No. 21-2019

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

ROBERT BARTLETT, *et al.*,
Plaintiffs-Appellees,

v.

DR. MUHAMMAD BAASIRI,
Movant-Appellant,

JAMMAL TRUST BANK SAL
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTRODUCTION

The United States respectfully submits this amicus brief in response to the Court's request for the United States' views on whether the time-of-filing rule from *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), precludes a post-filing claim of sovereign immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA) when the defendant, sued as a private party, goes into liquidation while the suit is pending in a process governed by a foreign central bank pursuant to foreign law. In the view of the United States, if such a defendant becomes an agency or instrumentality of a foreign state within the meaning of the FSIA in virtue of the liquidation (an issue governed in part by foreign law that the United States does not address), it is entitled to immunity from suit under the FSIA, subject to the exceptions enumerated by that statute; *Dole Food* is not to the contrary.

The views expressed in this brief represent the United States' understanding of the governing law. The United States condemns in the strongest possible terms the acts of terrorism that grievously injured some plaintiffs and injured or killed the relatives of other plaintiffs. The United States also condemns the acts of entities that knowingly facilitate the banking activities of terrorist organizations.

STATEMENT

Plaintiffs are U.S. Service Members or the family members of U.S. Service Members who were injured or killed in terrorist attacks carried out in Iraq by Hezbollah, an entity designated by the United States as a Foreign Terrorist Organization.[1] SPA-1-2. Plaintiffs sued various Lebanese banks, including defendant Jammal Trust Bank (JTB), alleging that they knowingly provided financial services to Hezbollah, thereby facilitating those terrorist attacks. SPA-1-2. Plaintiffs asserted district court jurisdiction under the federal question statute, 28 U.S.C. § 1331, and the Antiterrorism Act of 2001, 18 U.S.C. §§ 2333(a), 2338. A-105.

Nine months after plaintiffs brought suit, the United States sanctioned JTB as a Specially Designated Global Terrorist because of the bank's support for Hezbollah. SPA-2. Pursuant to that sanction, JTB's assets subject to United States jurisdiction were frozen. SPA-2. Not long after, JTB sought liquidation and was placed into receivership by Lebanon's Central Bank. SPA-2. The Central Bank assigned a liquidator, Dr. Muhammad Baasiri, who is charged with overseeing JTB's liquidation under the supervision of the Central Bank. SPA-2.

[1] The facts are taken from the district court's August 6, 2021 Memorandum and Order, SPA-1-24. The facts described are only those relevant to the question the Court invited the government to address.

Dr. Baasiri sought to substitute himself for JTB as defendant in this suit "because JTB's assets and rights are now controlled by the Central Bank of Lebanon and its liquidator." SPA-4. Alternatively, Dr. Baasiri sought to intervene. SPA-5. JTB and Dr. Baasiri also sought dismissal of plaintiffs' claims against JTB, arguing in part that the liquidation has made JTB an "agency or instrumentality" of Lebanon and that, as such, it is immune from suit under the FSIA. SPA-10; *see* 28 U.S.C. §§ 1330, 1441(d), 1602-1611. The district court granted Dr. Baasiri's intervention motion (SPA-5-10) but otherwise denied his motion and JTB's (SPA-3-5, 15-18).

The district court believed its FSIA holding to be compelled by the Supreme Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). That case involved the application of 28 U.S.C. § 1441(d), which provides that "[a]ny civil action brought in a State court against a foreign state as defined in [28 U.S.C. § 1603(a)] may be removed by the foreign state" to a federal district court. *See* 538 U.S. at 473 (alterations in original; quoting 28 U.S.C. § 1441(d)). Under § 1603(a), a "foreign state" includes "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The question in *Dole Food* was whether, for purposes of removal under § 1441(d), "a corporation's instrumentality status is defined as of the time an alleged tort or other actionable wrong occurred or, on the other hand, at the time suit is filed." SPA-15-16 (quoting 538 U.S. at 471).

The defendants in *Dole Food* claimed to be agencies or instrumentalities of a foreign state under a provision of the FSIA that defines "agency or instrumentality" as an entity "[a majority of whose] shares or other ownership interest is owned by a foreign state or political subdivision thereof," among other requirements. SPA-16 (quoting 28 U.S.C. § 1603(b)(2)). The Supreme Court held that because " 'the plain text of this provision' is 'expressed in the present tense … instrumentality status [must] be determined at the time suit is filed.' " SPA-16 (alterations in original; quoting 538 U.S. at 478). The Supreme Court found support for that interpretation in "the longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought." SPA-16 (quoting 538 U.S. at 478) (quotation marks omitted).

Because JTB was a private party at the time this suit was filed, the district court held that it is not entitled to foreign sovereign immunity under the FSIA. SPA-18. In so holding, the district court noted this Court's characterization of *Dole Food* as "holding unequivocally" that an entity's instrumentality status is determined at the time the complaint is filed. SPA-16-17 (quoting *Abrams v. Société Nationale des Chemins de Fer Francais*, 389 F.3d 61, 64 (2d Cir. 2004) (per curiam)).

ARGUMENT

An Entity That Becomes an Agency or Instrumentality of a Foreign State After Litigation Has Begun Is Entitled to Immunity Under the Foreign Sovereign Immunities Act, Subject to Statutory Exceptions

The FSIA codified substantive principles of foreign sovereign immunity, based on customary international law, in addition to providing for district court jurisdiction in suits against foreign states. Regardless of whether the courts' jurisdiction is established on some other basis at the time suit is brought, an entity that becomes an agency or instrumentality of a foreign state within the meaning of the FSIA during the pendency of litigation is entitled to immunity under that statute, subject to the act's enumerated exceptions. *Dole Food*'s central holding is that the FSIA's definition of agency or instrumentality reflects foreign sovereign immunity's focus on the present sovereign status of an entity. Applying the FSIA's immunity principles to an entity that acquires status as a foreign-state agency or instrumentality (instrumentality status) after suit is filed is fully consistent with that holding.

1. Before Congress enacted the FSIA, courts recognized a distinction between the courts' subject-matter jurisdiction and a foreign state's immunity from suit. Prior to the FSIA, district courts had subject-matter jurisdiction over suits brought by or against foreign states under the diversity statute. *See, e.g.*, 28 U.S.C.

§ 1332(a)(2), (3) (1970); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 n.5 (1989). But even if a district court had diversity jurisdiction, a suit could not proceed against a foreign state if it was immune from suit. As a matter of U.S. law, "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). In deciding whether to recognize a foreign state's claim of immunity, "courts traditionally deferred to the decisions of the political branches—in particular, those of the Executive Branch." *Turkiye Halk Bankasi A.S. v. United States*, 143 S. Ct. 940, 946 (2023) (quotation marks omitted). If the State Department recognized a foreign state's immunity from suit, "the district court surrendered its jurisdiction" and dismissed the case. *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010).

The Supreme Court's decision in *Oliver American Trading Co. v. United States of Mexico*, 264 U.S. 440 (1924), exemplifies the distinction between the district courts' subject-matter jurisdiction and substantive foreign sovereign immunity principles in the era before the FSIA. In that suit, a private party brought an action against Mexico and its nationalized railroad alleging breach of contract and other claims. *Oliver American Trading Co. v. Government of the United States of Mexico*, 5 F.2d 659, 661 (2d Cir. 1924). At the time the plaintiff filed suit, the United States did not

recognize or have diplomatic relations with the de facto government of Mexico, and the plaintiff sued Mexico and the railroad as foreign corporations. *Oliver*, 264 U.S. at 442. Before the district court entered judgment, however, the United States recognized and established diplomatic relations with the Mexican government "and solely upon this ground, the District Court held that Mexico was entitled to immunity from suit." *Id.*

The plaintiff in *Oliver* sought direct review in the Supreme Court of the district court's immunity-based dismissal under a statute authorizing such review of decisions that "present the question of jurisdiction of the District Court as a federal court." *Oliver*, 264 U.S. at 442; *see Oliver*, 5 F.2d at 660 n.1 (reproducing statute). The Supreme Court transferred the case to this Court because "the question of [foreign] sovereign immunity" was not a question about "the power of the court, as defined or limited by the Constitution or statutes of the United States, to hear and determine the cause." *Oliver*, 264 U.S. at 442. This Court affirmed the district court's dismissal, holding that, as a recognized foreign sovereign, Mexico was entitled to foreign sovereign immunity.[2] *Oliver*, 5 F.2d at 667.

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[2] Both the Supreme Court and this Court referred to foreign sovereign immunity as a matter of "general law" affecting the "jurisdiction" of courts in the United States. *See, e.g.*, *Oliver*, 264 U.S. at 442-43; *Oliver*, 5 F.2d at 660-61, 666-67. But this sense of "jurisdiction" did not involve the courts' subject-matter

The Supreme Court's *Oliver* decision shows that before the FSIA's enactment, a foreign state's immunity from suit did not implicate the district courts' subject-matter jurisdiction. *See also, e.g.*, *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("[I]t is a guiding principle in determining whether a court should *exercise or surrender* its jurisdiction in [suits against a foreign state], that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs." (emphasis added)).

2. Congress enacted the FSIA to "prescribe[] a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Turkiye Halk Bankasi*, 143 S. Ct. at 946 (quotation marks omitted). That comprehensive regime codified substantive immunity principles, rooted in international law, and established a new basis for subject-matter jurisdiction for suits against foreign states.

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jurisdiction. Instead, it referred to substantive international law limits on the authority of the courts of one state to adjudicate suits against another state, which were applied in federal courts as a matter of "general law." *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019). *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), put an end to the federal courts' application of international law as "general law." And the Supreme Court has clarified that the federal courts' subject-matter jurisdiction is "the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *id.* at 90 ("'Jurisdiction,' it has been observed, is a word of many, too many, meanings[] ...." (quotation marks omitted)).

The FSIA establishes the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" by enumerated exceptions. 28 U.S.C. § 1604; *see id.* §§ 1605-1607 (exceptions); *see also, e.g.*, *id.* § 1605(a)(2) (providing that a foreign state is not immune from suits involving claims based upon certain commercial activity). Together, the general rule and statutory exceptions "codif[ied] pre-existing international and federal common law" of foreign sovereign immunity. *Stephens v. National Distillers & Chem. Corp.*, 69 F.3d 1226, 1234 (2d Cir. 1995); *see Samantar*, 560 U.S. at 319-20 ("[O]ne of the primary purposes of the FSIA was to codify the restrictive theory of sovereign immunity, which Congress recognized as consistent with extant international law."). The FSIA also created a new basis for subject-matter jurisdiction in U.S. district courts for suits against foreign states. The statute eliminated diversity jurisdiction over such suits and created district court jurisdiction "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity" under one of the FSIA's statutory exceptions. 28 U.S.C. § 1330(a); *see Amerada Hess*, 488 U.S. at 437 n.5.

Although the FSIA defined the federal district courts' subject-matter jurisdiction by reference to sovereign immunity principles, "the FSIA is not simply a jurisdictional statute 'concern[ing] access to the federal courts' but a codification of

'the standards governing foreign sovereign immunity as an aspect of *substantive* federal law.'" *Republic of Austria v. Altmann*, 541 U.S. 677, 695 (2004) (alteration in original; quoting *Verlinden*, 461 U.S. at 496-97); *see Verlinden*, 461 U.S. at 496 ("[T]he jurisdictional provisions of the [FSIA] are simply one part of th[e] comprehensive scheme."). That is to say, the FSIA's immunity provisions have effect independently of the statute's grant of subject-matter jurisdiction.

For example, even though the statute does not address the jurisdiction of state courts, if no exception to immunity applies, "the plaintiff will be barred from raising his claim in any court in the United States," including in state courts, just as was the case under the prior regime of foreign sovereign immunity. *Verlinden*, 461 U.S. at 497; *see Oliver*, 264 U.S. at 442-43 ("The question of sovereign immunity is … a question of general law, applicable as fully to suits in the state courts as to those prosecuted in the courts of the United States."); *see also, e.g.*, *Verlinden*, 461 U.S. at 497 ("The [FSIA's] jurisdictional grant is within the bounds of Article III, since every action against a foreign sovereign necessarily involves application of a body of substantive federal law, and accordingly 'arises under' federal law, within the meaning of Article III."). Thus, even if a court has jurisdiction over a suit against a foreign-state agency or instrumentality, it may not exercise that jurisdiction if the entity is entitled to immunity under the FSIA.

3. As the Supreme Court has recognized, "the principal purpose of foreign sovereign immunity … [is] to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Altmann*, 541 U.S. at 696 (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003)). Foreign sovereign immunity is thus unlike the immunities applicable to domestic officials in the United States, such as qualified immunity, in that foreign sovereign immunity "is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business" and hence is not based on the status of the entity at the time of the conduct giving rise to the suit. *Dole Food*, 538 U.S. at 479. Instead, "[foreign sovereign] immunity reflects current political realities and relationships," *Altmann*, 541 U.S. at 696, and so is concerned with the existing sovereign status of a defendant to a suit.

The Supreme Court's decision in *Dole Food* makes clear that the FSIA incorporates foreign sovereign immunity's focus on the present status of a defendant at the time the FSIA is applied. *Dole Food* involved corporations that professed to be agencies or instrumentalities of a foreign state at the time of the conduct giving rise to the claim but not at the time the plaintiff filed suit. 538 U.S. at 471-72. In light of that history, the question the Court considered was "whether a corporation's

instrumentality status is defined as of the time an alleged tort or other actionable wrong occurred or, on the other hand, at the time suit is filed." *Id.* at 471.

In answering that question, the Court interpreted 28 U.S.C. § 1603(b), the provision of the FSIA defining the phrase "agency or instrumentality of a foreign state." *Dole Food*, 538 U.S. at 473. At issue was the statutory requirement that an agency or instrumentality be an entity "a majority of whose shares or other ownership interest is owned by a foreign state." *Id.* at 478 (quoting 28 U.S.C. § 1603(b)(2)). The Supreme Court explained that the provision's use of "the present tense has real significance." *Id.* Because "[a]ny relationship recognized under the FSIA between the [corporations] and [the foreign state] had been severed before suit was commenced," giving legal effect to any instrumentality status the corporations once had would be inconsistent with the statute's use of the present tense and would not further the FSIA's purpose of giving foreign states present protection from suit. *Id.* at 479, 480.

Accordingly, the Court held that the corporations' "instrumentality status [is to] be determined at the time suit is filed." *Dole Food*, 538 U.S. at 478. The Court found that conclusion "consistent with the longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Id.* (quotation marks omitted).

4. *Dole Food*'s central interpretive holding is that courts must give effect to § 1603(b)'s use of the present tense. When an entity acquires instrumentality status during a suit against it, giving the present tense real significance requires recognizing the entity's claim to foreign sovereign immunity under the FSIA.

The FSIA's immunity provision states that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless a claim comes within a statutory exception. 28 U.S.C. § 1604. The statute defines "foreign state" as including "an agency or instrumentality of a foreign state." *Id.* § 1603(a). And it defines "agency or instrumentality of a foreign state" as "any entity—"

> (1) which *is* a separate legal person, corporate or otherwise, and
>
> (2) which *is* an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest *is* owned by a foreign state or political subdivision thereof, and
>
> (3) which *is* neither a citizen of a State of the United States ..., nor created under the laws of any third country.

Id. § 1603(b) (emphases added). That definition expresses Congress' intent that an entity qualifies as an "agency or instrumentality" based on its current relationship with the foreign state.

The definition permits an entity that satisfies the conditions at the outset of litigation to claim immunity at that time, subject to the exceptions, and it denies an

entitlement to immunity to any entity that fails to possess the required relationship at the time of suit. *See Dole Food*, 538 U.S. at 480. To give the present tense real significance, the definition also permits an entity that acquires instrumentality status during the pendency of litigation to claim immunity. At that time, the entity "is a separate legal person," "is an organ of a foreign state" or an entity that "is" majority-owned by the state, and "is" not a U.S. citizen or the citizen of a third country. Recognizing such an entity's entitlement to claim immunity, subject to the exceptions, implements the text's requirement that the immunity of an entity turn on the entity's present relationship with the foreign state.[3] And it is congruent with the Supreme Court's recognition that "the principal purpose of foreign sovereign immunity … [is] to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit.'" *Altmann*, 541 U.S. at 696 (quoting *Dole Food*, 538 U.S. at 479).

[3] Even if an entity becomes entitled to claim immunity under the FSIA after suit is brought, it is possible that the entity may waive its right to assert it in some circumstances. *See* 28 U.S.C. § 1605(a)(1) (providing for exception to immunity when "the foreign state has waived its immunity either explicitly or by implication"); *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991) ("Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly."). The United States takes no position on the circumstances under which wavier may be found in this context.

This interpretation of the FSIA also is consistent with the foreign sovereign immunity provision of the Antiterrorism Act. That statute provides in relevant part that "[n]o action shall be *maintained* under [18 U.S.C. § 2333] against[] … a foreign state[or] an agency of a foreign state." 18 U.S.C. § 2337(2) (emphasis added). The plain text of that provision strongly supports the proposition that courts should consider the current status of an entity asserting foreign sovereign immunity rather than the entity's status at the time suit was brought. Courts have construed an assertion of immunity under § 2337(2) as "functionally equivalent" to an assertion of immunity under the FSIA. *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 283 (1st Cir. 2005). Section 2337(2) therefore supports a construction of the FSIA that entitles an entity that acquires instrumentality status during litigation to assert immunity.

Dole Food's holding that "instrumentality status [is to] be determined at the time suit is filed," 538 U.S. at 478, is not to the contrary. That holding must be understood in context. In light of the history of the corporations' alleged sovereign status, the Court considered only two options: whether instrumentality status should be determined at the time of the alleged tort or at the time the suit was brought. *Id.* at 471. The Court had no occasion in *Dole Food* or in subsequent cases to consider whether instrumentality status may appropriately be found during the

pendency of a suit if the entity becomes an agency or instrumentality of the state after the complaint is filed. *Dole Food* should not be read to resolve the latter question. *See Turkiye Halk Bankasi*, 143 S. Ct. at 950 ("This Court has often admonished that general language in judicial opinions should be read as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." (quotation marks omitted)).[4]

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[4] The existing court of appeals precedent also would appear to be of limited use in construing § 1603(b) in this context. In one court of appeals decision applying the FSIA, it is unclear whether suit was brought before the entity became an agency or instrumentality of the foreign state. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985). In another, the court applied the FSIA to an entity that did become an agency or instrumentality during the litigation. *Wolf v. Banco Nacional de Mex.*, S.A., 739 F.2d 1458 (9th Cir. 1984). But both decisions are of limited value because they pre-date *Dole Food*. Since *Dole Food*, the courts of appeals appear not to have had an opportunity to consider the immunity of an entity whose instrumentality status arose after the commencement of litigation. *See, e.g.*, *United States v. Pangang Grp. Co.*, 6 F.4th 946 (9th Cir. 2021), *abrogated in part Turkiye Halk Bankasi A.S. v. United States*, 143 S. Ct. 940 (2023); *TIG Ins. Co. v. Republic of Argentina*, 967 F.3d 778 (D.C. Cir. 2020); *Kirschenbaum v. 650 Fifth Ave. & Related Props.*, 830 F.3d 107 (2d Cir. 2016); *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014), *rev'd* 579 U.S. 325 (2016); *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), *overruled in part* 560 U.S. 305 (2010); *Olympia Express, Inc. v. Linee Aeree Italiane, S.P.A.*, 509 F.3d 347 (7th Cir. 2007); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980 (10th Cir. 2007); *Abrams v. Société Nationale des Chemins de Fer Francais*, 389 F.3d 61 (2d Cir. 2004) (per curiam); *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir. 2004); *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190 (3d Cir. 2003).

Nor is there any tension between the present-tense interpretation of the FSIA and *Dole Food*'s reliance on "the longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought." 538 U.S. at 478 (quotation marks omitted); *see also* Brief for the United States as Amicus Curiae Supporting Respondents at 23-24, *Dole Food Co. v. Patrickson*, 538 U.S. 468, Nos. 01-593, 01-594, 2002 WL 31261045 (Oct. 3, 2022) (highlighting that jurisdictional principle). Because the FSIA's substantive foreign sovereign immunity principles apply independently of the statute's grant of jurisdiction, an entity that acquires instrumentality status during litigation is entitled to claim immunity under the FSIA even if the district court's subject-matter jurisdiction is established under some other statute at the outset of litigation.

5. Interpreting the FSIA's immunity provisions to give effect to the emergence of sovereign status that occurs during the pendency of a suit is in keeping with foreign sovereign immunity principles as they existed under the preexisting immunity regime. In *Oliver*, this Court rejected the plaintiff's contention that Mexico could not claim foreign sovereign immunity because "the jurisdiction of the [district] court fully attached prior to the recognition of Mexico." 5 F.2d at 661. Once the United States recognized the Mexican government, this Court held, Mexico and its national railroad were entitled to claim foreign sovereign immunity

and the plaintiff had no right to have its claims resolved by courts in the United States. *Id.* at 666-67; *see Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 11 (2015) ("Legal consequences follow formal recognition. Recognized sovereigns may sue in United States courts and may benefit from sovereign immunity when they are sued." (citations omitted)). Because the FSIA codified the preexisting principles of foreign sovereign immunity, *Stephens*, 69 F.3d at 1234, this Court's decision in *Oliver* supports a construction of the statute that extends immunity to entities that become foreign-state agencies or instrumentalities during litigation.

Interpreting the FSIA's immunity provisions to apply to entities that acquire instrumentality status during litigation is also consistent with customary international law. Foreign sovereign immunity "ha[s] been adopted as a general rule of customary international law solidly rooted in the current practice of States." Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, 2012 I.C.J. Rep. 99, ¶ 56 (Feb. 3) (quotation marks omitted). In light of that rule, "States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity." *Id.*

There is no customary international law rule of which the United States is aware that permits one state to decline to afford a foreign state an opportunity to

assert foreign sovereign immunity due to a change in status since the suit was filed. Construing the FSIA to have that result with respect to agencies or instrumentalities would appear to require a similar application to foreign states themselves and would thus risk a determination that the United States has violated its obligation under customary international law to recognize the immunity of a foreign state. *Cf. Oliver*, 5 F.2d 659. It could also result in the adverse treatment of the United States or agencies and instrumentalities of the United States in foreign courts. *See Garb v. Republic of Poland*, 440 F.3d 579, 597 n.24 (2d Cir. 2006) (noting that foreign sovereign immunity is "a reciprocal norm that significantly insulates the United States from suits in foreign countries").

The principles of foreign sovereign immunity that the FSIA codified were based on customary international law. *See Samantar*, 560 U.S. at 319-20; *Stephens*, 69 F.3d at 1234. The absence of any customary international law rule that would permit a state to decline to recognize the sovereign status of an entity that became an agency or instrumentality during litigation, entitled to claim immunity on that basis, is therefore a further reason to construe the FSIA's immunity provisions to apply to such an entity.

6. In resolving this appeal, the Court will need to determine whether JTB became an agency or instrumentality of Lebanon, within the meaning of 28 U.S.C.

§ 1603(b), as a result of its liquidation. That inquiry will in part require an interpretation of Lebanese law. For example, determining whether JTB "is a separate legal person, corporate or otherwise," 28 U.S.C. § 1603(b)(1), and whether JTB "is an organ" of Lebanon or an entity a majority of whose ownership interest "is owned by" Lebanon, *id.* § 1603(b)(2), will require an interpretation of Lebanese receivership law and that law's application in to JTB. The United States takes no position on those questions of foreign law. As part of that inquiry, the Court may have to consider whether JTB has any personhood apart from the Central Bank of Lebanon, which is an organ of Lebanon. *See S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 414 (2d Cir. 1983). The United States also takes no position on that question.[5]

CONCLUSION

The Court should construe the FSIA to permit an entity that becomes an agency or instrumentality of a foreign state during litigation to assert immunity under that statute, subject to the statutory exceptions.

[5] Although suits against entities that acquire instrumentality status after litigation is commenced implicate important interests of the United States, they are also extremely rare. The United States is aware of no case in which a foreign state has made an entity an agency or instrumentality in order to manipulate the courts' ability to adjudicate a suit against the entity. Should such a problem arise in the future, it would be for the political branches to consider and, if appropriate, to address through amendment of the FSIA.

Respectfully submitted,

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June 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the page limit specified in the Court's March 8, 2023 order inviting the views of the United States because it is 20 pages long, excluding the signature block. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word in Goudy Old Style 14-point font, a proportionally spaced typeface.

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