Latest court decision in Exxon v. CIMEX and CUPET lawsuit under Title III of the Helms-Burton Act

The Court analyses the exemption of foreign states from immunity from prosecution and calls for evidence to clarify the application of the commercial activity exception.

In a recent decision, the US District Court for the District of Columbia (the "Court") has (i) analysed the immunity waiver of instruments or agents of a foreign state, taking into account the commercial activity exception and the expropriation exception, (ii) ordered the production of evidence to determine the actual relationship between a Cuban entity and its apparent Panamanian subsidiary, and (ii) considered the standing requirements for bringing actions under Title III of the Helms Burton Act.

Remember that, in 2019, the US government of Donald Trump activated Title III of the Cuban Liberty and Democratic Solidarity Act (Libertad Act), known as the "Helms-Burton Act" (the "HBA"), which grants the right to US nationals to sue any natural or legal person who, after a period of three months from the effective date of Title III, profits from the exploitation or "trafficking" of property that has been confiscated by the Cuban government from 1st January 1959 until the effective date of the Act (12/03/1996).

With the activation of Title III of the HBA, Exxon Mobile Corporation (the "Claimant") initiated a legal proceeding against Corporación CIMEX, S.A. (Cuba), Corporación CIMEX, S.A. (Cuba), Corporación CIMEX, S.A. (Panama) and UNION CUBA-PETROLEO ("CUPET"), all controlled by the Cuban government (collectively, the "Respondents"). Exxon, then known as Standard Oil, owned several subsidiaries operating in Cuba, including the Panamanian company Esso Standard Oil, S.A. (also known as "ESSOSA"), whose head office was in Havana, Cuba. CUPET, for its part, has as its object the exploitation of oil in Cuba, to which the former ESSOSA refinery, now the Ñico López refinery, belongs. CIMEX, on the other hand, includes the CUPET - CIMEX Division, which is responsible for the management of service stations in Cuba.

The Claimant claims compensation under Title III of the LHB for the alleged "trafficking" of certain assets that were confiscated by the Cuban government in 1960, including the refinery, as well as many service stations. It bases its claim on a claim certified by the Foreign Claims Settlement Commission (FCSC), which recognises losses of $71,611,002.90, plus interest at 6% per annum from 1st July 1960. In addition, certification of this claim by the FCSC would entitle the Claimant to receive three times the amount of damages. The Respondents, for their part, argue that: (i) they are agencies or instrumentalities of a foreign sovereign state, Cuba, and are therefore immune from suit under the Foreign Sovereign Immunities Act (the "FSIA"); and that (ii) Exxon lacks standing under Article III of Title III of the HBA.

The Court hearing the case issued on 20th April a decision (Memorandum Opinion and Order) partially granting the Defendants' motion to dismiss. The Court rejects the motion to dismiss as far as CIMEX (Cuba) is concerned, and orders that evidence be provided in relation to the aspects determined in its decision with respect to CUPET and CIMEX (Panama). By 4th May, the

parties must propose a timetable for the submission of evidence consistent with the limited scope described in the above-mentioned ruling to the Court.

Exemption from immunity

In relation to the immunity waiver, the Court went on to analyse the two exceptions provided for in the FSIA that are relevant to the case: the commercial activity exception and the expropriation exception. Regarding the commercial activity exception, it provides that a foreign state will not be immune from the jurisdiction of US courts with respect to actions based on an act committed outside the territory of the US when the commercial activity of that foreign state and that act causes a direct effect in the US. In this regard, the case focuses on two elements of this exception: whether Exxon's claim is based on a commercial activity and whether the defendants' alleged commercial activity causes a direct effect in the United States.

On the one hand, as to the requirement for commercial activity, the Court found that, since Exxon's claim is based on "trafficking" in confiscated assets and not on the expropriation thereof, i.e., not on the exercise of a sovereign State's sole power, by the very definition of "trafficking" the Court must find that it is commercial activity. On the other hand, as to the direct effect on the USA that such commercial activity would produce, from the Claimant's allegations, the Court concluded (i) that CIMEX's processing of remittances from the USA to Cuba and its purchase and sale of imported goods from the USA do have a direct effect on the USA, and (ii) that it has not been demonstrated that CIMEX's (Panama) activity has had a direct effect on the USA.

Regarding the application of the expropriation exception, the Court considered (i) the existence of certain property rights; (ii) whether these rights were acquired in violation of international law; and (iii) whether there is a jurisdictional link between the expropriation and the US. In this regard, the Court recalled that the expropriation by a State of assets of a company, but not the expropriation of the entire company, is not considered under customary international law to be an indirect expropriation of the rights of foreign shareholders, even if the value of the shares is reduced to zero. In this regard, the Court considered that the Claimant has not gathered sufficient evidence, under reliable sources of customary international law, to support its position that the parent company Exxon has ownership rights over the assets of its subsidiary (ESSOSA), the value of which has not been totally reduced by an expropriation.

The Court found that international law protects the "direct rights" of shareholders in relation to the ownership of the company, including the right to dividends, to attend and vote at general meetings, and to share in the residual assets of the company in the event of liquidation. In addition, it also confirmed that a state is thought to be in violation of international law if it takes measures that have an effect equivalent to a formal expropriation of a foreign shareholder's ownership rights, even if the state does not formally divest the shareholder of its shares. But not every state action that has a detrimental impact on a shareholder's interests amounts to an indirect expropriation of its property rights. Only when the state action is focused on the direct rights of the shareholder's status can it give rise to an international expropriation claim. Accordingly, a State's expropriation of a company's assets will not be considered an indirect expropriation of foreign shareholders' rights under customary international law, even if the value of the shares is reduced to zero. Since Exxon's claim concerns ESSOSA's assets and ESSOSA continues to operate, the Court considered that the Claimant has failed to establish that the expropriation violates international law.

In response, the Claimant argued that the Court should accept FCSC's certified claim as conclusive evidence of Claimant's rights in the assets in question. But the Court considered that this argument suffers from two problems: (i) that FCSC's certification of a claim creates, at most, a property right under national law, not international law; and (ii) that FCSC certifies claims to interests broader than the property rights recognised by customary international law. The FCSC has jurisdiction to adjudicate any right or interest owned, in whole or in part, directly or indirectly, by U.S. nationals. However, the expropriation exception requires the Claimant to identify a violation of international law by virtue of which it has been deprived of certain property rights, which the Claimant has failed to prove.

Although the Court ruled that the expropriation defence does not apply to any of the Respondents, it did consider that the commercial activity defence might apply to CIMEX (Cuba), but not to CUPET or CIMEX (Panama). The latter would hold its status as a Respondent solely based on its relationship with CIMEX (Cuba), and the Court has therefore ordered and authorised an investigation and evidence of the corporate separation of the two. The Court will also allow limited jurisdictional discovery in relation to the "trafficking" activities of CUPET and CIMEX (Panama), as these could have caused direct effects in the US.

Legitimacy

Finally, as to Claimant's standing, the Court determined that a claimant has standing if (i) it has suffered an injury in fact that is causally related to the conduct complained of and (ii) that can be redressed by a favourable decision of the court. Such injury is what Congress regulated in Title III through the definition of "trafficking," as Defendants are alleged to have trafficked and continue to traffic in the forfeited property. In addition, Claimant headlines a certified claim from FCSC certifying that it suffered a loss in a concrete amount, which constitutes an actual, not abstract, injury that is clearly attributable to Defendants' alleged trafficking, and not the result of the independent action of a third party. Finally, a favourable decision would redress Exxon's injury, as Exxon would be entitled to financial compensation. In view of the foregoing, the Court concluded that the Claimant has Article III standing to bring a claim under Title III of the HBA.

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