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The Restatement of Foreign Sovereign Immunity: Tutto il Mondo è Paese

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Abstract

Chapter 5 of the Restatement of the Law (Fourth): The Foreign Relations Law of the United States *provides a systematic, discerning and accessible account of the US law of foreign sovereign immunity as laid down in the Foreign Sovereign Immunities Act (FSIA), accompanied by consistent comparative reference to the international and foreign domestic law of state immunity. From the perspective of a non-US reader, however, where Chapter 5 adds greater value in its own right is in the attention it pays in the comments and reporters' notes to a range of preliminary issues of domestic law on the determination of which the provisions of the FSIA turn but that the latter do not regulate. These issues, although superficially peculiar to the US law of foreign sovereign immunity, arise similarly in connection with the corresponding international and foreign domestic rules. In this way, what are ostensibly the most particular aspects of Chapter 5 may be those of most universal interest.*

1 Introduction

The black-letter rules[1] on the immunity of states from the jurisdiction of the courts of other states found in Chapter 5, entitled 'Immunity of States from Jurisdiction', of the *Restatement of the Law (Fourth): The Foreign Relations Law of the United States* do not

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[1] The presentation of the respective volumes of the American Law Institute (ALI)'s *Restatement of the Law* project is characterized by a series of numbered sections each containing a rule in bold black typeface ('black-letter rules'), followed by short comments on these rules ('comments'), followed in turn by longer, more detailed reporters' notes each containing ample reference to US federal and state case law, to other relevant statutory provisions and, in the case of the *Restatement of the Law: The Foreign Relations Law of the United States*, to relevant treaty provisions and decisions of international and foreign courts.

purport for the most part to restate international law[2] or to be otherwise generalizable beyond the USA. Indeed, they are mostly not rules on the immunity of states from the jurisdiction of the courts of other states at all but rather rules on the immunity of foreign states from the jurisdiction of US courts.[3] This stands to reason in the context not only of a restatement of what is explicitly called the foreign relations law of the United States, as distinct from international law, but also of a chapter that, by virtue of the animating spirit of the American Law Institute (ALI)'s whole *Restatement* project and the judicial focus of the law of state or, in US parlance, foreign sovereign immunity, is conceived first and foremost as an aid to practice in and by US courts. These rules on the immunity of foreign states from the jurisdiction of US courts are necessarily drawn from the governing US federal statute, the Foreign Sovereign Immunities Act (FSIA),[4] and from federal and state case law related to it.

The existence of the FSIA leaves little room as far as the black-letter rules of Chapter 5 are concerned for what can realistically be considered choices on the part of the ALI and its reporters and, as such, for the independent scholarly authority of the *Restatement (Fourth)*. The FSIA, moreover, differs in certain significant respects, in its precise formulation and in its broader substance, from customary international law, from the only universal multilateral treaty on state immunity, namely the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property,[5] and from the state immunity legislation and case law of other states. This, along with its rare reference even in other instances to international law, deprives of international and comparative legal value much of the case law on the FSIA presented and analysed so expertly in the reporters' notes. These constraints and limitations inherent in its subject matter might be thought to make Chapter 5 little more than an object of curiosity to non-US readers unlikely ever to advise on or plead a case before a US court.

Where, however, Chapter 5 of the *Restatement (Fourth)* has something to offer in its own right that may be of more value to at least those non-US readers who concern themselves with state immunity is in the attention paid in the comments and even more so in the reporters' notes to legal questions on the determination of which the FSIA, like the state immunity legislation of other states and the international rules of

[2] See, explicitly, *Restatement of the Law (Fourth): The Foreign Relations Law of the United States* (2018) (*Restatement (Fourth)*), ch. 5, introductory note, explaining that, '[e]xcept as specifically noted, the Sections in this Chapter restate the domestic law of the United States governing state immunity rather than international law'. To the limited extent that the black-letter rules of Chapter 5 venture to restate international law, they do so only in very general terms.

[3] The terms 'US court' and 'US courts' are used throughout this article to refer generically to any and all courts in the USA (referred to in the *Restatement (Fourth)* as 'courts in the United States'), whether federal or state. The same goes, *mutatis mutandis*, for the term 'US law'.

[4] 28 USC §§ 1330, 1332(*a*)(2)–(4), 1391(*f*), 1441(*d*), 1602–1611 (FSIA). In restating rules based predominantly on a single federal statute, Chapter 5 differs not only from the other chapters of the *Restatement (Fourth)* but also from the ALI's original conception of its *Restatement of the Law* project, which was to distil into general statements on different areas of law the respective common law rules of the 50 states of the Union.

[5] United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/RES/59/38, 2 December 2004, Annex (not in force) (UN Convention on Jurisdictional Immunities).

state immunity, is premised but on which it is almost completely and they are completely silent. Perhaps more than Chapter 5's treatment of the provisions of the FSIA as such, it is this thorough examination of how US courts answer these logically precedent questions dictating whether and how the rules of foreign sovereign immunity in the FSIA are engaged – questions approached by those courts as pure questions of domestic law – that stands to reward the *Restatement (Fourth)*'s non-US readership. It may be that, subject to any statutory or other domestic legal constraints or differences, non-US lawyers and domestic courts opt to look to the judgments of other national jurisdictions for persuasive authority when wrestling, as they increasingly find themselves doing today, with cognate preliminary issues of law in the context of the law of state immunity. In highlighting how these issues are handled in what historically has been a jurisdiction at or near the forefront of international developments in relation to state immunity, the comments and especially the reporters' notes to Chapter 5 provide, probably without setting out to do so, a practical service to non-US readers. At a more systemic level, these comments and reporters' notes also invite non-US and, indeed, US readers, implicitly and again likely unwittingly, to reflect on the extent to which international law could and should inform the determination by domestic courts of these domestic legal questions on which the edifice of state immunity rests.

None of this should be taken to suggest that Chapter 5's account of the rules on the immunity of foreign states from the jurisdiction of US courts is parochial. On the contrary, one of the striking features of Chapter 5 is its openness to international and foreign domestic law notwithstanding that it necessarily focuses first and foremost on the US law of foreign sovereign immunity. Even where not included in the relevant black-letter rule, international law rates a consistent mention in the comments, reporters' notes or both, which also have repeated and informed comparative regard to the legislative and judicial practice of other states. Against the background of a US Supreme Court not always predisposed to considering international, let alone foreign law, these discreet but insistent reminders that the US law of foreign sovereign immunity is not an island are worthy of note. The point here is merely that the universal relevance of Chapter 5 may well derive, perhaps paradoxically, less from its overt comparisons to international and foreign domestic rules of state immunity and more from its consideration of points ostensibly peculiar to the US law on which its corresponding rules of foreign sovereign immunity are overlaid.

2 Chapter 5 of the *Restatement* in Brief

The 'immunity of states from jurisdiction' of the title of Chapter 5 of the *Restatement (Fourth)* is foreign sovereign immunity as provided for in the FSIA.[6] Chapter 5 is

[6] Chapter 5 does not examine the immunity *ratione materiae* from the jurisdiction of US courts of serving and former officials of foreign states in respect of acts performed in their official capacity, which under international law and the domestic law of other states is considered a manifestation of state immunity but to which, as a matter of statutory construction, the FSIA has been held not to apply. See *Restatement (Fourth)*, *supra* note 2, § 451, Comment *d* and Reporters' Note 1, the latter citing *Samantar v. Yousuf*,

arranged into three subchapters dealing respectively with the immunity of a foreign state from proceedings,[7] meaning in practice civil proceedings[8] (Subchapter A), related procedural questions such as service of process, discovery and default judgments (Subchapter B) and the immunity of a foreign state from judicial measures of constraint against its property in support of civil proceedings (Subchapter C). In a structural anomaly inherited from the *Restatement of the Law (Third): The Foreign Relations Law of the United States* (1987), the definition of a 'foreign state' and the discussion of it in the comments and reporters' notes, which are relevant to all three subchapters,[9] appear in Subchapter A. Subchapter A opens with a section that acknowledges that '[i]nternational law requires a state to provide other states with immunity from the jurisdiction of its domestic courts, subject to exceptions',[10] a proposition unremarkable in most other national contexts but not to be taken for granted in relation to the USA.[11] After this the remaining sections of all three subchapters track the provisions

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560 US 305, 315 (2010). Comment *c* to § 452 further specifies that, for the purposes of the FSIA, 'current and former individual government officials are not foreign states or agencies and instrumentalities', while Reporters' Note 5 to § 452 adds, again citing *Samantar*, that '[a] natural person cannot be an organ of a foreign state or otherwise entitled to immunity under the statute'. For the term 'organ of a foreign state' as used in the FSIA, see note 20 below.

7 Drawing on the terminology adopted in the *Restatement (Fourth)*'s chapters on jurisdiction, Subchapter A of Chapter 5 is entitled 'Immunity of Foreign States from Jurisdiction to Adjudicate'. Reference in this context to the immunity of a foreign state from 'jurisdiction' as a synonym for its immunity specifically from judicial proceedings, as distinct from its immunity from judicial measures of constraint, such as attachment and execution, against its property (also known as 'enforcement'), is widespread and unobjectionable in principle. It is, however, prone to confuse, given that judicial orders for measures of constraint also constitute exercises of jurisdiction *lato sensu* and that the terms 'jurisdictional immunity' and 'jurisdictional immunities' encompass immunity from measures of constraint as much as immunity from 'jurisdiction', the latter 'understood *stricto sensu* as the right of a State not to be the subject of judicial proceedings in the courts of another State'. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, at 147, para. 113. The term 'immunity from proceedings' is preferred throughout this article.

8 But see *Restatement (Fourth)*, *supra* note 2, § 451, Reporters' Note 4, on the possible application of the FSIA to criminal proceedings.

9 Indeed, the distinction between a foreign state and an agency or instrumentality of a foreign state, as discussed in the *Restatement (Fourth)*, *supra* note 2, § 452, Comments *d*, *g–i* and Reporters' Notes 4, 7–9, is of greater salience to the rules in Subchapters B and C than to those in Subchapter A, as pointed out in Reporters' Note 4.

10 *Restatement (Fourth)*, *supra* note 2, § 451, Comment *a*.

11 It is puzzling for the non-US international lawyer to read statements by the US Supreme Court, harking back to Chief Justice Marshall in *Schooner Exchange v. McFaddon*, 7 Cranch 116 at 137, 3 L.Ed. 287 (1812), to the effect that the grant to a foreign state of immunity from the jurisdiction of US courts is 'a matter of grace and comity', not a response to a legal right of the foreign state. See, e.g., *Verlinden BV v. Central Bank of Nigeria*, 461 US 480, 486 (1983); *Dole Food Co. v. Patrickson*, 538 US 468, 479 (2003); *Republic of Austria v. Altmann*, 541 US 677, 689, 696 (2004); *Rubin v. Islamic Republic of Iran*, 138 S.Ct. 816, 821 (2018). It is not obvious to those not grounded in US law whether, in its opposition of comity to legal right, the Supreme Court is referring to a right under international law – in which case it is mistaken, as underlined by the International Court of Justice (ICJ) in *Jurisdictional Immunities*, *supra* note 7, at 123, para. 56 – or under US law. Either way, the black-letter rule, the comments and the reporters' notes in *Restatement (Fourth)*, *supra* note 2, § 451 leave the reader in no doubt that the FSIA was intended on the whole to give effect to international law, while § 451, Reporters' Note 2 indicates that the Supreme Court has on occasion interpreted the FSIA in the light of the customary international law of state immunity.

of the FSIA, referring in the reporters' notes also to relevant international and foreign domestic practice.

In terms of the rules of foreign sovereign immunity as such, of particular interest to a non-US audience may be Subchapter A's account of the more exceptionalist of the FSIA's exceptions to the immunity of a foreign state from proceedings in US courts and from post-judgment orders by those courts for execution or attachment in aid of execution against a foreign state's property. These are the exceptions in relation to claims concerning property taken in violation of international law[12] and the exceptions in relation to certain claims connected with terrorism.[13] There is a measure of fascination for the non-US reader in seeing how the reporters' notes broach the delicate question of the stark disconformity of these outliers with general practice. The approach taken hints at how the ALI conceives of both the function of the *Restatement of the Law: The Foreign Relations Law of the United States* and the relationship between this private initiative and the international legal interests of the USA.[14]

[12] See 28 USC §§ 1605(*a*)(3), 1610(*a*)(3), (*b*)(2), restated in *Restatement (Fourth)*, *supra* note 2, §§ 455, 464 respectively and considered more recently by the US Supreme Court in *Federal Republic of Germany v. Philipp*, Case no. 19–351, Opinion, 3 February 2021. As highlighted at § 455, Reporters' Note 15, no exception to a foreign state's immunity from proceedings comparable to 28 USC § 1605(*a*)(3) appears in the UN Convention on Jurisdictional Immunities, *supra* note 5, in the European Convention on State Immunity 1972, 1495 UNTS 182, or in the state immunity legislation of other states.

[13] See 28 USC §§ 1605A, 1605B, 1610(*a*)(7), (*b*)(3), (*g*), restated in *Restatement (Fourth)*, *supra* note 2, §§ 460, 464. (28 USC § 1605B, which was inserted into the FSIA only in September 2016, is not reflected in the black-letter rule at *Restatement (Fourth)*, § 460 but is discussed in Reporters' Note 9 to the same, as well as in § 464, Reporters' Note 10.) As § 460, Reporters' Note 11 records, no exception to immunity from proceedings equivalent to 28 USC § 1605A is found in the UN Convention on Jurisdictional Immunities, *supra* note 5, while at the national level only Canada has followed the US example. As alluded to in § 464, Reporters' Note 16, it was on account of the US Supreme Court's decision in *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016), applying 28 USC §§ 1605A, 1610(*g*), that Iran initiated proceedings in the ICJ in *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, 13 February 2019, ICJ Reports (2019) 7, in which the Court ruled that it lacked jurisdiction over the issues of state immunity. See generally Stephens, 'The Fourth Restatement, International Law, and the "Terrorism" Exception to the Foreign Sovereign Immunities Act', in P.B. Stephan and S.H. Cleveland (eds), *The Restatement and Beyond: The Past, Present, and Future of US Foreign Relations Law* (2020) 391.

[14] While noting that, apart from Canada's legislative amendment along the lines of 28 USC § 1605A, these idiosyncratic exceptions find no counterparts in international or foreign state immunity instruments, neither *Restatement (Fourth)*, *supra* note 2, § 455, Reporters' Note 15 nor § 460, Reporters' Note 11 characterizes them as contrary to international law. This would seem to suggest that the ALI, perfectly reasonably, does not see it as part of the function of the *Restatement of the Law: The Foreign Relations Law of the United States* to assess the international lawfulness of the practice of the USA. The picture is complicated, however, by statements in the same two reporters' notes which appear to downplay and, in the latter case, to cast doubt on the inconsistency with international law of the relevant exception. These statements possibly speak to a desire on the part of the ALI to paint US practice in the best possible light so as not to embarrass the USA in its international legal relations, in the latter case particularly given what was then the pendency before the ICJ of Iran's claims in relation to immunity in *Certain Iranian Assets*. That said, other statements in the same reporters' notes point overall to an attempt to reconcile divergent views aired during the drafting process.

3 Questions on Which Foreign Sovereign Immunity Is Premised

As informative as Chapter 5 of the *Restatement (Fourth)*'s exegesis on the rules of foreign sovereign immunity and its references to international and foreign domestic practice are, perhaps of more value to a non-US readership is the sustained and insightful attention devoted in the comments and in particular the reporters' notes to a range of preliminary legal questions on the determination of which the provisions of the FSIA and, indeed, of the corresponding legislation of other states and of the international law of state immunity are premised but on which these provisions themselves are either silent or, in the case of the FSIA, silent with one exception.[15] Some of these questions relate to terms included but not defined or not defined sufficiently in the FSIA. Others relate to principles of liability on which the FSIA is overlaid but that it does not itself regulate. All of these are formally questions of domestic law, although there is no inherent reason why at least some of them could not be answered by reference to international law – that is, why the content of the applicable domestic law could not be derived from international law. Chapter 5 nonetheless indicates that US courts have to date treated all of them as pure questions of domestic law, determining them without reference to international law.

The consideration of these questions in the comments and reporters' notes to Chapter 5 promises both comparative and more systemic legal interest for non-US readers. The legal interest is comparative insofar as non-US lawyers and domestic courts may look to US case law for persuasive authority when required to engage, as they have been and will continue to be, with corresponding preliminary questions of law around which their applicable rules of state immunity are framed but about which these rules themselves say nothing. The legal interest is systemic insofar as the questions considered raise, albeit not explicitly, the issue of the extent to which international law could and should inform the determination by domestic courts of such domestic legal questions with which the application of the law of state immunity is intertwined. Several such questions are considered here.

A *Comparative Legal Interest*

1 The Distinction between a Foreign State and an Agency or Instrumentality of a Foreign State

The comments and especially the reporters' notes to the black-letter rule dealing with the definition of a 'foreign state' in the FSIA[16] are particularly thorough in relation to a distinction on which various provisions of the FSIA turn, namely that between

[15] For the exception, see note 23 below.

[16] See 28 USC § 1603(*a*), cross-referable to § 1603(*b*), as restated in *Restatement (Fourth)*, *supra* note 2, § 452. See notes 20 and 21 below. As highlighted in *Restatement (Fourth)*, § 452, Reporters' Note 13, the reporters' notes to § 452 have been substantially revised since the *Restatement (Third)*, not least to take account of subsequent case law on points considered here.

what the reporters' notes call 'integral parts of a foreign state'[17] and what the FSIA refers to as an 'agency or instrumentality of a foreign state'.[18] Two distinct but closely related legal questions on the determination of which differences of treatment under the FSIA hinge[19] arise under US law with respect to this distinction. Both have been answered by US courts without reference to international law.

The first question is how to distinguish for the purposes of the FSIA between those entities enjoying separate domestic legal personality that constitute an 'agency or instrumentality of a foreign state', as defined in the FSIA,[20] and those that, despite enjoying a domestic legal personality separate from that of the foreign state, nonetheless constitute for the purposes of the FSIA an integral part of the 'foreign state', a term not exhaustively defined in the FSIA.[21] The comments and reporters' notes explain that the test formulated and applied in the case law focuses on the 'core functions' of

[17] *Restatement (Fourth)*, *supra* note 2, § 452, Reporters' Note 3 (heading), borrowing from *Howe v. Embassy of Italy*, 68 F. Supp. 3d 26, 33 (DDC 2014).

[18] Although treated differently for certain purposes of the FSIA from the separate domestic legal person of the foreign state, an agency or instrumentality of a foreign state is nonetheless encompassed by the definition of 'foreign state' in 28 USC § 1603(*a*). See note 21 below.

[19] For these differences of treatment, see *Restatement (Fourth)*, *supra* note 2, § 452, Comment *d* and Reporters' Note 4.

[20] 28 USC § 1603(*b*) provides: 'An "agency or instrumentality of a foreign state" means 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.' The term 'organ of a foreign state' as used in 28 USC § 1603(*b*)(2) is prone to confuse the non-US reader. It is not coextensive with the notion of an 'organ of government' of a state as used in the UN Convention on Jurisdictional Immunities, *supra* note 5, Art. 2(1)(*b*)(i), or with national legislation based on it, namely Act on Civil Jurisdiction over Foreign States 2009 (Japan) (ACJFS (Jpn)), Act No. 24 of 24 April 2009, Art. 2(iii); Federal Law on Jurisdictional Immunities of a Foreign State and a Foreign State's Property in the Russian Federation 2015 (Russia) (FLJI (Rus)), Federal Law No. 297-FZ of 3 November 2015, Art. 2(1)(*c*); Organic Law on Privileges and Immunities of Foreign States, International Organizations with a Headquarters or Office in Spain, and International Conferences and Meetings Held in Spain 2015 (Spain) (LPIFS (Spa), Law 16/2015 of 27 October 2015, Art. 2(*c*)(iii). Nor is it coextensive with the concept of an 'organ of a State' or 'State organ' as used in International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc. A/56/83, 3 August 2001, Annex, Art. 4. Nor again is it coextensive with the concept of an 'executive organ of the government of a State' or an 'organ of the executive government of the foreign state' as used in the state immunity legislation of a variety of states, namely State Immunity Act 1978 (UK) (SIA (UK)), c. 33 of 1978, s. 14(1); Foreign States Immunities Act 1981 (South Africa) (FStIA (SA)), Act 87 of 1981, s. 1(2)(i); State Immunity Ordinance 1981 (Pakistan) (SIO (Pak)), Ordinance No. 6 of 1981, s. 15(1); Immunities and Privileges Act 1984 (Malawi) (IPA (Mwi)), Act No. 12 of 1984, s. 16(1); Foreign States Immunities Act 1985 (Australia) (FStIA (Aus)), No. 19, 1985, s. 15(1), (3)(*c*); State Immunity Act 1985 (Singapore) (SIA (Sing)), Cap. 313, s. 16(1). The term 'organ of a foreign state' in 28 USC § 1603(*b*)(2) is akin to the notion of an '*organisme*' (in the English text, 'agency') of a foreign state as defined in the French text of the State Immunity Act 1982 (Canada) (SIA (Can)), RSC, 1985, c. S-18, s. 2 and of an '*organismo*' of the foreign state as found in LPIFS (Spa), *ibid.*, Art. 2(*c*)(iii), as terminologically distinct respectively from an '*organe*' (in the English text, 'organ') of a foreign state as used in the same definition in SIA (Can), *ibid.*, s. 2 and from an '*órgano de gobierno*' as found in LPIFS (Spa), *ibid.*, Art. 2(*c*)(i).

[21] See 28 USC § 1603(*a*): 'A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (*b*).'

the entity. If these core functions are predominantly governmental, a legally separate entity is not characterized as an agency or instrumentality but is instead considered an integral part of the foreign state for the purposes of the FSIA.[22]

The second question is whether and, if so, in what circumstances it may be permissible to ignore the separate legal personality of an agency or instrumentality of a foreign state so as to assimilate the agency or instrumentality to the domestic legal person of the foreign state for the purposes of the applicable substantive domestic law and with it of the provisions of the FSIA predicated on it. This question of 'piercing the corporate veil' is essential to determining whether, in various contexts relevant to the FSIA, the conduct, liabilities or property of the one may be treated as the conduct, liabilities or property of the other.[23] The comments and reporters' notes explain, by detailed reference to the case law, that, while there is a presumption that the separate legal personality of an agency or instrumentality of a foreign state will be respected, there are circumstances in which the agency or instrumentality will be assimilated in ways relevant to the FSIA to the domestic legal person of the foreign state.[24] These circumstances, which are said to derive from general principles of corporate law[25] and to represent a 'high bar' to be overcome,[26] are where it can be shown that the foreign state exercised such 'extensive control' over the agency or instrumentality that the latter can be treated as the 'alter ego' of the former[27] and, in the alternative, where to respect the separate legal personality of the agency or instrumentality would work a fraud or injustice.[28] In relation to the first, the comments and reporters' notes outline some of the indices of 'extensive control' developed by different courts.[29]

Both of these questions are of genuine comparative legal interest, and Chapter 5's consideration of the US case law offers non-US lawyers and domestic courts potentially useful material on which to draw, whether it be to agree or to differ. As to the first, the state immunity legislation of other states distinguishes between and treats differently a foreign state and its organs of government, on the one hand, and what

[22] See *Restatement (Fourth)*, *supra* note 2, § 452, Comment *d* and Reporters' Notes 3, 4. None of the case law cited on point emanates from the US Supreme Court.

[23] The only provision of the FSIA that regulates the issue is 28 USC § 1610(*g*)(1), which, for the purposes of execution and attachment in aid of execution of a judgment entered under the terrorism exception in 28 USC § 1605A, pierces the corporate veil to treat as effectively one and the same the property of a foreign state and the property of an agency or instrumentality of that foreign state, regardless of whether the latter could be considered the 'alter ego' of the former. See *Restatement (Fourth)*, *supra* note 2, § 464, Reporters' Note 10.

[24] See *Restatement (Fourth)*, *supra* note 2, § 452, Comments *g*, *h*, *i* and Reporters' Notes 7–9.

[25] But see the approach, noted at *ibid.*, § 452, Reporters' Note 7, in *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000), where the Court of Appeals for the Eleventh Circuit understood the Supreme Court's judgment in *First Nat'l City Bank v. Banca para el Comercio Exterior de Cuba*, 462 US 611 (1983) (*Bancec*) to encompass also common law rules of agency.

[26] *Restatement (Fourth)*, *supra* note 2, § 452, Comments *h*, *i*.

[27] *Ibid.*, § 452, Comment *h* and Reporters' Notes 7, 8, the test having been enunciated by the Supreme Court in *Bancec*, *supra* note 25.

[28] See *Restatement (Fourth)*, *supra* note 2, § 452, Comment *i* and Reporters' Notes 7, 9, the test again having been enunciated in *Bancec*, *supra* note 25.

[29] See *Restatement (Fourth)*, *supra* note 2, § 452, Comment *h* and Reporters' Note 8.

is variously termed an 'agency', 'agency or instrumentality' or 'separate entity' of a foreign state, on the other.[30] This includes more recent legislation based on the UN Convention on Jurisdictional Immunities,[31] which itself draws the distinction between 'the State and its various organs of government' and 'agencies or instrumentalities of the State or other entities',[32] treating the two differently. Like the FSIA, neither this legislation nor the UN Convention, to which the courts of yet more states commonly look for evidence of the customary international law of state immunity, specifies how to distinguish between the two, while the International Law Commission (ILC)'s commentary to its draft articles on jurisdictional immunities of states and their property observes that '[t]here is in practice no hard-and-fast line to be drawn between agencies or instrumentalities of a State and departments of government'.[33] The issue has arisen[34] and will no doubt arise again in litigation in these and other domestic jurisdictions. Although some jurisdictions have their own judicial authority in this regard,[35] most do not.

The same goes, *mutatis mutandis*, for the question whether and, if so, when a court may decline to give effect to the separate legal personality of an agency or instrumentality so as to assimilate it for the purposes of the applicable substantive domestic law, and consequently of the law of state immunity overlaid on it, to the domestic legal person of the foreign state. This question of substantive law, not regulated by the relevant rules of state immunity but nonetheless determinative of how they apply in a particular case, has arisen to date in other jurisdictions in the context of execution,[36]

[30] See SIA (UK), *supra* note 20, s. 14(1)–(4); FStIA (SA), *supra* note 20, ss 1, 15; SIO (Pak), *supra* note 20, s. 15(1)–(4); IPA (Mwi), *supra* note 20, s. 16(1)–(4); SIA (Sing), *supra* note 20, ss 16(1)–(4); SIA (Can), *supra* note 20, ss 2, 11(3), 12(2), (4); FStIA (Aus), *supra* note 20, ss 3(3), 22, 35; Foreign States Immunity Law 2008 (Israel) (FSIL (Isr)), ss 1, 18; ACJFS (Jpn), *supra* note 20, Art. 2(iii); FLJI (Rus), *supra* note 20, Art. 2(1)(*c*); LPIFS (Spa), *supra* note 20, Art. 2(*c*)(iii). For the sake of ease, the generic term 'agency or instrumentality' will be used in this article, except when quoting.

[31] See ACJFS (Jpn), *supra* note 20, Art. 2(iii); FLJI (Rus), *supra* note 20, Art. 2(1)(*c*); LPIFS (Spa), *supra* note 20, Art. 2(*c*)(iii). Sweden has also legislated to enact the UN Convention on Jurisdictional Immunities, *supra* note 5, into domestic law via its Act on Jurisdictional Immunities of States and Their Property 2009:1514, but the Act will come into force only if and when the Convention does. In the meantime, the Swedish courts look to the UN Convention as evidence, not necessarily conclusive, of the customary international law of state immunity on specific points.

[32] See UN Convention on Jurisdictional Immunities, *supra* note 5, Art. 2(1)(*b*)(i) and (iii) respectively.

[33] ILC, 'Draft articles on jurisdictional immunities of States and their property and commentaries thereto', 2(2) *ILC Yearbook* (1991) 13, at 17, draft Art. 1, para. (16).

[34] See, e.g., *Tsavliris Salvage (International) Ltd v. Grain Board of Iraq (The Altair)* [2008] EWHC 612 (Comm), [2008] 2 All ER (Comm) 895, paras 2, 6–7, 51–54, 60–74; *Wilhelm Finance Inc. v. Ente Administrador del Astillero Rio Santiago* [2009] EWHC 1074 (Comm), paras 1–52; *Taurus Petroleum Ltd v. State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2015] EWCA Civ 835, [2016] 2 All ER (Comm) 1037, paras 3, 39–45.

[35] See, e.g., *La Générale des Carrières et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 27, [2013] 1 All ER 409 (*Gécamines*), especially paras 28–29, 42, as applied in *Taurus Petroleum*, *supra* note 34, paras 44–45. The Privy Council in *Gécamines*, *ibid.*, paras 28–29, underlined that the test for the purpose of state immunity and the test for the purpose of liability, the latter being at issue in the case, should be one and the same.

[36] See, e.g., *Gécamines*, *supra* note 35, paras 30, 42; *Roxford Enterprises SA v. Government of the Republic of Cuba*, 2003 FCT 763, paras 27–41; Cass. Civ. 1re, 6 février 2007, pourvoi n^{os} 04-13108, 04-16889,

where the issue at stake is whether the one may be held liable for the debts of the other – that is, whether a judgment secured against an agency or instrumentality of a foreign state may be executed against assets of the foreign state within the jurisdiction or vice versa. For its part, the UN Convention on Jurisdictional Immunities, in respective 'understandings' annexed to and forming an integral part of the Convention, provides only that the relevant rules '[do] not prejudge the question of "piercing the corporate veil"'.[37] Again, while some jurisdictions have case law on the matter,[38] most do not.

It ought to go without saying that any non-US lawyer or non-US court that draws on the US case law need not apply it the same way as a US court would. One foreign court, for example, while looking to the US case law, has treated its two questions effectively as one and the same, finding 'generally instructive' in deciding whether an entity with separate legal personality constitutes an integral part or an agency or instrumentality of a foreign state the US Supreme Court's presumption of respect for the separate legal personality of the entity and the gist of its 'extensive control' criterion for rebutting this presumption.[39] A different foreign court, adopting the same Supreme Court authority, has approached the matter exactly as would a US court.[40] The point here is simply that Chapter 5's account of this case law should be of service to any such comparative ends. How a foreign court uses it is a matter for the foreign court.

2 Property of a Foreign State or of an Agency or Instrumentality of a Foreign State

While the reporters' notes to Chapter 5 pay less attention to this than they and the comments do to other essentially definitional questions arising under the FSIA in relation to a foreign state's rights in property,[41] they nonetheless usefully touch on the question, again not answered by the FSIA itself, of what constitutes 'property of a foreign state' and 'property of an agency or instrumentality of such a state' for the

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Bull. civ. 2007, I, N° 52; Cass. Civ. 1re, 14 novembre 2007, pourvoi n° 04-15388, Bull. civ. 2007, I, N° 355; *Republic of Kazakhstan and National Bank of Kazakhstan v. Ascom Group SA*, Decision 11729, 17 June 2020 (Svea Court of Appeal, Sweden) (currently on appeal to the Swedish Supreme Court), paras 35–41, where the issue arose in the particular form of whether a separate legal entity having the characteristics of a central bank of a foreign state for the purposes of the UN Convention on Jurisdictional Immunities, *supra* note 5, Art. 21(1)(*c*), was so lacking in autonomy from the foreign state as to constitute instead an organ of the latter, with the result that, in accordance with Art. 19(*c*), any of its property in use or intended for use for commercial purposes was not immune from post-judgment measures of constraint.

37 UN Convention on Jurisdictional Immunities, *supra* note 5, Annex, understandings with respect to Arts 10, 19 respectively.

38 See note 36 above.

39 See *Gécamines*, *supra* note 35, paras 35–39 (quotation at para. 35) and, more generally, paras 28–30, 42, using the language, drawn from the SIA (UK), of 'organs of a state' (in SIA (UK), s. 14(1), 'executive organs of the government of a State') and 'separate entities'.

40 See *Roxford Enterprises*, *supra* note 36, paras 27–41.

41 For the latter, see *Restatement (Fourth)*, *supra* note 2, § 455, Comment *d* and Reporters' Note 3 (what count as 'rights in property' for the purposes of 28 USC § 1605(*a*)(3)) and § 456, Reporters' Note 2 (what count as 'rights in immovable property' for the purposes of 28 USC § 1605(*a*)(4)).

purposes of immunity from execution and attachment in aid of execution.[42] They explain briefly that these terms have been understood by US courts to require ownership on the part of the foreign state or the agency or instrumentality of a foreign state, as the case may be[43] – that is, 'to require "at least *some* ownership interest"'.[44]

The question of what counts as property of a foreign state and as property of at least a central bank or other monetary authority of a foreign state for the purposes of immunity from judicial measures of constraint against that property is again of real comparative legal interest. Like the FSIA, most national state immunity legislation speaks without more of 'property of a foreign state' and 'property of a central bank or other monetary authority of a foreign state' or the equivalent. One court has taken the first to demand on the part of a foreign state 'some identifiable proprietary or legal interest [in the property] against which execution could lie'[45] and to exclude the foreign state's mere possession of or control over the property.[46] The legislation of another state indicates that at least certain ships and vessels merely under the possession and control of a foreign state benefit from immunity from execution,[47] which may or may not imply the same for other property under a foreign state's possession and control.[48] For its part, the UN Convention on Jurisdictional Immunities also uses the bare term 'property of a State',[49] seemingly leaving it to the states parties to decide what qualifies as such property. At the same time, during the ILC's preparation of its draft articles on jurisdictional immunities of states and their property, on which the

[42] The account in *Restatement (Fourth)*, *supra* note 2, § 464, Reporters' Note 10 pertains to only one provision among many in the FSIA dedicated to immunity from execution, namely 28 USC § 1610(*g*). It can only be assumed that the case law cited is applicable *mutatis mutandis* to the other provisions of 28 USC §§ 1609, 1610, 1611, which employ the same terminology.

[43] *Restatement (Fourth)*, *supra* note 2, § 464, Reporters' Note 10.

[44] *Ibid.*, § 464, Reporters' Note 10 (emphasis in the original), quoting *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 483 (DC Cir. 2016). Whether the foreign state or the agency or instrumentality of a foreign state actually has an ownership interest in the property is a matter of substantive domestic law. See, by necessary implication, *Restatement (Fourth)*, § 464, Reporters' Note 10.

[45] *Boru Hatlari Ile Petrol Tasima AS (also known as Botas Petroleum Pipeline Corporation) v. Tepe Insaat Sanayii AS (Jersey)* [2018] UKPC 31 (*Botas*), para. 22. See also, more generally, paras 17–27, including within the term 'any right or interest, legal, equitable, or contractual in assets', the last insofar as, like the others, the interest is 'legally ascertainable' and has 'realisable value' (para. 17, quoting *AIG Capital Partners Inc. v. Republic of Kazakhstan* [2005] EWHC 2239 (Comm), [2006] 1 WLR 1420, para. 45). See too *Taurus Petroleum*, *supra* note 34, paras 50–52. Whether such an interest exists 'must', as per *Botas*, *ibid.*, para. 17, 'necessarily be determined by reference to the relevant domestic law, ascertained on conventional private international law principles'.

[46] See *Botas*, *supra* note 45, paras 17–27, reasoning partly on the basis of a comparison with the wording of other provisions of the applicable legislation but also, and more so, on principled grounds.

[47] In relation to the waiver under FStIA (Aus), *supra* note 20, s. 31 of the immunity from execution provided for in respect of the 'property of a foreign state' in s. 30, s. 31(4) makes special provision in respect of, *inter alia*, 'military property', which is defined in s. 3(1) to encompass 'a ship or vessel that, at the relevant time, is operated by the foreign State concerned (whether pursuant to requisition or under a charter by demise or otherwise)'. Requisition and charter by demise involve only possession and control, not ownership, of the ship or vessel.

[48] There is no Australian case law to date on point.

[49] UN Convention on Jurisdictional Immunities, *supra* note 5, Arts 18, 19, 21.

UN Convention was based, the term 'property of a State' was employed as shorthand for what in earlier drafts had read 'its property or property in its possession or control'.[50] The subsequent implementing legislation of one state party refers, at least as translated, variously to 'their property' and 'property owned by Foreign States',[51] that of another refers to 'property owned by the foreign State or … which it possesses or controls',[52] while a court in a third has held that the term embraces 'all assets owned, managed, possessed or controlled' by a foreign state or, in that case, its central bank.[53]

Against this backdrop of divergent state practice, the account, albeit fleeting, in the reporters' notes to Chapter 5 of how courts in the USA, a major and traditionally influential state in the field of state immunity, have understood the terms 'property of a foreign state' and 'property of an agency or instrumentality of such a state' for the purposes of the FSIA's provisions on immunity from execution and attachment in aid of execution offers non-US lawyers and courts in those many jurisdictions in which analogous questions remain open potentially helpful points of comparison.

3 Attribution of Conduct to a Foreign State or to an Agency or Instrumentality of a Foreign State

Chapter 5 pays repeated attention to the question of the attribution or, synonymously, imputation of acts or omissions of natural or formally unconnected legal persons to the domestic legal person of a foreign state or of an agency or instrumentality of a foreign state. As the comments and reporters' notes observe, the issue has arisen under the FSIA in the context of the 'commercial activity', 'noncommercial tort' and arbitration exceptions to immunity from proceedings[54] in connection with the conduct of commercial agents and employees. As further highlighted, US courts have treated this as a pure question of domestic law and have answered it mostly in reliance on common law principles of agency and, in the case of torts, of vicarious liability.[55]

The question again holds comparative legal interest insofar as once more neither the state immunity legislation of other states nor the international rules of state immunity regulates the matter.[56] While a foreign court may be less likely to have regard to the approach taken by US courts once it has decided that the issue is to be determined by reference to the domestic legal principles of attribution of the forum state or, depending on the governing law, of a third state, it may well look to comparative legal

[50] See Brown and O'Keefe, 'Article 18', in R. O'Keefe and C.J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (2013) 293, at 294–297.

[51] ACJFS (Jpn), *supra* note 20, Arts 17(1), 18(2) respectively, as translated in 23 *Japanese Yearbook of International Law* (2010) 830, at 835.

[52] LPIFS (Spa), *supra* note 20, Art. 20(1) (translation by author).

[53] *Kazakhstan v. Ascom*, *supra* note 36, para. 42.

[54] See 28 USC §§ 1605(*a*)(2), 1605(*a*)(5), 1605(*a*)(6), restated in *Restatement (Fourth)*, *supra* note 2, §§ 454, 457, 458 respectively.

[55] See *Restatement (Fourth)*, *supra* note 2, § 452, Comment *j* and Reporters' Note 10, § 454, Comment *g* and Reporters' Note 10, § 457, Reporters' Note 2.

[56] Note that under the UN Convention on Jurisdictional Immunities, *supra* note 5, Art. 12, and national legislation giving effect to it, the conduct need only be 'alleged to be attributable' to the foreign state.

authority when deciding whether to apply domestic or international legal principles of attribution. To this extent, Chapter 5's account of the US case law once more offers potentially instructive material to non-US readers.

B *Systemic Legal Interest*

Although a customary international law of restrictive state immunity exists, it does so only at a level of generality. The precise formulations of the respective exceptions to the immunity from proceedings and from measures of constraint against its property to which customary international law otherwise entitles a state before the courts of another state remain uncertain. As for the UN Convention on Jurisdictional Immunities, at present it has only 28 states parties and a further 14 states signatories, neither of which includes the USA, and has not yet entered into force. In the light of both these things, it remains likely for the foreseeable future that the rules of state immunity applied in different states, whether on the basis of existing legislation or avowedly of customary international law, will resist standardization, all the more so in the case of the FSIA, which lacks one exception found in customary international law and contains a few that are not.[57] To the extent, nonetheless, that international law embodies rules of state immunity, uniformity of the rules applied in different states is at least in principle possible. Were, hypothetically, all states to become parties to the UN Convention on Jurisdictional Immunities or to adopt identical positions on the detailed content of the customary international law of state immunity, they would, subject to any reservations or interpretative declarations entered by them in the first scenario, all apply identical rules of state immunity.

Yet even leaving aside the usual differences among courts over the application of law to fact, the hypothetical adoption by all states of identical, international rules of state immunity would still not ensure that these rules play out the same way in different states, for the reason that these rules have nothing to say about the legal substrate on which their application depends. Like the FSIA and the state immunity legislation of other states, and as is evident from the reporters' notes to Chapter 5 of the *Restatement (Fourth)*, the international law of state immunity does not regulate fundamental questions on which the availability of immunity turns, such as how to distinguish for its purposes between those entities with separate domestic legal personality that form an integral part (or, in non-US parlance, 'organ of government') of a foreign state and those that constitute an agency or instrumentality of a foreign state and whether and, if so, when it is permissible to treat the latter effectively as the former; what counts for the purposes of immunity from measures of constraint as property of a foreign state or property of a central bank or other monetary authority of a foreign state; and which conduct counts for immunity purposes as conduct of a foreign state.

[57] In contrast to the international and other national iterations of state immunity, the FSIA contains no freestanding 'contract of employment' exception to a foreign state's immunity from proceedings. See *Restatement (Fourth)*, *supra* note 2, § 454, Comment *b* and Reporters' Note 2. For exceptions not found in customary international law, recall notes 12 and 13 above.

The upshot is that, even were all states to apply standardized international rules of state immunity, a foreign state, in one or other of its domestic legal guises, could find itself immune from proceedings or measures of constraint against its property in the courts of one state but, on the very same facts, not in those of another. This variability undermines in effect the 'uniformity and clarity in the law of jurisdictional immunities of States and their property' heralded as important by the UN General Assembly when adopting the UN Convention on Jurisdictional Immunities,[58] as well as the 'legal certainty, particularly in dealings of States with natural or juridical persons', and 'the harmonization of practice in this area' extolled in the Convention's preamble.[59] This poses the question of how, short of the unlikely express agreement among all states on the answers to these logically prior questions on which the availability of state immunity turns, such harmonization might be achieved notwithstanding the silence on point of both the current international law of state immunity and the state immunity legislation, among it the FSIA, of different states.

One way might be for domestic courts to seek to align their respective approaches to the preliminary legal questions on which the application of the rules of state immunity depends through recourse to relevant principles of general international law. For example, the questions whether, for the purposes of the law of state immunity, a particular entity with separate domestic legal personality forms an 'integral part' (as per Chapter 5 of the *Restatement (Fourth)*) or an 'organ of government' (as per the UN Convention on Jurisdictional Immunities and much national legislation) of a foreign state, rather than an agency or instrumentality of that state, and whether and, if so, when it may be permissible to assimilate the latter to the former – questions better viewed as one and the same question of characterization – might be said to parallel the question whether, for the purposes of the attribution of conduct under the law of state responsibility, an entity that does not have the status of an organ of the state under the internal law of a foreign state nonetheless constitutes a de facto organ of that state.[60] In both contexts, as noted by the ILC,[61] the relevant corpus of international law, be it state immunity or state responsibility, proceeds on the basis of an autonomous, international legal conception of an organ of a state, rather than purely by *renvoi* to the domestic law of that state. To the question of attribution under the law of state responsibility, international law takes two complementary approaches. First, regardless

58 GA res. 59/38, 2 December 2004, preamble (seventh recital).

59 UN Convention on Jurisdictional Immunities, *supra* note 5, preamble (third recital).

60 See O'Keefe, 'La Générale des Carrières et des Mines v. FG Hemisphere Associates LLC', 83 *British Yearbook of International Law* (2012) 231, at 236–237. See also ARSIWA, *supra* note 20, Art. 4(2) (a state organ 'includes', but is not limited to, 'any person or any entity which has that status in accordance with the internal law of the State').

61 See ILC, 'Responsibility of States for Internationally Wrongful Acts. Text of the draft articles with commentaries thereto', 2(2) *ILC Yearbook* (2001) 31 (ARSIWA commentary), at 39, part 1, ch. II, paras (6), (7), the latter observing that organs of a state may enjoy separate legal personality under domestic law, and at 42, Art. 4, para. (11), citing at n. 122 decisions of domestic courts that it notes 'were State immunity cases', to which it adds 'but the same principle applies in the field of State responsibility'. Consider also Council of Europe, Explanatory Report to the European Convention on State Immunity (1972), paras 107–109.

of how the domestic law of a state may view them, international law characterizes 'certain institutions performing public functions and exercising public powers (e.g. the police)' as organs of that state.[62] Secondly, in 'exceptional' cases,[63] other entities 'may … be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument',[64] a finding that 'requires proof of a particularly great degree of State control over them'.[65] Common recourse by the courts of different states to these two principles of general international law when addressing the common preliminary issue, on which the application of the rules of state immunity hinges, of the distinction between a foreign state and an agency or instrumentality of a foreign state would likely contribute to 'the harmonization of practice in this area'.[66] For those jurisdictions with existing judicial authority on point, this need not imply the wholesale recasting of their case law, which may measure up well against these international legal yardsticks. The jurisprudence of US courts highlighted in the reporters' notes to Chapter 5, with its 'core functions' test complemented by its demanding 'alter ego' analysis based on a state's 'extensive control' over a legally separate entity, is a case in point.[67]

Yet not every prior legal issue on which the application of the rules of state immunity is premised could be decided by reference to general international law. General international law may have nothing of relevance to say. For example, general international law offers no guidance as to what might be considered property of a foreign state or property of a central bank or other monetary authority of a foreign state for the purpose of immunity from measures of constraint against such property.[68] The only way that domestic courts could seek to harmonize their practice on point would be by engaging with each other's case law with a view to the emergence of an international judicial consensus on the matter.[69]

[62] See ARSIWA commentary, *supra* note 61, at 39, part 1, ch. II, para. (6) (quote) and at 42, Art. 4, para. (11).

[63] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43, at 205, para. 393.

[64] *Ibid.*, para. 392.

[65] *Ibid.*, para. 393.

[66] UN Convention on Jurisdictional Immunities, *supra* note 5, preamble (third recital). An example of recourse to the first principle when addressing the issue is *Gécamines*, *supra* note 35, para. 29, referring back to para. 25, in turn referring back to paras 16–18, where the Privy Council quotes from relevant passages of the ARSIWA commentary, *supra* note 61, Arts 4, 5, and of the Council of Europe's Explanatory Report to the European Convention on State Immunity, *supra* note 62.

[67] See section 3.A.1 in this article. Were the US Supreme Court to dispense with the alternative 'fraud or injustice' ground for piercing the corporate veil of an agency or instrumentality of a foreign state (see note 28 above), its approach would mirror that under general international law.

[68] This is even leaving aside the necessarily domestic legal question whether the foreign state or the agency or instrumentality of a foreign state actually enjoys the requisite right or interest in the asset.

[69] Note that the question is not, as it was mistakenly framed in *Botas*, *supra* note 45, para. 17, one of 'defin[ing] and apply[ing] some autonomous, international concept of "property"'. The question is what international law might say as to which sorts of domestic legal proprietary rights or interests enjoyed in

Courts, however, are to a greater or lesser extent reliant on the arguments of counsel. Domestic courts either may not or are in practice unlikely to have recourse to international or comparative legal sources unless led to them by the parties. They would be in a position to align their respective approaches to the preliminary legal questions on which the application of state immunity depends only if given the international or comparative material with which to do so.

As for the determination of certain other preliminary questions on which the rules of state immunity hinge, there is no reason why recourse should be had for this purpose to international law of any stamp, even were it capable of providing an answer, or indeed why domestic judicial practice should be harmonized in the first place, for the reason that they are inherently questions of domestic law. Take, for example, in the context of immunity from proceedings, whether the domestic legal person of a foreign state or of a constituent federal unit or political subdivision or an agency or instrumentality of a foreign state can be considered to have entered into a particular contract concluded by an employee or agent, for the purposes of waiver of immunity or of the 'commercial activity' (or 'commercial transaction') or arbitration exceptions to immunity, or whether a particular act or omission by an employee can be considered an act or omission of that legal person, for the purposes of the 'noncommercial tort' (or 'territorial tort') exception.[70] Whether, as a threshold matter, any of these legal persons can in principle be bound by or answerable for particular acts or omissions of an employee or agent is ultimately indissociable from substantive doctrines of liability, such as agency and vicarious liability, applicable to the relevant cause of action under the governing domestic law.[71] To this extent, any variation among domestic jurisdictions as to how the rules of state immunity play out on identical facts is merely inherent in the pluralism of domestic legal orders and, like variation among domestic

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an asset by a foreign state are to be protected by that state's immunity from execution in respect of its 'property', the term being understood as a domestic legal concept. Nor is it in doubt that enforcement of a judgment 'relates necessarily and only to property recognised as such for the purposes of enforcement under domestic law', as said in *Botas*, *ibid.*, para. 17. What is at stake, however, in whether 'property of a foreign state' within the meaning of the law of state immunity extends beyond ownership to mere possession or control of an asset by a foreign state is whether a court may order enforcement against property owned by a third party, not the foreign state, of a judgment secured against that third party, not the foreign state, where the property is in the possession or under the control of the foreign state. Examples include an order for execution against a privately owned artwork of a judgment secured against the owner of the artwork where the artwork is at that time on long-term loan to the national gallery of a foreign state; an order for execution against a privately owned building of a judgment secured against the owner of the building where the building is at that time leased to a foreign state; and an order for execution against a privately owned vessel of a judgment secured against the owner of the vessel where the vessel is at that time operated by a foreign state pursuant to requisition or under a charter of demise. For the last, recall note 47 above.

70 Recall from note 56 above that under the UN Convention on Jurisdictional Immunities, *supra* note 5, Art. 12 and national legislation giving effect to it, the conduct need only be 'alleged to be attributable' to the foreign state.

71 As far as the USA goes, see the case law cited at *Restatement (Fourth)*, *supra* note 2, § 452, Comment *j* and Reporters' Note 10, § 454, Comment *g* and Reporters' Note 10, § 457, Reporters' Note 2.

jurisdictions as to the availability of a relevant cause of action to begin with, should be a matter of principled indifference.

In the end, whatever position one takes on them, these are the sorts of systemic issues as to the workings of the law of state immunity over which, probably without meaning to do so, Chapter 5 of the *Restatement (Fourth)*, through its attention to preliminary points on which the FSIA rests but does not regulate, invites us all, US and non-US readers alike, to muse.

4 Conclusion

Chapter 5 of the *Restatement (Fourth)* provides a systematic, discerning and accessible account of the US law of foreign sovereign immunity as laid down in the FSIA, accompanied by consistent comparative reference to the international and foreign domestic law of state immunity. From the perspective of a non-US reader, however, where Chapter 5 adds greater value in its own right is in the attention it pays in the comments and reporters' notes to a range of preliminary issues of domestic law on the determination of which the provisions of the FSIA turn but that the latter do not regulate. These issues, although superficially peculiar to the US law of foreign sovereign immunity, arise similarly in connection with the corresponding international and foreign domestic rules. In this way, what are ostensibly the most particular aspects of Chapter 5 may be those of most universal interest.