceed. The Judiciary should take yes for an answer. This Court should grant the petition and reverse.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-51a) is reported at 111 F.4th 12. The opinion of the district court (App., *infra*, 52a-108a) is reported at 534 F. Supp. 3d 1.

JURISDICTION

The court of appeals entered judgment on July 30, 2024. On October 11, 2024, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including December 27, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 126a-165a.

STATEMENT OF THE CASE

A. Factual Background

1. By the late 1950s, Standard Oil Company, which was later renamed Exxon Mobil Corporation, had been conducting business in Cuba for decades. App., *infra*, 53a-54a. Standard Oil owned several subsidiaries with extensive operations in the country, including its wholly owned subsidiary Esso Standard Oil S.A. (Essosa). *Ibid.*

Exxon's Cuba business came to an abrupt halt when Castro rose to power. On July 1, 1960, the new Cuban government appointed an "Intervenor" for "all the properties and installations that [Essosa] may have in Cuba." Complaint ¶ 28, *Exxon Mobil Corp.* v. *Corporación CIMEX S.A.*, 2021 WL 6805533 (D.D.C. Nov. 23, 2021). Those properties included an

oil refinery, multiple product terminals and packaging plants, and 117 service stations and related properties. *Id.* ¶ 31. The Cuban government then ordered the transfer of those properties to two state-owned enterprises: Unión Cuba-Petróleo (CUPET), Cuba's state-owned oil company, and Corporación CIMEX S.A. (Cuba) (CIMEX), a conglomerate. *Id.* ¶ 68. The Cuban government never paid any compensation for the confiscated properties.

2. In 1964, after several years of failed negotiations with Cuba, Congress passed the Cuban Claims Act, creating a mechanism for U.S. nationals to have their takings claims adjudicated. Pub. L. No. 88-666, 78 Stat. 1110 (codified at 22 U.S.C. § 1643 *et seq.*). The law tasked the U.S. Foreign Claims Settlement Commission with determining, "in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba" for "losses resulting from the nationalization, expropriation, intervention, or other taking of . . . property," "including any rights or interests therein owned wholly or partially, directly or indirectly." 22 U.S.C. § 1643b(a).

In signing the Cuban Claims Act into law, President Johnson emphasized that the Castro regime had "violated every standard by which the nationals of the free world conduct their affairs." U.S. Foreign Claims Settlement Commission, *Section II Completion of the Cuban Claims Program Under Title V of the International Claims Settlement Act* 69 (1972) (Commission Report). The Act did not provide for compensation to victims, and no one expected Castro's

government to make things right in the near term. But President Johnson expressed hope that, "one day," it would "be possible to settle claims of American nationals whose property has been wrongfully taken from them." *Id.* at 70. To that end, the Commission would "provide for the adjudication of these claims . . . . while evidence and witnesses are still available." *Ibid.*

In 1969, the Commission certified Standard Oil's claim based on the confiscation of Essosa's assets in Cuba. The Commission determined that "Standard Oil Company suffered a loss, as a result of the actions of the Government of Cuba," of $71,611,002.90 plus interest at 6% per year, beginning on July 1, 1960. App., *infra*, 124a. All told, the Commission certified $1.9 billion in claims—excluding interest—held by almost 6,000 claimants. Commission Report 412.

3. Several decades later, another international incident prompted Congress to act again. On February 24, 1996, Cuban fighter jets shot down two private planes in international air space over the Florida Straits, killing three U.S. citizens and one permanent resident who had been conducting volunteer search-and-rescue missions for refugees. The next month, Congress enacted the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. § 6021 *et seq.*), also known as the Helms-Burton Act. The Act strengthened the U.S. embargo and imposed other sanctions against Cuba or persons who do business in Cuba.

This case concerns Title III of the Helms-Burton Act. In that part of the Act, Congress again con-

demned the "wrongful confiscation or taking of property belonging to United States nationals by the Cuban Government." 22 U.S.C. § 6081(2). Congress also found that the "international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment from the use of wrongfully confiscated property by governments and private entities." *Id.* § 6081(8). Congress concluded that the "United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny" those wrongdoers "any profits from economically exploiting Castro's wrongful seizures." *Id.* § 6081(11); *see id.* § 6022 (Title III's purpose is to "protect United States nationals against confiscatory takings").

Title III thus creates a private right of action for U.S. nationals who "own[] the claim" to property "confiscated by the Cuban Government on or after January 1, 1959." 22 U.S.C. § 6082(a)(1)(A). Such claimants may sue "any person" who "traffics in" the confiscated property. *Ibid.* A person "traffics" "in confiscated property if that person knowingly and intentionally," and without authorization of the U.S. claimant, possesses, uses, or benefits from that property in a wide variety of ways. *Id.* § 6023(13)(A) (trafficking includes selling, distributing, purchasing, managing, possessing, using, or holding or acquiring an interest). Title III requires a court to accept the Commission's certification of a claim as "conclusive proof of ownership of an interest in property." *Id.* § 6083(a)(1). It also creates a rebuttable presumption that the plaintiff is entitled to the amount of loss certified by the

Commission. *Id.* § 6082(a)(1)-(2). Congress then provided for treble damages, plus costs and attorney's fees. *Id.* § 6082(a)(3)(A), (a)(3)(C)(ii).

Title III undeniably authorizes suits against Cuban state-owned instrumentalities. The Act expressly defines the "person[s]" who may be sued for trafficking to "include[e] any agency or instrumentality of a foreign state." 22 U.S.C. § 6023(11). Another provision states that "any judgment against an agency or instrumentality of the Cuban Government" in "an action brought under this section" may not be enforced against a "transition government in Cuba or a democratically elected government in Cuba." *Id.* § 6082(d). And another provides that "any claim against the Cuban Government" held by a U.S. national "shall not be deemed to be an interest in property" subject to otherwise applicable import controls. *Id.* § 6082(a)(7)(B).

4. The Helms-Burton Act authorizes the President to suspend Title III's cause of action for up to six months at a time, upon determining "that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." 22 U.S.C. § 6085(b). For 23 years, starting with President Clinton, every President suspended the cause of action and kept Title III from taking effect.

On May 2, 2019, the Trump Administration allowed the suspension to lapse for the first time. It has not been reinstated since.

B. Procedural Background

1. The same day that President Trump allowed the previous suspension to expire, Exxon filed this Ti-

tle III action in federal district court in the District of Columbia. The complaint names three Cuban instrumentalities as defendants: CUPET, the state-owned oil company that took over Standard Oil's Cuban refinery, plants, and terminals; CIMEX, the state-owned conglomerate that took over Standard Oil's service stations; and Corporación CIMEX S.A. (Panama), an alleged alter ego of CIMEX.

The complaint alleges that, using Essosa's confiscated property, CUPET operates, explores, produces, refines, trades, and sells oil products, and thus engages in prohibited trafficking under Title III. App., *infra*, 58a. The complaint similarly alleges that CIMEX operates service stations that were built or are maintained on Essosa property. *Id.* at 57a-58a. Exxon seeks damages equaling the amount of its Commission-certified claim, plus pre-judgment interest and treble damages. *Id.* at 6a.

2. The Cuban defendants moved to dismiss, arguing that the district court lacks jurisdiction over them under the FSIA. That statute, enacted two decades before the Helms-Burton Act, provides that foreign states and their instrumentalities are generally immune from the jurisdiction of U.S. courts unless an enumerated exception applies. 28 U.S.C. § 1604. There is no dispute here that all three defendants are wholly owned by Cuba. But the parties disputed both whether it was necessary to satisfy an FSIA exception and whether the FSIA's commercial-activity exception or expropriation exception could be met. The former applies when "the action is based upon a commercial activity" that "causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The latter

applies when "rights in property taken in violation of international law are in issue," "that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the [expropriating] state," and "that agency or instrumentality is engaged in a commercial activity in the United States." *Id.* § 1605(a)(3).

The district court denied the motion to dismiss as to CIMEX, and permitted jurisdictional discovery as to the other two defendants. App., *infra*, 53a. The court first held, contrary to Exxon's argument, that Title III does not separately abrogate the defendants' foreign sovereign immunity. *Id.* at 65a. Accordingly, the court concluded that it could exercise jurisdiction only if Exxon's claims fell within an FSIA exception.

The district court then considered the two relevant FSIA exceptions. It concluded that none of Exxon's claims satisfied the FSIA's expropriation exception. App., *infra*, 101a. The court then analyzed the commercial-activity exception, 28 U.S.C. § 1605(a)(2), finding it satisfied with respect to CIMEX, but not the other two defendants. App., *infra*, 95a. The court nevertheless permitted "limited jurisdictional discovery" of those defendants. *Id.* at 104a.

3. On interlocutory appeal, a divided panel of the court of appeals vacated the district court's order and remanded for further jurisdictional discovery and analysis of the commercial-activity exception as applied to CIMEX.[1]

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[1] CIMEX appealed under the collateral-order doctrine. *See* App., *infra*, 7a. The other two defendants then sought and were

a. The panel majority began by rejecting Exxon's argument that Title III displaces the FSIA. App., *infra*, 8a. Citing several of this Court's decisions—none of which addressed a statute enacted after the FSIA—the court of appeals stated that the FSIA "provides the *sole basis* for obtaining jurisdiction over a foreign state." *Id.* at 8a (quoting *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)). The court recognized that Title III defines covered "persons" to include foreign agencies and instrumentalities, and that the statute thus "contemplates that its cause of action can encompass suits against a foreign state." *Id.* at 10a. But that was not enough, the court concluded, given "the absence of . . . language in Title III" that "mention[s] jurisdiction or [sovereign] immunity expressly." *Id.* at 11a.

On that point, the panel majority attempted to distinguish this Court's recent decision in *Kirtz*. There, this Court unanimously held that the Fair Credit Reporting Act "effects a clear waiver of" the federal government's sovereign immunity by (i) imposing civil liability on "any person" who fails to comply with the Act, and (ii) defining such "person[s]" to include "any . . . government or governmental subdivision or agency." 601 U.S. at 50 (quoting 15 U.S.C. §§ 1681a(b), 1681n(a)). The court of appeals gave two reasons for declining to read Title III's virtually identical lan-

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granted permission to appeal under 28 U.S.C. § 1292(b). *See Exxon Mobil Corp.* v. *Corporación CIMEX S.A.*, 2021 WL 6805533, at *1 (D.D.C. Nov. 23, 2021). Exxon cross-appealed on the Title III question.

guage as displacing the FSIA. First, the court reasoned, the "foreign-relation concerns" unique to foreign sovereign immunity "bolster[] the need to respect Congress's balancing of those considerations in the provisions of the FSIA." App., *infra*, 14a. Second, unlike in *Kirtz*, the conclusion that Cuban instrumentalities continue to enjoy immunity would not make Title III "completely pointless," because trafficking claims could still be brought against some foreign instrumentalities "if an FSIA exception applies." *Id.* at 15a.

The court of appeals then turned to the FSIA exceptions. It agreed with the district court that Exxon "failed to allege any 'rights in property taken in violation of international law.'" App., *infra*, 19a (quoting 28 U.S.C. § 1605(a)(3)). The property seized in 1961, the court reasoned, "was owned by Exxon's subsidiary, Essosa," meaning that *Exxon's* interest was "as a shareholder" in Essosa. *Ibid.* And the court concluded that "international law generally does not recognize a shareholder's right in property owned by the corporation." *Ibid.*

Next, the court of appeals addressed the commercial-activity exception as applied to CIMEX. Under that exception, the alleged conduct must "bear a connection with a commercial activity in Cuba" and "cause[] a direct effect in the United States." App., *infra*, 29a-30a (internal quotation marks omitted). The court found the first element satisfied based on CIMEX's operation of service stations and a remittance-processing business. *Id.* at 34a. But the court remanded for jurisdictional discovery on the direct-effect element. The court reasoned that Exxon could

establish a direct effect in the United States if, among other things, it could show that the remittance-processing business that CIMEX operates at service stations located on former Essosa property causes a net "outflow of money from the United States to Cuba." *Id.* at 35a.

b. Judge Randolph dissented. He would have held that "Title III, considered alone, deprives the Cuban defendants of immunity from suit," leaving no need for Exxon to fit its claims within an exception to the FSIA. App., *infra*, 45a. Judge Randolph found "scarcely a difference between" the law at issue in *Kirtz* and Title III "in terms of language or function," and saw no reason to give foreign sovereigns greater solicitude than federal or state governments in determining whether Congress has superseded a background rule of immunity. *Id.* at 47a. Indeed, Judge Randolph explained, the notion that "Cuban agencies enjoy more protection from lawsuits than agencies of the United States . . . would be a shock" to the Congress that wrote Title III. *Id.* at 48a.

REASONS FOR GRANTING THE PETITION

Title III of the Helms-Burton Act displaces the foreign sovereign immunity that Cuban instrumentalities otherwise would enjoy under the FSIA. The panel majority concluded otherwise by relying on a magic-words requirement for revoking *foreign* sovereign immunity that this Court has rejected in cases involving federal and state sovereign immunity. As Judge Randolph explained, that distinction has no basis in precedent or principle. And it would gut a stat-

ute specifically enacted to create an effective judicial remedy against Cuban instrumentalities.

The decision below imposes yet another in a long line of barriers to recovery for victims of the Castro government's illegal confiscations. It heavily burdens —if not wipes out—billions in claims held by thousands of American businesses and individuals. It pushes Title III claimants into the FSIA, even though Congress passed the Helms-Burton Act to control the specific question here. And it undercuts the judgment of the Executive Branch that has finally allowed these claims to go forward. This Court should grant review on this important question, which has real separation-of-powers consequences.

I. THE DECISION BELOW IS WRONG

Title III abrogates the sovereign immunity of Cuban instrumentalities in suits by U.S. nationals for trafficking in their confiscated property. The text of Title III expressly authorizes damages actions against Cuban instrumentalities. Other provisions of the Helms-Burton Act, its history, and its core purposes confirm that it contemplates such suits. The FSIA provides generally applicable exceptions from its grant of foreign sovereign immunity, but Congress specifically abrogated immunity here—and that specific exception stands on its own.

A. The Helms-Burton Act Abrogates The Sovereign Immunity Of Cuban Instrumentalities

1. By its plain text, Title III of the Helms-Burton Act abrogates any sovereign immunity that Cuban instrumentalities would otherwise possess under the FSIA.

a. Title III creates a cause of action for damages against "any person . . . that traffics in" property confiscated by the Cuban government. 22 U.S.C. § 6082(a)(1). It defines "person" to include "an agency or instrumentality of a foreign state." *Id.* § 6023(11). The statute thus authorizes damages suits against Cuban instrumentalities.

Under this Court's precedents, the plain text of Title III means what it says. As the Court explained in *Kirtz*, it has consistently found "clear waiver[s]" of sovereign immunity in statutes that both "'create[] a cause of action' and 'explicitly authorize[] suit against a government on that claim.'" 601 U.S. at 49 (quoting *Financial Oversight and Management Bd. for P.R.* v. *Centro De Periodismo Investigativo, Inc.*, 598 U.S. 339, 347 (2023)). Although such statutes "may not discuss sovereign immunity in so many words," they "clearly demonstrate[] [an] intent to subject" the government "to suit for money damages." *Id.* at 50 (quoting *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 74 (2000)).

"Guided by these principles," the Court in *Kirtz* unanimously held that the Fair Credit Reporting Act (FCRA) waives the federal government's immunity from damages actions. 601 U.S. at 49. The FCRA, the Court explained, "authorizes consumer suits for money damages against '[a]ny person' who willfully or negligently fails to comply" with certain directives, and "defines the term 'person'" "to include 'any . . . governmental . . . agency.'" *Ibid.* (quoting 15 U.S.C. §§ 1681a(a), 1681n(a), 1681*o*(a)). Congress thus "explicitly permitted . . . claims for damages against the government," removing the sovereign immunity to

which the federal government would otherwise be entitled. *Id.* at 51. Indeed, the Court stated, it "need[ed] look no further to resolve" the question than the combination of the claim authorized and the statutory definition of "person." *Ibid.*

Kirtz's reasoning directly controls this case. The language of Title III is substantively identical to the language of the FCRA. Just like the FCRA, Title III creates a cause of action for damages against "any person" who takes a prohibited action. 22 U.S.C. § 6082(a)(1)(A). Just like the FCRA, Title III expressly defines the term "person" to cover governmental entities that would otherwise be entitled to sovereign immunity. *Id.* § 6082(a)(1)(A) ("The term 'person' means any person or entity, including any agency or instrumentality of a foreign state."). Thus, just like the FRCA, Title III "explicitly permit[s] . . . claims for damages against" a governmental entity, and dismissing such suits on immunity grounds "would effectively negate suits Congress has clearly authorized." *Kirtz*, 601 U.S. at 51 (alteration and citation omitted). One "need look no further" to find a clear abrogation of sovereign immunity. *Id.* at 50.

Indeed, the case for abrogation here is stronger than it was in *Kirtz*. The federal government is just one among thousands of possible defendants under the FCRA, which applies to all entities that provide or obtain lending information to or from credit agencies. 601 U.S. at 46. By contrast, Congress understood that the entities that would most frequently violate Title III's prohibition on "trafficking" in confiscated property would be Cuban instrumentalities. As Congress noted, such property is often still held by state-

owned enterprises, like CUPET or CIMEX. *See* 22 U.S.C. § 6081(5) ("[T]he Cuban Government . . . use[s] property and assets some of which were confiscated from United States nationals."); *id.* § 6081(6) ("This 'trafficking' in confiscated property provides badly needed financial benefit . . . to the current Cuban Government."). That is all the more reason to conclude that Congress meant what it said in authorizing Title III actions against foreign instrumentalities.

b. The panel majority tried to distinguish *Kirtz* in three ways. None is persuasive.

First, the court of appeals reasoned that "whether there has been a waiver of sovereign immunity" and "whether the source of the substantive law upon which the claimant relies provides an avenue of relief" are two different inquiries. App., *infra*, 11a (quoting *FDIC* v. *Meyer*, 510 U.S. 471, 483-484 (1994)). In the court's view, the fact that Title III "provides an avenue of relief" against foreign states therefore "does not tell us whether there has been a waiver of sovereign immunity." *Ibid.* (internal quotation marks omitted). *Kirtz* expressly rejected that reasoning. There, the government likewise argued—relying on *Meyer*—that "a plaintiff must identify both a 'source of substantive law' that 'provides an avenue for relief' *and* 'a waiver of sovereign immunity,'" in separate provisions. 601 U.S. at 53. This Court squarely rejected that argument. "At the risk of repeating ourselves," it held, "a cause of action authorizing suit against the government may waive sovereign immunity even without a separate waiver provision," and *Meyer* does not "say anything to the contrary." *Ibid.*

Second, the court of appeals thought foreign sovereign immunity might be different. It observed that a "host of sensitive diplomatic and national-security judgments" "pervade waivers of foreign sovereign immunity, bolstering the need to respect Congress's balancing of those considerations in the provisions of the FSIA." App., *infra*, 14a (citation omitted). For one thing, sensitive judgments also pervade waivers of federal and state sovereign immunity—which are equally subject to *Kirtz*'s interpretive approach. *See* 601 U.S. at 50 (citing *Kimel*, 528 U.S. at 74); *see also* *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."). More fundamentally, the argument misses the point that Congress *rebalanced* the specific "sensitive and diplomatic national-security judgments" at play when it subjected Cuban instrumentalities to damages suits in Title III. That deliberate legislative judgment is entitled to just as much respect as Congress's earlier general judgment in the FSIA.

Third, the court of appeals read *Kirtz* to require a showing that, absent a waiver of immunity, "the conferral of a cause of action against the government would have been completely pointless." App., *infra*, 15a. The court observed that Title III suits can still proceed against foreign sovereigns "if an FSIA exception applies." *Ibid.* But *Kirtz* did not require a plaintiff to show that a cause of action would be "completely pointless" if sovereign immunity remains intact. Rather, this Court asked whether a finding of immun-

ity would negate at least *some* "suits Congress has clearly authorized." 601 U.S. at 51.

It would here. As noted above, Congress expected that many Title III actions would be brought against Cuban-owned entities, which would most frequently be the ones "trafficking." *See supra*, p. 17. Yet there are many ways in which Cuban instrumentalities might "traffic" in confiscated property under Title III that will never satisfy an FSIA exception—including by merely "possess[ing]" or "hold[ing] an interest in confiscated property," *id.* § 6023(13)(A)(i), or by engaging in commercial activity outside the United States.[2] Applying the FSIA therefore will "effectively negate" a number of claims that "Congress has clearly authorized." *Kirtz*, 601 U.S. at 50 (citation omitted).

2. The Helms-Burton Act contains several other textual indicia that it displaces the FSIA's general grant of immunity to foreign-state instrumentalities.

a. First, several provisions plainly assume that Title III actions can and will be brought against Cuban government entities in particular. Section 6082(d), for example, states that in "an action brought under this section, 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 or a democratically

---

[2] Indeed, the decision below makes it even more difficult for Title III plaintiffs to satisfy the expropriation exception by holding that companies that operated in Cuba through wholly owned subsidiaries cannot "allege any 'rights in property taken in violation of international law.'" App., *infra*, 19a.

elected government in Cuba." 22 U.S.C. § 6082(d) (emphasis added). Such "judgment[s]" can of course only arise in suits against Cuban agencies and instrumentalities.

Other provisions similarly anticipate "actions" or "claims" "against the Cuban Government." *See* 22 U.S.C. § 6064(a) (after certifying that a transition government is in power, the President is authorized to "suspend" Title III "with respect to actions thereafter filed against the Cuban Government"); *id.* § 6082(a)(1)(B) (U.S. nationals' "claim[s] against the Cuban Government" under Title III "shall not be deemed to be an interest in property" subject to licensing requirements). And Congress's statutory findings likewise note that one of the core purposes of Title III was to correct for the lack of "fully effective remedies for the wrongful confiscation of property . . . *by governments*," by "endow[ing]" the "victims of these confiscations" "with a judicial remedy in the courts of the United States." *Id.* §§ 6081(8), (11).

Second, Title III specifically provides that it supersedes general jurisdictional rules in the event of a conflict. The statute states that "the provisions of Title 28"—which include the FSIA—"apply to actions under this section to the same extent" as they apply to "any other action brought under section 1331 of Title 28," "*[e]xcept as provided in this subchapter*." 22 U.S.C. § 6082(c)(1) (emphasis added). In other words, Title III specifically recognized that it might depart from standard jurisdictional or procedural rules for suits in federal court, and confirmed that those departures control.

Section 6082(c)(1) is relevant for another reason, too: it characterizes Title III suits as "action[s] brought under section 1331 of Title 28." 22 U.S.C. § 6082(c)(1). As Judge Randolph pointed out in dissent below, Section 1331 is the general federal-question jurisdiction statute. Yet "suits under the FSIA are brought under 28 U.S.C. § 1330," which is a separate grant of jurisdiction that depends on meeting the FSIA's exceptions. App., *infra*, 49a (Randolph, J., dissenting). By describing Title III actions as "brought under section 1331," rather than Section 1330, Congress made clear that the FSIA does not apply to such actions and Title III plaintiffs need not satisfy the FSIA's exceptions to proceed.

Third, Title III expressly incorporates the FSIA's procedures for service of process on foreign instrumentalities. *See* 22 U.S.C. § 6082(c)(2). There would have been no need for Congress to do that if the FSIA already applied wholesale in Title III actions. The panel majority recognized this point, but did not offer a direct response. App., *infra*, 11a.

b. The panel majority instead focused on one supposedly contrary textual indicator: Section 1611(c) of the FSIA, which Congress added as part of the Helms-Burton Act. App., *infra*, 12a. Section 1611(c) states that, in Title III actions, "[n]otwithstanding the provisions of section 1610" of the FSIA, "the property of a foreign state shall be immune from attachment and from execution to the extent" the property is used for diplomatic facilities. 28 U.S.C. § 1611(c). Section 1610, in turn, specifies circumstances in which the property of foreign instrumentalities is *not* immune from attachment and execution. *See id.* § 1610. The

court below seized on Section 1611(c)'s "notwithstanding" clause. In its view, Congress would not have needed to specify that Section 1610's exceptions from immunity do not apply to Title III actions unless Congress "understood foreign states to enjoy FSIA immunity in Title III actions in the first place." App., *infra*, 12a.

That does not follow. For starters, Section 1611(c) at most has implications for execution. And whatever Section 1611(c) may imply about the application of the FSIA's *execution* provisions, it cannot overcome the clear textual evidence that Congress superseded the FSIA's separate *jurisdictional* provisions. On the key jurisdictional question presented here, there are far more express textual and structural clues.

At any rate, Section 1611(c) does not even imply anything about the application of the FSIA's execution rules in Title III cases. Instead, the "notwithstanding" clause merely heads off any possible misunderstanding about the interaction of Sections 1610 and 1611(c). *See Atlantic Richfield Co.* v. *Christian*, 590 U.S. 1, 16 (2020) (A "notwithstanding" clause does not "expand or contract the scope of [any] provision by implication"; it simply "explain[s] what happens in the case of a clash.") (citation omitted). Section 1610 states that property of a foreign instrumentality "shall" be subject to attachment and execution in certain circumstances, full stop. 28 U.S.C. § 1610. If Section 1610's conditions were met in a Title III case, that could have created a conflict with Section 1611(c), which states that diplomatic property may *never* be used to satisfy a Title III judgment. *Id.* § 1611(c). Congress thus reasonably added the "notwithstand-

ing" clause to make sure that Section 1611(c) controls in those circumstances. That suggests nothing about whether foreign property is generally immune from execution in Title III cases.

3. Finally, the history and purpose of Title III confirm what the text makes clear: Congress intended to subject Cuban instrumentalities to damages actions. Congress found that the federal government has an "obligation to its citizens to provide protection against wrongful confiscations by foreign nations and their citizens, including the provision of private remedies." 22 U.S.C. § 6081(10). Yet, Congress concluded, "the international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property." *Id.* § 6081(8). As Judge Randolph pointed out, the "FSIA was part of that system" in that it posed a barrier to suits against Cuban instrumentalities. App., *infra*, 50a (Randolph, J., dissenting). Thus, to achieve Title III's goal of "endow[ing] the victims of [Castro's] confiscations with a judicial remedy" that is "fully effective," 22 U.S.C. § 6081(12), Congress overrode the FSIA and subjected Cuban instrumentalities to suit directly under the Helms-Burton Act. The decision below undercuts exactly what Congress was attempting to achieve.

B. The FSIA Does Not Preclude The Helms-Burton Act's Independent Abrogation Of Sovereign Immunity

Based on general language in this Court's decisions, the panel majority adopted the sweeping view that the FSIA occupies the field of foreign sovereign immunity. It believed that "jurisdiction in a civil ac-

tion against a foreign sovereign [can] arise only under the FSIA itself, not some other statute like Title III." App., *infra*, 8a. From that premise, the court reasoned that Congress must "mention[] jurisdiction or . . . immunity *expressly*" to depart from the FSIA baseline. *Id.* at 12a. (emphasis added). That is all wrong. Although the FSIA provides the general framework for foreign sovereign immunity, neither basic interpretive principles nor this Court's precedents prevent Congress from modifying that framework in a later enactment, just as Congress may modify any other federal statute.

1. Under basic interpretive principles, the FSIA does not and cannot control how a later-in-time statute like the Helms-Burton Act is interpreted. For one thing, "statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute," or "to exempt the current statute from the earlier statute," "either expressly or by implication as it chooses." *Dorsey* v. *United States*, 567 U.S. 260, 274 (2012). Moreover, the usual rule is that "when two statutes are at odds, the specific prevails over the general." App., *infra*, 48a (Randolph, J., dissenting) (citing *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974)).

The panel majority did not mention either of those "time-honored canons of construction," both of which squarely apply here. App., *infra*, 48a (Randolph, J., dissenting). As discussed above, in Title III, Congress superseded the FSIA for Cuban instrumentalities both "expressly" and "by implication" in numerous ways. *Dorsey*, 567 U.S. at 274. Title III is also far more specific than the general FSIA, as it creates

a special cause of action for a targeted group of plaintiffs who typically can sue only the instrumentalities of one particular nation.

At most, overcoming the general grant of sovereign immunity in the FSIA requires the kind of clear statement that this Court required—and unanimously found—in *Kirtz*. And there, the Court made clear that Congress "need *not* use magic words." *Kirtz*, 601 U.S. at 48. There is no reason to apply a more demanding, "*ultra-clear* statement to abrogate foreign sovereign immunity." App., *infra*, 48a (Randolph, J., dissenting). If anything, it should be easier for Congress to abrogate foreign sovereign immunity than federal or state sovereign immunity. Foreign sovereign immunity is "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Federal and state sovereign immunity, by contrast, *are* "embedded in the text and structure of the Constitution." *Franchise Tax Bd. of Calif.* v. *Hyatt*, 587 U.S. 230, 248 (2019); *see, e.g.*, *United States* v. *Clarke*, 33 U.S. 436, 443 (1834) (Marshall, C.J.) ("[T]he United States are not suable of common right.").

2. The panel majority placed too much reliance on this Court's previous descriptive statements that the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989); *see OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 40 (2015) (quoting *Amerada Hess* in dicta); *Republic of Austria* v. *Altmann*, 541 U.S. 677, 699 (2004) (calling the FSIA "a comprehensive framework

for resolving any claim of sovereign immunity"). As this Court said recently about *these very statements*, the "general language" of its opinions should not be read as "referring to quite different circumstances that the Court was not then considering." *Turkiye Halk Bankasi A.S.* v. *United States*, 598 U.S. 264, 278 (2023) (holding that the FSIA does not apply in criminal cases).

So too here. None of the above-cited cases had any "occasion to consider the FSIA's implications for" Title III of the Helms-Burton Act, or any other statute with an independent textual basis for abrogating foreign sovereign immunity. *Turkiye*, 598 U.S. at 278. *Amerada Hess* was decided in 1989, before the Helms-Burton Act was enacted. It addressed whether the Alien Tort Statute, a general jurisdictional statute enacted in 1789, continued to provide jurisdiction over foreign sovereigns even after the enactment of the FSIA. The Court held no, explaining that the more specific, later-in-time FSIA controlled. *See* 488 U.S. at 438 (explaining that the ATS is broader because it "does not distinguish among classes of defendants"). Applied to this case, that logic cuts *against* applying the FSIA to the more specific, later-in-time Title III.

Meanwhile, both *Altmann* and *Sachs* were decided before Title III's cause of action had ever been permitted to come into effect, and involved "quite different circumstances" from the question presented here, *Turkiye*, 598 U.S. at 278. In *Altmann*, the Court considered whether the FSIA applies in suits that were pending prior to the Act's enactment. *See* 541 U.S. at 697. And in *Sachs*, the Court considered when a tort

claim for injuries suffered abroad fell within the FSIA's commercial-activity exception. *See* 577 U.S. at 33. Neither had any occasion to opine on the interaction of the FSIA with a statute enacted after 1976.

II. THE DECISION BELOW WARRANTS IMMEDIATE REVIEW

This Court's review is warranted because the decision below is inconsistent with this Court's precedents, eviscerates an important federal statute with major foreign-policy implications, and directly affects billions of dollars in claims held by American individuals and businesses. Critically, because the federal venue statute limits actions against Cuban instrumentalities to the District of Columbia, this petition may well be the Court's *only* opportunity to consider the question presented.

A. The Question Presented Is Important

Whether Title III claimants may sue Cuban instrumentalities in federal court is a matter of great political, diplomatic, and financial significance. Congress concluded that the United States has an "obligation to its citizens" to provide a "fully effective remed[y]" against Cuban instrumentalities. 22 U.S.C. § 6081(8), (10)-(11). Such cases are so diplomatically sensitive that Congress allowed the President to suspend them if "necessary to the national interests of the United States," which four different Presidents did. *Id.* § 6085(b)(1). President Trump eventually allowed the suspension to lapse, and President Biden elected not to reinstate it. The decision below directly undercuts those Executive Branch judgments by making it harder—and in some cases impossible—for

injured entities with certified claims to bring the actions that Congress authorized. The court below wrongly inserted itself into an important dialogue between the political branches over foreign affairs.

In sheer dollars, this case matters, too. Title III plaintiffs may be entitled to many billions in total compensation if they can get into court as Congress intended. Nearly 6,000 individuals and businesses hold over $1.9 billion in certified claims, plus over 60 years of interest and treble damages. *See* 22 U.S.C. § 6082(a)(1). As explained above, the court of appeals' requirement that Title III plaintiffs proceed through the FSIA likely closes the courthouse doors to many claimants who will not be able to satisfy an FSIA exception. *See supra*, p. 19. And even when an FSIA exception ultimately applies, establishing that jurisdictional requirement will be a costly and uncertain exercise. This litigation—already five years old and now enmeshed in further jurisdictional discovery about specific service stations and remittance-processing offerings—is a perfect example. For other claimants without the same resources or fortitude, the game may not be worth the candle. Unjustified costs and delays thus undermine Congress's goal of a "fully effective remed[y]" for Castro's victims. 22 U.S.C. § 6081(8).

The decision below also threatens significant spillover effects. By misinterpreting this Court's unconsidered dicta in *Amerada Hess*, the D.C. Circuit required Congress to play by different rules when departing from the FSIA than from other statutes. That puts an unwarranted thumb on the scale for foreign instrumentalities in future disputes over other

statutes like Title III—even those not yet enacted. For example, several post-FSIA laws authorize the U.S. government to bring civil damages actions against "any person" that violates restrictions on chemical or nuclear weapons, and define "person" to include "any instrumentality or political subdivision of [a foreign] government or nation . . . located in the United States." *See* 22 U.S.C. §§ 8102(11), 8141, 8142 (nuclear); 22 U.S.C. §§ 6701(6), 6726, 6761 (chemical weapons). Another statute permits civil penalty suits against "foreign persons" that violate certain drug-trafficking laws, including "any political subdivision, agency, or instrumentality of a foreign government." 21 U.S.C. §§ 2302(6), 2313-2314. The D.C. Circuit's approach would likely preclude such suits unless an FSIA exception applies, because these statutes similarly lack a magic-words reference to the FSIA.

B. There Is No Realistic Possibility Of Further Percolation

The decision below "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). As explained above, over a series of decisions culminating in *Kirtz*, this Court has articulated a simple test for determining when a federal statute clearly abrogates sovereign immunity: "when [the] statute creates a cause of action and explicitly authorizes suit against a government on that claim." 601 U.S. at 49 (internal quotation marks omitted). The court below declined to apply that test to foreign sovereigns, adopting an even more demanding "*ultra-clear* statement" rule applicable to foreign sovereign immunity alone. App., *in-*

fra, 48a (Randolph, J., dissenting). Such a "principle has no support" in this Court's cases. *Ibid.*

This case is likely to be the Court's only real opportunity to correct that error. As a practical matter, under Section 1391(f) of the federal venue statute, Title III actions against Cuban instrumentalities can be brought *only* in the District of Columbia. It is very unlikely that any of the other venue options set forth in Section 1391(f) will ever be available in a Title III case. Absent truly unusual circumstances, there will be no U.S. district where "a substantial part of the events or omissions giving rise to the claim occurred"; where "a substantial part of property that is the subject of the action is situated"; or where the defendant "instrumentality is licensed to do business or is doing business." 28 U.S.C. § 1391(f)(1)-(3). The expropriations and trafficking took place in Cuba; the property is in Cuba; and Cuban state entities like CIMEX generally cannot "do business" in the United States within the meaning of subsection (f)(3), given the embargo and other sanctions. Thus, Title III claimants will virtually always fall back on subsection (f)(4), which establishes venue in the District Court for the District of Columbia if the action "is brought against a foreign state or political subdivision thereof." *Id.* § 1391(f)(4). As a result, there is no reasonable prospect that any court of appeals other than the D.C. Circuit will have the chance to opine on the question presented here.

This Court often grants review of issues arising from the Federal Circuit that divide that court, and over which that court has exclusive jurisdiction. *E.g.*, *Harrow* v. *Department of Def.*, 601 U.S. 480 (2024); *Rudisil* v. *McDonough*, 601 U.S. 294 (2024). Indeed,

this Court often reviews decisions from that court even where the panel was unanimous. *E.g.*, *Feliciano* v. *Department of Transportation*, No. 23-861 (argued Dec. 9, 2024); *Amgen* v. *Sanofi*, 598 U.S. 594 (2023); *Arellano* v. *McDonough*, 598 U.S. 1 (2023). Review is warranted here for similar reasons. The question presented will realistically not arise outside of the D.C. Circuit, and the panel sharply divided on it. That is as close to a split as the question can generate.

C. This Case Is An Excellent Vehicle

This case offers an excellent vehicle for addressing the interaction of the Helms-Burton Act and the FSIA. The question presented is a clean issue of statutory interpretation. It was well ventilated below, prompting thorough opinions from the panel majority and dissent. The financial stakes of this case alone are enormous: after pre-judgment interest and trebling, Exxon seeks nearly a billion dollars in damages. And there are no other jurisdictional, threshold, or prudential barriers to this Court's review. Exxon filed this action on the first possible day that President Trump allowed Title III to take effect, and the Cuban defendants appeared to defend it. That is not always assured in cases involving nations with which the United States does not have normal diplomatic relations.

Although the case is on interlocutory appeal, that is no obstacle. This Court often decides FSIA immunity issues in that posture. *See, e.g.*, *Turkiye*, 598 U.S. 264; *Federal Republic of Germany* v. *Philipp*, 592 U.S. 169 (2021); *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170

(2017). And the issues that remain to be decided have no bearing on the Title III question.

If anything, the ongoing proceedings illustrate the stakes here. The court of appeals sent the parties into unnecessary and extensive jurisdictional discovery on the "direct effect" prong of the FSIA's commercial-activity exception. For example, the court tasked the district court with determining whether, on the whole, "Americans would still send the same amount of money [to Cuba] and Cuban recipients would still withdraw the same amount of money" if CIMEX did not operate a remittance-processing business at "four to ten" of its 66 service stations. App., *infra*, 35a. To answer that question, the district court apparently must determine whether there are "Western Union sites in the immediate vicinity" of those "four to ten" stations, and what "the conduct of the business at those stations looks like." *Id.* at 36a. None of this effort is relevant to the question presented here, and Exxon should not be required to suffer even greater delay and expense—precisely what Title III was designed to avoid. Sixty years is long enough.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 27, 2024

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-7127
Consolidated with 22-7019, 22-7020

EXXON MOBIL CORPORATION,

Appellee,

v.

CORPORACION CIMEX, S.A. (CUBA),

Appellant,

CORPORACION CIMEX, S.A. (PANAMA)
AND UNION CUBA-PETROLEO,

Appellees.

Decided July 30, 2024, Argued January 19, 2023

Before: SRINIVASAN, *Chief Judge*, PILLARD, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* SRINIVASAN.

Dissenting opinion filed by *Senior Circuit Judge* RANDOLPH.

SRINIVASAN, *Chief Judge*: Over six decades ago, Exxon owned multiple subsidiaries in Cuba that in turn owned various oil and gas assets. In 1960, the Cuban government expropriated those assets without compensating Exxon.

In 1996, Congress enacted the Cuban Liberty and Democratic Solidarity Act, which furnishes a cause of action against those who traffic in property confiscated

by the Cuban government. Exxon brought suit under that Act against three state-owned defendants. Exxon's suit contends that the defendants currently traffic in confiscated property by participating in the oil industry and operating service stations using the property.

One of the defendants unsuccessfully moved to dismiss the complaint based on foreign sovereign immunity. The Foreign Sovereign Immunities Act (FSIA) generally bars United States courts from exercising jurisdiction over foreign sovereign entities like the defendants in this case. The district court held that the Cuban Liberty and Democratic Solidarity Act does not itself overcome a foreign sovereign's general immunity from suit under the FSIA, and that jurisdiction in this case thus depends on the applicability of an FSIA exception. The court determined that the FSIA's expropriation exception does not apply in the circumstances but that the FSIA's commercial-activity exception does.

We agree with the district court that the Cuban Liberty and Democratic Solidarity Act does not confer jurisdiction in this case and that the FSIA's expropriation exception is inapplicable. As for the commercial-activity exception, we conclude that the district court needed to undertake additional analysis before determining that jurisdiction exists under that exception. We thus vacate the district court's decision and remand the case for further analysis on the applicability of the FSIA's commercial-activity exception.

I.

A.

In 1959, Exxon, then known as Standard Oil, owned several subsidiaries in Cuba, including Esso Standard Oil, S.A. (Essosa). After Fidel Castro's rise to power, the Cuban government seized files, maps, and other records of geological exploration from the offices of Standard Oil's subsidiaries, and the subsidiaries ceased all exploration efforts in Cuba. In 1960, the Cuban government issued a series of resolutions expropriating property, including all Cuban property owned by Essosa. The Cuban government prohibited Essosa from operating a refinery, caused it to abandon its Cuba-based marketing operations, and forced it to stop operating its service stations in Cuba. All told, the Cuban government confiscated the refinery, multiple bulk-products terminals, and over one hundred service stations from Standard Oil's subsidiaries.

In 1964, Congress established a mechanism for U.S. nationals to submit expropriation claims against Cuba to the U.S. Foreign Claims Settlement Commission (the Commission). *See* 22 U.S.C. § 1643 *et seq.* Congress tasked the Commission with determining "the amount and validity of claims by nationals of the United States against the Government of Cuba" for "losses resulting from the nationalization, expropriation, intervention, or other taking of . . . property," including claims based on "any rights or interests . . . owned wholly or partially, directly or indirectly." *Id.* § 1643b(a).

In 1969, the Commission certified that Standard Oil had "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," and that Standard Oil was also entitled to interest at a rate of 6% per annum. *See* In the Matter of the Claim of Standard Oil Company (F.C.S.C. Decision No. CU-3838 Sept. 3, 1969) at 9, J.A. 60. Neither Standard Oil nor its successor Exxon has received any payment in connection with that certified claim.

B.

Three decades after the Commission certified Standard Oil's claim, Congress enacted the Cuban Liberty and Democratic Solidarity Act of 1996. *See* 22 U.S.C. § 6021 *et seq.* Title III of the Act creates a private right of action enabling U.S. nationals who previously owned property in Cuba to sue any "person" who, after a certain date, "traffics in property which was confiscated by the Cuban Government on or after January 1, 1959." *Id.* § 6082(a)(1)(A). The Act defines a "person" as "any person or entity, including any agency or instrumentality of a foreign state." *Id.* § 6023(11). And the Act broadly defines "traffics": one "traffics" in property by "knowingly and intentionally" taking one of a long list of actions without authorization, such as purchasing, selling, controlling, or using an interest in confiscated property, as well as "engag[ing] in a commercial activity using or otherwise benefiting from confiscated property." *See id.* § 6023(13)(A)(i)–(iii).

The Act's stated purpose in part is to "deter trafficking in wrongfully confiscated property" by giving "United States nationals who were the victims of these confiscations . . . a judicial remedy in the courts of the United States that would deny traffickers any profits

from economically exploiting Castro's wrongful seizures." *Id.* § 6081(11). While Title III provides multiple possible measures of damages, it creates a rebuttable presumption that a claimant is entitled to the amount certified to them by the Commission, in addition to court costs and attorneys' fees. *See id.* § 6082(a)(1)–(2). Title III also provides for treble damages when a claim to property previously certified by the Commission is at issue. *See id.* § 6082(a)(3)(A), (a)(3)(C)(ii).

The Act authorizes the President to suspend Title III's private right of action for periods of up to six months at a time upon determining "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). From the time of the Act's enactment, Presidents issued sequential six-month suspensions until 2019, when President Trump's administration announced that it would no longer suspend the right to bring Title III actions. That decision paved the way for this suit.

C.

In May 2019, Exxon sued three state-owned defendants: (i) Corporación CIMEX S.A. (Cuba), a conglomerate, whom we will refer to as CIMEX; (ii) Corporación CIMEX S.A. (Panama), whom Exxon alleges is the alter ego of CIMEX; and (iii) Unión Cuba-Petróleo (CUPET), Cuba's state-owned oil company. Exxon alleges that the defendants traffic in confiscated property by extracting, importing, and refining crude oil, operating service stations, and engaging in commercial activity involving the confiscated property. *See* Second Am. Compl. ¶¶ 127–35, J.A. 47–48. Exxon seeks a damages

award equaling the amount certified by the Commission, as well as pre-judgment interest and treble damages. *Id.* ¶ 137, J.A. 48.

The defendants moved to dismiss Exxon's complaint for lack of jurisdiction based on foreign sovereign immunity. The parties agree that all three defendants are wholly owned by Cuba, rendering them agencies or instrumentalities of a foreign state. As such, the defendants are "presumptively immune from the jurisdiction of United States courts" under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, unless one of the FSIA's exceptions applies. *See OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 30–31, 136 S. Ct. 390, 193 L. Ed. 2d 269 (2015) (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993)). At issue here are two FSIA exceptions: the expropriation exception and the commercial-activity exception. *See* 28 U.S.C. § 1605(a)(2), (a)(3).

The district court denied the motion to dismiss as to CIMEX, but deferred ruling and allowed limited jurisdictional discovery as to the other two defendants. *Exxon Mobil Corp. v. Corporación CIMEX S.A.*, 534 F. Supp. 3d 1, 7 (D.D.C. 2021). The court began by rejecting Exxon's argument that, regardless of the FSIA, Title III independently confers jurisdiction over the defendants. *Id.* at 11. The court then examined the relevant FSIA exceptions, concluding that the commercial-activity exception is satisfied with respect to CIMEX but that the expropriation exception is unsatisfied with respect to any defendant. *Id.* at 15–22, 26–29. The court later denied the defendants' motion for reconsideration. *Exxon*

Mobil Corp. v. Corporación Cimex S.A., 567 F. Supp. 3d 21 (D.D.C. 2021).

All three defendants now appeal the district court's denial of CIMEX's motion to dismiss for lack of jurisdiction. Exxon cross-appeals the district court's holdings that the FSIA's expropriation exception is unsatisfied and that Title III does not independently confer jurisdiction.

II.

While we generally lack jurisdiction to review the denial of a motion to dismiss because such an order is interlocutory, we have jurisdiction when the dismissal was sought on grounds of sovereign immunity (including foreign sovereign immunity). *See Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126, 363 U.S. App. D.C. 87 (D.C. Cir. 2004). We thus possess jurisdiction over CIMEX's appeal from the denial of its motion for dismissal. As for the other two defendants, the district court certified their appeals for interlocutory review as a discretionary matter under 28 U.S.C. § 1292(b), *see Exxon Mobil Corp. v. Corporación Cimex S.A.*, No. 19-cv-1277, 2021 U.S. Dist. LEXIS 253582, 2021 WL 6805533 (D.D.C. Nov. 23, 2021), and we agree that the statutory standards for interlocutory appeal are satisfied. And when a district court certifies an order for interlocutory appeal under that statute, we can decide "any issue fairly included within the certified order," *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996), which here includes the issues raised by Exxon in its cross-appeal.

We thus proceed to examine: (i) Exxon's argument that, regardless of the applicability of any FSIA exception, Title III independently establishes jurisdiction over foreign sovereign entities like the defendants; (ii) Exxon's contention that the FSIA's expropriation exception applies in this case; and (iii) the defendants' submission that the FSIA's commercial-activity exception does not apply.

A.

Exxon initially contends that we need not consider the applicability of any FSIA exception because Title III independently confers jurisdiction over its action against Cuba-owned entities. The district court, in our view, correctly rejected that contention.

The terms of the FSIA contemplate that jurisdiction in a civil action against a foreign sovereign could arise only under the FSIA itself, not under some other statute like Title III. To that end, the FSIA prescribes that "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 (emphasis added); *see also* 28 U.S.C. § 1330(a). Section 1605 then sets out the FSIA's exceptions to the default bar against jurisdiction over foreign sovereigns—and we will examine two of those exceptions below. And Section 1607, inapposite here, concerns counterclaims against foreign states who themselves bring an action.

Given the FSIA's terms, the Supreme Court has repeatedly explained that the "Foreign Sovereign Immunities Act 'provides the *sole basis* for obtaining jurisdiction over a foreign state in the courts of this

country.'" *Sachs*, 577 U.S. at 30 (emphasis added) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989)). Said otherwise, "Congress established [in the FSIA] a comprehensive framework for resolving *any claim* of [foreign] sovereign immunity." *Republic of Austria v. Altmann*, 541 U.S. 677, 699, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004) (emphasis added). Accordingly, when the Supreme Court recently held that the FSIA does not pertain to criminal cases against foreign sovereigns, the Court reiterated "the 'comprehensiveness' of the statutory scheme as to civil matters" like this case. *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 278, 143 S. Ct. 940, 215 L. Ed. 2d 242 (2023) (quoting *Amerada Hess*, 488 U.S. at 437).

In short, "[t]hrough the FSIA, Congress enacted a comprehensive scheme governing claims of immunity in civil actions against foreign states and their instrumentalities." *Id.* at 272–73. Consistent with that understanding, our court has described the "FSIA exceptions [as] exhaustive; if none applies to the circumstances presented in a case, the foreign state has immunity and the court lacks subject-matter jurisdiction." *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 690, 455 U.S. App. D.C. 373 (D.C. Cir. 2022); *see also Simon v. Republic of Hungary*, 77 F.4th 1077, 1090 (D.C. Cir. 2023) ("Absent a pre-existing agreement with the United States affecting the scope of sovereign immunity, a foreign sovereign is generally immune, unless one of the FSIA's enumerated exceptions applies."); *Valambhia v. United Republic of Tanzania*, 964 F.3d 1135, 1139, 448 U.S. App. D.C. 91 (D.C. Cir. 2020).

Exxon nonetheless contends that the FSIA does not set out the exclusive mechanism for securing jurisdiction over civil suits against foreign sovereigns, and that courts have jurisdiction in Title III actions against foreign sovereigns without regard to the FSIA. In support of that proposition, Exxon observes that Title III creates liability for "any person that . . . traffics in property which was confiscated by the Cuban Government," 22 U.S.C. § 6082(a)(1)(A), and defines a "person" as "any person or entity, including any *agency or instrumentality of a foreign state*," *id.* § 6023(11) (emphasis added).

It is true that Title III thereby contemplates that its cause of action can encompass suits against a foreign state (and its agencies or instrumentalities). But Title III nowhere says that *any* Title III action against a foreign state automatically lies within a district court's jurisdiction. Rather, Title III harmoniously coexists with the FSIA if it allows for actions against foreign sovereign entities who traffic in expropriated property in those circumstances in which the FSIA allows for jurisdiction over the foreign sovereign—i.e., when an FSIA exception applies.

After all, Title III speaks in terms of establishing "liability" for persons (potentially including foreign states) who "traffic[] in property which was confiscated by the Cuban Government," *id.* § 6082(a)(1)(A), without saying anything about the existence of jurisdiction over a foreign sovereign. The FSIA, by contrast, specifically addresses when a "foreign state [is] immune from . . . jurisdiction." 28 U.S.C. § 1604. And "whether there has been a waiver of sovereign immunity" and "whether

the source of substantive law upon which the claimant relies provides an avenue of relief" are "two 'analytically distinct' inquiries." *FDIC v. Meyer*, 510 U.S. 471, 483–84, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994) (quoting *United States v. Mitchell*, 463 U.S. 206, 218, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983)). So, while Title III "provides an avenue of relief" against persons (potentially including foreign states) who traffic in property expropriated by Cuba, that does not tell us "whether there has been a waiver of sovereign immunity" enabling the exercise of jurisdiction over a foreign sovereign sued under Title III. *See id.*

Congress, moreover, was well aware of the FSIA when it enacted Title III, so much so that it expressly referenced and incorporated FSIA definitions, *see* 22 U.S.C. § 6023(1), (3), and FSIA procedures for service of process, *see id.* § 6082(c)(2). Conversely, when Congress sought to render FSIA provisions inapplicable to actions under Title III, Congress specifically said so, as it did with respect to the FSIA's delineation of the scope of immunity from attachment or execution. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 302(e), 110 Stat. 785, 818 (codified at 28 U.S.C. § 1611(c)). Title III contains no such language referencing—much less departing from—the FSIA's prescription that "a foreign state shall be immune from the jurisdiction of the courts . . . except as provided in" the FSIA's enumerated exceptions. 28 U.S.C. § 1604. The absence of any such language in Title III is significant: "Given the FSIA's comprehensive and explicit regulation of jurisdiction over foreign sovereigns, we cannot assume that Congress abrogated these sovereigns' immunity

from suit through other statutes" like Title III "without mentioning jurisdiction or their immunity expressly." *Does v. Taliban*, 101 F.4th 1, 10 (D.C. Cir. 2024). Indeed, even if Title III were ambiguous on whether it abrogates foreign sovereign immunity, "any statutory ambiguity concerning a waiver of foreign immunity outside the FSIA must be resolved in favor of its preservation." *Id.* at 12.

Our dissenting colleague suggests that if Congress understood the FSIA to apply to Title III, it would not have needed to specify the applicability of various FSIA provisions in Title III actions. Dissenting Op. 9. As alluded to above, however, when enacting Title III, Congress amended the FSIA to provide that, "[n]otwithstanding" the FSIA's exceptions to a foreign sovereign's immunity from attachment and execution, in Title III actions "the property of a foreign state shall be immune from attachment and from execution" in certain conditions. 28 U.S.C. § 1611(c) (citing 28 U.S.C. § 1610). Congress would expressly provide that an FSIA exception to FSIA-created immunity is inapplicable in Title III actions only if Congress understood foreign states to enjoy FSIA immunity in Title III actions in the first place. True, that provision specifically concerns FSIA execution immunity (as opposed to FSIA jurisdictional immunity) in Title III cases. *See* Dissenting Op. 9. But if Congress in fact wanted Title III plaintiffs to secure judgments against foreign states without needing to surmount FSIA jurisdictional immunity—as our dissenting colleague supposes—then it is hard to see why Congress still forced those same plaintiffs to overcome FSIA execution immunity to collect on those same judgments.

Nor are we persuaded by our colleague's reliance on the Supreme Court's decision in *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42, 144 S. Ct. 457, 217 L. Ed. 2d 361 (2024), in support of the proposition that Title III's conferral of liability on foreign governments also effected an abrogation of their otherwise-applicable jurisdictional immunity under the FSIA. *See* Dissenting Op. 5–7. *Kirtz* held that the Fair Credit Reporting Act (FCRA) waived the federal government's (domestic) sovereign immunity because the "'statute creates a cause of action' and explicitly 'authorizes suit against a government on that claim.'" 601 U.S. at 49 (quoting *Fin. Oversight & Mgmt. Bd. for P.R. v. Centro De Periodismo Investigativo, Inc.* (*FOMB*), 598 U.S. 339, 347, 143 S. Ct. 1176, 215 L. Ed. 2d 321 (2023)). In reaching that conclusion, the Court adopted the approach it has long taken when considering the sovereign immunity of domestic states. *See, e.g., Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 726, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73–74, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 56–57, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

Our colleague observes that, like the FCRA, Title III also imposes liability on any "person" and defines "person" to include a government agency or similar entity. *See Kirtz*, 601 U.S. at 51; *compare* 22 U.S.C. § 6023(11) ("any agency or instrumentality of a foreign state"), *with* 15 U.S.C. § 1681a(b) ("any . . . governmental subdivision or agency, or other entity"). But we believe it is mistaken to rely on that similarity alone to conclude that Title III

likewise both confers a cause of action against foreign states and abrogates their sovereign immunity.

To begin with, *Kirtz* and the line of cases preceding it concerned either federal or state sovereign immunity, which derive from different sources than does foreign sovereign immunity. Whereas federal and state sovereign immunity stem from the common law and the Constitution, respectively, *see Whole Woman's Health v. Jackson*, 595 U.S. 30, 39, 142 S. Ct. 522, 211 L. Ed. 2d 316 (2021); *Alden v. Maine*, 527 U.S. 706, 712–13, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999); *Shuler v. United States*, 531 F.3d 930, 932–33, 382 U.S. App. D.C. 201 (D.C. Cir. 2008), foreign sovereign immunity is "a matter of grace and comity" extended to foreign states by our political branches, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486–88, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983); *Altmann*, 541 U.S. at 689, 696. So a host of "sensitive diplomatic and national-security judgments . . . pervade waivers of foreign sovereign immunity," bolstering the need to respect Congress's balancing of those considerations in the provisions of the FSIA. *Does v. Taliban*, 101 F.4th at 12. Those sorts of foreign-relations concerns do not arise in cases involving federal or state sovereign immunity.

Additionally, when the Supreme Court has held that Congress waived or abrogated immunity in cases involving federal or state sovereign immunity, it was not just because the statute created a cause of action and authorized suit against a government (as Title III also does). Instead, the Court deemed immunity waived or abrogated because "recognizing immunity would have negated" the conferral of a cause of action against governments *entirely*, as any

and all "suits allowed [by the statute] against governments would automatically have been dismissed" on sovereign-immunity grounds. *FOMB*, 598 U.S. at 348; *see Kirtz*, 601 U.S. at 49–51. In other words, unless the statute creating the cause of action were construed to waive sovereign immunity, the conferral of a cause of action against the government would have been completely pointless. That is not the case here. Our holding that Title III does not independently abrogate FSIA immunity does *not* entirely "negate" the Title III cause of action against foreign governments: Title III suits against those governments can proceed if an FSIA exception applies.

The upshot is that plaintiffs bringing Title III actions against foreign states must satisfy one of the FSIA's exceptions, which is the same condition any litigant seeking to sue a foreign sovereign must meet. That approach, contrary to Exxon's submission, does not undermine Title III's purposes. It poses no obstacle to Title III suits against non-sovereign parties who traffic in confiscated property. And with respect to Title III actions against foreign sovereigns, insofar as Congress intended for such suits to go forward only when the FSIA allows for jurisdiction, as we believe to be the case, our reading of course furthers—rather than frustrates—Congress's intentions. That conclusion respects Congress's decision to craft the FSIA as a "careful balance between respecting the immunity historically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions." *See Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 208–09, 138 S. Ct. 816, 200 L. Ed. 2d 58 (2018).

B.

Because Exxon's Title III action is subject to the FSIA's "baseline principle of immunity for foreign states and their instrumentalities," the action must fit within one of the FSIA's "exceptions to that principle." *Turkiye Halk Bankasi*, 598 U.S. at 272. Exxon "bears the initial burden to overcome" the FSIA's "presumption of immunity . . . by producing evidence that an exception applies." *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183, 407 U.S. App. D.C. 133 (D.C. Cir. 2013). The defendants then "bear[] the ultimate burden of persuasion to show the exception does not apply." *Id.*

Exxon submits that its suit satisfies two FSIA exceptions: the expropriation exception and the commercial-activity exception. We agree with the district court that the expropriation exception is inapplicable. With respect to the commercial-activity exception, while the district court considered that exception to apply, we remand for further assessment of whether CIMEX's use of expropriated property causes the requisite direct effect in the United States.

Before turning to an examination of each of the two exceptions relied on by Exxon, we pause briefly to consider a threshold theory advanced by the defendants: that because this case arises out of Cuba's ct of expropriating property, the only FSIA exception potentially in play is the expropriation exception, such that the commercial-activity exception could not separately supply a basis for jurisdiction.

Nothing in the FSIA supports that kind of one-and-only-one-exception approach. The FSIA sets out a list of exceptions enumerating various circumstances in which a "foreign state shall not be immune from the jurisdiction of courts," and those exceptions are framed as alternatives, separated by the word "or." *See* 28 U.S.C. § 1605(a). The most natural reading is that, if any of those exceptions applies in a given case, immunity is overcome. There is no textual (or other) indication that a court must first somehow determine which exception is the sole one possibly in play in any given case, and then should limit itself to examining whether that—and only that—exception applies. Indeed, it is unclear how a court would evaluate which of two (or more) exceptions is most germane without proceeding to assess whether each exception's requirements are satisfied—the very inquiry the defendants suggest should not happen.

Our court accordingly 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, 429 U.S. App. D.C. 342 (D.C. Cir. 2017). In fact, with specific regard to the expropriation and commercial-activity exceptions, we have explained that they involve "altogether different questions." *Id.* We thus rejected the idea that an activity must fall under "either the expropriation exception or the commercial activity exception, but not both." *Id.* As long as "a proper showing is made," a plaintiff can rely on the commercial-activity exception even if a case may involve "the taking of property"—i.e., an expropriation. *Foremost-McKesson, Inc. v. Islamic Republic of Iran*,

905 F.2d 438, 450 n.15, 284 U.S. App. D.C. 333 (D.C. Cir. 1990) (internal quotation marks omitted).

1.

We first consider the expropriation exception. As relevant here, that exception abrogates 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 or operated 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). "Generally speaking, the exception has two requirements: (1) the claim must put in issue 'rights in property taken in violation of international law,' and (2) there must be an adequate connection between the defendant and both the expropriated property and some form of commercial activity in the United States." *Simon*, 77 F.4th at 1091 (quoting 28 U.S.C. § 1605(a)(3)).

The first of those requirements is dispositive here. In determining whether a claim involves rights in property that are recognized by and taken in violation of international law, courts look to the "customary international law of expropriation" (if the plaintiff "do[es] not rely on an express international agreement"). *Id.* at 1097. Such a plaintiff thus "must show that [its] legal theory 'has in fact crystallized into an international norm that bears the heft of customary law.'" *Id.* (quoting *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 743 F. App'x 442, 449 (D.C. Cir. 2018)); *see Fed. Republic of Germany v. Philipp*, 592 U.S. 169, 180–81, 141 S. Ct. 703, 208 L. Ed. 2d 589 (2021).

We agree with the district court that Exxon has failed to allege any "rights in property taken in violation of international law." 28 U.S.C. § 1605(a)(3). Exxon does not contend that it directly owned any of the property seized by Cuba. The seized property instead was owned by Exxon's subsidiary, Essosa. Exxon's asserted property right, then, is its interest, as a shareholder and parent of Essosa, in Essosa's property. And under the international law of expropriation, "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*, 743 F. App'x at 454. Because a "shareholder's direct rights generally are not implicated by state action that depreciates the value of a corporation's shares, even severely," shareholders typically cannot establish a violation of their rights on the basis of such state action unless the action is aimed at the direct rights of the shareholders themselves. *See id.* (quoting Helmerich & Payne Int'l Drilling Co. at 12–13, *Bolivarian Republic of Venez.*, 743 F. App'x 442 (No. 13-7169)).

Decisions by the International Court of Justice confirm that international law generally does not recognize a shareholder's right in property owned by the corporation. As that court has explained, there is "a firm distinction between the separate entity of the company and that of the shareholder," and "[s]o long as the company is in existence[,] the shareholder has no right to the corporate assets." *The Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, Judgment, 1970 I.C.J. 3, 35, ¶ 41 (Feb. 5). That understanding governs even in the case of a shareholder who is the sole owner of the subsidiary. *See Ahmadou Sadio Diallo (Republic of*

Guinea v. Democratic Republic of the Congo), Judgment, 2010 I.C.J. 640, 688, ¶ 151, 689–90, ¶¶ 155–56 (Nov. 30).

Exxon insists that other sources of international law recognize its shareholder interest in Essosa's assets as a property right. The scattered authorities Exxon cites, however, are secondary to the judgments of the International Court of Justice, which are "accorded great weight" in understanding the content of international law. *See* Restatement (Third) of the Foreign Relations Law of the United States § 103 cmt. b (Am. L. Inst. 1987) (Third Restatement). At any rate, even on their own terms, the sources Exxon cites do not support its position.

Two of the sources—decisions by the Iran-United States Claims Tribunal and investor-state arbitration decisions—tell us little about the customary international law of expropriation. The Tribunal's decisions involve "specific, bargained-for agreements" subject to governing law distinct from customary international law. *See Helmerich*, 743 F. App'x at 452 (citing Third Restatement § 102(2)). One Tribunal decision, for example, explains that the State Department had specifically bargained with Iran for a broader definition of property that extended to interests in property. *See Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co. (Pemex)*, 15 Iran-U.S. Cl. Trib. Rep. 23 (1987), 767 F.2d 1140, 1987 WL 503885, at *8 n.9. Investorstate arbitration decisions likewise involve negotiated Bilateral Investment Treaties whose terms do not necessarily reflect the parameters of customary international law. *See, e.g., Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, ¶ 78 (Aug. 25,

2006) (distinguishing bilateral investment treaties from customary international law). Exxon's reliance on a third source—the Commission's certification of Exxon's claim—falls short for similar reasons: Congress authorized the Commission to certify losses due to the expropriation of "property including any rights or interests therein owned wholly or partially, directly or indirectly," *see* 22 U.S.C. § 1643b(a), a definition of property that sweeps substantially broader than the one recognized by our decision in *Helmerich* and by the International Court of Justice's decisions.

To be sure, there is an exception to the general rule under customary international law that shareholders lack a property right in the assets of entities in which they hold ownership interests. As we recognized in *Helmerich*, if a state's action "'is aimed at the direct rights of the shareholder as such,' it can form the basis for an international expropriation claim." 743 F. App'x at 454 (quoting *Barcelona Traction*, 1970 I.C.J. at 36, ¶ 47). That can occur if the state action "completely destroy[s] the beneficial and productive value of the shareholder's ownership of their company," "leaving the shareholder with shares that have been rendered useless." *Id.* (quoting Helmerich & Payne Int'l Drilling Co. at 12, *Bolivarian Republic of Venez.*, 743 F. App'x 442 (No. 13-7169)). In *Helmerich*, for example, we concluded that a parent company had adequately alleged that a foreign sovereign had taken its rights in property in violation of international law because the takings, while aimed at the subsidiary, had destroyed the entire value of the parent company's shares. *Id.* at 455.

That exception is inapplicable here. Unlike in *Helmerich*, the district court here found undisputed evidence that Essosa has continued its operations. The defendants produced documents demonstrating that Essosa continued to hold annual shareholder meetings and Board of Directors meetings, operated fuel stations as of 2011, and began operating under a different name in 2012 that is listed as in good standing with the Public Registry of Panama. *See* Frank Decl. ¶¶ 2–19, J.A. 323–33. Exxon has not alleged any clear error in the district court's factual findings, and there is no evidence that Exxon's shares in Essosa were "rendered useless," *Helmerich*, 743 F. App'x at 454, by Cuba's expropriation of Essosa's property. And while Exxon contends in its reply brief in our court that Cuba in fact destroyed the entire value of Essosa's operations, we have no occasion to consider that argument: Exxon forfeited the argument twice over by failing to raise it in the district court or in our court in its opening brief. *See Bryant v. Gates*, 532 F.3d 888, 898, 382 U.S. App. D.C. 287 (D.C. Cir. 2008); *Abdullah v. Obama*, 753 F.3d 193, 199–200, 410 U.S. App. D.C. 80 (D.C. Cir. 2014).

Finally, our dissenting colleague suggests that the foregoing analysis is misplaced because the U.S. Foreign Claims Settlement Commission long ago effectively settled that Exxon itself has a legally cognizable interest in the expropriated property. *See* Dissenting Op. 8. Title III requires that if the Commission certifies "a claim to ownership of [an] interest" in property, courts "shall accept" that certification "as conclusive proof of ownership of [that] interest." 22 U.S.C. § 6083(a)(1). And because the Commission determined that Cuba unlawfully took

Exxon's property rights, our colleague reasons, we are bound to treat Exxon's ownership of those property rights as conclusive of Exxon's property interests. We do not see things the same way.

It is true that the statute establishing the Commission charged it with determining "the amount and validity of claims" "in accordance with applicable substantive law, including international law." 22 U.S.C. § 1643b(a). But the statute also directs the Commission to determine claims "for losses resulting from the . . . . expropriation [of] . . . property including any rights *or interests* therein owned wholly or partially, directly *or indirectly* at the time by nationals of the United States." *Id.* (emphasis added). As the district court observed, the Commission thus evaluated property interests much broader than those recognized under customary international law. *See Exxon*, 534 F. Supp. 3d at 29. And there is no evidence that the Commission purported to evaluate property claims based on customary international law. The Commission's certification, then, cannot resolve whether the expropriation exception applies.

In sum, because Exxon does not assert a right recognized by the international law of property, it cannot satisfy the expropriation exception. Exxon submits that Cuba not only expropriated property but intentionally discriminated against U.S. nationals in doing so, thereby ostensibly running afoul of international law's prohibition on discriminatory takings. But even if that were so, Exxon still could not meet the expropriation exception's requirements: a successful claim of a discriminatory taking of property requires both discrimination and a

taking of property in violation of international law. The latter is absent here for the reasons explained.

2.

The commercial-activity exception—the "most significant of the FSIA's exceptions"—strips sovereign immunity on the basis of a foreign sovereign's commercial activities. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992); 28 U.S.C. § 1605(a)(2). The exception abrogates immunity in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or 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). At issue here is the third clause, which withdraws immunity when a suit is "(1) 'based . . . upon an act outside the territory of the United States'; (2) that was taken 'in connection with a commercial activity' of [the defendant] outside this country; and (3) that 'cause[d] a direct effect in the United States.'" *Weltover*, 504 U.S. at 611 (first and third alterations in original) (quoting *id.*).

There is no dispute that Exxon's suit fulfills the first requirement, as CIMEX's alleged trafficking occurs in Cuba. The parties dispute whether Exxon's suit

satisfies the second and third requirements—namely, whether CIMEX's actions are taken in connection with a commercial activity and whether they cause a direct effect in the United States. We conclude that Exxon's suit meets the second requirement because trafficking in confiscated property for purposes of Title III constitutes commercial activity under the FSIA. We vacate and remand, however, for the district court to further assess whether, under the third requirement, CIMEX's actions cause a direct effect in the United States.

a.

In applying the commercial-activity exception, "[w]e begin our analysis by identifying the particular conduct on which the [plaintiff's] action is 'based' for purposes of the Act." *Nelson*, 507 U.S. at 356. We look to "the 'basis' or 'foundation' for a claim," or the "gravamen of the complaint," which generally accounts for "those elements . . . that, if proven, would entitle a plaintiff to relief." *Sachs*, 577 U.S. at 33–34 (alteration in original) (quoting *Nelson*, 507 U.S. at 357).

The relevant clause of the commercial-activity exception requires that the gravamen of the complaint bear a connection to "commercial activity," which the FSIA defines as "a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The statute further instructs that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.*; *see also Weltover*, 504 U.S. at 614. While the

statute's definition "leaves the critical term 'commercial' largely undefined," the following principle guides our inquiry: "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Weltover*, 504 U.S. at 612, 614. In *Weltover*, for example, the Supreme Court concluded that because sovereign bonds are "garden-variety debt instruments" that could "be held by private parties," could "be traded on the international market," and "promise[d] a future stream of cash income," Argentina's issuance of those bonds constituted commercial activity under the FSIA. *Id.* at 615.

The gravamen of Exxon's suit is plainly connected to commercial activity. Exxon alleges that CIMEX processes remittances (transfers of money) sent by U.S. residents to Cuba and that it operates service stations that sell gas and consumer goods. Running retail and financial-services operations is not uniquely sovereign activity, as any private actor can also engage in those functions. In performing those activities, then, the Cuban government acts not as a "regulator of a market," but rather "in the manner of a private player." *See id.* at 614.

The defendants resist that conclusion by contending that the gravamen of Exxon's suit is the original expropriation and possession of the confiscated property rather than the subsequent commercial activity of processing remittances and selling goods. According to the defendants, allowing later commercial use of confiscated property to meet the FSIA's commercial-activity exception would enable an end-run around the

expropriation exception by permitting plaintiffs to shoehorn suits about sovereign expropriations into the commercial-activity exception.

The fact that Cuba's antecedent expropriation and the defendants' possession of Exxon's property may have enabled the challenged commercial activity, however, does not diminish the applicability of the commercial-activity exception. The Supreme Court has repeatedly distinguished enabling conduct preceding a claim from activity forming the basis of the claim.

Nelson, for instance, involved tort claims for injuries a person sustained from a foreign sovereign's imprisonment and torture of him. 507 U.S. at 353–54. He alleged that the defendants had retaliated against him for reporting safety violations at a state-owned hospital where he worked. *Id.* at 362. The Court explained that, even if the defendants had engaged in commercial activity when they "recruited [the plaintiff] for work at the hospital, signed an employment contract with him, and subsequently employed him," it was the subsequent "torts, and not the arguably commercial activities that preceded their commission," that "form[ed] the basis" of the suit. *Id.* at 358.

Similarly, in *Sachs*, a person bought a European rail pass while in the United States and later suffered injuries when attempting to board a train using that pass in Austria. 577 U.S. at 29. The Court assessed whether, for purposes of the commercial-activity exception, the claim was "based upon a commercial activity carried on in the United States by [a] foreign state." *Id.* (alteration in original) (quoting 28 U.S.C. § 1605(a)(2)). In rejecting the plaintiff's argument that the rail's sale of the pass to

her in the United States satisfied the exception, the Court again separated the antecedent commercial activity from the subsequent, allegedly injurious activity, concluding that the gravamen of the suit occurred in Austria, not the United States. *Id.* at 35–36.

As those decisions instruct, the inquiry turns on the specific conduct forming the basis of the plaintiff's action. So here, even if Cuba's original expropriation and the defendants' current possession were in some sense necessary to enable the subsequent trafficking, the gravamen of Exxon's action under Title III—the trafficking—is commercial activity. A court must "zero[] in on the core of [the plaintiff's] suit," that is, the "acts that actually injured" the plaintiff. *Id.* at 35. Here, then, we focus on the core of the suit brought by Exxon: the commercial use of confiscated property, which Congress has deemed actionable under Title III.

Our decisions in *Rong v. Liaoning Province Government*, 452 F.3d 883, 371 U.S. App. D.C. 507 (D.C. Cir. 2006), and *Ivanenko v. Yanukovich*, 995 F.3d 232, 452 U.S. App. D.C. 76 (D.C. Cir. 2021), lend no support to the defendants. While both decisions held that the plaintiffs' suits did not satisfy the commercial-activity exception's requirements, the core of the suit in those cases, unlike here, was an antecedent act of expropriation, not subsequent commercial activity. *See Rong*, 452 F.3d at 887; *Ivanenko*, 995 F.3d at 239. The defendants' reliance on various decisions from foreign tribunals fails for similar reasons: the claims in those cases focused on the wrongful expropriation of property rather than the unlawful commercial use of the property.

The defendants relatedly submit that the alleged trafficking is inseparable from Cuba's exercise of sovereign authority to nationalize property, publicly control industry, and establish a socialist economy, ostensibly rendering the trafficking non-commercial in nature. The terms of the FSIA, though, prescribe that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). It is therefore irrelevant whether "the foreign government is acting . . . with the aim of fulfilling uniquely sovereign objectives"; "[r]ather, the issue is 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." *Weltover*, 504 U.S. at 614 (internal quotation marks omitted); *see also Nelson*, 507 U.S. at 360 ("[W]hether a state acts 'in the manner of' a private party is a question of behavior, not motivation."). And because private parties can equally engage in the types of actions in which Exxon contends the defendants are engaged, the defendants' challenged actions are properly characterized as taken "in connection with a commercial activity." *See* 28 U.S.C. § 1605(a)(2).

b.

To fit within the commercial-activity exception, CIMEX's trafficking activity not only must bear a "connection with a commercial activity" in Cuba but must also "cause[] a direct effect in the United States." 28 U.S.C. § 1605(a)(2). "[A]n effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'"

Weltover, 504 U.S. at 618 (second alteration in original) (citation omitted). Although "jurisdiction may not be predicated on purely trivial effects in the United States," there is no "unexpressed requirement of 'substantiality' or 'foreseeability.'" *Id.*

The district court concluded that CIMEX causes a direct effect in the United States in two ways: first, by operating a remittances business that enables transfers of money from the United States to recipients in Cuba; and second, by selling goods imported from the United States at its convenience stores. We agree with Exxon and the district court that the types of effects Exxon alleges—outflows of money from the United States and purchases of U.S. goods—can constitute direct effects in the United States. Still, we vacate and remand for the district court to further assess whether CIMEX "causes" those effects and whether the effects are sufficiently "direct."

i.

We first consider CIMEX's remittances business. A remittance is initiated when a U.S. resident designates a recipient in Cuba and makes a payment to Western Union. Valmaña Decl. ¶ 13(a)–(b), J.A. 195. The recipient in Cuba can then collect the remittance at any of 502 Western Union locations in the country. *Id.* ¶¶ 12, 13(d)–(e), J.A. 194, 196. Exxon estimates that Cuba received $3.6 billion in remittances in 2018, and that 90% of those remittances came from the United States. Second Am. Compl. ¶ 112, J.A. 43. CIMEX operates service stations that process remittance payments from the United States through Western Union, and of the 502 Western Union locations in Cuba, 276 are operated by CIMEX and 66 are specifically

located at CIMEX's service stations. Valmaña Decl. ¶ 12, J.A. 194.

Exxon contends that CIMEX's remittances business causes a direct effect in the United States by creating a market for remittances and drawing money from the United States to Cuba. We agree that causing a non-trivial outflow of money from the United States to Cuba would amount to a "direct effect" under the FSIA. In *Weltover*, the Supreme Court concluded that Argentina's unilateral rescheduling of certain bond payments caused a "direct effect" in the United States. 504 U.S. at 618–19. The bondholders had "designated their accounts in New York as the place of payment" and Argentina had already "made some interest payments into those accounts before announcing that it was rescheduling the payments." *Id.* at 619. The Court held that Argentina's "rescheduling of those obligations necessarily had a 'direct effect' in the United States" because "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id. Weltover* indicates that a change in the flow of money in the United States constitutes a direct effect.

Our court has similarly found the existence of a direct effect when a defendant alters the flow of money within, out of, or into the United States. In one case, we found a direct effect in the United States when "an American corporation transferr[ed] $28,000 from a New York bank to the Somali government's D.C. bank." *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1004, 247 U.S. App. D.C. 208 (D.C. Cir. 1985). In another case, the termination of a contract constituted a direct

effect because "revenues that would otherwise have been generated in the United States were 'not forthcoming.'" *Cruise Connections Charter Mgmt. 1, LP v. Att'y Gen. of Canada*, 600 F.3d 661, 665, 390 U.S. App. D.C. 130 (D.C. Cir. 2010) (quoting *Weltover*, 504 U.S. at 619); *see also I.T. Consultants, Inc. v. Republic of Pakistan*, 351 F.3d 1184, 1188–90, 359 U.S. App. D.C. 40 (D.C. Cir. 2003) (finding direct effect when defendants failed to make promised payment into Virginia bank account). Here, Exxon claims that money that otherwise would have remained in the United States was transferred to Cuba in the form of remittances. Evidence that CIMEX caused such transfers would demonstrate a direct effect in the United States.

The defendants argue that the effect is indirect because it rests on the intervening decisions of multiple third parties: people in the United States must decide to send remittances to Cuba through Western Union, and the intended recipients in Cuba must decide to receive the remittances at stations operated by CIMEX. We have explained that a direct effect is one that "has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1172, 307 U.S. App. D.C. 102 (D.C. Cir. 1994) (citation and internal quotation marks omitted). And in the defendants' view, the integral role of third-party transferors and recipients means the effect of CIMEX's remittances business in the United States is not "an immediate consequence of the defendant's . . . activity." *Weltover*, 504 U.S. at 618 (alteration in original) (citation and internal quotation marks omitted).

When the involvement of third parties is an entirely foreseeable (and even intended) consequence of the defendants' relevant actions, however, it will not stand in the way of concluding that the defendants' activity causes a direct effect in the United States. In *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 894 F.3d 339, 342–43, 436 U.S. App. D.C. 397 (D.C. Cir. 2018), a Brazilian state-owned oil company secured funding for an oil exploration project from various U.S. investors including EIG Management Company, LLC. After an extensive bribery scheme came to light, "skittish lenders withdrew their support," rendering EIG's shares in the project worthless. *Id.* at 343. EIG brought fraud-related claims against the state-owned oil company and other defendants, asserting direct effects based on the concealment of fraud and mismanagement of its money. *Id.* at 343, 345. We held that the suit satisfied the commercial-activity exception, rejecting the defendants' argument that it was the third-party lenders' decisions to withdraw their support, rather than the defendants' fraud, that caused the direct effect in the United States. *Id.* at 346. We refused to adopt a "highly restrictive causation requirement under which contributing factors *readily and predictably caused* by the defendant's same act would preclude jurisdiction." *Id.* (emphasis added).

As in *EIG*, third parties' decisions to send and receive remittances originating from the United States are "readily and predictably caused by" CIMEX's operation of a remittances business. An entity that operates a remittances business knows full well—and indeed, intends—that people in one location will use the service

to send money to recipients in another location. And just as in *EIG*, CIMEX appears to have "specifically targeted" parties in the United States. *See id.* at 342. In part due to U.S. regulations, the only remittances "currently being paid out in Cuba" via Western Union are remittances that originated in the United States. *See* Valmaña Decl. ¶ 14, J.A. 199. As such, "CIMEX's entire remittance business is aimed at bringing money from the United States into Cuba." *Exxon*, 534 F. Supp. 3d at 20. For the same reasons, the presence of FINCIMEX, a third-party agent who acts as an intermediary between CIMEX and Western Union, does not preclude finding that CIMEX caused direct effects in the United States: FINCIMEX and CIMEX contract with each other for the very purpose of carrying out a remittances business. *See* Valmaña Decl. ¶ 6, J.A. 193.

Contrary to the defendants' suggestion, the relevant acts can cause a direct effect in the United States regardless of whether the "locus of the tort" or a "legally significant act" occurred in the United States. A "foreign locus does not always mean that a tort causes no 'direct effect' in the United States." *EIG*, 894 F.3d at 347. Nor must the alleged direct effect cause an injury or a harm, as "[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)). And although the defendants note that we have often found direct effects when the parties had been engaged in commercial dealings, a preexisting relationship of that kind is not a prerequisite to finding a direct effect.

The defendants, though, do raise one point that precludes us from deciding at this stage that CIMEX's processing of remittances causes a direct effect in the United States in the form of outflows of money from the United States to Cuba. The defendants have provided evidence that, of the 66 stations CIMEX uses to process remittances, a maximum of four to ten stations sit on confiscated property formerly owned by Essosa. Valmaña Decl. ¶ 12, J.A. 195. Because Title III makes the defendants liable only for trafficking in confiscated property, the pertinent inquiry is whether CIMEX's remittances operations at the four to ten stations located on former Essosa property cause a direct effect in the United States—not whether CIMEX's entire remittances business does so.

For example, it is possible that precisely the same amount of remittances would be sent from the United States to Cuba even if those four to ten stations did not exist. There is no evidence in the record about any of those individual stations, where they are located, or how much they process in remittances. Given that there are 502 Western Union locations in Cuba, it is possible that, even without the four to ten stations on former Essosa property, Americans would still send the same amount of money and Cuban recipients would still withdraw the same amount of money from other readily accessible stations. If that were the case, one would be hard pressed to conclude that CIMEX's operation of a remittances business at those stations "causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The effect would be the same regardless of those stations. *Cf. Univ. of Tex. S.W.*

Med. Ctr. v. Nassar, 570 U.S. 338, 346–47, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013) (noting that an action cannot be a but-for "cause of an event if the particular event would have occurred without" the action (citation omitted)).

Exxon maintains that the limited number of stations is irrelevant because the amount of remittances those stations likely process exceeds the threshold of triviality under *Weltover*. But whether an effect is too trivial to count as a direct effect under the FSIA is a distinct question from whether a defendant's activity can be said to *cause* that effect, trivial or not. If, as things currently stand, there are readily available substitutes for the processing of remittances at those four to ten stations—for instance, other Western Union sites in the immediate vicinity—the conduct of the business at those stations may not ultimately cause any outflow of money from the United States that would not already occur. Without any examination of that issue, we cannot say whether CIMEX's conduct of a remittances business on confiscated property in fact "causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

We vacate and remand for the district court to assess whether CIMEX's conduct of a remittances business at the four to ten stations operated on former Essosa property, as opposed to CIMEX's remittances activity writ large, causes a direct effect in the United States. We do not suggest that courts invariably must splinter jurisdictional inquiries under the FSIA and conduct them parcel-by-parcel. But here, the relevant inquiry concerns only the four to ten stations on former Essosa property because Title III makes it unlawful to traffic in confiscated

property, limiting the relevant jurisdictional inquiry to those sites. Our decision should not be understood to express any prediction in either direction on whether CIMEX's remittances business at the four to ten stations causes a direct effect in the United States. Because the district court has not examined that question, we remand for it to conduct the inquiry and reach a conclusion in the first instance.

ii.

In addition to CIMEX's remittances business, Exxon submits that CIMEX's sale of imported U.S. goods at its stations satisfies the commercial-activity exception. According to Exxon, CIMEX's sale of those goods causes a direct effect in the United States by stimulating demand for U.S. goods and by moving capital into and goods out of the United States.

We agree with Exxon that an inflow of capital and an outflow of goods constitutes a direct effect in the United States. The defendants respond, however, that the way in which CIMEX obtains imported goods from the U.S. precludes concluding that CIMEX caused the effect in the United States. Specifically, rather than directly importing goods from the United States, CIMEX orders products through another Cuban company, Alimport, which exercises sole discretion in determining the source location of the goods it sends on to CIMEX. In the defendants' view, Alimport's role as a third-party intermediary presents an "intervening element" that prevents any effect in the United States from "flow[ing] in a straight line without deviation or interruption" from

CIMEX's sales. *Princz*, 26 F.3d at 1172 (citation and internal quotation marks omitted).

Alimport is the exclusive importer in Cuba of foodstuffs from the United States, meaning that all U.S. goods on CIMEX's shelves are procured through Alimport. *See* Second Valmaña Decl. ¶ 6, J.A. 2039–40. Alimport appears to make entirely independent decisions about the source country of the goods it imports. The defendants represent that CIMEX "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 Alimport "decides all this on its own" and "not . . . as an agent of CIMEX (Cuba)." *Id.*, J.A. 2040. A report submitted into the record indicates that Alimport "has wide discretion to choose the foreign companies and countries from which to make food purchases." U.S. Int'l Trade Comm'n, U.S. Agricultural Sales to Cuba: Certain Economic Effects of U.S. Restrictions at 1–5 (2007), J.A. 1604. Considerations that influence Alimport's buying decisions include economic factors, such as "the availability of bartering and credit financing," "[p]urchase price, transportation cost, quality, and delivery considerations," along with non-economic factors such as "political motivations." *Id.* at 2–13, J.A. 1620. The report even suggests that Alimport may decline to source from the United States altogether if U.S. "laws or regulations" make it "unavailable" as a supplier. *See id.* That suggestion indicates that Alimport's decision to import goods for CIMEX from the United States is not a foregone conclusion.

To be sure, CIMEX and Alimport agree on the specific types and amounts of products that Alimport will procure for CIMEX. *See Exxon*, 534 F. Supp. 3d at 21 (citing Second Valmaña Decl. ¶ 6, J.A. 2040). But the record indicates that CIMEX never specifies that Alimport must buy goods from the United States, meaning Alimport's decision to purchase U.S. goods is unrelated to any direction from CIMEX. The defendants' declaration states that CIMEX does not specify even the "brands of a product" when placing an order through Alimport. Second Valmaña Decl. ¶ 6, J.A. 2040. On that understanding, Alimport is the key player causing a "direct effect in the United States," 28 U.S.C. § 1605(a)(2), and the purchase of U.S. goods at CIMEX stations is not an "immediate consequence of" CIMEX's "activity." *See Weltover*, 504 U.S. at 618 (citation omitted). Insofar as the sale of U.S. goods by CIMEX occurs only because Alimport opts to purchase the products from the United States without input or encouragement from CIMEX, CIMEX would not cause the direct effect in the United States.

CIMEX, however, might still be said to cause a direct effect in the United States if it has sufficient and continuing awareness that the goods it receives from Alimport originate from the United States—in other words, if CIMEX knows it is all but ordering U.S. goods when it places an order with Alimport. Such knowledge would suggest that, by ordering goods through Alimport, CIMEX causes a "direct effect" by inducing the purchase of what it knows and anticipates would be U.S. goods, even if CIMEX does not specifically request the country of origin. The subsequent inflow of money, outflow of goods,

and stimulation of demand in the United States would then be fairly characterized an "immediate consequence" of CIMEX's decisions to continue procuring goods through Alimport and to sell those goods on confiscated property. *See id.; cf. Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1147, 307 U.S. App. D.C. 79 (D.C. Cir. 1994) (Wald, J., concurring) (suggesting that a failure to make a payment could have a direct effect in the United States if there were a "longstanding consistent customary practice" of payments using New York bank accounts). For example, if Alimport supplies CIMEX with U.S. goods year after year, and if CIMEX knows and continuously approves of that pattern, CIMEX would be unable to insulate itself from the jurisdiction of our courts by invoking Alimport's role as an intermediary.

On remand, the district court may find evidence that CIMEX has sufficient awareness that the goods it sells at its stations originate from the United States such that Alimport's role as a third party does not preclude finding direct effects caused by CIMEX. The district court did not engage in that kind of analysis, though, and we again leave it to that court to conduct the inquiry in the first instance.

* * * * *

For the foregoing reasons, we vacate the district court's denial of CIMEX's motion to dismiss and remand for further proceedings consistent with this opinion.

So ordered.

Randolph, *Senior Circuit Judge*, dissenting:

In February 1996, the Cuban military shot down two small civilian planes on a humanitarian mission off the coast of Cuba. Three U.S. citizens and one permanent U.S. resident from Cuba were killed. Outraged, Congress passed and President Clinton signed into law the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996. Pub. L. No. 104–114, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021 *et seq.*).

Passage of this legislation established a *specific, independent*, and *exclusive* cause of action for American nationals whose property the Cuban government had confiscated decades earlier. The liability of those trafficking in such property does not depend on the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* The majority holds otherwise. I therefore dissent.

In 1960 the Cuban government, then under Fidel Castro, issued an edict nationalizing all "property and enterprises . . . owned by the juridical persons who are nationals of the United States." *See Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 849 (2d Cir. 1962) (quoting Banco Nacional de Cuba (1960), Cuba), *rev'd*, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964); *see also* 22 U.S.C. § 6081(3). At the time U.S. nationals "either owned or held significant investments in Cuba's electric company, its telephone system, a wide variety of mining operations, the petroleum sector, hotels, sugar and other agricultural products," and more. David Kaye, *The Helms-Burton Act:*

Title III and International Claims, 20 Hastings Int'l & Comp. L. Rev. 729, 730 (1997).

Four years later, in 1964, Congress responded with the Cuban Claims Act, authorizing the U.S. Foreign Claims Settlement Commission to determine the amount and validity of "claims by nationals of the United States against the Government of Cuba . . . for losses resulting from the nationalization, expropriation, intervention, or other taking of . . . property . . . owned wholly or partially, directly or indirectly" by U.S. nationals "at the time" of the taking. Pub. L. No. 88-666 § 503(a), 78 Stat. 1110, 1110–11 (1964) (codified as amended at 22 U.S.C. § 1643b(a)). The Commission ultimately certified $1.9 billion in claims.

With respect to Exxon's claim, the Commission determined, "in accordance with applicable substantive law, including international law,"[1] that Exxon (then called Standard Oil) had suffered a loss of $71,611,002.90 resulting from Cuba's confiscation of all property in Cuba held by Exxon's wholly-owned subsidiary. *See* Standard Oil Co., F.C.S.C. Decision No. CU-0938, Claim No. CU-3838, at 9 (Sept. 3, 1969). The Commission certified Exxon's claim in that amount, plus annual interest of 6 percent beginning on July 1, 1960, "to the date of settlement." *Id.* at 10.

But in the decades after Castro's seizure of property, U.S. claimants like Exxon had no effective means of

[1] 22 U.S.C. § 1643b(a). See also 22 U.S.C. § 1623(a)(2)(B), which requires the Commission to apply the "applicable principles of international law, justice, and equity."

obtaining compensation. Title III of the LIBERTAD Act in 1996 filled that gap. Title III created a cause of action; required courts to accept the Commission's certification of a claim as "conclusive proof of ownership of an interest in property"; and provided federal courts with a jurisdictional basis for such actions by stripping Cuban instrumentalities of sovereign immunity. 22 U.S.C. §§ 6082, 6083(a)(1).

Title III's civil remedy is against those who "traffic[]" in the confiscated property. 22 U.S.C. § 6082(a)(1)(A). Its purpose was not only "to provide protection against wrongful confiscations" of the property of U.S. nationals, *id.* § 6081(10), but also to discourage "transactions involving [this] confiscated property, and in so doing to deny the Cuban regime the capital generated by such ventures." H. Rep. No. 104-202, pt. 1, at 39 (1995); *see also* 22 U.S.C. §§ 6022, 6081(6). After a series of suspensions, *see* 22 U.S.C. § 6085(b), Title III finally went into effect on May 2, 2019.[2] Exxon filed its lawsuit on the same day.

The question raised in this appeal is framed as whether there is subject-matter jurisdiction over Exxon's suit. The majority holds that the Foreign Sovereign Immunities Act (FSIA)—not Title III—provides the answer. As a result, unless Exxon satisfies one of the exceptions to foreign sovereign immunity in the FSIA, the defendants,

[2] Title III authorizes the President to suspend its provisions for renewable six-month periods if he determines that suspension would advance U.S. interests and expedite a transition to democracy in Cuba. 22 U.S.C. § 6085(b)–(c). Beginning with President Clinton, each President continually suspended Title III, until President Trump let the suspensions lapse.

as instrumentalities of Cuba, are "immune from the jurisdiction" of federal and state courts. 28 U.S.C. § 1604.

That mistaken conclusion rests in large measure on Supreme Court opinions stating, in one way or another, that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." Majority Op. at 8–9 (quoting *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 30, 136 S. Ct. 390, 193 L. Ed. 2d 269 (2015)) (emphasis omitted). It is true that the Supreme Court and this court have repeatedly referred to the exclusive nature of the FSIA. But in each case Title III did not apply for at least one of three reasons. One, it did not exist at the time. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989). Two, it was not in effect because the President had suspended its cause of action. *Sachs*, 577 U.S. at 30; *Republic of Austria v. Altmann*, 541 U.S. 677, 699, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004). Or three, the plaintiffs' claims did not arise out of or relate to Cuba's confiscations. *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 278, 143 S. Ct. 940, 215 L. Ed. 2d 242 (2023); *Does v. Taliban*, 101 F.4th 1, 10 (D.C. Cir. 2024); *Simon v. Republic of Hungary*, 77 F.4th 1077, 1090 (D.C. Cir. 2023), *cert. granted*, No. 23-867, __ S. Ct. __, 2024 U.S. LEXIS 2816, 2024 WL 3089537, at *1 (U.S. June 24, 2024); *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 690, 455 U.S. App. D.C. 373 (D.C. Cir. 2022); *Valambhia v. United Republic of Tanzania*, 964 F.3d 1135, 1139, 448 U.S. App. D.C. 91 (D.C. Cir. 2020).

Not one of these opinions mentions Title III. When "questions of jurisdiction" are "passed on in prior decisions sub silentio," a later court is not "bound when a subsequent case finally brings the jurisdictional issue before [it]." *Hagans v. Lavine*, 415 U.S. 528, 535 n.5, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974). And in one of the leading cases the majority invokes, the Supreme Court stated what should be obvious—that "general language" in its opinions should not be applied to "quite different circumstances that the Court was not then considering." *Turkiye Halk Bankasi A.S.*, 598 U.S. at 278 (citation omitted); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399, 5 L. Ed. 257 (1821) (Marshall, C.J.) ("If [general expressions] go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."). Thus, decisions dealing only with jurisdiction under the FSIA without considering Title III cannot possibly control the issue posed in this case. *See, e.g., Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144, 131 S. Ct. 1436, 179 L. Ed. 2d 523 (2011).

As to that issue and contrary to the majority's view, Title III is an *exclusive* and *independent* remedy in no wise dependent upon the FSIA.

Title III, considered alone, deprives the Cuban defendants of immunity from suit. Here are the words: "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 for money damages." 22

U.S.C. § 6082(a)(1)(A). "[P]erson" is defined to include "any agency or instrumentality of a foreign state." *Id.* § 6023(11).

The Supreme Court has held that nearly identical statutory language waives the sovereign immunity of the U.S. government. *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 50, 144 S. Ct. 457, 217 L. Ed. 2d 361 (2024); *see also Mowrer v. U.S. Dep't of Transp.*, 14 F.4th 723, 729, 454 U.S. App. D.C. 340 (D.C. Cir. 2021) (same). In *Kirtz*, the Court interpreted the Fair Credit Reporting Act (FCRA), a consumer protection statute. 601 U.S. at 45. Two provisions were relevant to its analysis. *Id.* at 50–51. First, the FCRA imposes civil liability on "[a]ny person" who willfully or negligently fails to comply with the statute's provisions. 15 U.S.C. §§ 1681n(a), 1681o(a). Second, the FCRA defines "person" to "mean[]," among other things, "any . . . government or governmental subdivision or agency." *Id.* § 1681a(b). With those two provisions, the Court held, "Congress has explicitly permitted consumer claims for damages against the government." 601 U.S. at 51. Dismissing such actions on immunity grounds would "effectively negate suits Congress has clearly authorized." *Id.* (internal quotation marks and alteration omitted).

Title III establishes that "any person," including "any agency or instrumentality of a foreign state," that traffics in expropriated property confiscated by the Cuban Government "*shall be liable*" to U.S. nationals with claims to that property. 22 U.S.C. §§ 6023(11), 6082(a)(1)

(A) (emphasis added). Compare that language with the FCRA's: "Any person," including "any . . . government or governmental subdivision or agency," that violates the statute's requirements "*is liable* to th[e] [affected] consumer." 15 U.S.C. §§ 1681a(b), 1681n(a), 1681o(a) (emphasis added).

There is scarcely a difference between the two statutes in terms of language or function. Both impose civil liability on any "person." And both define "person" to include governmental instrumentalities.[3] The Supreme Court has ruled that legislation of the 1996 Congress—which enacted both the FCRA's cause of action and Title III—"explicitly" abrogated the sovereign immunity of the

[3] The majority characterizes Title III as exposing all "foreign states" to potential liability. Majority Op. at 14. This is doubly mistaken. Title III does not allow suits against Cuba or any other foreign state. It applies only to agencies and instrumentalities of foreign states. *See* 22 U.S.C. §§ 6023(1), (11), 6082(a)(1)(A); 28 U.S.C. § 1603(a)–(b). In addition it is fanciful to suppose that nations other than Cuba would "traffic[]" in property that the Cuban government confiscated. *See* 22 U.S.C. § 6082(a)(1)(A). Such a possibility is so remote as to be effectively nonexistent. It comes as no surprise that the parties have identified no instance in which Cuba has sold or transferred confiscated property to another foreign sovereign's instrumentality that then trafficked in that property. *Exxon Mobil Corp. v. Corporación Cimex S.A.*, 567 F. Supp. 3d 21, 27 n.3 (D.D.C. Oct. 8, 2021) ("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."). Nor has any such Title III action yet been filed.

United States. *See Kirtz*, 601 U.S. at 46–47, 51. And yet, according to the majority opinion, the same Congress in the same Session using the same language did not bring about the same result with respect to Cuban agencies. *See* Majority Op. at 13–14. Put aside for the moment the obvious disconnect—that Cuban agencies enjoy more protection from lawsuits than agencies of the United States, which would be a shock. Rather, consider the legal principle underlying the majority's analysis—unheard of until now—that Congress must make an *ultra-clear* statement to abrogate foreign sovereign immunity. That principle has no support. Like statutes are to be treated alike. Title III thus functions as both a cause of action and an abrogation of immunity. *Cf.* 22 U.S.C. § 6082(d) (specifically discussing the enforceability of Title III judgments against Cuban instrumentalities).

Title III is also *specific* in comparison to the FSIA. The majority decides that if Title III is inconsistent with the FSIA, the FSIA controls. Majority Op. at 8–14. That has it upside-down. The time-honored canon of statutory construction is that when two statutes are at odds, the specific prevails over the general. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 550–51, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183–88 (2012).

Title III is specific, the FSIA is general. Title III applies only to Cuba's confiscations of property. The FSIA applies to all nations. *Compare* 22 U.S.C. § 6082(a)

(1)(A), *with* 28 U.S.C. §§ 1330, 1604(a), 1605(a). Under Title III only U.S. nationals may bring an action.[4] Under the FSIA anyone may sue, including aliens. *Compare* 22 U.S.C. § 6082, *with* 28 U.S.C. §§ 1330, 1605. Title III only authorizes actions in which the amount in controversy exceeds $50,000, while FSIA claims have no minimum. *Compare* 22 U.S.C. § 6082(b), *with* 28 U.S.C. § 1330(a).[55]

There is yet another stark conflict between Title III and the majority's application of the expropriation exception in the FSIA. The majority concludes that the FSIA's expropriation exception does not apply because, under international law, the property Cuba confiscated was owned not by Exxon but by its subsidiary. Majority Op. at 16–22. But in Title III actions, "the court shall accept" claims certified by the Foreign Claims Settlement Commission "as conclusive proof" of violated property rights. 22 U.S.C. § 6083(a)(1).

This is an action under Title III. *See* J.A. 18–20, 47–48. The Commission, which considered international law, determined that Cuba illegally took Exxon's rights

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[4] A U.S. national "that brings an action under" Title III "may not bring any other civil action" dealing with "the same subject matter" under "Federal law." 22 U.S.C. § 6082(f)(1)(A). FSIA suits are necessarily "under" federal law. *See, e.g., Federal Republic of Germany v. Philipp*, 592 U.S. 169, 185–86, 141 S. Ct. 703, 208 L. Ed. 2d 589 (2021); *Saudi Arabia v. Nelson*, 507 U.S. 349, 354, 363, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993).

[5] Title III suits are brought under 28 U.S.C. § 1331 (federal question), *see* 22 U.S.C. § 6082(c)(1), while suits under the FSIA are brought under 28 U.S.C. § 1330 (actions against foreign states).

in property worth more than $71 million. The statute instructs the courts to treat Exxon's ownership of an interest in that property as "*conclusive*." 22 U.S.C. § 6083(a)(1) (emphasis added). Yet in defiance of that statutory mandate, the majority completely disregards the Commission's certification.

The majority also disregards the congressional findings and statements of purpose in the LIBERTAD Act. Such legislative pronouncements are important in determining a statute's meaning and scope. *See, e.g., Bittner v. United States*, 598 U.S. 85, 98 n.6, 143 S. Ct. 713, 215 L. Ed. 2d 1 (2023); Scalia & Garner, *supra*, at 35, 217–20. In the Act, Congress not only condemned Cuba's confiscations, 22 U.S.C. § 6081(2)–(3); *see also id.* § 6021, but also declared that the Act's purpose was "to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime." *Id.* § 6022(6); *see also id.* § 6022(3). "To deter" that trafficking, Congress concluded that "United States nationals who were the victims of these confiscations should be endowed with a judicial remedy." *Id.* § 6081(11). Yet "[t]he international judicial system, as currently structured lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment . . . at the expense of the rightful owners of the property." *Id.* § 6081(8). The FSIA was part of that system. Congress expressly determined that Cuba's wrongful takings required a remedy beyond what was then available. *See* 22 U.S.C. § 6081(2). That remedy is Title III, unencumbered by the FSIA.

One thing more. As the majority points out, some FSIA provisions do apply to Title III actions. Majority Op.

at 11–12 (citing 22 U.S.C. §§ 6023(1), (3), 6082(c)(2) and 28 U.S.C. § 1611(c)). But they have no effect on the outcome of this case. For example, Title III incorporates the FSIA's procedures for service of process. 22 U.S.C. § 6082(c)(2). There would be no need for such a provision if Congress understood the FSIA to apply to Title III *in toto*. For another example, the LIBERTAD Act amended the FSIA (28 U.S.C. § 1611(c)) to provide that Cuban "diplomatic" "property" will not be subject to attachment and execution. The amendment dealt only with what property may satisfy a judgment in a Title III action. Threshold immunity for a defendant is a quite different matter. *See, e.g., Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493–94, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983); *Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 205, 138 S. Ct. 816, 200 L. Ed. 2d 58 (2018). The amendment to the FSIA's execution provision therefore has nothing to do with Title III's separate provisions depriving Cuban instrumentalities of a sovereign immunity defense.

Nor is it compelling that Congress could have stated more clearly that jurisdiction under Title III does not depend on the FSIA. *Contra* Majority Op. at 11. Just because "Congress knows how to say thus and so" does not mean it necessarily "would have written thus and so if that is what it really intended." *Doris Day Animal League v. Veneman*, 315 F.3d 297, 299, 354 U.S. App. D.C. 216 (D.C. Cir. 2003). Congress "almost always" could write a provision more clearly. *Id.*

Because Title III abrogates the defendants' sovereign immunity, I would not decide whether the Foreign Sovereign Immunities Act does so as well.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 19-cv-01277 (APM)

EXXON MOBIL CORPORATION,

Plaintiff,

v.

CORPORACIÓN CIMEX, S.A. *et al.*,

Defendants.

Filed April 20, 2021

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, 342 U.S. App. D.C. 145 (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, 436 U.S. App. D.C. 397 (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, 234 U.S. App. D.C. 75 (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, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989) (emphasis added); *see also OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 136

S. Ct. 390, 393, 193 L. Ed. 2d 269 (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, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (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, 359 U.S. App. D.C. 299 (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, 333 U.S. App. D.C. 7 (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, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992), and again the following year in *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (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, 121 S. Ct. 903, 149 L. Ed. 2d 1 (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, 208 L. Ed. 2d 589 (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, 84 S. Ct. 923, 11 L. Ed. 2d 804 (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, 431 U.S. App. D.C. 163 (D.C. Cir. 2017), *vacated & remanded on other grounds sub nom. Opati v. Republic of Sudan*, 140 S. Ct. 1601, 206 L. Ed. 2d 904 (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, 371 U.S. App. D.C. 507 (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, 429 U.S. App. D.C. 342 (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, 284 U.S. App. D.C. 333 (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 U.S. Dist. LEXIS 4055, 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, 307 U.S. App. D.C. 102 (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., 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

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[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.

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 en 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, 404 U.S. App. D.C. 358 (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, 390 U.S. App. D.C. 130 (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, 270 U.S. App. D.C. 382 (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, 415 U.S. App. D.C. 21 (D.C. Cir. 2015), *vacated & remanded*, 137 S. Ct. 1312, 197 L. Ed. 2d 663 (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

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[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.

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. 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 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.*

[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.

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, 407 U.S. App. D.C. 133 (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, 407 U.S. App. D.C. 133. 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, 448 U.S. App. D.C. 91 (D.C. Cir. 2020) ("We have squarely held that 'harm to a U.S. citizen, in and of itself, cannot satisfy the direct effect

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[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.

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 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, 284 U.S. App. D.C. 333. *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. Werkzeugmaschinenhandel 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, 224 U.S. App. D.C. 119 (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, 377 U.S. App. D.C. 79 (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, 197 L. Ed. 2d 663 (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)). The D.C. Circuit in *Helmerich III* explained the state of customary international law

[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, 208 L. Ed. 2d 589, however, Exxon abandoned that argument. *See* Pl.'s Notice of Suppl. Authority, ECF No. 55, at 2 n.1.

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, 415 U.S. App. D.C. 21, 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

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*

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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.").

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, 413 U.S. App. D.C. 183 (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. Rafidain 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, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (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, 194 L. Ed. 2d 635 (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, 424 U.S. App. D.C. 251 (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

/s/ Amit P. Mehta
Amit P. Mehta
United States District Court Judge

APPENDIX C

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON, D.C. 20579

Claim No. CU-0938
Decision No. CU 3838

IN THE MATTER OF THE CLAIM OF
STANDARD OIL COMPANY

Under the International Claims Settlement Act of 1949, as amended

PROPOSED DECISION

This claim against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, in the amount of $71,686,002.90, was presented by the STANDARD OIL COMPANY, based upon the loss of real and personal property of a Cuban corporation known as Esso Standard Oil, S.A.

Under Title V of the International Claims Settlement Act of 1949 [78 Stat. 1110 (1964), 22 U.S.C. §§1643-1643k (1964), as amended, 79 Stat. 988 (1965)], the Commission is given jurisdiction over claims of nationals of the United States against the Government of Cuba. Section 503(a) of the Act provides that the Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba arising since. January 1, 1959 for

> losses resulting from the nationalization, expropriation, intervention or other taking of,

> or special. measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States.

Section 502(3) of the Act provides:

> The term 'property' means any property, right, or interest including any leasehold interest, and debts owed by the Government of Cuba or by enterprises which have been nationalized, expropriated, intervened, or taken by the Government of Cuba and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba.

Section 502(1)(B) of the Act defines the term "national of the United States" as a corporation or other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or the Commonwealth of Puerto Rico, if natural persons who are citizens of the United States own, directly or indirectly, 50 per centum or more of the outstanding capital stock or other beneficial interest of such corporation or entity.

The claimant, STANDARD OIL COMPANY, was organized under the laws of the State of New Jersey in 1882. An officer of claimant has certified that at all times pertinent to this claim more than 50% of its outstanding capital stock has been owned by nationals of the United States, and that as of December 31, 1966, at least 80% of its outstanding capital stock was held by nationals of

the United States. The Commission holds that claimant qualifies as a national of the United States within the meaning of Section 502(1)(B) of the Act.

STANDARD OIL COMPANY, hereinafter referred to as claimant, has asserted this claim for loss of the Cuban assets of Esso Standard Oil, S.A., hereinafter referred to as Essosa, a Panamanian corporation and a wholly-owned subsidiary of claimant. The claimant initiated operations in Cuba over 80 years ago when it obtained an interest in a company owning a small refinery located near Havana. In 1895 the refinery was moved to its present site on Havana Harbor and over the years it was expanded. In 1922 the claimant acquired 100% ownership of the company owning such refinery. In 1957 a substantial investment was made to expand refinery capacity from 9,300 to 34,500 barrels of crude petroleum per day. Essosa had extensive marketing operations in Cuba and in connection with such operations, owned three ocean terminals, one island terminal and seven bulk and package plants at commercially strategic points throughout the island.

Essosa was intervened on July 1, 1960, by Resolution No. 33 of that date, issued by the Institute Cubano de Petroleo, pursuant to Resolution No. 190, of June 30, 1960, issued by the Prime Minister of the Revolutionary Government, Fidel Castro Ruz. Subsequently, this firm was listed as nationalized in Resolution No. 1 of August 6, 1960, pursuant to Cuban Law 851. The Commission finds, however, that the Essosa enterprise was effectively intervened within the meaning of the Act by the Government of Cuba on July 1, 1960.

The Act provides in Section 503(a) that in making determinations with respect to the validity and amount of claims and value of properties, rights, or interests taken, the Commission shall take into account the basis of valuation most appropriate to the property and equitable to the claimant, including but not limited to fair market value, book value, going concern value, or cost of replacement.

The question, in all cases, will be to determine the basis of valuation which, under the particular circumstances, is "most appropriate to the property and equitable to the claimant". The Commission has concluded that this phraseology does not differ from the international legal standard that would normally prevail in the evaluation of nationalized property and that it is designed to strengthen that standard by giving specific bases of valuation that the Commission shall consider; i.e., fair market value, book value, going concern value, or cost of replacement.

The claimant has asserted this claim for loss of Essosa, submitting book values of the enterprise while stating the amount of claim which might be based on some other method, would be supplied later. Such evaluation has not been forthcoming although claimant has been reminded thereof.

Accordingly, the Commission finds that the book value of the enterprise, as further discussed below, represents the most appropriate basis of evaluation.

Claimant has asserted that Essosa enjoyed the good will of its suppliers and customers which gave it a value over that of its measurable assets, but no evidence has

been submitted to establish the extent of value of such a "going concern". The Cuban assets and liabilities of Essosa are reflected in the following balance sheet which claimant submitted as Exhibit A with its claim application in support of Item 18 thereof:

ASSETS

Current		
Cash	$ 7,942,693.19	
Receivables and Other Current Assets	18,481,691.11	
Inventories - Crude Products and Other	6,035,603.32	
Inventories, Materials and Supplies	2,319,569.60	
Total Current Assets		$34,779,557.22
Investments		
Long Term Notes and Accounts Receivable (Net)	$ 4,054,581.25	
Other Investments	2,265,497.04	6,320,078.29
Deposits and Other Special Funds		5,456,62
Property - Plant & Equipment (Net)		38,949,536.42
Prepaid and Deferred Charges		1,405,839.44
Total Assets		$81,460,467.99

LIABILITIES

Current

Reserve for Income Tax	$ (1,747,161.21)	
All Other Current Liabilities	(5,122,022.29)	
Total Current Liabilities		$(6,869,183.50)
Long Term Debt		(1,332,878.65)
Deferred Interest Income		(17,711.94)
Reserve for Annuities		(1,554,691.00)
Total Liabilities		(9,774,465.09)
NET WORTH		$71,686,002.90

The claimant has submitted extensive evidence in support of the claim including a Trial Balance prepared under the supervision of the Cuban Interventor during July 1960. This Trial Balance was prepared by Essosa employees who temporarily continued to perform their employment under the direction of the Interventor; and, following preparation of the Trial Balance, it was approved by the Interventor and forwarded to the Comptroller of Essosa for the permanent records of the firm. Additionally, claimant has made certain adjustments to supplement data contained in the Trial Balance. Such material clarifies transactions pertaining to refining operations and other transactions which occurred on or shortly before June 30, 1960, or immediately before the Trial Balance was prepared.

The file includes various records and affidavits in support of the claim, including claimant's records, those of Essosa or another wholly-owned subsidiary of claimant, Esso Export Corporation, now known as Esso International, Inc., a Delaware corporation. These records, pertaining to the items of claim designated by claimant as Items 1 through 63, include banking records, data pertaining to cash on hand, accounts receivable, investments, inventories, property, plant and equipment, as well as prepaid and deferred charges, and extensive data pertaining to the liabilities of Essosa. The Interventor's Trial Balance, with claimant's adjustments, based on its available records, is set out below:

I. ASSETS

Current

Cash		
Cash in banks and on hand:		
Interventor Trial Balance	$ 7,923,918.19	
Recovered	5,000.00	$ 7,918,918.19
Petty cash funds		23,775.00
Receivables and Other Current Assets		
Trade notes receivable		909,347.02
Reserve for doubtful notes receivable		(64,346.72)

Trade accounts receivable - current:		
I.T.B.	13,245.168.62	
Received from Esso affiliates	29,077.24	13,274,245.86
Trade accounts receivable - suspended		230,594.18
Remittances unapplied (credit)		(179.58)
Cash sales		63,202.41
Unpaid cash sale checks		15,597.41
Agents and employees accounts receivable (shortages)		4,880.89
Advance expense funds:		
I.T.B.	25,058.53	
Late Plane Ticket Adjustment	165.58	25,224.11
Claims receivable:		
I.T.B.	4,264,792.98	
Steamship claim collected	156.81	4,264,636.17.

Trade creditors (Debit)		$ 350.00
Other accounts receivable		59,316.87
Reserve for doubtful accounts receivable		(439,032.91)
Accrued interest receivable		137,855.40
Inventories - Crude Products and Other:		
Inventory - crude oil		208,682.57
Inventory - products, finished and unfinished		4,997,913.01
Inventory - other saleable merchandise		829,007.74
Inventories, Materials and Supplies:		
I.T.B.	$ 2,316,083.35	
Purchased from affiliates	3,486.25	2,319,569.60

<u>Investments</u>

Long Term Notes and Accounts Receivable (Net)		
Long-term notes receivable		34,935.63
Loans receivable		2,421,834.54
Accounts receivable - deferred		1,842,615.16
Reserve for loss in investment		(244,804.08)
Other Investments		
Stock owned - other than affiliated companies		117,400.00
Miscellaneous investments:		
I.T.B.	2,146,597.04	
Club membership	1,500.00	2,148,097.04

<u>Deposits and Other Special Funds</u>	5,456.62

<u>Property, Plant and Equipment (Net)</u>

Plant and equipment	41,290,843.33
Other lands, leases and easements	5,542,845.99
Incomplete construction	792,839.71

Surplus property available for sale		72,301.60
Reserve for amortization of plant and equipment		(127,260.43)
Reserve for depreciation of plant and equipment:		
I.T.B.	(12,725,680.39)	
Elimination of double depreciation	4,118,000.00	(8,607,680.39)
Reserve for depreciation - surplus property for sale		(14,353.39)
Prepaid and Deferred Charges		
Prepaid taxes:		
I.T.B.	992,000.52	
Additional taxes paid	2,664.10	994,664.62
Stationery and office supplies		25,613.04
Job orders:		
I.T.B.	378,183.24	
Additional expenditures	7,378.54	385,561.78
TOTAL ASSETS (as adjusted)		$81,460,467.99

II. LIABILITIES

Current

Reserve for Income Tax:		
I.T.B.	$ (528,387.42)	
Non-assessed deficiencies	399,982.00	
Credit	(1,618,755.79)	$(1,747,161.21)

All Other Current Liabilities

Vouchers payable		(598,028.06)
Liabilities for goods received - not invoiced:		
I.T.B.	(3,289,543.68)	
Payable to Esso Export	2,074,938.58	(1,214,605.10)
Individuals and companies:		
I.T.B.	(475,612.46)	
Payable to Esso Export	29,793.70	(445,818.76)
Excise, sale and gasoline taxes:		
I.T.B.	(2,845,689.39)	
Payment	644,728.68	(2,200,960.71)

Income and other taxes collected:		
I.T.B.	(39,179.66)	
Payable to Esso Export	132.50	(39,047.16)
Unclaimed wages		(1,130.25)
Deposits of cash		(25,556.58)
Salaries, wages and commissions payable		(52,923.65)
Thrift, annuity and vacation savings plans		(4,692.45)
Disability benefits payable		(4,724.25)
Survivors' benefits payable		(35,914.19)
Other accrued taxes payable:		
I.T.B.	(664.714.82)	
Tax accrual not assessed	206,867.00	(457,847.82)
Accrued insurance payable:		
I.T.B.	(12,449.98)	
Insurance payment	4,500.00	(7,949.98)
Accrued rentals payable		(11,800.00)

Miscellaneous accrued liabilities	(926.47)
Unredeemed merchandise coupons	(6,701.86)
Liabilities - deposit on returnable containers	(13,395.00)
Long Term Debt	
Long term notes payable	(1,298,755.83)
Purchase obligations	(34,122.82)
Deferred Interest Income	(17,711.94)
Reserve for Annuities	(1,554,691.00)
TOTAL LIABILITIES (as adjusted)	($9,774,465.09)
NET WORTH (as claimed)	$71,686,002.90

In connection with "Other Investments", the claimant has included "Stock Owned" which pertains to 1,174 shares of stock of the Ferrocarriles Occidentales de Cuba, S.A., and has claimed the cost of such shares in the total amount of $117,400.00. In support of the claim for loss of stock interests in this corporation, claimant has submitted photostatic copies of the certificates and data concerning the purchase of the shares in question. The certificates were originally held in the Havana Office of The First National Bank of Boston but no quotations were available after the purchase date indicating the market value of the shares. Thus, the Commission has previously held

that the value of these shares is the original cost of such shares, or $100.00 per share. (See Claim of Ruth Anna Haskew, Claim No. CU-0849.) The Commission now finds that claimant has sustained a loss in the claimed amount of $117,400.00 for its stock interest in Ferrocarriles Occidentales de Cuba, S.A.

It is noted that the item of Loans Receivable in the amount of $2,421,834.54 includes a loan of Essosa, as of March 21, 1960, to Cia. Cubana de Electricidad in the amount of $75,000.00. The records of the Commission reveal that Cia. Cubana de Electricidad is a corporation organized under the laws of the State of Florida. Pursuant to the provisions of Section 505(a) of the Act, a claim based upon a debt of a corporation qualifying as a national of the United States, within the contemplation of the Act, may not be considered unless the debt was a charge on property which was nationalized or otherwise taken by Cuba. There is no evidence to establish that the instant loan was secured by property taken by Cuba. Accordingly, the Commission finds that this sum of $75,000,00 is not within the purview of Section 505(a) of the Act and therefore must be deducted from the total assets, reducing the asset figure to $81,385,467.99. (See Claim of Anaconda American Brass Company, Claim No. CU-0112, 1967 FCSC Ann. Rep. 60.)

Essosa was a corporation organized in Panama and the Commission has been determining the extent of loss arising from the operations of Essosa in Cuba. Consequently, the Commission will determine the net worth of the Cuban branch, not merely its Cuban assets, when arriving at the extent of the losses in the instant

claim. Accordingly, the amount of $9,774,465.09, the total liabilities, including taxes, debts and accounts payable, as enumerated above, must be deducted from the adjusted value of the assets to reach the net value of the Cuban branch of Essosa resulting in a net worth of $71,611,002.90.

The Commission concludes that claimant herein, STANDARD OIL COMPANY, suffered a loss in the total amount of $71,611,002.90 within the meaning of Title V of the Act, as a result of the intervention on July 1, 1960, of the Cuban branch of Essosa, a Panamanian corporation, wholly owned by claimant.

The Commission has decided that in certification of losses on claims determined pursuant to Title V of the International Claims Settlement Act of 1949, as amended, interest should be included at the rate of 6% per annum from the date of loss to the date of settlement (see Claim of Lisle Corporation, Claim No. CU-0644), and in the instant case it is so ordered.

CERTIFICATION OF LOSS

The Commission certifies that STANDARD OIL COMPANY suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of Seventy-one Million Six Hundred Eleven Thousand Two Dollars and Ninety Cents ($71,611,002.90), with interest at 6% per annum from July 1, 1960, to the date of settlement.

Dated at Washington, D. C., and entered as the Proposed Decision of the Commission

/s/ ______________________
Leonard v. B. Sutton, Chairman

/s/ ______________________
Theodore Jaffe, Commissioner

/s/ ______________________
Sidney Freidberg, Commissioner

NOTICE TO TREASURY: The above-referenced securities may not have been submitted to the Commission or if submitted, may have been returned; accordingly, no payment should be made until claimant establishes retention of the securities for the loss here certified.

The statute does not provide for the payment of claims against the Government of Cuba. Provision is only made for the determination by the Commission of the validity and amounts of such claims. Section 501 of the statute specifically precludes any authorization for appropriations for payment of these claims. The Commission is required to certify its findings to the Secretary of State for possible use in future negotiations with the Government of Cuba.

NOTICE: Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commissim otherwise orders. (FCSC Reg., 45 C.F.R. 531.5(e) and (g), as amended, 32 Fed. Reg. 412-13 (1967).)

APPENDIX D

STATUTORY PROVISIONS

1. 22 U.S.C. § 6023 provides:

Definitions

As used in this chapter, the following terms have the following meanings:

(1) Agency or instrumentality of a foreign state

The term "agency or instrumentality of a foreign state" has the meaning given that term in section 1603(b) of title 28.

(2) Appropriate congressional committees

The term "appropriate congressional committees" means the Committee on International Relations and the Committee on Appropriations of the House of Representatives and the Committee on Foreign Relations and the Committee on Appropriations of the Senate.

(3) Commercial activity

The term "commercial activity" has the meaning given that term in section 1603(d) of title 28.

(4) Confiscated

As used in subchapters I and III of this chapter, the term "confiscated" refers to—

(A) the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property, on or after January 1, 1959—

(i) without the property having been returned or adequate and effective compensation provided; or

(ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure; and

(B) the repudiation by the Cuban Government of, the default by the Cuban Government on, or the failure of the Cuban Government to pay, on or after January 1, 1959—

(i) a debt of any enterprise which has been nationalized, expropriated, or otherwise taken by the Cuban Government;

(ii) a debt which is a charge on property nationalized, expropriated, or otherwise taken by the Cuban Government; or

(iii) a debt which was incurred by the Cuban Government in satisfaction or settlement of a confiscated property claim.

(5) Cuban Government

(A) The term "Cuban Government" includes the government of any political subdivision of Cuba, and any agency or instrumentality of the Government of Cuba.

(B) For purposes of subparagraph (A), the term "agency or instrumentality of the Government of Cuba" means an agency or instrumentality of a

foreign state as defined in section 1603(b) of title 28, with each reference in such section to "a foreign state" deemed to be a reference to "Cuba".

(6) Democratically elected government in Cuba

The term "democratically elected government in Cuba" means a government determined by the President to have met the requirements of section 6066 of this title.

(7) Economic embargo of Cuba

The term "economic embargo of Cuba" refers to—

(A) the economic embargo (including all restrictions on trade or transactions with, and travel to or from, Cuba, and all restrictions on transactions in property in which Cuba or nationals of Cuba have an interest) that was imposed against Cuba pursuant to section 2370(a) of this title, section 5(b) of title 50, Appendix, the Cuban Democracy Act of 1992 (22 U.S.C. 6001 and following), or any other provision of law; and

(B) the restrictions imposed by section 902(c) of the Food Security Act of 1985.

(8) Foreign national

The term "foreign national" means—

(A) an alien; or

(B) any corporation, trust, partnership, or other juridical entity not organized under the laws of the United States, or of any State, the District

of Columbia, or any commonwealth, territory, or possession of the United States.

(9) Knowingly

The term "knowingly" means with knowledge or having reason to know.

(10) Official of the Cuban Government or the ruling political party in Cuba

The term "official of the Cuban Government or the ruling political party in Cuba" refers to any member of the Council of Ministers, Council of State, central committee of the Communist Party of Cuba, or the Politburo of Cuba, or their equivalents.

(11) Person

The term "person" means any person or entity, including any agency or instrumentality of a foreign state.

(12) Property

(A) The term "property" means any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest.

(B) For purposes of subchapter III of this chapter, the term "property" does not include real property used for residential purposes unless, as of March 12, 1996—

(i) the claim to the property is held by a United States national and the claim has been certified under title V of the International Claims Settlement Act of 1949 [22 U.S.C. 1643 et seq.]; or

(ii) the property is occupied by an official of the Cuban Government or the ruling political party in Cuba.

(13) Traffics

(A) As used in subchapter III of this chapter, and except as provided in subparagraph (B), 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.

(B) The term "traffics" does not include—

(i) the delivery of international telecommunication signals to Cuba;

(ii) the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated national;

(iii) transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel; or

(iv) transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban Government or the ruling political party in Cuba.

(14) Transition government in Cuba

The term "transition government in Cuba" means a government that the President determines is a transition government consistent with the requirements and factors set forth in section 6065 of this title.

(15) United States national

The term "United States national" means—

(A) any United States citizen; or

(B) any other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or any commonwealth,

territory, or possession of the United States, and which has its principal place of business in the United States.

* * *

2. 22 U.S.C. § 6081 provides:

Findings

The Congress makes the following findings:

(1) Individuals enjoy a fundamental right to own and enjoy property which is enshrined in the United States Constitution.

(2) The wrongful confiscation or taking of property belonging to United States nationals by the Cuban Government, and the subsequent exploitation of this property at the expense of the rightful owner, undermines the comity of nations, the free flow of commerce, and economic development.

(3) Since Fidel Castro seized power in Cuba in 1959—

(A) he has trampled on the fundamental rights of the Cuban people; and

(B) through his personal despotism, he has confiscated the property of—

(i) millions of his own citizens;

(ii) thousands of United States nationals; and

(iii) thousands more Cubans who claimed asylum in the United States as refugees because

of persecution and later became naturalized citizens of the United States.

(4) It is in the interest of the Cuban people that the Cuban Government respect equally the property rights of Cuban nationals and nationals of other countries.

(5) The Cuban Government is offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets some of which were confiscated from United States nationals.

(6) This "trafficking" in confiscated property provides badly needed financial benefit, including hard currency, oil, and productive investment and expertise, to the current Cuban Government and thus undermines the foreign policy of the United States—

(A) to bring democratic institutions to Cuba through the pressure of a general economic embargo at a time when the Castro regime has proven to be vulnerable to international economic pressure; and

(B) to protect the claims of United States nationals who had property wrongfully confiscated by the Cuban Government.

(7) The United States Department of State has notified other governments that the transfer to third parties of properties confiscated by the Cuban Government "would complicate any attempt to return them to their original owners".

(8) The international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment from the use of wrongfully confiscated property by governments and private entities at the expense of the rightful owners of the property.

(9) International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.

(10) The United States Government has an obligation to its citizens to provide protection against wrongful confiscations by foreign nations and their citizens, including the provision of private remedies.

(11) To deter trafficking in wrongfully confiscated property, United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro's wrongful seizures.

3. 22 U.S.C. § 6082 provides:

Liability for trafficking in confiscated property claimed by United States nationals

(a) Civil remedy

(1) Liability for trafficking

(A) Except as otherwise provided in this section, any person that, after the end of the 3-month period beginning on the effective date of this subchapter,

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 for money damages in an amount equal to the sum of—

(i) the amount which is the greater of—

(I) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949 [22 U.S.C. 1621 et seq.], plus interest;

(II) the amount determined under section 6083(a)(2) of this title, plus interest; or

(III) the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater; and

(ii) court costs and reasonable attorneys' fees.

(B) Interest under subparagraph (A)(i) shall be at the rate set forth in section 1961 of title 28, computed by the court from the date of confiscation of the property involved to the date on which the action is brought under this subsection.

(2) Presumption in favor of the certified claims

There shall be a presumption that the amount for which a person is liable under clause (i) of paragraph (1)(A) is the amount that is certified as described in

subclause (I) of that clause. The presumption shall be rebuttable by clear and convincing evidence that the amount described in subclause (II) or (III) of that clause is the appropriate amount of liability under that clause.

(3) Increased liability

(A) Any person that traffics in confiscated property for which liability is incurred under paragraph (1) shall, if a United States national owns a claim with respect to that property which was certified by the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act of 1949 [22 U.S.C. 1643 et seq.], be liable for damages computed in accordance with subparagraph (C).

(B) If the claimant in an action under this subsection (other than a United States national to whom subparagraph (A) applies) provides, after the end of the 3-month period described in paragraph (1) notice to—

(i) a person against whom the action is to be initiated, or

(ii) a person who is to be joined as a defendant in the action,

at least 30 days before initiating the action or joining such person as a defendant, as the case may be, and that person, after the end of the 30-day period beginning on the date the notice is provided, traffics in the confiscated property that is the subject of the action, then that person shall be liable to that

claimant for damages computed in accordance with subparagraph (C).

(C) Damages for which a person is liable under subparagraph (A) or subparagraph (B) are money damages in an amount equal to the sum of—

(i) the amount determined under paragraph (1)(A)(ii), and

(ii) 3 times the amount determined applicable under paragraph (1)(A)(i).

(D) Notice to a person under subparagraph (B)—

(i) shall be in writing;

(ii) shall be posted by certified mail or personally delivered to the person; and

(iii) shall contain—

(I) a statement of intention to commence the action under this section or to join the person as a defendant (as the case may be), together with the reasons therefor;

(II) a demand that the unlawful trafficking in the claimant's property cease immediately; and

(III) a copy of the summary statement published under paragraph (8).

(4) Applicability

(A) Except as otherwise provided in this paragraph, actions may be brought under paragraph (1) with

respect to property confiscated before, on, or after March 12, 1996.

(B) In the case of property confiscated before March 12, 1996, a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996.

(C) In the case of property confiscated on or after March 12, 1996, a United States national who, after the property is confiscated, acquires ownership of a claim to the property by assignment for value, may not bring an action on the claim under this section.

(5) Treatment of certain actions

(A) In the case of a United States national who was eligible to file a claim with the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act of 1949 [22 U.S.C. 1643 et seq.] but did not so file the claim, that United States national may not bring an action on that claim under this section.

(B) In the case of any action brought under this section by a United States national whose underlying claim in the action was timely filed with the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act of 1949 but was denied by the Commission, the court shall accept the findings of the Commission on the claim as conclusive in the action under this section.

(C) A United States national, other than a United States national bringing an action under this section

on a claim certified under title V of the International Claims Settlement Act of 1949, may not bring an action on a claim under this section before the end of the 2-year period beginning on March 12, 1996.

(D) An interest in property for which a United States national has a claim certified under title V of the International Claims Settlement Act of 1949 may not be the subject of a claim in an action under this section by any other person. Any person bringing an action under this section whose claim has not been so certified shall have the burden of establishing for the court that the interest in property that is the subject of the claim is not the subject of a claim so certified.

(6) Inapplicability of act of state doctrine

No court of the United States shall decline, based upon the act of state doctrine, to make a determination on the merits in an action brought under paragraph (1) .

(7) Licenses not required

(A) Notwithstanding any other provision of law, an action under this section may be brought and may be settled, and a judgment rendered in such action may be enforced, without obtaining any license or other permission from any agency of the United States, except that this paragraph shall not apply to the execution of a judgment against, or the settlement of actions involving, property blocked under the authorities of section 5(b) of title 50, Appendix, that were being exercised on July 1, 1977, as a result of a national emergency declared by the President before such date, and are being exercised on March 12, 1996.

(B) Notwithstanding any other provision of law, and for purposes of this subchapter only, any claim against the Cuban Government shall not be deemed to be an interest in property the transfer of which to a United States national required before March 12, 1996, or requires after March 12, 1996, a license issued by, or the permission of, any agency of the United States.

(8) Publication by Attorney General

Not later than 60 days after March 12, 1996, the Attorney General shall prepare and publish in the Federal Register a concise summary of the provisions of this subchapter, including a statement of the liability under this subchapter of a person trafficking in confiscated property, and the remedies available to United States nationals under this subchapter.

(b) Amount in controversy

An action may be brought under this section by a United States national only where the amount in controversy exceeds the sum or value of $50,000, exclusive of interest, costs, and attorneys' fees. In calculating $50,000 for purposes of the preceding sentence, the applicable amount under subclause (I), (II), or (III) of subsection (a)(1)(A)(i) of this section may not be tripled as provided in subsection (a)(3) of this section.

(c) Procedural requirements

(1) In general

Except as provided in this subchapter, the provisions of title 28 and the rules of the courts of the United States 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.

(2) Service of process

In an action under this section, service of process on an agency or instrumentality of a foreign state in the conduct of a commercial activity, or against individuals acting under color of law, shall be made in accordance with section 1608 of title 28.

(d) Enforceability of judgments against Cuban Government

In an action brought under this section, 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.

(e) Omitted

(f) Election of remedies

(1) Election

Subject to paragraph (2)—

(A) any United States national that brings an action under this section may not bring any other civil action or proceeding under the common law, Federal law, or the law of any of the several States, the District of Columbia, or any commonwealth, territory, or possession of the United States, that seeks monetary or nonmonetary compensation by reason of the same subject matter; and

(B) any person who brings, under the common law or any provision of law other than this section, a civil action or proceeding for monetary or nonmonetary compensation arising out of a claim for which an action would otherwise be cognizable under this section may not bring an action under this section on that claim.

(2) Treatment of certified claimants

(A) In the case of any United States national that brings an action under this section based on a claim certified under title V of the International Claims Settlement Act of 1949 [22 U.S.C. 1643 et seq.]—

(i) if the recovery in the action is equal to or greater than the amount of the certified claim, the United States national may not receive payment on the claim under any agreement entered into between the United States and Cuba settling claims covered by such title, and such national shall be deemed to have discharged the United States from any further responsibility to represent the United States national with respect to that claim;

(ii) if the recovery in the action is less than the amount of the certified claim, the United States national may receive payment under a claims agreement described in clause (i) but only to the extent of the difference between the amount of the recovery and the amount of the certified claim; and

(iii) if there is no recovery in the action, the United States national may receive payment on the certified claim under a claims agreement described

in clause (i) to the same extent as any certified claimant who does not bring an action under this section.

(B) In the event some or all actions brought under this section are consolidated by judicial or other action in such manner as to create a pool of assets available to satisfy the claims in such actions, including a pool of assets in a proceeding in bankruptcy, every claimant whose claim in an action so consolidated was certified by the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act of 1949 [22 U.S.C. 1643 et seq.] shall be entitled to payment in full of its claim from the assets in such pool before any payment is made from the assets in such pool with respect to any claim not so certified.

(g) Deposit of excess payments by Cuba under claims agreement

Any amounts paid by Cuba under any agreement entered into between the United States and Cuba settling certified claims under title V of the International Claims Settlement Act of 1949 [22 U.S.C. 1643 et seq.] that are in excess of the payments made on such certified claims after the application of subsection (f) of this section shall be deposited into the United States Treasury.

(h) Termination of rights

(1) In general

All rights created under this section to bring an action for money damages with respect to property confiscated by the Cuban Government—

(A) may be suspended under section 6064(a) of this title; and

(B) shall cease upon transmittal to the Congress of a determination of the President under section 6063(c)(3) of this title that a democratically elected government in Cuba is in power.

(2) Pending suits

The suspension or termination of rights under paragraph (1) shall not affect suits commenced before the date of such suspension or termination (as the case may be), and in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if the suspension or termination had not occurred.

(i) Imposition of filing fees

The Judicial Conference of the United States shall establish a uniform fee that shall be imposed upon the plaintiff or plaintiffs in each action brought under this section. The fee should be established at a level sufficient to recover the costs to the courts of actions brought under this section. The fee under this subsection is in addition to any other fees imposed under title 28.

4. 22 U.S.C. § 6083 provides:

Proof of ownership of claims to confiscated property

(a) Evidence of ownership

(1) Conclusiveness of certified claims

In any action brought under this subchapter, the court shall accept as conclusive proof of ownership

of an interest in property a certification of a claim to ownership of that interest that has been made by the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act of 1949 (22 U.S.C. 1643 and following).

(2) Claims not certified

If in an action under this subchapter a claim has not been so certified by the Foreign Claims Settlement Commission, the court may appoint a special master, including the Foreign Claims Settlement Commission, to make determinations regarding the amount and ownership of the claim. Such determinations are only for evidentiary purposes in civil actions brought under this subchapter and do not constitute certifications under title V of the International Claims Settlement Act of 1949.

(3) Effect of determinations of foreign or international entities

In determining the amount or ownership of a claim in an action under this subchapter, the court shall not accept as conclusive evidence any findings, orders, judgments, or decrees from administrative agencies or courts of foreign countries or international organizations that declare the value of or invalidate the claim, unless the declaration of value or invalidation was found pursuant to binding international arbitration to which the United States or the claimant submitted the claim.

(b) Omitted

(c) Rule of construction

Nothing in this chapter or in section 514 of the International Claims Settlement Act of 1949 [22 U.S.C. 1643*l*], as added by subsection (b) of this section, shall be construed—

(1) to require or otherwise authorize the claims of Cuban nationals who became United States citizens after their property was confiscated to be included in the claims certified to the Secretary of State by the Foreign Claims Settlement Commission for purposes of future negotiation and espousal of claims with a friendly government in Cuba when diplomatic relations are restored; or

(2) as superseding, amending, or otherwise altering certifications that have been made under title V of the International Claims Settlement Act of 1949 [22 U.S.C. 1643 et seq.] before March 12, 1996.

* * *

5. 22 U.S.C. § 6085 provides:

Effective date

(a) In general

Subject to subsections (b) and (c) of this section, this subchapter and the amendments made by this subchapter shall take effect on August 1, 1996.

(b) Suspension authority

(1) Suspension authority

The President may suspend the effective date under subsection (a) of this section for a period of not more than 6 months if the President determines and reports in writing to the appropriate congressional committees at least 15 days before such effective date that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.

(2) Additional suspensions

The President may suspend the effective date under subsection (a) of this section for additional periods of not more than 6 months each, each of which shall begin on the day after the last day of the period during which a suspension is in effect under this subsection, if the President determines and reports in writing to the appropriate congressional committees at least 15 days before the date on which the additional suspension is to begin that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.

(c) Other authorities

(1) Suspension

After this subchapter and the amendments of this subchapter have taken effect—

(A) no person shall acquire a property interest in any potential or pending action under this subchapter; and

(B) the President may suspend the right to bring an action under this subchapter with respect to confiscated property for a period of not more than 6 months if the President determines and reports in writing to the appropriate congressional committees at least 15 days before the suspension takes effect that such suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.

(2) Additional suspensions

The President may suspend the right to bring an action under this subchapter for additional periods of not more than 6 months each, each of which shall begin on the day after the last day of the period during which a suspension is in effect under this subsection, if the President determines and reports in writing to the appropriate congressional committees at least 15 days before the date on which the additional suspension is to begin that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.

(3) Pending suits

The suspensions of actions under paragraph (1) shall not affect suits commenced before the date of such suspension, and in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if the suspension had not occurred.

(d) Rescission of suspension

The President may rescind any suspension made under subsection (b) or (c) of this section upon reporting to the appropriate congressional committees that doing so will expedite a transition to democracy in Cuba.

* * *

6. 28 U.S.C. § 1604 provides:

Immunity of a foreign state from jurisdiction

Subject 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.

7. 28 U.S.C. § 1605 provides:

General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States

in connection with a commercial activity of the foreign state elsewhere; or 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;

(3) 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 present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his

agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under

subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[**(e), (f)** Repealed.Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) Limitation on discovery.—

> **(1)** In general.—**(A)** Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A or section 1605B, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—**(A)** Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(h) Jurisdictional immunity for certain art exhibition activities.—

(1) In general.—If—

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

(B) the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)), that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)),

any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

(2) Exceptions.—

(A) Nazi-era claims.—Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

(iii) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(iv) a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(B) Other culturally significant works.—In addition to cases exempted under subparagraph (A),

paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(v) a determination under clause (iv) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(3) Definitions.—For purposes of this subsection—

(A) the term "work" means a work of art or other object of cultural significance;

(B) the term "covered government" means—

(i) the Government of Germany during the covered period;

(ii) any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

(iii) any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

(iv) any government in Europe that was an ally of the Government of Germany during the covered period; and

(C) the term "covered period" means the period beginning on January 30, 1933, and ending on May 8, 1945.

* * *

8. 28 U.S.C. § 1610 provides:

Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding

any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with

respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.—

(1) In general.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

9. 28 U.S.C. § 1611 provides:

Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to

attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.