SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-11-060766-223
(500-17-119144-213 before February 21, 2022)

DATE: August 29, 2024

BY THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.

CC/DEVAS (Mauritius) Ltd.
and
Devas Employees Mauritius Private Limited
and
Telcom Devas Mauritius Limited
Plaintiffs
and
CCDM Holdings, LLC
and
Devas Employees Fund US, LLC
and
Telcom Devas, LLC
Plaintiffs in continuance of proceedings
v.
Republic of India
Defendant
and
The Airports Authority of India
and
Air India Limited
Mis-en-cause

and

International Air Transport Association

Third-Party Garnishee

JUDGMENT ON THE AIRPORTS AUTHORITY OF INDIA'S APPLICATION *DE BENE ESSE* TO DISMISS

(Subsections 3(1) *State Immunity Act*, RSC 1985, c S-18)

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1. OVERVIEW

[1] By its *Application De Bene Esse to Dismiss the Modified Judicial Application Originating a Proceeding in Recognition and Enforcement of Arbitration Awards Made Outside Québec* ("**Application**"), the Mis-en-Cause, The Airports Authority of India ("**AAI**"), seeks judgment dismissing Plaintiffs' and Plaintiffs in continuance of proceedings' (collectively, "**Plaintiffs**") *Modified Judicial Application Originating a Proceeding in Recognition and Enforcement of Arbitration Awards Made Outside Québec* ("**Originating Application**") as against AAI, on the basis that AAI is an agency of a foreign state namely the Republic of India ("**ROI**" or "**India**") and is therefore immune from the jurisdiction of this Court pursuant to Subsection 3(1) of the *State Immunity Act*[1] ("***SIA***") which stipulates:

> **3 (1)** Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

[2] AAI appears before this Court for the sole purpose of invoking its State Immunity pursuant to the *SIA* ("**State Immunity**") and under reserve of all its rights. AAI claims that the dismissal of the Originating Application is a necessary measure to preserve the integrity of its vital right of State Immunity.

[3] More precisely, AAI claims for the purposes hereof to be an *agency of the foreign state* India within the meaning of the definition found at Section 2 of the *SIA* that reads as follows:

> **2** In this Act,
>
> ***agency of a foreign state*** means any legal entity that is an organ of the foreign state but that is separate from the foreign state; (*organisme d'un État étranger*[2])
>
> [Emphasis added]

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[1] RSC 1985, c S-18.

[2] ***Organisme d'un État étranger*** Toute entité juridique distincte qui constitue un organe de l'État étranger. (*agency of a foreign state*)

[4] It is not disputed that India is a *foreign state*[3] pursuant to the provisions of the *SIA*[4].

[5] However, Plaintiffs are contesting the Application and dispute the eligibility of AAI to invoke herein its State Immunity on the following grounds:

- in light of its close ties with India, AAI cannot be considered as an *agency that is separate from the foreign state*; AAI is precluded from claiming State Immunity herein since it is an inseparable and integral part of India being a department of the foreign state—who in any event waived its own State Immunity in the present case;

- indeed, as an *agency that is not separate from the foreign state* India, AAI cannot invoke its State Immunity in light of the judgment rendered on December 23, 2022, in virtue of which this Court rejected India's *Application De Bene Esse to Dismiss Pursuant* to the *SIA* ("**ROI's Application**") and concluded that India was not immune from jurisdiction because Plaintiffs had established the application of both the commercial activity exception[5] and the waiver exception[6] ("**ROI Judgment**[7]");

- Plaintiffs also claim that in any event, AAI waived its immunity pursuant to Subsection 4(2) c)[8] of the SAI by filing previously its *Application to vacate the seizure before judgment on the basis of an Act Respecting the International Air Transport Association* ("**Application to vacate**").

[6] In light of the foregoing, Plaintiffs are inviting the Court to determine AAI's State Immunity status in the present instance by answering the following questions at issue:

- What is the applicable test to determine AAI's status under the SIA?

- Is AAI an agency that is separate of the foreign state of the ROI pursuant to the provisions of the SIA?

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[3] Henceforth, whenever the expression "*foreign state*" will be written in italic, it will refer to its definition pursuant to the *SIA*. Same comment for the word "*agency*".

[4] India's status as a foreign state was confirmed in a certificate dated December 22, 2021, issued by Ms. Jessica Dawson, Deputy Director, Criminal, Security and Diplomatic Law Division of Global Affairs Canada, under the authority of the Minister of Foreign Affairs pursuant to Section 14 of the SIA (**D-2**).

[5] Section 5 of the SIA.

[6] Subsection 4(2)(a) of the SIA.

[7] 2022 QCCS 4785; on March 14, 2023, Justice Martin Vauclair granted India's Application for leave to appeal the ROI Judgment and suspended the proceedings as against India (2023 QCCA 327).
On December 11 and 12, 2023, the Court of Appeal heard, *inter alia*, the appeal of the ROI Judgment. As of today, no decision has been rendered in this appeal.

[8] **4 (2)** In any proceedings before a court, a foreign state submits to the jurisdiction of the court where it
(a) explicitly submits to the jurisdiction of the court by written agreement or otherwise either before or after the proceedings commence;
(b) initiates the proceedings in the court; or
(c) intervenes or takes any step in the proceedings before the court.

- Did AAI waive its State Immunity and submitted to the jurisdiction of this Court by previously filing and presenting its Application to vacate?

[7] For the reasons that follow, the Court is of the view that AAI is an *agency of the foreign state* India pursuant to the definition of Section 2 of the SIA and is therefore immune from this jurisdiction in the present instance.

[8] Before proceeding with the analysis, a brief overview of AAI and of the procedural context is in order.

2. OVERVIEW OF THE AIRPORTS AUTHORITY OF INDIA

[9] According to counsel for AAI[9], their client is a statutory organization constituted by an Act of the Parliament of India, namely *The Airports Authority of India Act*[10] ("***AAI Act***"). AAI was constituted in 1995 and is the result of the merger of the National Airports Authority ("**NAA**") and the International Airports Authority of India ("**IAAI**").

[10] As set forth in Section 3(2)[11] of the *AAI Act*, AAI is a "*body corporate… with power, subject to the provisions of this Act, to acquire, hold and dispose of property both movable and immovable, and to contract*" and "*sue and be sued*" in its own name, as demonstrated by the instant proceedings.

[11] Since its constitution, AAI has been "*entrusted with the responsibility for creating, upgrading, maintaining and managing civil aviation infrastructure both on the ground and in air space in*" India:

> The Airports Authority of India (AAI) was constituted by an Act of Parliament and came into being on 1st April 1995 by merging the erstwhile National Airports Authority (NAA) and International Airports Authority of India (IAAI). The merger brought into existence a single organization entrusted with the responsibility for creating, upgrading, maintaining, and managing civil aviation infrastructure both on the ground and in air space in the country. […][12]

[12] More particularly, as outlined by the *AAI Act*, its functions include, *inter alia*, the management of airports, civil enclaves and aeronautical communication stations in India with a workforce exceeding 17,000 employees[13], the provision of air traffic services and air transport services at airports and civil enclaves in India[14], and the performance of other

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[9] Outline of argument of The Airports Authority of India, paras. 37 – 40.
[10] 1994 (last updated 9-9-2021) (**WC-1**).
[11] **3. (2)** The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property both movable and immovable, and to contract and shall by the said name sue and be sued.
[12] Corporate Plan for 2017–2026 of Airport Authority of India (**WC-5**), p. 17. ["**Corporate Plan**"]
[13] *Ibid*., para. 2.2.2.1.
[14] Corporate Plan at page 17: "*AAI manages 125 airports, which include 21 international airports (3 civil enclaves), 8 customs airports (4 civil enclaves), 77 domestic airports, and 19 domestic civil enclaves at defence airfields and provides air navigation services for over 2.8 million square nautical miles of air space*."

functions considered necessary or desirable for ensuring the safe and efficient operation of aircrafts to, from, and across the air space of India[15].

[13] In their *Application for a seizure before judgment by garnishment* dated November 15, 2021 ("**Application for seizure**"), Plaintiffs sought the Court's authorization to seize before judgment all sums or moveable property of India and/or AAI[16], including all Aviation Charges[17] invoiced and/or collected and/or otherwise being held by the Garnishee International Air Transport Association ("**IATA**") on behalf of India and/or AAI ("**Seizure**").

[14] Plaintiffs alleged in their Application for seizure that AAI was also responsible for collecting Aviation Charges which explains why its funds were seized in the hands of the Garnishee IATA:

> 123. As part of its mission, AAI is tasked with collecting air navigation charges, incurred during flights through India's air space, and aerodrome charges, which relate to the use of airport and other ground or navigation facilities, including airport maintenance fees and route maintenance fees (the "**Aviation Charges**").
>
> 124. Aviation Charges are payable by airlines and countries to AAI in order to be granted permission to fly over India's air space and to use its airports and other ground or navigation facilities.
>
> 125. Like many other aviation service providers, AAI entrusted the collection and remittance of Aviation Charges from airlines and countries to the IATA, as appears page 14 of a magazine entitled *Airlines International, The AGM Issue,* Issue 62, June AGM 2016, communicated in support of the Champion Declaration as Exhibit AC-20.

3. PROCEDURAL CONTEXT

[15] Concurrently with their Application for seizure, Plaintiffs issued a *Judicial Application Originating a Proceeding in Recognition and Enforcement of Arbitration Awards Made Outside of Québec* dated November 15, 2021 (as subsequently modified, the "**Originating Application**") seeking to enforce in Québec two arbitration awards made against the ROI by a three-member tribunal under the auspices of the Permanent Court of Arbitration (the "**PCA**") seated in The Hague, Netherlands (the "**Arbitration Awards**").

[16] AAI was not a party to the underlying arbitration proceedings and no award has ever been made against it. In fact, AAI has nothing to do with the underlying proceedings.

[17] On November 24, 2021, the Application for Seizure was heard *ex parte* and granted by Justice Lukasz Granosik ("**Granosik Judgment**").

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[15] *AAI Act*, Section 12.

[16] Air India and its assets were added with Plaintiffs' *Second Application for seizure before judgment by garnishment* dated December 17, 2021.

[17] As defined hereafter.

[18] On January 2, 2022, despite having never received proper service, AAI filed an *Application to Dismiss and to Stay the Seizure Before Judgment by Garnishment Authorized on November 24, 2021* ("**Application to Dismiss**"), the whole without prejudice to and without waiving its State Immunity which it clearly invoked in said Application.

[19] By then, Plaintiffs had managed to seize in the hands of the Garnishee IATA, US$12,767,745.25 belonging to AAI as of December 31, 2021[18]. By May 10, 2022, the Garnishee IATA declared holding US$37,206,560 and US$985,003 belonging to AAI[19].

[20] By judgment dated January 8, 2022[20] (the "**Judgment on Seizure**"), the Court granted, *inter alia*, AAI's Application to Dismiss and quashed the Seizure on the basis that the State Immunity invoked by AAI was a threshold issue and that AAI's entitlement to claim its State Immunity from the jurisdiction of Canadian courts had to be decided on a merits basis before any other issues in the present proceedings[21]. Plaintiffs were also ordered to effect proper service of the proceedings upon AAI in accordance with the *SIA*. Finally, provisional execution of the judgment notwithstanding appeal was granted.

[21] On January 19, 2022, Plaintiffs sought leave to appeal the Judgment on Seizure and applied to suspend provisional execution thereof which were granted on April 27, 2022[22]. As a result, the provisional execution was suspended, and the Seizure was reinstated pending the appeal which is still pending.

[22] On June 1, 2022, the National Assembly of Québec passed *An Act Respecting the International Air Transport Association* ("***IATA Act***"), which in sum and substance provides that, subject to limited exceptions, amounts held by IATA on behalf of third parties to which IATA offers financial services may not be the object of a seizure. The Act was assented to on June 2, 2022, and became effective retroactively to May 5, 2022.

[23] On June 27, 2022, AAI filed its Application to vacate seeking a judgment (i) vacating and dismissing the Seizure on the basis of IATA Act, and (ii) ordering IATA to release to AAI all monies due to AAI that were the subject of the Seizure. The Application to Vacate was expressly made without prejudice to and without waiver of AAI's State Immunity.

[24] On September 6, 2022, the Court granted the Application to Vacate in part, declaring that the *IATA Act* rendered the Seizure inoperative for any sums of money received, collected or held by IATA for AAI's benefit after May 5, 2022. The Court declined, however, to rule on the effect of the new law on the sums of money seized

[18] *CC/ Devas (Mauritius) Ltd. c. Republic of India*, 2022 QCCS 7, para. 21.
[19] *CC/ Devas (Mauritius) Ltd. C. Republic Of India*, 2022 QCCS 3272, para. 5.
[20] *CC/ Devas (Mauritius) Ltd. c. Republic of India*, 2022 QCCS 7 (appeal still pending with respect to AAI).
[21] *Ibid*., paras. 102–103.
[22] *CCDM Holdings c. Airport Authority of India*, 2022 QCCA 625 (the appeal is still pending).

before May 5, 2022, as the Court considered that such issue was already pending before the Court of Appeal[23] ("***IATA Act* Judgment**[24]").

[25] Earlier, the Court alluded to the ROI Judgment. It merits a brief explanation bearing in mind that with their Originating Application, Plaintiffs are attempting to execute in Québec certain Arbitration Awards rendered outside of Québec against India as sole Defendant.

[26] On March 16, 2022, India filed the ROI's Application claiming that as a foreign state, it was immune from the jurisdiction of this Court pursuant to the *SIA* and that Plaintiffs had failed to establish any exception to India's State Immunity.

[27] The ROI's Application was contested by Plaintiffs on the basis that (i) the Arbitration Awards purportedly related to India's commercial activity, and therefore fell under the exception found in Section 5 of the *SIA*; and (ii) India had allegedly waived its State Immunity by concluding an arbitration agreement under the "*Agreement Between the Government of the Republic of India and the Government of the Republic of Mauritius for the Promotion and Protection of Investments*" and by participating in the arbitration, as well as by being a signatory of the New York Convention.

[28] On December 23, 2022, the Court rendered the ROI Judgment and rejected the ROI's Application as it concluded that India was not immune from jurisdiction in the present instance because Plaintiffs had successfully established the application of both the commercial activity exception and the waiver exception under the *SIA*.

[29] On March 14, 2023, Justice Martin Vauclair granted the ROI's Application for leave to appeal and suspended the proceedings as against India pending the appeal.

[30] On December 11 and 12, 2023, the Court of Appeal heard the appeals of the Judgment on Seizure with respect to AAI, the *IATA Act* Judgment and the ROI Judgment. As of today, no decision has been rendered in these appeals, and the Seizure, as modified by the *IATA Act* Judgment, remains in effect. The Court understands that as a result thereof, AAI never recovered until now the US$38 M held by the Garnishee IATA.

4. THE QUESTIONS AT ISSUE

[31] The Court finds the issues raised by the parties herein can be stated as follows:

1- Is AAI an "*agency of a foreign state*" within the meaning of the SIA, *i.e.* an organ which is a separate legal entity (or an *entité juridique distincte*), such that it benefits from its own distinct presumption of state immunity?

[23] Leave to appeal granted on April 27, 2022 (*CCDM Holdings c. Airport Authority of India*, 2022 QCCA 625) (appeal still pending).

[24] *CC/ Devas (Mauritius) Ltd. C. Republic Of India*, 2022 QCCS 3272 (leave to appeal granted on November 14, 2022, 2022 QCCA 1553) appeal still pending.

2- In the affirmative, have Plaintiffs demonstrated that AAI waived such state immunity?

[32] The Court shall also deal with objections taken under reserve made by Plaintiffs with respect to certain paragraphs found in the Second Sworn Statement of the expert witness Mr. Ashim Sood dated March 24, 2023.

5. ANALYSIS

[33] Before addressing the questions at issue, what is the applicable legal framework which shall govern the Court's analysis?

5.1 The applicable legal framework

[34] The *SIA* was enacted in 1982 to codify the law as it relates to state immunity from civil proceedings[25]. Since then, the immunity of foreign states and their agencies is guaranteed by the *SIA.*

[35] Section 3 of the *SIA* provides that a foreign state, including an agency thereof, is presumed to be immune from the jurisdiction of any Canadian Court:

State immunity	**Immunité de juridiction**
3 (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.	**3 (1)** Sauf exceptions prévues dans la présente loi, l'État étranger bénéficie de l'immunité de juridiction devant tout tribunal au Canada.
Court to give effect to immunity	**Immunité reconnue d'office**
(2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.	**(2)** Le tribunal reconnaît d'office l'immunité visée au paragraphe (1) même si l'État étranger s'est abstenu d'agir dans l'instance.

[36] Section 2 of the *SIA* defines *foreign state* to include *any agency of the foreign state* (*les organismes de cet État)*:

foreign state includes **(a)** any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,	***État étranger*** Sont assimilés à un État étranger : **a)** le chef ou souverain de cet État ou d'une subdivision politique de celui-ci, dans l'exercice de ses fonctions officielles ;

[25] *Re Canada Labour Code*, 1992 CanLII 54 (SCC), page 73:
"In the 1970s, several countries moved to codify the common law regarding restrictive immunity. The United States passed the *Foreign Sovereign Immunities Act of 1976,* the United Kingdom passed its *State Immunity Act 1978,* followed by the Canadian *State Immunity Act* in 1982. […] I view the Canadian *State Immunity Act* as a codification that is intended to clarify and continue the theory of restrictive immunity, rather than to alter its substance."

(b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and **(c)** any political subdivision of the foreign state; (*État étranger*)	**b)** le gouvernement et les ministères de cet État ou de ses subdivisions politiques, ainsi que les organismes de cet État ; **c)** les subdivisions politiques de cet État. (*foreign state*)

[37] As previously mentioned, an *agency of a foreign state* is also defined in Section 2 of the *SIA* as:

agency of a foreign state means any legal entity that is an organ of the foreign state but that is separate from the foreign state; (***organisme d'un État étranger***)	***organisme d'un État étranger*** Toute entité juridique distincte qui constitue un organe de l'État étranger. (*agency of a foreign state*)

5.2 Preliminary Comments

[38] Preliminary comments are warranted.

5.2.1 The State Immunity of the agency versus the State Immunity of the foreign state

[39] The *SIA* is structured in such a manner that an *agency of a foreign state* benefits from its own state immunity which is distinct from that of the foreign state itself. Thus, barring special circumstances—which are not present herein—a waiver or exception applicable to the foreign state's immunity, would not directly affect the agency's own immunity:

> [97] The Court believes that the foregoing principles and obligations apply as well to an agency of a foreign state under the SIA and that a waiver or an exception affecting the State Immunity of a foreign state does not automatically impact in the same manner the State Immunity that may enjoy an agency of that foreign state pursuant to the provisions of the SIA.[26]
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> [Emphasis added]

5.2.2 The evolution of Plaintiffs' position vis-à-vis AAI's status as an *agency of a foreign state* under the *SIA*

[40] Is AAI an "*agency of a foreign state*" within the ambit of the *SIA*, *i.e.* an *organ that is a separate legal entity* (or an *entité juridique distincte*), such that it benefits from its own distinct presumption of State Immunity?

[41] This question hinges on the *SIA*'s definition of *agency* being *any legal entity that is an organ of the foreign state but that is separate from the foreign state* (an *entité juridique distincte qui constitue un organe de l'État étranger*).

[26] The Seizure Judgment—*CC/Devas (Mauritius) Ltd. c. Republic of India*, 2022 QCCS 7.

[42] There are two elements or criteria to the *SIA*'s definition of *agency*: being (i) an *organ of the foreign state*, and (ii) an *entité juridique distincte* (separate legal entity).

[43] AAI claims to satisfy both criteria that it defines as the Agency Test.

[44] The fact that AAI is an *organ* of the foreign state of India is not at issue.

[45] In any event, the Court shares the view of AAI's counsel that with respect to the first criterion of the Agency Test, it is admitted by all parties that AAI is indeed an *organ* of India in that it satisfies the historic *alter ego* test ("**Historic AE Test**"), i.e., AAI performs government functions and is controlled by the *foreign state* of India. Government control is a prerequisite to being an *organ* as if AAI was not controlled by India, it could not by definition be an *organ* or an *agency*, nor benefit from State Immunity[27].

[46] The second criterion, being an *entité juridique distincte*, is now strongly disputed by Plaintiffs. The Court uses the word "now" as they have altered their approach, as will be discussed further hereafter.

[47] The parties presently diverge of opinion on the aspect of the Agency Test applicable to determine whether AAI is an *entité juridique distincte* (separate) from India within the scope of the *SIA*.

[48] On the one hand, AAI maintains that a *de jure* test is applicable herein which entails discerning AAI's core attributes under Indian law and then comparing such attributes to the key characteristics that Québec and Canadian laws associate with a distinct or separate legal entity.

[49] On the other hand, Plaintiffs argue instead that, regardless of the *de jure* legal separation between India and AAI, the test actually turns on whether, *de facto*, India exercises "extensive control" over AAI.

[50] Plaintiffs have somehow introduced the "**Control Test**".

[51] In retrospect, the Court seriously doubts that the judicial exercise of determining whether a corporate entity is an *agency of a foreign state* within the purview of the *SIA* actually requires a four-day hearing. The Court cannot believe that by enacting the *SIA*, barring special or exceptional circumstances—which are absent herein—the legislator was contemplating such a Control Test that turns out to be a disproportionately complicated exercise to determine the eligibility of an *agency of a foreign state* in virtue of the *SIA*.

[52] With all due respect, the Court shares the opinion of AAI's counsel that Plaintiffs have needlessly complexified and confused the matter at hand. Counsel added that Plaintiffs are now grasping at straws to justify their position, which is an accurate statement in the circumstances.

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[27] *Mallat c. Autorité des marchés financiers de France*, 2021 QCCA 1102, para. 103.

[53] Plaintiffs' proposed Control Test is contradicted by the plain language of the *SIA*, the scheme of the Act, and applicable authorities. It is also unworkable. It requires an entity to meet some hazy, undefined "*goldilocks*" standard of control to qualify as an *agency of the foreign state*: the entity would first need to show that it *is controlled*, so as to satisfy the Historic AE Test for an *organ* and would then need to show that it *is not so controlled*, so as to be *separate*. Plaintiffs did not explain what this level of control looks like in practice—not too little, not too much, but just right—nor why the *SIA* should distinguish entities that meet their proposed level of control from all others, especially when it is not expressly stated or defined in the Act.

[54] The Court finds that for the purposes hereof, the constituting statute of the *agency of a foreign state* namely the *AAI Act* did not require to be dissected by Plaintiffs and their expert in surrealistic minute details in their attempt to establish that even if the *agency* is clearly a distinct legal corporation or entity, AAI is not in reality *separate* from the *foreign state* of India within the meaning of the *SIA*.

[55] According to AAI's counsel, in doing so, Plaintiffs have somehow changed or redirected their initial approach by reinjecting in the debate their "**Enforcement AE**[28] **Test**", a test crafted in common law Canada to justify the lifting of the corporate veil in the context of enforcing international judgments or arbitral awards involving immune states or agencies.

[56] Previously, Plaintiffs' keystone argument was that as AAI (like Air India) was the *alter ego* of India *for execution purpose* of the Arbitration Awards. AAI's assets (like those of Air India) could be considered to be India's assets as well and therefore could be executed upon indiscriminately. To achieve the *alter ego* status, Plaintiffs alleged that AAI was so close to India that it had to be considered inseparable from the foreign state but always within the purview of the *SIA*.

[57] Plaintiffs resorted to the Enforcement AE Test to justify their seizure by garnishment in the hands of the IATA seeking the assets of India's *agencies* AAI and Air India by claiming that despite the fact that AAI (and Air India) was an *agency of the foreign state* pursuant to the *SIA,* the *agency* was so close as to render it inseparable vis-à-vis India, thus conferring its status of *alter ego* of India for enforcement or execution purposes based on common law precedents. Therefore, the assets of India's *alter ego* AAI (and Air India) may be subject to seizure as AAI and India were one and the same.

[58] The Enforcement AE Test also served Plaintiffs to neutralize AAI's claimed State Immunity. Since the *foreign state* of India had waived its own State Immunity under the *SIA*—as it was claimed by Plaintiffs—AAI, as the inseparable *alter ego* of India, could no longer benefit from its own State Immunity if India was precluded from invoking the same.

[59] In early January 2022, while arguing AAI's Application to Dismiss as AAI's State Immunity under the *SIA* was invoked to quash a seizure before judgment by garnishment

[28] AE stands for *alter ego*.

granted *ex parte* against AAI's assets, Plaintiffs never maintained that the *SIA* did not apply to AAI on the basis that it was not an *agency that is separate* from India as they contend now.

[60] As per the Judgment on Seizure dated January 8, 2022[29], the Court noted at the time that Plaintiffs were alleging, *inter alia*, that:

- AAI and Air India being the *alter egos* of the Republic of India, their assets can serve to satisfy the execution of their claim against India pursuant to the Treaty Awards[30];
- Although AAI and Air India are *agencies of a foreign state* [India], as they are allegedly *alter egos* of the Republic of India who waived its right to invoke State Immunity by participating in the commercial arbitration that led to the Treaty Awards, they cannot claim as well State Immunity against Plaintiffs' proceedings[31]. [Emphasis added]

[61] Again, at no time did Plaintiffs argue that the *SAI* did not apply to AAI as the latter was not an *agency of a foreign state* pursuant to that statute. In any event, the two arguments are incompatible. Plaintiffs could not rely on the *SIA* on the one hand by resorting to the Enforcement AE Test and argue the opposite—that AAI is not an *agency of a foreign state* pursuant to the *SIA*—on the other hand.

[62] In January 2022, while seeking leave to the appeal of the Judgment on Seizure which ordered, *inter alia*, that the proceedings are properly served upon AAI pursuant to the *SIA*[32], Plaintiffs sought and obtained from the Court of Appeal permission to serve their Application for leave to appeal upon AAI by alternative means while alleging that AAI "*is an agency of a foreign State which must be served according to Section 9(3) SIA*."[33]

[63] It is immediately apparent that when convenient in the present instance, Plaintiffs have affirmatively and intentionally used and benefited from the simpler service requirements that flow from AAI's status as an *agency of the foreign state* of India under the *SIA*.[34]

[64] In June 2022, while arguing before the Court of Appeal in connection with their appeal on the portion of the Judgment on Seizure dealing with Air India's seized funds, Plaintiffs stated that AAI could not claim State Immunity, "*regardless of its status of agency of a foreign state, since India and AAI are 'one and the same' and AAI's assets are India's assets*."[35] At the time, although the application of the *SIA* was at the heart of

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[29] *CC/ Devas (Mauritius) Ltd. c. Republic of India*, 2022 QCCS 7.
[30] Judgment on Seizure, para. 34 (*CC/Devas (Mauritius) Ltd. c. Republic of India*, 2022 QCCS 7).
[31] *Ibid*.
[32] [147] **ORDERS** Plaintiffs to effect proper service upon the Mis-en-cause, Airports Authority of India, in accordance with the *State Immunity Act.*
[33] Plaintiffs' Application for special mode of service dated January 21, 2022, para 24. (Application granted by judgment of January 7, 2022 (2022 QCCA 182) (**R-2**).
[34] *Ibid*.
[35] Plaintiffs' Argument before the Québec Court of Appeal dated June 10, 2022, para. 50 (**R-11**).

the issues to be dealt with by the Court of Appeal, Plaintiffs never specifically argued that AAI was not an "*agency*" of India meeting the definition of the *SIA*.

[65] On September 20, 2022, the Court of Appeal, *inter alia*, quashed the seizure by garnishment of the funds of Air India held by the Garnishee IATA[36]. Although Air India did not invoke State Immunity contrary to AAI, Plaintiffs nevertheless invoked the Enforcement AE Test under the *SIA* to justify their seizure by garnishment of Air India's assets in the hands of the Garnishee IATA.

[66] In the *Air India* Decision, while qualifying as *creative* and *novel* the argument of Plaintiffs, the Court of Appeal confirmed that the Enforcement AE Test under the *SIA*[37] using Air India as *alter ego* of India for the purpose of enforcement or execution of the Arbitration Awards against Air India's assets, had no application in Québec adding that the degree of control and oversight that a shareholder exercises over a corporation—including the degree of control exercised by a foreign state over a state-controlled corporation—does not negate the existence of the corporation's distinct legal personality under Québec law.

[67] The Court finds that the Enforcement AE Test for the purpose sought by Plaintiffs—be it against Air India or AAI—was conclusively rejected by the Court of Appeal in the *Air India* Decision:

> [45] Or, le *Code civil du Québec* contient maintenant une règle, celle énoncée à l'article 317, édictant expressément les circonstances dans lesquelles il est permis de soulever le voile corporatif existant entre une société et son actionnaire. À mon avis, cela justifie de refuser de puiser à des sources étrangères pour y ajouter.
>
> [46] Il faut d'ailleurs présumer que le législateur connaissait les débats qui avaient cours en cette matière (plusieurs des décisions auxquelles réfèrent les intimées ont d'ailleurs été rendues avant qu'il choisisse de codifier la règle) et qu'il a voulu clarifier la situation en prévoyant expressément les circonstances qui permettraient de faire échec au principe de la personnalité et du patrimoine corporatifs distincts. Il a retenu trois cas de figure, qui, certes, impliquent généralement que la société soit l'*alter ego* de l'actionnaire, mais qui dénotent également, dans chacun d'entre eux, un comportement répréhensible, soit l'utilisation de la personnalité distincte de la société pour masquer 1) une fraude, 2) un abus de droit ou 3) une contravention à une règle intéressant l'ordre public.
>
> [47] Selon moi, il faut voir dans cette exigence qu'il a posée que la personnalité de la société soit ainsi utilisée, son intention de ne pas permettre que la seule qualité d'*alter ego* soit un motif suffisant pour permettre la levée du voile corporatif. Il s'agit là d'ailleurs de l'opinion exprimée par la Cour dans l'affaire *Gestion André*

[36] *Air India, Ltd. c. CC/Devas (Mauritius) Ltd*., 2022 QCCA 1264 ("***Air India* Decision**") (Plaintiffs' Application for leave to Appeal was dismissed by the Supreme Court of Canada on May 11, 2023).

[37] Purporting to import common law notions foreign to Québec law in order to permit the execution of international arbitral awards in Québec against the assets of an *alter ego* corporation of a foreign state without any evidence of fraud or the like.

Lévesque[38] et de celle généralement exprimée par les auteurs, qui suggèrent même que la levée du voile corporatif n'est possible en présence de l'une ou l'autre des trois situations mentionnées par le législateur que si, de plus, la société est l'***alter ego*** de son actionnaire.

[47] Ainsi, Paul Martel, écrit[39] :

> 1-289 […] L'interrelation de ces deux notions est la suivante : l'article 317 permet le « soulèvement du voile corporatif » lorsque la société est l'*alter ego* de son actionnaire ou d'une autre société, et qu'elle est utilisée pour commettre, à l'instigation ou au bénéfice de celui-ci ou de celle-ci, une fraude, un abus de droit ou une contravention à une règle d'ordre public. En l'absence d'un de ces trois gestes, le fait que la société soit un *alter ego* n'entraînera pas le non-respect de son identité corporative, ou de l'immunité de son actionnaire.
>
> [Renvois omis]

[48] La théorie que les intimées mettent de l'avant m'apparaît d'ailleurs inconciliable avec le fait qu'au Québec, une société qui n'a qu'un seul actionnaire, qui peut aussi en être le seul dirigeant, bénéficie comme toutes les autres sociétés d'une personnalité juridique et d'un patrimoine distincts de celui de son actionnaire. **Cette société est pourtant nécessairement l'*alter ego* de son actionnaire puisque celui-ci la contrôle entièrement, étant celui qui, ultimement, prend toutes les décisions**.

[49] Accepter la proposition des intimées voulant que le droit québécois permette que les actifs d'une société soient saisis pour payer une dette de son actionnaire dès lors qu'elle en est l'*alter ego* (ou vice-versa) équivaudrait, selon moi, à priver toutes les sociétés ayant un actionnaire et un dirigeant unique d'un bénéfice pourtant offert à toutes les sociétés par actions. Je ne peux m'y résoudre.

[50] **Vraisemblablement conscientes de la difficulté que pose l'article 317 *C.c.Q.*, les intimées ne plaident toutefois pas que la théorie de l'*alter ego* permet toujours la levée du voile corporatif**. **Leur argument est plus raffiné puisqu'elles plaident que la théorie de l'*alter ego* permet de lever le voile corporatif lorsqu'il s'agit d'exécuter une sentence arbitrale rendue contre un état étranger. Celui-ci bénéficiant généralement de l'immunité étatique**[40], il peut en effet être difficile de saisir ses actifs et, en conséquence, certaines juridictions ont décidé de permettre que de telles sentences soient exécutées sur les biens des sociétés appartenant à cet état lorsqu'elles en sont l'*alter ego*. S'appuyant essentiellement sur le fait que le Canada a pris des engagements aux termes de la *Convention pour la reconnaissance et l'exécution des sentences*

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38 *Gestion André Lévesque inc. v. Compt'le inc.*, J.E. 97-631 (C.A.).

39 Paul Martel, *La société par actions au Québec : les aspects juridiques,* volume 1, Montréal, Wilson & Lafleur/Martel, 2011, nº 1-289 ; voir aussi Arnaud Meunier, *Aux frontières de la personnalité morale : la levée du voile social,* Mémoire en droit commercial et des entreprises, Belgique. Université catholique de Louvain, 2013, p. 4-5.

40 Au Canada, cette immunité découle de la *Loi sur l'immunité des États*, L.R.C. (1985), ch. S-18.

arbitrales étrangères » (la « *Convention* »)[41], **et invoquant de la jurisprudence américaine, anglaise ainsi que provenant des provinces de la common law, les intimées soutiennent que le Québec devrait leur emboîter le pas et permettre également que les actifs d'une société d'État puissent être saisis pour satisfaire la dette d'un état condamné au terme d'un arbitrage international lorsque les faits démontrent qu'elle en est l'*alter ego***. Les règles, disent-elles, devraient être uniformes et le Québec, à cet égard, ne devrait pas faire cavalier seul.

[51] **À mon avis, leur argument, aussi créatif et novateur soit-il, doit échouer**.

[Emphasis added]

[68] Previously in the 2021 case of *Mallat*[42]*,* the Court of Appeal had already confirmed that the line of common law cases—invoked by Plaintiffs—giving rise to the Enforcement AE Test had no application in Québec. Moreover, the Court of Appeal also indicated that the control and oversight that a foreign state as a shareholder exercises over a state-controlled corporation were essential to qualify the latter as an *organ* of a *foreign state* pursuant to the *SIA* without necessarily precluding a form of independence:

[103] Le critère de contrôle d'un organisme par le gouvernement demeure essentiel à l'analyse permettant de qualifier l'organisme d'un État étranger. Après tout, si un tel organisme n'avait tout simplement pas de lien avec un État étranger, il serait incongru que celui-ci bénéficie de l'immunité conférée normalement aux États étrangers.

[104] Toutefois, il faut nuancer l'application de la théorie de l'*alter ego* [the Historic AE Test]. À cet effet, il faut souligner qu'il n'y a rien dans la *Loi sur l'immunité des États* qui interdit que le contrôle soit exercé de façon indirecte. Un organe instauré par un pouvoir législatif étranger qui prévoit sa création, sa structure et son fonctionnement est tout de même contrôlé par l'État, même si son fonctionnement quotidien dénote une certaine indépendance.

[105] De plus, la jurisprudence citée par les parties ne traite pas de la notion d'*alter ego* aux fins d'application de la *Loi sur l'immunité des États*. La jurisprudence discute plutôt des questions d'exécution d'un jugement ou d'une ordonnance rendue contre une entité prétendant être l'*alter ego* d'un État étranger bénéficiant de l'immunité[43]. **Les tribunaux doivent faire preuve de beaucoup plus de retenue avant de conclure qu'une entité est effectivement l'*alter ego* d'un État dans une telle situation**. Le fait que l'organisme en question soit entièrement assujetti au contrôle de l'État et étroitement contrôlé par celui-ci s'avère alors nécessaire afin de ne pas faire exécuter un jugement contre une partie qui n'a qu'un lien éloigné exécuté avec la partie à l'encontre de qui le jugement devrait normalement être exécuté.

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41 L.R.C. 1985, 2e suppl., c.16, annexe, 330 R.T.N.U. 3 et [1986] R.T.C. no 43.

42 *Mallat v. Autorité des marchés financiers de France*, 2021 QCCA 1102.

43 *Roxford Enterprises S.A. v. Cuba*, 2003 FCT 763; *Collavino Incorporated v. Yemen (Tihama Development Authority)*, 2007 ABQB 212.

[Emphasis added]

[69] Until recently, Plaintiffs' entire case against both AAI and Air India was premised on the now-rejected Enforcement AE Test.

[70] Even if the AAI appeal of the Judgment on Seizure is still pending, the *Air India* Decision forced Plaintiffs back to the drawing board, which prompted them to resort to their "new" argument that AAI cannot claim State Immunity because it does not meet the definition of an *organ of the foreign state but that is separate from the foreign state* in accordance with the provisions of the *SIA*.

[71] Without presuming of the forthcoming decision of the Court of Appeal on Plaintiffs' appeal of the Judgment on Seizure regarding AAI, the Court fails to see how the outcome would be different insofar as the Enforcement AE Test is concerned. In other words, even if AAI is considered the *alter ego* of the *foreign state* of India, its own assets could not be executed upon without lifting the corporate veil pursuant to the provisions of Article 317[44] of the *Civil Code of Québec* ("**CCQ**"):

> [57] À mon avis, l'article 317 *C.c.Q.* énumère les cas de figure permettant de lever le voile corporatif existant entre une société et son actionnaire. Ceux-ci sont d'ailleurs suffisamment larges pour couvrir la quasi-totalité des situations où la personnalité de la société est utilisée à mauvais escient. La partie qui désire soulever le voile corporatif pour saisir des biens d'une société afin d'assurer le paiement d'une dette de son actionnaire doit donc alléguer des faits permettant de conclure que sa personnalité distincte est utilisée pour masquer une fraude, un abus de droit ou une contravention à une règle intéressant l'ordre public. **Le fait que l'instrument qu'on tente de mettre à exécution soit une sentence arbitrale étrangère rendue contre un état étranger ne permet pas, à mon avis, de faire échec aux exigences posées par le législateur québécois**. Il n'appartient pas aux tribunaux, dans les circonstances, d'ajouter aux exceptions édictées expressément par le législateur ou d'en amoindrir les exigences.
>
> [58] **D'ailleurs le test de l'*alter ego* développé sous la *Loi sur l'immunité des États* et appliqué par la Cour[45] n'a pas d'application en l'espèce**. Il ne s'agit pas de décider si Air India est un organe de l'Inde qui bénéficie d'une immunité de poursuite devant les tribunaux, mais bien de déterminer si l'Inde se sert de sa société d'État comme un instrument pour masquer une fraude, un abus de droit ou une contravention à une règle intéressant l'ordre public[46].
>
> [59] En l'absence d'allégations démontrant qu'Air India a été créé ou utilisé pour l'une de ces fins, j'estime que le juge ne pouvait autoriser les intimées à saisir les biens de celle-ci pour éventuellement satisfaire la dette de l'Inde.[47]

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[44] **317.** The juridical personality of a legal person may not be invoked against a person in good faith so as to dissemble fraud, abuse of right or contravention of a rule of public order.

[45] *Mallat v. Autorité des marchés financiers de France*, 2021 QCCA 1102.

[46] *Rhéaume v. Dazé*, 2015 QCCA 1047, paras. 28-30 ; voir aussi *Coutu c. Québec (Commission des droits de la personne)*, 1998 CanLII 13100 (QC CA), J.E. 98-2088, p.15.

[47] The *Air India* Decision.

[Emphasis added]

[72] Needless to say, if AAI successfully invokes its State Immunity under the *SIA*, Plaintiffs would be precluded from executing or enforcing via the present proceedings their Arbitration Awards against its assets to satisfy a debt of India.

[73] In any event, with the Enforcement AE Test already set aside via the *Air India* Decision, even if AAI was precluded from invoking its State Immunity herein on Plaintiffs' basis that it does not meet the definition of an *agency that is separate of the foreign state* of India under the *SIA*, the practical result remains the same.

[74] By somewhat paraphrasing the Court of Appeal, Plaintiffs would still have to satisfy the Court that AAI was constituted or utilized by India as an instrument to dissemble fraud, abuse of right or contravention of a rule of public order in accordance with Article 317 CCQ which cannot be ignored. Yet, no such allegations were ever made against AAI who is totally foreign to the Arbitration Awards and to India's dispute with Plaintiffs.

[75] With all due respect, absent of any real and compelling arguments by Plaintiffs that the provisions of Article 317 CCQ apply to India and to its *agency* AAI, the present exercise involving the determination of AAI's State Immunity appears moot if not somewhat futile as ultimately, the results would remain unchanged even if AAI failed to benefit from State Immunity in virtue of the *SIA*.

[76] Be that as it may, the Court shall address the Agency Test.

5.3 The Agency Test

[77] The Court has already determined that the Agency Test or the *SIA*'s definition of *agency* is twofold: being (i) an *organ of the foreign state*, and (ii) an *entité juridique distincte* (separate legal entity).

5.3.1 Is AAI an *organ of the foreign state* of India pursuant to the *SIA*?

[78] Yes, AAI is an *organ* of the *foreign state* of India pursuant to the *SIA.*

[79] AAI is an *organ* of the *foreign state* of India because it has a distinct or separate legal existence, it performs functions associated with governmental authority and the effectiveness of the control is exercised over it by the *foreign state* of India.[48]

[80] In fact, AAI being an *organ* of the *foreign state* of India in virtue of the *SIA* is not a point of contention between the parties.

[81] The *SIA* establishes a clear distinction between (i) organs that are not separate juristic entities and (ii) those that are, *i.e.*, state agencies.

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[48] *TMR Energy Ltd. v. State Property Fund of Ukraine*, 2003 FC 1517, paras. 112–113("***TMR***").

[82] An *agency of a foreign state*, while benefiting from an independent immunity pursuant to Section 3 of the *SIA*, is not assimilated to a *foreign state* and, as such, does not benefit from all the same protections under the Act (such as in relation to the service of proceedings).[49]

[83] It bears repeating that for purposes of the *SIA*, the Historic AE Test is only relevant to determine whether AAI is an *organ*, a necessary condition to a finding of State Immunity. However, it is wholly irrelevant to the second criterion of an "*entité juridique distincte*."[50]

[84] In *Mallat*, the Court of Appeal discussed the concept of Historic AE Test while considering the applicable case law from other provinces to assess whether an entity qualifies as an *agency of a foreign state* within the meaning of the *SIA*:

> [91] La *Loi sur l'immunité des États* prévoit que l'organisme d'un État étranger se rapporte à « toute entité juridique distincte qui constitue un organe de l'État étranger ». Celle-ci ne prévoit toutefois pas de définition quant à la notion d'« organe ». La jurisprudence à ce sujet est par ailleurs anémique, le statut d'organisme d'un État étranger étant d'ailleurs parfois admis par les parties. Toutefois, une certaine jurisprudence semble admettre que celle-ci est établie en utilisant le critère de l'*alter ego* [the Historic AE Test] qui a été élaboré lorsque la *Loi sur l'immunité des États* n'existait pas encore et dont les parties débattent la question de l'applicabilité de la doctrine. **Le critère de l'*alter ego* consiste à déterminer si l'entité en question exerce des fonctions qui relèvent habituellement des autorités gouvernementales et à préciser la nature du contrôle qu'exerce sur elle l'État**. **En ce sens, la notion d'organisme d'un État étranger admet trois critères** : 1) **posséder une personnalité juridique distincte** ; 2) **exercer des fonctions gouvernementales** ; 3) **être contrôlé par l'État**.
>
> [92] La jurisprudence note, par ailleurs, que la notion d'organisme d'un État étranger semble aujourd'hui plus large et englobe plus que ce qui pouvait être considéré à une certaine époque comme l'*alter ego* d'un État étranger. **En ce sens, la jurisprudence antérieure à l'adoption de la *Loi sur l'immunité des États* devrait être appliquée avec prudence**.[51]
>
> [Emphasis added, footnotes omitted]

[85] In the *Air India* Decision, the Court of Appeal confirmed that the Historic AE Test under the *SIA* is normally used to determine whether an entity is an *organ* of a foreign state for State Immunity purposes:

> [58] D'ailleurs le test de l'*alter ego* développé sous la *Loi sur l'immunité des États* et appliqué par la Cour n'a pas d'application en l'espèce. Il ne s'agit pas de décider

[49] M. L. Jewett & Henry L. Molot, "State Immunity Act: Basic Principles," Legislative Comment, (1983) 61:4 Can Bar Review, p. 849.
[50] *TMR*, footnote 48, paras. 112–113.
[51] *Mallat c. Autorité des marchés financiers de France*, 2021 QCCA 1102.

si Air India est un organe de l'Inde qui bénéficie d'une immunité de poursuite devant les tribunaux, mais bien de déterminer si l'Inde se sert de sa société d'État comme un instrument pour masquer une fraude, un abus de droit ou une contravention à une règle intéressant l'ordre public.

[Emphasis added]

[86] Mr. Zal T. Andhyarujina, the expert in Indian Law retained by Plaintiffs confirmed that AAI was constituted by statute as a body corporate pursuant to Section 3(a) of the *AAI Act* which sets out of all of the features of a body corporate as understood in Indian law, and that, regardless of the level of control exerted by India, AAI retains its independent juristic personality:

> 20.1. The AAI is constituted and incorporated as a body corporate under Section 3 of the Airports Authority of India Act, 1994 ("**AAI Act**"). As more particularly set out below, the AAI is a statutory corporation, i.e., a body corporate established by or under a Central Act. The AAI is governed in all respects, solely by the provisions of the AAI Act. […][52]
>
> [Emphasis added]

[87] Section 3 (2) of the *AAI Act* sets out in plain terms the status and powers of AAI, as an Indian statutory corporation:

> **3. (2)** The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property both movable and immovable, and to contract and shall by the said name sue and be sued.

[88] AAI's expert Mr. Ashim Sood, a registered advocate on the rolls of the Bar Council of Delhi, who was retained by AAI, echoed that position of Mr. Andhyarujina:

> 3. The fact that the AAI is an agency of the Central Government [India] is beyond dispute, and concomitant with this is the Central Government's role as AAI's principal. This relationship is regulated by, and subject to, statutory provisions which demarcate clear boundaries between what the Central Government may and may not do. They make clear that the AAI is a separate juridical entity—a body corporate with its own powers, functions, finances, assets, and other aspects intrinsic to a body corporate […]. The Central Government's involvement is at all times as a principal, but not as an *alter ego*, of the AAI.[53]
>
> [Emphasis added]

[52] Expert Report of Mr. Zal T. Andhyarujina, Senior Advocate, January 20, 2023.
[53] Second Sworn Statement of Mr. Ashim Sood dated March 24, 2023, para. 3

[89] Mr. Sood, citing the Supreme Court of India in his Second Sworn Statement dated March 24, 2023, confirmed that the expression "*body corporate*" used in Section 3 of the *AAI Act* implies that the AAI has a distinct legal personality[54].

[90] The fact that AAI is a body corporate and a statutory corporation with a distinct legal personality established by the *foreign state* of India is not disputed by Plaintiffs. All three experts in Indian law[55] agree that AAI is a *de jure* distinct legal entity.

5.3.2 Is AAI an *organ of the foreign state but that is separate from the foreign state* of India pursuant to the definition of Section 2 of the SIA?

[91] Again, the Court answers in the affirmative.

[92] It has long been recognized that states do not act alone or in a vacuum but rather through various organs and instrumentalities. These "… *normally include the persons, representatives, subordinates, organs, instrumentalities, corporations and government departments of which the machinery of government is composed*."[56]

[93] In the case of *Schreiber v. Canada*[57], the Supreme Court of Canada indicated that the words of the *SIA* must be read "*in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament*"[58].

[94] The Supreme Court also commented as follows when faced with differing versions of the *SIA,* indicating that the common meaning of both the English and French versions should be preferred:

> […] Both language versions of federal statutes are equally authoritative. Where the meaning of the words in the two official versions differs, the task is to find a meaning common to both versions that is consistent with the context of the legislation and the intent of Parliament: […]
>
> […] A principle of bilingual statutory interpretation holds that where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two versions would *a priori* be preferred; […][59]

[54] *Ibid*., paras. 18–19.
[55] Mr. Zal T. Andhyarujina, Mr. Ashim Sood and Justice L. Nageswara Rao (who is a former Justice of the Supreme Court of India).
[56] M. L. Jewett & Henry L. Molot, "State Immunity Act: Basic Principles," Legislative Comment, (1983) 61:4 Can Bar Rev, p. 848.
[57] 2002 SCC 62.
[58] *Ibid*., para. 54.
[59] *Ibid*., paras. 54–56.

[95] In the present case, the Court finds that the language of the *SIA* is clear and unambiguous. To determine whether AAI is an *agency* within the meaning of the *SIA*, the Court must determine whether:

> (a) AAI is an *organ* of India, in that it satisfies the Historic AE Test of (i) exercising governmental functions, and (ii) being controlled by the state—which is already admitted; and
>
> (b) AAI is a separate juridical entity (*entité juridique distincte*).

[96] With respect to the test for the latter requirement—that AAI is a separate juridical entity (*entité juridique distincte*)—the Court retains the approach proposed by counsel for AAI which essentially involves two steps:

- The first is an assessment of the core attributes of the relevant entity under foreign law; and

- The second is an assessment of those attributes by reference to the characteristics Québec and Canadian law associate with a distinct legal entity.

[97] The Court shares AAI's counsel opinion that where, as in the present instance, the entity is one that the Court is familiar with, from a jurisdiction sharing common legal roots with Canada, the inquiry need not be particularly searching. The nature of the evidence required to determine whether a *body corporate* from a common law jurisdiction (*i.e.*, as such an entity is understood pursuant to British common law) has a distinct legal personality is likely to be less extensive than that that may be required to assess the *de jure* separate personality of a Liechtenstein "*Anstalt*" or a Chinese "*Cooperative Joint Venture*".

[98] A *separate* legal entity is one that is juridically distinct[60].

[99] The concept of *agency* thus necessarily *extends* State Immunity to entities that are *not*, *de jure*, the *foreign state* itself as they must be separate (or distinct)—*i.e.*, *entités juridiques distinctes.* It does so on the condition that such entities remain *organs* of the *foreign state*, by performing government functions and being controlled by the *foreign state*.

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[60] *McClurg v. Minister of National Revenue*, 1990 CanLII 28 (SCC), p. 1056:
"Since the famous decision of the House of Lords in *Salomon v. Salomon & Co.*, [1897] A.C. 22, it has been a settled proposition of law that **a corporation has a separate legal existence, independent from that of its shareholders**. Even before *Salomon*, it had been said that it was **this proposition that lay at the 'root' of corporate law**; *Farrar v. Farrars, Ltd.* (1888), 40 Ch. D. 395, at 409-10."
[Emphasis added];
see also *Option Consommateurs c. Fédération des caisses Desjardins du Québec,* 2010 QCCA 1416, paras. 27 and 29.

[100] In light of the evidence, the Court finds that AAI meets the second test of being a *separate* legal entity at all levels. AAI is in fact an autonomous legal entity *separate* from India within the purview of the *SIA*. No matter which standard is applied, AAI qualifies as a *separate* legal entity. Specifically:

> (a) AAI constitutes, *de jure*, a legal entity *separate* from India as understood in both Indian and Canadian law; and
>
> (b) AAI possesses all the core characteristics of a separate legal entity, namely a corporation, as such entity is understood under both Indian and Canadian law.

[101] Even if, in theory, India could control every element of AAI under the *AAI Act* as the sole shareholder, this would not be a basis to pierce the corporate veil, as held by the Court of Appeal in the *Air India* Decision. In all cases, it is clear that AAI *in fact* enjoys significant autonomy and functions as a true corporation yet controlled by a single shareholder.

[102] As to Plaintiffs, they argue that notwithstanding the clear legal separation between AAI and India, their proposed Control Test to be applied is one of theoretical control that could be exercised over the *agency* by the *foreign state*.

[103] However, the statutory requirement—a *separate juridical entity* (une *entité juridique distincte*)—says absolutely nothing about the theoretical level of *control* the *foreign state* may exercise over the entity to be determinative, nor is there a test for an *inseparable organ* (a term proposed by Plaintiffs). Indeed, the term *organ* appears nowhere in the *SIA* other than as an element of the definition of *agency*.

[104] With all due respect, Plaintiffs confuse the applicable standard to determine whether a particular entity is an *organ* of the *foreign state*, *i.e.*, the Historic AE Test, with that of the second criterion for *agency*, *i.e.*, a separate legal existence (une *entité juridique distincte*), thus creating a self-defeating test.

[105] At the risk of being repetitive, Plaintiffs' argument results in an internally contradictory test that would require an *organ* to meet some undefined "*goldilocks*" standard of control—not too little, not too much, but just right—to qualify.

[106] There is no reason to think that the *SIA* was intended to distinguish between *organs* of a *foreign state* based on a theoretical degree of control exercised over them by the *foreign state*, beyond the base threshold of being actually an *organ*.

[107] In order to meet the first part of the definition of *agency*—being an *organ*—an entity needs to be *sufficiently* controlled by the foreign state to be its *alter ego* (the Historic AE Test). Yet, Plaintiffs argue that to meet the second part of the Agency Test, being a *separate* legal entity (une *entité juridique distincte*), the same entity would need to meet the Control Test by establishing that it *cannot be so controlled* so as to be an *alter ego*.

[108] Moreover, if AAI is not an *agency* of India as it is so *inseparable* from the *foreign state* to exclude the application of the *SIA,* how can one explain why AAI was sued by Plaintiffs in its own name in the present proceedings? Isn't this evidence of Plaintiffs' original recognition of AAI's independent legal personality[61]?

[109] With respect to the Control Test, the Court respectfully disagrees with Plaintiffs. Their test is unmoored from the language of the *SIA*, the scheme of the Act, and applicable jurisprudence.

[110] Plaintiffs' argument, centered on the application of a "control" standard, is misguided. It is founded on a misapplication of an irrelevant test (the Enforcement AE Test)—one used by some courts in common law Canada but expressly rejected by the Court of Appeal in the *Air India* Decision. Plaintiffs' argument was, in fact, first articulated in the aftermath of the *Air India* Decision and is undermined by Plaintiffs' own earlier conduct in the present proceedings as previously outlined.

[111] When faced with a clearly distinct legal entity, such as a statutory corporation from a common law jurisdiction, the Court should not undertake an analysis of the *theoretical control* its shareholder could exercise over it, especially not to the disproportionate extent proposed by Plaintiffs.

5.3.3 AAI and the *Airports Authority of India Act*

[112] The Court already noted that Section 3 (2) of the *AAI Act* sets out in plain terms the status and powers of AAI, as an Indian statutory corporation[62].

[113] In his Second Sworn Statement, expert witness Mr. Sood, citing the Supreme Court of India, confirmed that the expression "*body corporate*" used in Section 3 of the *AAI Act* implies that the AAI has a distinct legal personality.[63]

[114] In *Ashoka Marketing Limited v. Punjab National Bank*, the Supreme Court of India opined that the distinctive features of a corporation in India are "*that it has the capacity of continuous existence and succession, notwithstanding changes in its membership and it possesses the capacity of taking, holding and conveying property, entering into contracts, suing and being sued, and exercising such other powers and privileges conferred on it by law of its creation just as a natural person may*."[64]

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[61] H.L. Molot & M.L. Jewett, "The State Immunity Act of Canada", (1983) 20 *Canadian Yearbook of International Law* 79, at p. 109:
"However, it recognizes the distinction between the state instrumentality or alter ego having no separate legal existence of its own, and the state agency that, while acting as its alter ego, is a juridical entity in its own right under Canadian law. The former is incapable of being sued as such in Canadian courts and, therefore, the foreign state for which it is acting is the only suable entity or juridical person to which a potential plaintiff can look for relief." [Emphasis added]

[62] Paragraph 87.

[63] Second Sworn Statement of Mr. Sood dated March 24, 2023, para. 3.

[64] Second Sworn Statement of Mr. Sood dated March 24, 2023, para. 18 citing *Ashoka Marketing Limited v. Punjab National Bank*, 1991 AIR 855, 1990 SCR (3) 649, para. 16.

[115] The Supreme Court of India has also held that "*bodies corporate owned and controlled by the Government of India are not different in any way from corporations and are equally separate juristic entities*."[65]

> 19. Merely because the expression "body corporate" has been used in relation to the nationalised banks in Section 3(4) of the *Banks Nationalisation Act* and the expression "corporation" has not been used, does not mean that the nationalised bank is not a corporation. The expression "body corporate" is used in legal parlance to mean "a public or private corporation" (Black's Law Dictionary p. 159).[66]
>
> [Emphasis added]

[116] The Supreme Court of India further explained:

> 16. […] [I]t is normally created by a special statute; it has no shares and no shareholders either private or public, and its shareholder, in the symbolic sense, is the nation represented through government and Parliament; the responsibility of the public corporation is to the government, represented by the competent minister and through the Minister to Parliament; the administration of the public corporation is entirely in the hands of a board which is appointed by the competent minister; and it has the legal status of a corporate body with independent legal personality. […][67]
>
> [Emphasis added]

[117] In analyzing the provisions of the *International Airports Authority Act*—AAI's predecessor—which is akin to the *AAI Act* as noted by Plaintiffs' expert[68], the Supreme Court of India determined that:

> 22. […] these several provisions make it clear that the [International Airports] Authority is a distinct juristic entity, having its own properties, fund and employees, and that it is capable of borrowing from any source, including the Government of India. […][69]

[118] AAI's counsel pointed out that it was notable that such a relevant decision of the Supreme Court of India—*Municipal Commissioner of Dum Dum Municipality*—was nowhere mentioned by Plaintiffs' expert opinion.

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[65] Second Sworn Statement of Mr. Sood dated March 24, 2023, para. 18.
[66] Second Sworn Statement of Mr. Sood dated March 24, 2023, para. 18, citing *Ashoka Marketing Limited v. Punjab National Bank*, 1991 AIR 855, 1990 SCR (3) 649, para. 19.
[67] Second Sworn Statement of Mr. Sood dated March 24, 2023, para. 18 citing *Ashoka Marketing Limited v. Punjab National Bank*, 1991 AIR 855, 1990 SCR (3) 649, para. 16.
[68] Expert Report of Mr. Z. Andhyarujina dated January 20, 2023, Schedule 4.
[69] Second Sworn Statement of Mr. Sood dated March 24, 2023, at para. 17, citing *Municipal Commissioner of Dum Dum Municipality v. Indian Tourism Development Corporation*, 1995 SCC (5) 251, para. 22.

[119] In any event, the expert evidence satisfies the Court that AAI has all of the trappings—or distinct features—of a true corporation, as understood in Indian law.

5.3.4 The Québec and Canadian law perspective

[120] Considering the evidence adduced at the hearing, the Court agrees with AAI's counsel that the concept of a public corporation and the qualities of such corporations in India are substantially *identical* to the equivalent concepts under Canadian and Québec law. In other words, the term *corporation* is understood in the same manner in both jurisdictions.

[121] The Court understands that like much of Canada, the legal system in India has its roots in the British common law system. This influence is evident in many aspects of its judicial practices, procedures, and the legal terminologies used. In fact, India relies on various known common law authors and landmark decisions on corporate law, including the previously cited case of *Salomon v. Salomon*[70] with respect to distinct corporate personality.[71]

[122] With respect to Québec law, the concept of legal personhood is defined in Articles 298–300 of the CCQ.

[123] As in India, the CCQ provides that a legal person may be constituted directly by law (Art. 299 CCQ), which is sufficient in itself to confer such entity with a separate legal personality.[72]

[124] The same principles apply to Crown corporations or wholly owned state corporations who are considered distinct from their shareholder(s) and enjoy the core characteristics of separate legal personality under Canadian and Québec law, namely

> (a) Perpetual existence;
>
> (b) An independent patrimony;[73] and
>
> (c) Full enjoyment of civil rights, which include the right to sue, to contract, and to hold property.[74]

[70] Footnote 60.
[71] As opined by both Mr. Sood and Justice Rao in their respective testimony in chief.
[72] *Société des traversiers du Québec v. Produits d'Acier Écan inc.*, 2002 CanLII 62735 (QC CS), paras, 5-7.
[73] *Air India Decision*, para. 48.
[74] Article 301 of the CCQ:
301. Legal persons have full enjoyment of civil rights.

5.3.5 Comments on Plaintiffs' main argument dealt with their expert witness Mr. Zal T. Andhyarujina, Senior Advocate, that AAI is the "*State*" under Article 12 of the Constitution of India

[125] Plaintiffs' expert report purported to establish the ROI exercises such a "deep and pervasive control" (used for the Control Test) over the AAI that it rendered the latter *inseparable* from India, thus failing to meet the definition of *agency* of a *foreign state* pursuant to the *SIA*.

[126] The Court understands that the jurisprudence cited by Mr. Andhyarujina involves the determination of "agency" or "instrumentality" of the Government of India which has been developed entirely in the context of the Courts' determination of the meaning of the word "State" pursuant to Article 12 of the Constitution of India that reads as follows:

PART III
FUNDAMENTAL RIGHTS
General

> **12. Definition.** —In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

[127] According to Mr. Andhyarujina, AAI is an "instrumentality" or "agency" of the "State", under Indian law, as it is a body that is subject to a pervasive control by the "State".[75] The ROI exercises a "deep and pervasive control" over AAI which is apparent from the very nature of AAI and the control exercised by India over AAI's administration, operations, finances and assets.[76]

[128] However, based on the opinions of the experts Mr. Ashim Sood and Justice L. Nageswara Rao the fact that AAI may be considered as the "State" under Article 12 of the Constitution of India is irrelevant for the purposes hereof.

[129] Indian courts have derived various tests to determine whether a given entity that is separate from the "State" qualifies as an "other authority" within the meaning of Article 12 of the Constitution of India, so as to be treated as part of the "State" for purposes of the enforcement of the fundamental rights found in Part III of the Constitution.[77]

[130] In his Expert Report, Mr. Andhyarujina referred to the case of *R.D. Shetty*[78] and indicated that the Supreme Court of India had ruled that the IAAI (AAI's predecessor) was an "instrumentality" or "agency" of the "State". In his opinion, the same conclusion ought to be drawn with regard to the AAI on account of the similarities with the IAAI.[79]

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[75] *Ibid*., para. 11.
[76] Expert Report of Mr. Z. Andhyarujina dated January 20, 2023, para. 10.
[77] Testimony in chief of Mr. Ashim Sood.
[78] *Ramana Dayaram Shetty v. International Airports Authority of India and Ors.,* (1979) 3 SCC 489).
[79] Expert Report of Mr. Z. Andhyarujina dated January 20, 2023, para. 9.

[131] However, in the decision of *R.D. Shetty*—involving the enforcement of Fundamental Rights covered by Part III of the Constitution of India — the Supreme Court of India determined that the IAAI, AAI's predecessor, was an "other authority" within the meaning of Article 12 of the Constitution of India, and therefore an "agency" or "instrumentality" against which the Fundamental Rights set forth in Part III of the Constitution of India could be enforced by citizens of India.

[132] However, this finding was for the purpose of Indian constitutional law and has no bearing whatsoever on AAI's status as an *agency* under the *SIA*.

[133] Plaintiffs are leading the Court in a wrong and irrelevant direction.

[134] The definition of "State" that Mr. Andhyarujina relied upon has been developed for the specific context of citizens seeking to enforce against the "State" their Fundamental Right protected by Part III of the Constitution of India.[80] This test is intentionally broad, precisely in order to preserve Fundamental Rights and to prevent the "State" from utilizing the corporate form to circumvent those Fundamental Rights. It has no bearing, however, on the entity's separate juridical existence in any other context.[81]

[135] As explained by the Supreme Court of India in *Shrikant v. Vasantrao*:

> 19. Article 12 provides that in Part III of the Constitution dealing with fundamental rights, the word "State" would refer to and include not only the Government of India, Parliament of India, the Government and Legislature of each of the States, but also all local and other authorities within the territory of India and all local and other authorities under the control of Government of India. The significance of Article 12 lies in the fact that it occurs in Part III of the Constitution which deals with Fundamental Rights. The various Articles in Part III have placed responsibilities and obligations on the "State" vis-à-vis the individual, to ensure constitutional protection of the individual's rights against the "State", including the right to equality under Article 14, and equality of opportunity in matters of public employment under Article 16 and most importantly the right to enforce all or any of those fundamental rights against the "State" as defined in Article 12, either under Article 32 or Article 226 of the Constitution. The decisions rendered under Article 12 lay down that a body would answer the definition of State under Article 12 if it is financially, functionally and administratively dominated by or under all pervasive control of the "Government". On the other hand, where the control by the "Government" is merely regulatory, whether under any statute or otherwise, it would not serve to make the body "State". Thus the very decisions relied on by the High Court make it clear that "instrumentalities of State" are different from "State Government", **though both may answer the definition of "State" under Article 12 for the limited purpose of Part III of the Constitution**. Further, the very inclusive definition of "State"

[80] Sworn Statement of Justice L. Nageswara Rao, para. 10.

[81] Sworn Statement of Justice L. Nageswara Rao, para. 12; Second Sworn Statement of Mr. Sood, para. 16: "*An Article 12 analysis in inappropriate to determine whether a statutory corporation such as the AAI is a distinct juristic entity and tends to confuse the issue* […] *But such an analysis is agnostic to the separateness of the corporation from the Central Government, i.e. it does not concern itself with whether the corporation is juridically separate*."

under Article 12 by referring to Government of India, the Government of each of the States and the local and other authorities, makes it clear that a "State Government" and a local or other authorities, are different and that they fall under a common definition only for the purpose of Part III of the Constitution. **This Court has consistently refused to apply the enlarged definition of "State" given in Part III (and Part IV) of the Constitution, for interpreting the words "State" or "State Government" occurring in other parts of the Constitution**. While the term "State" may include a State Government as also statutory or other authorities for the purposes of Part III (or Part IV) of the Constitution, the term "State Government" in its ordinary sense does not encompass in its fold either a local or statutory authority. It follows, therefore, that though GMIDC and MJP may fall within the scope of "State" for purposes of Part III of the Constitution, they are not "State Government" for the purposes of section 9-A (read with section 7) of the Act.[82]

[Emphasis added]

[136] Likewise, in *Hindustan Steel Works Construction Ltd. v. State of Kerala*, the Supreme Court of India explained:

> 19. […] There may be deep and pervasive control of the government over the appellant company and the appellant company, on such account may be an instrumentality or agency of the Central Government and as such a "State" within the meaning of Article 12 of the Constitution. Even though the appellant company is an agency or instrumentality of the Central Government, it cannot be held to be a department or establishment of the government in all cases. Such instrumentality or agency has been held to be a third arm of the government in *Ajay Hasia*'s case, but it should not be lost sight of that it was only in the context of enforcement of fundamental rights against the action of government and its instrumentalities or agencies it was held that such agencies were the third arm of the government, and they cannot avoid constitutional obligation. There is no question of enforcing any fundamental right in the instant case.[83]
>
> [Emphasis added]

[137] The "deep and pervasive" control examined by Mr. Andhyarujina is in terms of the control that India, as the sole shareholder, *could* exert over an entity (or "*de jure* control"), as opposed to the control India is *in fact* exerting. In this sense, in the case of an entity who is wholly owned or wholly controlled by a single person, corporation or a state, the control would *always* be "deep and pervasive" if not a "complete" control.

[138] Mr. Andhyarujina, relying on *R. D. Shetty*, further noted in his report that corporations that are "*an instrumentality or agency of the government*" within the meaning of Article 12 of the Indian Constitution are "*subject to the same limitations in the field of*

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[82] Sworn Statement of Justice L. Nageswara Rao, para. 12, citing *Shrikant v. Vasantrao*, (2006) 3 SCC 682, para. 19.

[83] Sworn Statement of Justice L. Nageswara Rao, para 18, citing *Hindustan Steel Works Construction Ltd. v. State of Kerala*, (1997) 5 SCC 171, para. 19.

constitutional and administrative law as the government itself, though in the eyes of the law, they would be distinct and independent legal entities."[84] [Emphasis added]

[139] In his Expert Report, Mr. Andhyarujina also relied heavily upon the case of *Ajay Hasia*[85], to point out that the Supreme Court of India stated that the true owner of such corporations was the State. Be that as it may, the Court deplores the fact that Mr. Andhyarujina somehow omitted to include the highly relevant sentence immediately following the citation that he relied upon[86]. Following "*In such cases the true owner is the State, the real operator is the State and the effective controllorate is the State and accountability for its actions to the community and to Parliament is of the State*", the Supreme Court of India went on to say that:

> 7. […] It is undoubtedly true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions on business principles with a certain amount of autonomy which is necessary as well as useful from the point of view of effective business management. […][87]
>
> [Emphasis added]

[140] As previously mentioned, Mr. Andhyarujina also omitted to mention in his Expert Report the case of *Municipal Commissioner of Dum Dum Municipality v. Indian Tourism Development Corporation*, where the Supreme Court of India looked at the situation of IAAI, AAI's predecessor, and concluded that, for all purposes other than Part III of the Constitution of India, it was a distinct entity with its own legal personality. The Court therefore concluded that the IAAI was obligated to pay property taxes on its real estate properties.[88]

[141] The fact that at the time, IAAI was arguing against having to pay property taxes like the state of India does not negate the findings and conclusions of the Supreme Court of India.

[142] Be that as it may, in order to determine whether AAI is a *separate* legal entity (une *entité juridique distincte*) pursuant to the *SIA*, there is no need to move beyond the "legal personality" of AAI—that *is* the test to determine whether AAI is a *separate* legal entity or an *entité juridique distincte*.

[143] The sworn statements filed by the experts Mr. Ashim Sood and Justice L. Nageswara Rao and their testimonies lead the Court to the conclusion that the Control Test proposed by Plaintiffs is not only unnecessary but irrelevant as well.

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[84] Expert Report of Mr. Andhyarujina, para. 48 c).
[85] *Ajay Hasia v. Khalid Mujib Sehravardi,* (1981) 1 SCC 722.
[86] Expert Report of Mr. Andhyarujina, para. 19.3.
[87] *Ajay Hasia v. Khalid Mujib Sehravardi,* (1981) 1 SCC 722, para. 7.
[88] *Municipal Commissioner of Dum Dum Municipality v. Indian Tourism Development Corporation,* 1995 SCC (5) 251, para. 21.

[144] Therefore, with all due respect, the Court finds no reasons to proceed any further with the Control Test to the excessive extent proposed by Plaintiffs.

5.3.6 Plaintiffs' objections to portions of Mr. Ashim Sood's Second Sworn Statement of March 24, 2023

[145] The Court took under reserve objections of Plaintiffs regarding paragraphs 13 to 16, 20 c) and 26 to 29 of the Second Sworn Statement of Mr. Sood dated March 24, 2023 ("**Objections**").

[146] Considering that Mr. Ashim Sood's Second Sworn Statement is dated March 24, 2023, the Court finds that pursuant to Article 241[89] of the *Code of Civil Procedure*, the Objections must be dismissed for tardiness, having been raised during the trial more than one year after the filing of Mr. Sood's Second Sworn Statement.

[147] Plaintiffs' counsel did not offer any arguments justifying such a late filing.

[148] Notwithstanding the foregoing, the Court would have nevertheless dismissed those Objections.

[149] Plaintiffs consider that with respect to paragraphs 13 to 16 of his Second Sworn Statement, Mr. Sood is usurping the role of the Court by providing his opinion. It was inappropriate for Mr. Sood to directly import a "deep and pervasive" control analysis as applied in the Article 12 context to any other context[90]. At paragraph 16, Mr. Sood mentioned that an Article 12 analysis would also be inappropriate to determine whether a statutory corporation such as AAI is a distinct juristic entity as it also tends to confuse the issue[91].

[150] At paragraph 15, Mr. Sood pointed out that Justice Rao shared the same opinion, which happens to be the case.

[151] Moreover, Mr. Sood's comments are found in a section entitled "*The analysis of deep and pervasive control in the ZTA[92] Report is confined to the narrow issue of whether AAI is the 'State' under Article 12: this is immaterial*". Mr. Sood's proceeded with his analysis of Indian law to explain the reasons why Mr. Andhyarujina's own analysis of Article 12 of the Constitution of India was neither useful nor relevant to determine if, in

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[89] **241.** Before the trial begins, a party may apply for the dismissal of an expert report on the grounds of irregularity, substantial error or bias, in which case the application must be notified to the other parties within 10 days after the party becomes aware of the grounds for dismissing the report.

If the court considers the application well-founded, it orders that the report be corrected or that it be withdrawn. In the latter case, the court may allow other expert evidence to be appointed. It may also, to the extent it specifies, reduce the amount of the fee payable to the expert or order that the expert repay any amount already received. [Emphasis added]

[90] Second Sworn Statement of Mr. Sood, para.13.

[91] *Ibid*., para.16.

[92] Zal T. Andhyarujina.

India, AAI was a separate legal entity of the state of India for situations that do not involve the Fundamental Rights protected by Part III including said Article 12.

[152] The Objections regarding paragraphs 13 to 16 are overruled.

[153] Mr. Sood who was recognized as an expert in Indian law, was not giving a legal opinion in lieu of the Court, he was giving his opinion on his own interpretation of Indian law regarding Article 12 of the Constitution of India and relevant jurisprudence.

[154] The determination of the status of a foreign entity in Canadian law must be based or informed on the basis of the law applicable to the foreign entity in its own jurisdiction, i.e., India.[93]

[155] In the *TMR* case involving the *SIA*, the Court mentioned that Ukrainian law could not be considered in a vacuum, without regard for Canadian legal concepts:

> [116] This does not mean that the Canadian law conception of what constitutes a distinct legal entity and the criteria which are comprised in the *alter ego* test are not relevant to this determination, especially those concerning control, ownership of assets, and conduct of legal proceedings. Ukrainian law is, of course, essential to the determination of SPF's status as a distinct corporate entity: it governs its manner of creation, its status under Ukrainian law, its duties, powers, ability to own property, to act independently, to sue and be sued, to govern and manage its own affairs. Nevertheless, I do not think Ukrainian law must be considered in vacuum, without regard for Canadian legal concepts. **The issue arises for determination in the context of execution proceedings, which are governed by the *lex fori*, not by foreign law**. The purpose for which the status of SPF and its relationship to the State is being determined has less to do with who is liable for SPF's actions, than with SPF's ability to be sued, to own and dispose of property and to be answerable to the process of the Court. Canadian law must therefore by necessity be used to measure the criteria under which Ukrainian law recognizes an entity's status as a distinct legal entity, so that the definition used under Ukrainian law can be ascertained to be relevant to our execution process.[94]
>
> [Emphasis added]

[156] Mr. Sood's comments and legal opinion on India law served to assist the Court for that very legitimate purpose.

[157] Therefore, the Objections regarding paragraphs 13 to 16 are overruled.

[158] The Objections with respect to paragraphs 26 to 29 are also overruled for the same reasons.

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[93] *TMR Energy Ltd. v. State Property Fund of Ukraine*, 2003 FC 1517, para. 116.
[94] *Ibid*.

[159] The Court does not find anything inappropriate with respect to Mr. Sood's opinion found in those paragraphs especially since his comments were made in response to those made by Plaintiffs' own expert.

[160] Finally, the Objections concerning Mr. Sood's relying on facts mentioned in paragraphs 20c), 26 and 27 b) that have apparently not been specifically introduced into evidence are also overruled.

[161] The Court finds that those Objections concern introductory portions or facts linked to the special knowledge acquired by the expert. As such, they do not constitute inadmissible hearsay:

> The expert witness possesses special knowledge, skill or experience in a scientific, technical or other specialized field that is beyond that of the fact finder. The expert's knowledge may be the product of formal education comprised of the study and readings of works of authorities in the specialized field and information and data culled from research, lectures and numerous other sources. As stated by Martin J. A. in ***R. v. Valley***:
>
> > An expert in forming an opinion may, of course, draw on works of a general nature which form part of the corpus of knowledge with which an expert in a particular field would be expected to be acquainted…[95]
>
> […]
>
> Thus, there is a necessary and acceptable hearsay component in the knowledge, skill or experience of every expert.[96]

[162] In *Stations de la Vallée de St-Sauveur inc. c. M.A*.[97], the Court of Appeal made the following comment on that specific issue:

> [72] In his expert report, Mr. Rivest based his calculation on the least expensive rate of two financial institutions that he consulted. The appellants objected to this at trial, contending that the information on rates from the financial institutions was hearsay. The objection was dismissed. They raise the matter again on appeal. I am of the view that the source of the information did not affect its admissibility into evidence, and that the judge was free to measure its probative value as she saw appropriate. <u>There are many circumstances in which an expert will base his or her opinion on easily ascertainable facts without bringing direct evidence of those facts</u>, <u>and the figures cited in Mr. Rivest's report fall into that category of information without constituting inadmissible hearsay evidence</u>.[98]

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[95] Sopinka, Lederman & Bryant: "As a Component of the Expert's Knowledge or Experience", The Law of Evidence in Canada, 6th Ed., para. ¶ 12.194.

[96] *Ibid*., ¶ 12.196

[97] 2010 QCCA 1509.

[98] On the "acceptable hearsay component" of expert evidence, see John Sopinka *et al*., *The Law of Evidence in Canada*, 2nd ed. (Markham : Butterworths, 1999) no 1289 and Donald Béchard, "L'expert :

[163] In conclusion, Plaintiffs' Objections are all overruled.

5.4 Did AAI waive its State Immunity?

[164] Plaintiffs are claiming that regardless of its actual status under the *SIA*, AAI nevertheless waived its contested right to invoke State Immunity as an *agency of the foreign state* of India.

[165] With all due respect, Plaintiffs are mistaken.

[166] Section 4 of the *SIA* deals with waivers of state immunity and exceptions applicable thereto:

> **Immunity waived**
>
> **4 (1)** A foreign state is not immune from the jurisdiction of a court if the state waives the immunity conferred by subsection 3(1) by submitting to the jurisdiction of the court in accordance with subsection (2) or (4).
>
> **State submits to jurisdiction**
>
> **(2)** In any proceedings before a court, a foreign state submits to the jurisdiction of the court where it
>
> > **(a)** explicitly submits to the jurisdiction of the court by written agreement or otherwise either before or after the proceedings commence;
> >
> > **(b)** initiates the proceedings in the court; or
> >
> > **(c)** intervenes or takes any step in the proceedings before the court.
>
> **Exception**
>
> **(3)** Paragraph (2)(c) does not apply to
>
> > **(a)** any intervention or step taken by a foreign state in proceedings before a court for the purpose of claiming immunity from the jurisdiction of the court; or
> >
> > **(b)** any step taken by a foreign state in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained before the step was taken and immunity is claimed as soon as reasonably practicable after they are ascertained.
>
> **Third party proceedings and counter-claims**

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recevabilité, qualification et force probante" in Service de la formation continue du Barreau du Québec, *Les dommages en matière civile et commerciale*, vol. 255 (Cowansville : Éd. Yvon Blais, 2006) 123, 433.

> **(4)** A foreign state that initiates proceedings in a court or that intervenes or takes any step in proceedings before a court, other than an intervention or step to which paragraph (2)(c) does not apply, submits to the jurisdiction of the court in respect of any third party proceedings that arise, or counter-claim that arises, out of the subject matter of the proceedings initiated by the state or in which the state has so intervened or taken a step.
>
> [Emphasis added]

[167] Plaintiffs' position is twofold:

- Since India and AAI are *inseparable*—and, as a result thereof, AAI is not an *agency of the foreign state* and is not eligible to invoke State Immunity pursuant to the *SIA*—it is also bound by the fact that India has been determined to have waived its State Immunity in the present proceedings with the ROI Judgment (presently under appeal);

- AAI waived its State Immunity pursuant to Section 4(2) c) of the *SAI* by taking steps namely by previously filing in the present instance its Application to vacate the Seizure before judgment of its monies based on the newly sanctioned *IATA Act*.

[168] Plaintiffs' first argument has already been disposed of.

[169] There remains the argument that by filing and presenting its Application to vacate, AAI effectively waived its State Immunity in virtue of the provisions of the *SIA*.

[170] The Court finds that the actions of AAI and the position adopted in the present proceedings from the outset do not tantamount to a waiver of its State Immunity, *bien au contraire*.

[171] Following the Seizure authorized on November 24, 2021, AAI filed on January 2, 2022, its Application to Dismiss the Seizure of its moneys in the hands of the Garnishee IATA. At the time, AAI expressly invoked its State Immunity under the *SIA* and indicated that it was proceeding without prejudice to and without waiving the same.

[172] Pursuant to the Application to Dismiss, AAI's principal conclusions on the merits were to (i) declare that the Seizure should not have been heard on an *ex parte* basis by Justice Granosik (ii) declare that AAI is a state agency benefiting from State Immunity, as provided for by the *SIA*, (iii) set aside the Seizure before judgment by garnishment authorized on November 24, 2021 (iv) remove AAI as Mis-En-Cause and (v) release the Garnishee IATA from the Seizure.

[173] The *SIA* provides that a *foreign state* may submit to the jurisdiction of a court and waive its immunity if, in any proceedings before a court, it "*intervenes or takes any step in the proceedings before the court*".

[174] AAI's counsel argued that a waiver must be unequivocal, certain and amount to a willingness from the body to waive its immunity from jurisdiction[99]. A waiver of immunity cannot be analogous to the treatment of waiver in domestic law. The test to be applied herein is more stringent:

> [27] Comme je l'ai déjà dit, l'argument de la renonciation est fondé sur le fait qu'un agent des ressources humaines de l'ambassade des États-Unis à Ottawa a accusé réception de la lettre de M. Bozzo. Cet accusé de réception ne constitue pas une renonciation à l'immunité. La jurisprudence concernant la renonciation à l'immunité accordée aux États étrangers, tant en vertu de la LIÉ qu'en droit international, est différente du traitement de la renonciation dans le contexte du droit national. La renonciation par un État étranger doit être explicite, sans équivoque, inconditionnelle et certaine. La renonciation doit également venir de l'État lui-même, et le représentant qui renonce à l'immunité doit être autorisé par l'État à le faire. En l'espèce, aucune de ces exigences n'est respectée ; voir, par exemple, *Defense Contract Management Agency—America (Canada) c Public Service Alliance of Canada and Ontario Labour Relations Board*, 2013 ONSC 2005.[100]
>
> [Emphasis added]

[175] AAI claims that it asserted its State Immunity at every step of the proceedings until the Seizure of its funds in the hands of the Garnishee IATA was quashed with the *IATA Act* Judgment, it has not taken any "*step in the proceedings*" within the meaning of the *SIA.*

[176] AAI's counsel also pointed out that, at all times, AAI acted under duress.

[177] The Court shares that both opinions.

[178] From the outset, on January 2, 2022, AAI appeared before the Superior Court, under reserve of its right to be duly served in accordance with the *SIA* and without prejudice to its presumptive State Immunity. AAI answered the Originating Application in the following terms:

> AAI is answering… solely in order to invoke State Immunity and to seek urgent relief so as to immediately end the irreparable harm being caused to it as a third-party by the garnishment of funds held by [IATA].
>
> This Response shall in no way be construed or otherwise used as, or effect a waiver of:
>
> > (a) Plaintiffs' duty to fully and adequately serve notice of proceedings, which Plaintiffs have failed to do; and

[99] *Dash 224, LLC v. Vector Aerospace Engine Services-Atlantic Inc*., 2016 PECA 4 (CanLII), para. 21–22.
[100] *United States of America v. Zakhary*, 2015 FC 335 (CanLII), para. 27.

> (b) any argument relating to jurisdiction or any type of immunity as regards to the Mis-En-Cause Airport Authority of India or any other party.

[179] The Court noted that this initial reserve of right was reiterated throughout the proceedings before this Court as well as the Court of Appeal. AAI's Court of Appeal appearance was made under a similar reserve of right, which plainly indicated that AAI was not waiving its rights under the *SIA*.

[180] For instance, on March 3, 2022, Justice Marie-Josée Hogue while considering Plaintiffs' Application for leave to appeal the Judgment on Seizure insofar as AAI was concerned, made the following comment:

> [34] Je rappelle d'abord qu'AAI n'est pas partie aux procédures arbitrales et qu'elle n'y fait l'objet d'aucune condamnation. Seule l'Inde est condamnée. La saisie des sommes que lui doit IATA a plutôt été autorisée sur la prémisse qu'elle est un *alter ego* de l'Inde. Dans ce contexte, elle fait valoir l'immunité de juridiction et d'exécution édictées par la LIÉ et insiste pour que les dispositions de la LIÉ, et par ricochet celles de la Convention, applicables à la signification d'un acte de procédure introductif d'instance destiné à un état étranger soient respectées.[101]
>
> [Emphasis added]

[181] Moreover, on June 6, 2022, after being served, AAI filed its Answer specifying that it was answering "*under reserve of all rights and legal objections and solely in order to invoke State Immunity pursuant to the* [*SIA*]." AAI added:

> 2. The filing of this Answer, and the participation of the Airport Authority of India in defending the present proceedings, including without limitation the establishment of a case protocol with Plaintiffs, shall in no way be construed or otherwise used as, or effect a waiver of, any argument relating to jurisdiction or any type of immunity pursuant to the *SIA* as regards to the Airport Authority of India or any other party.

[182] On the same day, AAI's counsel also wrote this Court a letter explaining that it was moving to dismiss on the basis of State Immunity, and was negotiating a schedule with Plaintiffs:

> We write on behalf of the mis-en-cause Airport Authority of India ("**AAI**") to advise the Court that, on or about April 25, 2022, AAI was served through the Central Authority of India with the proceedings in the above-referenced action. We are filing with this letter our Appearance on behalf of AAI.
>
> As the Court knows, AAI is an agency of the Republic of India ("**India**"). It therefore intends to move to dismiss the *Modified Judicial Application Originating a Proceeding in Recognition and Enforcement of Arbitration Awards Made Outside Québec* on the basis of its State Immunity.

[101] *CCDM Holdings c. Airport Authority of India*, 2022 QCCA 318.

> We have already communicated with counsel for Plaintiffs and are working with them to develop a proposed protocol for the adjudication of AAI's forthcoming application to dismiss. We expect to submit the proposed protocol to this Court for its consideration well within the 45-day delay provided for pursuant to the *Code of Civil Procedure*.
>
> [Emphasis added]

[183] In June 2022, at the time the Application to vacate was filed, the Seizure against the funds of AAI held by the Garnishee IATA had already been quashed on immunity grounds via the Judgment on Seizure[102] which specifically provided:

> [41] Without prejudice to any argument relating to the sufficiency or veracity of the allegations in the sworn declarations in support of Plaintiffs' First Seizure, the latter should be dismissed on the basis that AAI enjoys State Immunity provided for in the *State Immunity Act*, including in respect of execution against its property, and that AAI has not waived and is not waiving its State Immunity in any way.
>
> [42] This would explain why AAI has not engaged actively until now on the front of the insufficiency or veracity of Plaintiffs' allegations in order to avoid jeopardizing its State Immunity claim and standing.
>
> [Emphasis added]

[184] Likewise, the Application to vacate was filed under reserve of AAI's State Immunity claim. Both this Application and AAI's representations contained clear reservations of rights:

> 2. The present Application is filed without prejudice to AAI's State Immunity and should not in any way be construed as a waiver of such immunity or of any argument related thereto or to the jurisdiction of this Court.

[185] Despite the appeal of Plaintiffs with respect to the Judgment on Seizure insofar as AAI was concerned, with more than US$38M under seizure in the hands of IATA, the Application to vacate was prompted by the exceptional turn of events of June 2, 2022, when the *IATA Act* was assented to with retroactive effect to May 5, 2022, providing, *inter alia*:

> 1. Malgré toute disposition contraire, toute somme d'argent détenue par l'Association du Transport Aérien International et devant être payée à un participant à ses services financiers ne peut faire l'objet d'une saisie en mains tierces ou d'une mesure au même effet.

[186] As previously mentioned, on September 6, 2022, this Court granted the Application to vacate in part, declaring that the *IATA Act* rendered the Seizure inoperative for any

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[102] However, the Court of Appeal reestablished the stay of execution pending appeal of the Judgment on Seizure (still pending). Therefore, the Seizure remains in full force and effect (*CCDM Holdings c. Airport Authority of India*, 2022 QCCA 625).

sums of money received, collected or held by IATA for AAI's benefit after May 5, 2022. The Court declined, however, to rule on the effect of the new law on the sums of money seized before May 5, 2022, as the Court considered that such issue was already (and is still) pending before the Court of Appeal.

[187] The Court shares AAI's counsel opinion that the Application to vacate filed on June 27, 2022, and the *IATA Act* Judgment rendered on September 6, 2022, must also be placed in the broader factual context of the litigation initiated by Plaintiffs which involved the ROI as sole Defendant.

[188] The provisions of the *SIA* relied upon by Plaintiffs are found at Subsection 4 (2)(c) of the *SIA* specifying that *in any proceedings before a court, a foreign state submits to the jurisdiction of the court where it intervenes or takes any step in the proceedings before the court*.

[189] AAI contends that in the present circumstances, it never "*intervened*" nor ever "*took any step in the present proceedings*" within the meaning contemplated by the *SIA*.

[190] Having considered the nature of steps taken by AAI in the present instance[103], the Court finds that AAI's conduct herein simply does not amount to "*intervening*" or "*taking any step in the proceedings*" implying a recognition of the jurisdiction of the Court to decide the merits of Plaintiffs' case, which is totally foreign to AAI save for Plaintiffs' attempts to seize its assets to satisfy a debt of India for which AAI bears no liability.

[191] In fact, other than endeavouring to retrieve its own funds seized in the hands of the Garnishee IATA pursuant to a judgment rendered *ex parte* without dealing beforehand with its presumptive State Immunity with preliminary threshold applications, AAI has absolutely no interests on the merits of the proceedings initiated by Plaintiffs seeking the execution or enforcement of their Arbitration Awards against their sole Defendant the Republic of India. Under such circumstances, AAI cannot be expected to file a defence on the merits.[104]

[192] The contest a seizure before judgment authorized *ex parte* does not tantamount to *taking a step in the proceedings* pursuant to Section 4(2)(c) of the *SIA*.[105]

[193] Finally, AAI also contended that it had to bring the Application to vacate under duress adding that even if its Application to vacate were to be considered a "*step in the proceeding*", which it is not, it was undertaken under duress, with tens of millions of dollars seized on the basis of a fundamentally flawed *ex parte* process. Under such circumstances, it cannot constitute a waiver of State Immunity.

[194] Again, the Court shares that view.

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[103] *Dorais c. Saudi Arabian General Investment Authority*, 2013 QCCS 4498, para. 16.

[104] *Barer v. Knight Brothers LLC*, 2019 SCC 13, para. 63; *G. Van Den Brink B.V. c. Heringer*, (C.S., 1994-01-26), SOQUIJ AZ-94021135

[105] *Ibid*.

[195] In *Dash 224*[106], the Prince Edward Island Court of Appeal taking into account the context of the case at hand and the fact that the entity's property had been seized and immobilized, concluded that the proceedings were undertaken under duress and could not amount to a party voluntarily attorning to the Court's jurisdiction:

> [39] Even if there was a proceeding and NPC had taken a step in that proceeding, then, in my opinion, **they did so under duress**. Attornment involves a party voluntarily accepting the jurisdiction of the court. A party who has no choice but to appear does not appear voluntarily. That party appears under duress. An appearance under duress is not attornment to the jurisdiction.
>
> [40] NPC wrote in their factum September 13th: "The only way the validity of the interim preservation order could be challenged by the respondent was to join the application by the applicant."
>
> […]
>
> [44] The fallacy in that argument is obvious. Dash chose to proceed on an ex parte basis May 24th, 2013. Dash did not bring s.3 (2) of the *State Immunity Act* to the court's attention. Dash's interim preservation order was not an execution order but it did prevent NPC from using the airplane engines which NPC claimed as theirs. If NPC did nothing, their property would be tied up indefinitely. Given the elapsed time since the engines were made subject to a preservation order (we are now almost three years into the matter without Dash having actually amended, served or filed the amended application which would normally be the first step in a proceeding), the interim preservation order may as well have been an execution order. **It seems to me that NPC had no choice**. **If they did nothing, they would suffer harm as their property would be tied up almost indefinitely. NPC had no choice but to be added as a party to attack the validity of the *ex parte* order. Perhaps it would have been better if they had raised the issue of immunity in attacking the initial order. However, given the faulty nature of that order, one cannot fault them for acting as they did.**
>
> [45] In conclusion, I agree with the motions judge's conclusion that NPC did not attorn to the jurisdiction. There was really no proceeding until September 27th, 2013, at the earliest, NPC took no step in the proceeding, and if they did it was under duress. I would dismiss Dash's first ground of appeal.
>
> [Emphasis added]

[196] In *Wang v. Sun*[107], Justice Skolrood of the Supreme Court of British Columbia opined as follows while finding that a party having its property seized acted under duress. In such a context, narrow applications to set aside seizing orders were not found to be a submission to the jurisdiction of the court seized:

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[106] 2016 PECA 4 (CanLII).

[107] 2014 BCSC 87 (CanLII); see also *Mfi Export Finance Inc. v. Rother International S.A. de C.V. Inc.*, 2004 CanLII 16200 (QC CS) 172, paras. 72–75.

[44] In my view, the defendants did not attorn to the jurisdiction of this court by way of their application to set aside the garnishing order. Such an application falls within the exception identified by Wood J. A. in the *Mid-Ohio Imported Car Co.* decision as being made under duress. In that decision, Wood J. A. referred at para. 8 to **the historical definition of duress as being limited to "those circumstances in which property belonging to the protesting party had been seized by process and was in the custody of the foreign court**."

[45] More recently, in *Schwarzinger v. Bramwell*, 2011 BCSC 283 [*Schwarzinger*], at para. 49, Madam Justice Gray noted the definition of duress taken from the English decision of *Pao On and others v. Lau Yiu and another*, [1979] 3 All E.R. 65 at 78 (P.C.): "**Duress, whatever form it takes, is a coercion of the will so as to vitiate consent**." Madam Justice Gray also noted that this definition had been adopted in B.C. in *Byle v. Byle* (1990), 1990 CanLII 313 (BC CA), 65 D.L.R. (4th) 641 at 651 (B.C.C.A.).

[46] In *Schwarzinger*, Madam Justice Gray held that an application by the defendants to vary a worldwide Mareva injunction did not constitute attornment because the application was brought under duress. The scope of the injunction was such that the defendants were precluded from carrying on in the ordinary course of business and they were in effect compelled to bring the application in order to be able to carry on their day-to-day business operations.

[47] In the case at bar, the effect of the garnishing order obtained by Wang was to seize significant assets belonging to the defendants, which seizure they alleged caused them undue hardship. In the circumstances, the defendants had no alternative but to come before this court to seek to have the garnishing order set aside.

[48] It is not a case, as Wang characterized it, of the defendants availing themselves of this court's process and benefitting from the exercise of judicial discretion in their favour. Rather, it was Wang who invoked the court's jurisdiction initially by obtaining the garnishing order, again leaving the defendants with no recourse but to come before the court to recover their property.

[49] It is true that in their application to set aside the garnishing order, the defendants contested the merits of Wang's claim. For example, they denied that any money was in fact owing to Wang. However, they did so only in the context of seeking to establish grounds for setting aside the garnishing order. I do not think that it can be said that the defendants' application was concerned with the merits of Wang's claim.

[Emphasis added]

[197] Here, the Application to vacate does not result in a waiver of AAI's State Immunity.

[198] In fact, in the present case, the Court believes that it would have been wholly improper for AAI—*or Plaintiffs*—to have waited years, including pleading the present Application and any appeals from it, before informing the Court that the Seizure was rendered unlawful as a result of the *IATA Act*.

6. CONCLUSION

[199] In light of the foregoing, AAI's Application *de bene esse* to dismiss the Modified Judicial Application Originating a Proceeding in Recognition and Enforcement of Arbitration Awards made outside Québec dated September 16, 2022, shall be granted.

[200] AAI is an *organ* of India and is also a *separate juridical entity*, thereby rendering it an *agency* of India within the meaning of the *SIA*.

[201] As such, AAI benefits from its own State Immunity from jurisdiction and execution on its assets regardless of India's own State Immunity status.

[202] Plaintiffs have failed to establish any exception to or waiver of AAI's State Immunity pursuant to the *SIA*.

FOR THOSE REASONS, THE COURT:

[203] **GRANTS** the Airports Authority of India's *Application de bene esse to dismiss the Modified Judicial Application Originating a Proceeding in Recognition and Enforcement of Arbitration Awards Made Outside Québec* dated September 16, 2022;

[204] **DISMISSES** Plaintiffs' and Plaintiffs in continuance of proceedings' *Modified Judicial Application Originating a Proceeding in Recognition and Enforcement of Arbitration Awards Made Outside Québec* dated December 17, 2021, as against the Airports Authority of India;

[205] **DECLARES** that the Airports Authority of India is immune from the jurisdiction of the Superior Court of Québec in court file no. 500-11-060766-223 (500-17-119144-213 before February 21, 2022);

[206] **THE WHOLE** with legal costs.

MICHEL A. PINSONNAULT, J.S.C.

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Hearing dates: May 13, 14, 15 and 16, 2024

NB. French translation requested on August 19, 2024, and available on August 29, 2024