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: December 23, 2022

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
Airport Authority of India
and
Air India Limited
Impleaded Parties

and

International Air Transport Association

Third-Party Garnishee

JUDGMENT
ON
THE REPUBLIC OF INDIA'S APPLICATION *DE BENE ESSE* TO DISMISS *PLAINTIFFS' AND PLAINTIFFS IN CONTINUANCE OF PROCEEDINGS' MODIFIED JUDICIAL APPLICATION ORIGINATING A PROCEEDING IN RECOGNITION AND ENFORCEMENT OF ARBITRATION AWARDS MADE OUTSIDE QUÉBEC*
(Subsections 3(1) and 14(1) *State Immunity Act*, RSC 1985, c S-18)

OVERVIEW

[1] With their Court filing made on November 24, 2021, the Plaintiffs - and the Plaintiffs in continuation of the present proceedings - are essentially attempting to have recognized the following arbitral awards in the Province of Québec for the purpose of enforcement and execution:

- The arbitral Award entitled "*Award on Jurisdiction and Merits*" in the PCA Case Nº2013-09 issued on July 25, 2016[1], in The Hague, Netherlands, by a three-member tribunal of the Permanent Court of Arbitration (the "**PCA Tribunal**") composed of The Hon. Marc Lalonde, P.C., O.C., Mr. David R. Haigh, Q.C. and The Hon. Shri Justice Anil Dev Singh (the "**Merits Award**"), in the matter opposing CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Ltd. and Telcom Devas Mauritius Ltd. (collectively, the "**Original Plaintiffs**") to The Republic of India ("**Defendant**" or the "**ROI**"); and

- The arbitral Award entitled "*Award on Quantum*" in the PCA Case Nº2013-09 issued on October 13, 2020[2], in The Hague, Netherlands, by the same three-member of the PCA Tribunal composed of The Hon. Marc Lalonde, P.C., O.C., Mr. David R. Haigh, Q.C. and The Hon. Shri Justice Anil Dev Singh (the "**Quantum Award**" and together with the Merits Award, the "**Treaty Awards**"), in the matter opposing the Original Plaintiffs to Defendant.

  [the "**Originating Application**"]

[2] The Merits Award concluded that the ROI had breached its obligations under the "*Agreement Between The Republic of India And The Republic Of Mauritius For The*

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[1] **P-6**.
[2] **P-7**.

Promotion And Reciprocal Protection Of Investments by "*destroying*" the Original Plaintiffs' investment in Devas Multimedia Private Limited ("**Devas**"), a company constituted under the laws of India. Pursuant to the Quantum Award, the ROI was condemned to pay the Original Plaintiffs USD 111 million plus interest.

[3] While the ROI is presently contesting the Treaty Awards before the courts in the Netherlands, so far, the endeavours of the Original Plaintiffs and the Plaintiffs in continuance of proceedings[3] (collectively, the "**Plaintiffs**" unless stated otherwise), to execute the Treaty Awards in India and in other jurisdictions have not been successful, hence their filing in Montreal of the Originating Application on November 24, 2021.

[4] On the same day of the filing of the Originating Application, the Original Plaintiffs were authorized to proceed with the seizure by garnishment before judgment in the hands of the Third-Party Garnishee, the International Air Transport Authority (the "**IATA**"), whose head office is located in Montréal, Québec, of all sums of money held by the latter for the benefit of the ROI and/or of the Impleaded Party, the Airport Authority of India (the "**AAI**"), being allegedly the *alter ego* of the ROI (the "**November 24, 2021 Seizure by garnishment**").

[5] The November 24, 2021 Seizure by garnishment was followed with a second one authorized on December 22, 2021, against the Impleaded Party Air India Limited ("**Air India**") also on the basis the Air India was allegedly the *alter ego* of the ROI.

[6] The Originating Application and the seizures before judgment triggered additional proceedings and contestations by the ROI, the AAI and Air India with the objections also voiced by the IATA against those seizures by garnishment. One of these proceedings is the present Application *de bene esse* of the ROI to dismiss the Plaintiffs' Originating Application on the basis that the ROI is immune from the jurisdiction of this Court pursuant to the provisions of the *State Immunity Act* (the "**SIA**") (the "**ROI Application to dismiss**").

[7] On January 10, 2022, Ms. Jessica Dawson, Deputy Director, Criminal, Security and Diplomatic Law Division of Global Affairs Canada, filed in the present Court record a letter and certificate both dated December 22, 2021 ("**GAC's Letter and Certificate**"), *inter alia*, certifying that, under the authority of Canada's Minister of Foreign Affairs and pursuant to Section 14 of the SIA, the ROI is a foreign state for the purposes of the SIA.[4]

[8] Pursuant to Subsection 14(1) of the SIA[5], the GAC's Letter and Certificate are admissible in evidence as conclusive proof of the ROI's status as a foreign state for the purposes of the SIA.

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[3] On January 3, 2022, three uncontested Notices of continuance of proceedings were filed by the Plaintiffs in continuance of proceedings, CCDM Holdings, LLC ("**CCDM**"), Devas Employees Fund US, LLC ("**DEFU**") and Telcom Devas, LLC ("**Telcom**") (collectively the "**Plaintiffs in continuance**").

[4] **D-2**.

[5] **14 (1)** A certificate issued by the Minister of Foreign Affairs, or on his behalf by a person authorized by him, with respect to any of the following questions, namely,

[9] Given its certification status as a foreign state, the ROI claims that it enjoys a strong presumption of immunity from the jurisdiction of this Court pursuant to Subsection 3(1) of the SIA[6] and from the remedies sought from this Court by the Plaintiffs pursuant to their Originating Application.

[10] Under the present circumstances, it is up to the moving party namely the Plaintiffs to satisfy the Court that an exception to the ROI's state immunity applies.[7]

[11] In Canada, state immunity is governed by the SIA, i.e., a complete codification of Canadian law as it relates to state immunity from civil proceedings. Subsection 3(1) of the SIA exhaustively establishes the parameters for state immunity and its exceptions.

[12] In an attempt to rebut the strong presumption of the ROI's state immunity, the Plaintiffs rely on two distinct exceptions to state immunity provided under the SIA, namely

- the commercial activity exception provided under Section 5 of the SIA[8] (the "**Commercial Activity Exception**"); and

- the waiver exception provided under Subsection 4(2)(a) of the SIA[9] (the "**Waiver Exception**").

[13] The ROI claims that none of those two exceptions find application herein and that consequently, the Originating Application should be dismissed forthwith as against the ROI.

[14] As a subsidiary argument, the counsel for the ROI maintained that should the Court conclude that the Waiver Exception applies which means that his client actually waived immunity pursuant to Subsection 4(2)(a) of the SIA as a result of its participation in the two arbitrations that gave rise to the Treaty Awards, such a waiver would have been nullified in any event as a result of the findings of the Supreme Court of India (the "**SCI**") that the Devas Agreement[10] was "*tainted by fraud*" from the outset.

[15] In support of his position, counsel filed as Exhibit **D-6**, a certified true copy of the decision rendered on January 17, 2022, by the SCI in the case involving Devas Multimedia Private Limited ("**Devas**[11]") versus Antrix Corporation Limited ("**Antrix**") (the "**SCI Judgment**").

(a) whether a country is a foreign state for the purposes of this Act, […]

[6] **3 (1)** Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

[7] *Kuwait Airways Corp. v. Irak*, 2010 SCC 40, par. 22.

[8] **5.** A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

[9] **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; […]

[10] As defined hereafter.

[11] DEVAS is an acronym for "*Digitally Enhanced Video and Audio Services*".

[16] The Plaintiffs objected to the filing of the SCI Judgment with the view to establish that the Devas Agreement was "*tainted by fraud*" from the outset, a fact that they strenuously deny. They also complain that they were denied the opportunity by the Courts of India to participate and to present evidence in the legal proceedings that took place in India.

[17] In any event, the Plaintiffs argued that the ROI cannot rely on the comments made in the SCI Judgment to evidence its allegations of fraud in the present instance to counter or escape the Waiver Exception.

[18] The SCI Judgment dismissed an appeal of Devas regarding a decision of the National Company Law Appellate Tribunal ("**NCLAT**"), who had previously confirmed a decision of the National Company Law Tribunal ("**NCLT**") that ordered the winding up and liquidation of Devas at a behest of Antrix, who happens to be the most important debtor of Devas.

[19] The ROI argued that if the Waiver Exception was found to be applicable herein, the Court should nullify its application on the basis of the comments and findings of "*fraud*" by the SCI evidenced with a certified true copy of the SCI Judgment which is sufficient to establish the existence of "illegalities" and "fraud" tainting the Original Plaintiffs' investment in Devas and which justifies the ROI's refusal and opposition to the Plaintiffs' attempts to enforce the Treaty Awards.

[20] Should the Court dismiss their objection and consider accepting the SCI Judgment as evidence of its content in connection with the alleged "*fraud*", the Plaintiffs are requesting permission to adduce additional evidence to counter these allegations of fraud which would add several days of hearing.

[21] The ROI responded that allowing further evidence on the part of the Plaintiffs to counter the SCI Judgment would constitute an abuse of process by relitigation.

[22] The Plaintiffs' objection was taken under reserve by the Court (the "**Objection**") and shall be disposed of with the present judgment.

[23] Therefore, the Court must determine the following questions at issue:

- Do the exceptions provided in either Section 5[12] or Subsection 4(2)(a)[13] of the SIA apply in the case at hand so as to deprive the ROI of the immunity from Canadian courts it enjoys as a sovereign nation pursuant to Subsection 3(1) of the SIA?

- Can the ROI rely on the SCI Judgment to essentially dispute the application of the Waiver Exception by attacking the validity of the Treaty Awards and of the Treaty Arbitration on the basis that the agreement which at the core of that litigation was

[12] The Commercial Activity Exception.
[13] The Waiver Exception.

"*tainted by fraud*", thus nullifying the participation of the ROI to the Treaty Arbitration?

- In light of the foregoing, should the Court maintain the Objection of the Plaintiffs in connection with the proposed filing of the SCI Judgment by the ROI and subsidiarily, allow the presentation of additional evidence by the Plaintiffs to counter or rebut the comments and findings made in the SCI Judgment relating to "*fraud*"?

CONTEXT

1. THE DEVAS AGREEMENT

[24] On January 28, 2005, Devas Multimedia Private Limited (Devas), an Indian company in which the Original Plaintiffs were shareholders, and Antrix, an Indian state-owned company, entered into the "*Agreement for the Lease of Space Segment Capacity on ISRO/ANTRIX S-Band Spacecraft*[14]*"* (the "**Devas Agreement**").

[25] Since the ROI was not a party to the Devas Agreement, the latter claims that, accordingly, the Devas Agreement itself does not constitute an obligation the ROI has entered into.

[26] The Original Plaintiffs, CCDM Holdings, LLC ("**CC/Devas**"), Devas Employees Mauritius Private Limited ("**DEMPL**") and Telcom Devas Mauritius Limited ("**Telcom Devas**") are shareholders of Devas, which was established to offer satellite-based multimedia services in India.[15]

[27] The Original Plaintiffs are all corporations domiciled in the Republic of Mauritius ("**Mauritius**").

[28] Antrix is an Indian corporation wholly owned by the Government of India and operates as the "commercial arm" of the Indian Department of Space ("**DOS**") and of the Indian Space Research Organization ("**ISRO**").[16]

[29] In 2003, Antrix and the officers of Devas started negotiating the establishment of a hybrid satellite-terrestrial communications system involving both satellite and terrestrial transmission which would provide broadband wireless access and audio-video services within India.[17]

[30] During those discussions, it was proposed that ISRO would develop the satellite segment by building, launching and operating two satellites and leasing a segment of the spectrum capacity on these satellites to Devas. Devas would be responsible for the

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[14] **P-24**.
[15] Merits Award (**P-6)**, par. 5.
[16] Merits Award (**P-6**), par. 67(h).
[17] Merits Award (**P-6**), par. 75-76.

terrestrial segment by, among other things, building the complementary ground components of the network.[18]

[31] The Devas project envisaged the establishment of a hybrid satellite-terrestrial communications system "*that would enable Devas to offer two main* [commercial] *services to customers in India: (i) broadband wireless access and audio-video services, to facilitate the delivery of video, multimedia and (ii) information services across India to mobile users*"[19] (the "**Devas Project**").

[32] On January 28, 2005, Devas and Antrix entered the Devas Agreement for the lease of space segment capacity on ISRO/ANTRIX S-Band Satellite to be launched[20]. Under the Devas Agreement, Antrix leased spectrum capacity in the "S-band" (2500–2690 MHz) to Devas and agreed to provide two satellites to broadcast in that spectrum, to be built, operated, and launched by ISRO.

[33] In its preamble, the Devas Agreement provides that "*ANTRIX is a marketing arm of the Department of Space and is the entity through which ISRO engages in* ***commercial activities***." [Emphasis added]

[34] The preamble of the Devas Agreement also specifies that the leased S-band capacity shall be used by Devas for "t*he purpose of offering a S-DMB service, a new digital multimedia and information service, including but not limited to audio and video content and information and interactive services, across India that will be delivered via satellite and terrestrial systems* […] ('*Devas Services*')".

[35] Under the Devas Agreement, Devas and Antrix have agreed to "*collaborate to build, launch and operate Satellite(s) and the Devas Services, and recognize that enabling the Devas Services and activities related thereto requires execution of interdependent technical and* ***business activities***." [Emphasis added]

[36] All in all, the Devas Agreement was a commercial contract concluded between a private company owned by Mauritius shareholders and the commercial entity of the Indian government (the DOS and the ISRO), for the provision of a commercial communication system to customers in India.

[37] The satellites to be launched by ISRO were to form an integral part of a hybrid satellite/terrestrial system through which Devas would provide broadband wireless access and audio-video services cost effectively within India. Under the Devas Agreement, Devas was required to pay Antrix upfront fees of approximately USD 40 million to reserve transponder capacity on the two satellites, followed by an annual lease fee after the satellites were launched.[21]

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[18] Merits Award (**P-6**), par. 78.
[19] Merits Award (**P-6**), par. 76.
[20] **P-24**.
[21] Sworn declaration of Mr. Lawrence T. Babbio Jr. ("**Mr. Babbio**") dated November 12, 2021, par. 14-15.

[38] Following the execution of the Devas Agreement, from 2006 to 2011, the Original Plaintiffs injected multiple rounds of capital into Devas to enable it to make the required payments under the Devas Agreement and trigger Antrix's obligation to launch the two satellites and lease spectrum to Devas.[22]

2. THE INDIA-MAURITIUS BILATERAL INVESTMENT TREATY ("BIT")

[39] The Original Plaintiffs' investments in Devas were governed, *inter alia*, by the *Agreement Between The Republic of India And The Republic Of Mauritius For The Promotion And Reciprocal Protection Of Investments*[23] (the "**BIT**") entered into on September 4, 1998, between the ROI and Mauritius.

[40] Given the importance taken by the BIT in the Treaty Awards, it is necessary to expand further on its relevant aspects.

[41] The BIT provides in its preamble that it aims to "*create favourable conditions for greater flow of investments made by investors of either Contracting Party in the territory of the other Contracting Party*" and recognizes that "*the Promotion and Protection of such investment will lend greater stimulation to the development of business initiatives and will increase prosperity of* […] *both Contracting Parties*".[24]

[42] The BIT offers various protections to investors from both countries and provides for arbitration of disputes relating to their investments. Notably:

- Article 4(1) provides that the "*Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party*";

- Article 6(1) provides that "*investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalization or expropriation except for public purposes under due process of law, on a non-discriminatory basis and against fair and equitable compensation*";

- Article 6(3) creates a positive obligation for the ROI and Mauritius to compensate investors to *ensure fair and equitable compensation* where Contracting States take measures having effect equivalent to nationalization or expropriation against the assets of a company in which investors of the other Contracting Party own shares;

- Article 8(1) provides for a dispute settlement mechanism for "[a]*ny dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under* [the BIT]";

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[22] Sworn declaration of Mr. Babbio dated November 12, 2021, par. 16.
[23] **P-23**.
[24] *Ibid*.

- Article 8(2) specifically provides that if the dispute between the investor of a Contracting Party and the other Contracting Party cannot be solved amicably, the investor may submit the dispute to (a) arbitration in accordance to the law of the Contracting Party; (b) to the International centre for the settlement of Investment Disputes, under reserve of certain conditions; (c) to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law; or (d) to an *ad hoc* arbitral tribunal set up in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (the "**UNCITRAL Rules**"), subject to certain modifications; and

- Article 8(2)(d)(iii) further stresses that "*the arbitral award shall be made in accordance with the provisions of this* [BIT] *and shall be binding on the parties to the dispute*".

3. THE ANNULMENT OF THE DEVAS AGREEMENT

[43] The dispute that led, *inter alia*, to the Treaty Awards stemmed from the unilateral termination of the Devas Agreement some six years after entering into the same on January 28, 2005.

[44] Unbeknownst to Devas, from 2009 onwards, the ROI began discussing internally the termination of the Devas Agreement.[25]

[45] In July 2010, the ROI Space Commission adopted a resolution favouring the termination of the Devas Agreement.[26] Then, on February 17, 2011, the Cabinet Committee on Security (the "**CCS**") of the Government of India purported to terminate the Devas Agreement which was announced via the following press release:

> **CCS Decides to Annul Antrix-Devas Deal**
>
> Cabinet Committee on Security (CCS) has decided to annul the Antrix-Devas deal. Following is the statement made by the Law Minister, Shri M. Veerappa Moily on the decision taken by the CCS which met in New Delhi today:
>
> "Taking note of the fact that Government policies with regard to allocation of spectrum have undergone a change in the last few years and there has been an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S band to Antrix **for commercial activities**, **including for those which are the subject matter of existing contractual obligations for S band**.
>
> In the light of this policy of not providing orbit slot in S Band to Antrix **for commercial activities**, the 'Agreement for the lease of space segment capacity

[25] Merits Award (**P-6**), par. 117-125.
[26] Merits Award (**P-6**), par. 126-134.

> on ISRO/ Antrix S-Band spacecraft by Devas Multimedia Pvt. Ltd.' entered into between Antrix Corporation and Devas Multimedia Pvt. Ltd. on 28th January, 2005 **shall be annulled forthwith**."[27]
>
> [Emphasis added]

[46] As a result thereof, on February 25, 2011, Antrix notified Devas that the Devas Agreement had been terminated by reason qualified as "*force majeure*" by Antrix.[28]

[47] The termination of the Devas Agreement triggered, *inter alia*, the arbitration process that led to the Treaty Awards in favour of the Original Plaintiffs against the ROI based on the provisions of the BIT.

[48] Moreover, following Antrix's repudiation of the Devas Agreement, Devas also sought relief directly from Antrix, its contracting party pursuant to the Devas Agreement, and commenced an arbitration against Antrix under the auspices of the International Chamber of Commerce ("**ICC**") on July 1, 2011 (the "**ICC Arbitration**"). The ICC Arbitration was seated in New Delhi, India.[29]

[49] On September 14, 2015, the tribunal, composed of three arbitrators (the "**ICC Tribunal**"), unanimously rejected Antrix's defence of *force majeure*, held that Antrix had wrongfully repudiated the Devas Agreement and awarded Devas USD 562.5 million in damages plus 18% interest *per annum* (the "**ICC Award**")[30]

4. THE TREATY ARBITRATION

[50] On July 3, 2012, the Original Plaintiffs commenced an arbitration against the ROI pursuant to Article 3 of the UNCITRAL Rules and Article 8(2)(d) of the BIT (the "**Treaty Arbitration**")[31].

[51] As previously mentioned, the Treaty Arbitration, as per the provisions of Article 8(2)(d) of the BIT, was heard by a three-member arbitral tribunal under the auspices of the Permanent Court of Arbitration and was seated in The Hague, Netherlands. The Tribunal was chaired by Canadian arbitrator Mr. Marc Lalonde, P.C, O.C, Q.C., with Canadian arbitrator Mr. David Haig, Q.C., and Indian arbitrator the Hon. Shri Justice Anil Dev Singh.

[52] The Court understands that both parties were actively involved in the Treaty Arbitration, the ROI submitting a Statement of Defence on December 2, 2013, and a Rejoinder on July 1, 2014.

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[27] Merits Award (**P-6**), par. 146.
[28] Sworn declaration of Mr. Babbio dated November 12, 2021, par. 19-21.
[29] Sworn declaration of Mr. Babbio dated November 12, 2021, par. 26.
[30] **P-13**, par.401.
[31] **P-23**.

4.1 The Treaty Awards

[53] On July 25, 2016, the PCA Tribunal issued the Merits Award being an award on jurisdiction and merits finding the ROI liable for breaches of the BIT.[32]

[54] More specifically, the PCA Tribunal found the ROI liable for breaching its obligations under the BIT by unlawfully expropriating the Original Plaintiffs' investments in Devas and by failing to give them fair and equitable treatment in violation of Articles 4(1) and 6(1) of the BIT.[33]

[55] At paragraph 501 of the Merits Award, the PCA Tribunal held:

> 501. **For the reasons set out above, the Tribunal decides and awards as follows:**
>
> (a) Unanimously, that the Claimants' [the Original Plaintiffs] claims relate to an "investment" protected under the Treaty;
>
> (b) Unanimously, that the notice of termination of the Devas Agreement sent by Antrix to Devas constituted an act of State attributable to the Respondent [the ROI];
>
> (c) By majority, that the Tribunal lacks jurisdiction over the Claimants' claims insofar as the Respondent's decision to annul the Devas Agreement was in part directed to the protection of the Respondent's essential security interests;
>
> (d) By majority, that the Respondent has expropriated the Claimants' investment insofar as the Respondent's decision to annul the Devas Agreement was in part motivated by considerations other than the protection of the Respondent's essential security interests;
>
> (e) By majority, that the protection of essential security interests accounts for 60% of the Respondent's decision to annul the Devas Agreement, and that the compensation owed by the Respondent to the Claimants for the expropriation of their investment shall therefore be limited to 40% of the value of that investment;
>
> (f) Unanimously, that the Respondent has breached its obligation to accord fair and equitable treatment to the Claimants between July 2, 2010, and February 17, 2011;
>
> [g] Unanimously, that the Claimants' other claims shall be dismissed;
>
> (h) Unanimously, that any decision regarding the quantification of compensation or damages, as well as any decision regarding the allocation of the costs of arbitration, shall be reserved for a later stage of the proceedings.[34]

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[32] **P-6**.
[33] Merits Award (**P-6**), par. 351-377, 410-425 and 449-470.
[34] *Ibid*.

4.2 The Quantum Award

[56] On October 13, 2020, the PCA Tribunal issued the Quantum Award[35] on the damages, in virtue of which the majority awarded to the Original Plaintiffs over USD 111 million plus interest, as compensation for the expropriation of 40% of the Original Plaintiffs' interests in the satellite/terrestrial communications business owned by Devas pursuant to the Devas Agreement, the whole as per paragraph 663 of the Quantum Award:

> 663. **For the reasons set out above, the Tribunal, by majority, decides as follows:**
>
> (a) The total value of Devas on February 17, 2011, is USD 740 million.
>
> [b] Each Claimant is entitled to compensation pursuant to the Award on Jurisdiction and Merits dated July 25, 2016, in an amount corresponding to 40% of USD 740 million, multiplied by the percentage of its shareholding.
>
> (c) The Respondent shall accordingly pay compensation to the Claimants in the following amounts:
>
> - CC Devas (holding 17.06% of the issued share capital of Devas): USD 50,497,600;
>
> - Telcom Devas (holding 17.06% of the issued share capital of Devas): USD 50,497,600; and
>
> - DEMPL (holding 3.48% of the issued share capital of Devas): USD 10,300,800.
>
> (d) The Respondent shall pay interest on the amounts stated in paragraph (c) at a rate of the six-month USD LIBOR + 2 percentage points, compounded semi-annually from February 17, 2011, until the date of full payment.
>
> (e) The Claimants and the Respondent shall share equally the Tribunal's costs and fees pursuant to Article 38(a), (b) and (c) of the UNCITRAL Rules, including the cost of expert advice and the administration of this arbitration by the PCA. Each side shall bear the fees and expenses of the appointing authority that it has expended pursuant to Article 38(f) of the UNCITRAL Rules.
>
> (f) The Respondent shall pay the Claimants pursuant to Article 38(c), (d), and (e) of the UNCITRAL Rules the amount of USD 10,000,000.
>
> (g) The Respondent shall pay post-award interest at a rate of the six-month USD LIBOR + 2 percentage points on the amount due pursuant to paragraph (f)

[35] **P-7**.

> compounded semi-annually from the date of this Award until the date of full payment.
>
> (h) In the event that LIBOR were to be discontinued while any amounts pursuant to paragraphs (c) and (f) remain outstanding, the interest due shall, from that date onward, be calculated on the basis of SOFR + 2 percentage points.
>
> (i) The Respondent may not withhold or offset payment of any portion of the award based on a claim that such amount is subject to taxation or other deductions.
>
> (j) The Respondent shall indemnify the Claimants with respect to any Indian taxes, charges, or other set-offs imposed on the compensation awarded.
>
> (k) Prior to payment of any amounts awarded in paragraphs (c), (d), (f) and (g), the Claimants shall provide an undertaking that they will not seek double recovery in relation to their investment and will take appropriate steps to ensure that they are not compensated twice in the event that any damages were to be paid by Antrix Corporation Limited to Devas Multimedia Private Limited pursuant to the ICC Award.
>
> (l) All other claims are dismissed.[36]

[57] So far, despite the Plaintiffs' demands, the Court understands that the ROI has failed to pay what is owed under the Treaty Awards, hence the filing of the Originating Application in Montreal after the Original Plaintiffs identified significant assets they believe belong to the ROI in the Province of Québec.

[58] The ROI justifies its refusal to pay as it is presently contesting the Treaty Awards before the courts in the Netherlands. It is not clear whether the present appeals in the Netherlands include the more recent argument that Devas' investment process was allegedly "*tainted by fraud*" which would vitiate, to all intents and purposes, the Treaty Awards that are based on the provisions of the BIT.

[59] Insofar as the Originating Application is concerned, the ROI is raising its state immunity which precludes the Plaintiffs from proceeding in Québec against a sovereign state who never waived in any manner whatsoever its state immunity pursuant to the SIA, a fact that is strongly disputed by the Plaintiffs.

ANALYSIS

[60] Firstly, the Court must address the immunity issues raised by the Plaintiffs that the ROI cannot successfully invoke its state immunity in the present instance based upon the exceptions provided in Section 5 and Subsection 4(2)(a) of the SIA so as to deprive the ROI of the immunity it enjoys from Canadian courts pursuant to Subsection 3(1) of the SIA.

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[36] *Ibid*.

[61] A single exception suffices to dismiss the ROI Application to dismiss.

[62] Secondly, depending on its findings with respect to the application of the aforementioned exceptions, the Court shall deal with the Objection taken under reserve in connection with the filing by the ROI of a certified true copy of the SCI Judgment and, if need be, determine the incidence or the impact of the SCI's findings and comments regarding Devas' alleged fraudulent conduct in concluding the Devas Agreement which, according to the ROI's counsel, should nullify the effects of the Waiver Exception.

[63] However, should the Court find that the Commercial Activity Exception applies herein, the subsidiary argument of the ROI claiming that the SCI Judgment and its findings and comments regarding Devas would be sufficient to nullify the Waiver Exception of Subsection 4(2)(a) of the SIA, would become moot.

[64] The Court shall begin its analysis by determining whether the Commercial Activity Exception can be successfully raised by the Plaintiffs against the ROI herein.

5. THE COMMERCIAL ACTIVITY EXCEPTION OF SECTION 5 OF THE SIA

[65] Did the Plaintiffs establish that the Commercial Activity Exception of Section 5 of the SIA applies and can be opposed to the ROI in the present instance?

5.1 Conclusion

[66] The Court answers this question in the affirmative. The Commercial Activity Exception applies herein.

[67] Here is why.

5.2 Discussion

[68] According to Section 5 of the SIA, which codifies the commercial/sovereign distinction for the purposes of jurisdictional immunity, a foreign state is not immune from the jurisdiction of a Canadian court in any proceedings that relate to any commercial activity of the foreign state.

[69] Section 5 of the SIA establishing the Commercial Activity Exception reads as follows:

> **5.** A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

[70] Section 2 of the SIA provides the following definition of *commercial activity*:

> ***commercial activity*** means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character;

> ***activité commerciale*** Toute poursuite normale d'une activité ainsi que tout acte isolé qui revêtent un caractère commercial de par leur nature.

[71] As is clear from the wording of Section 5 of the SIA, the Court needs to determine if the ROI's activity in issue in the proceedings conducted in The Hague that led to the Treaty Awards, is of a commercial character.

[72] In order to determine whether the Commercial activity exception applies in the present case, it is essential to properly characterize what the present recognition and enforcement proceedings are about. They stem directly from the Treaty Awards.

[73] On that specific issue, the parties adopted radically different positions.

[74] The Plaintiffs are basing their approach on a careful consideration of the entire circumstances and context that brought the ROI to participate to the two arbitrations held in The Hague that led to the Treaty Awards and to the condemnation of the ROI to pay some USD 111 million to the Plaintiffs as shareholders of Devas in damages for the loss of the commercial venture.

[75] The entire exercise involving the Plaintiffs i.e., the persons from Mauritius who agreed to invest in Devas in India, was a strictly commercial matter gone sour due to a unilateral decision of the ROI made in violation of the provisions of the BIT.

[76] It is important to bear in mind that the ROI was allowed to cancel the Devas Agreement. However, under such circumstances, the Devas shareholders were entitled to a certain *fair and equitable compensation* pursuant to the provisions of the BIT, as it will be more fully discussed hereafter.

[77] The investments made by the shareholders of Devas all being corporations of Mauritius were governed by, *inter alia*, the BIT entered between the ROI and Mauritius.

[78] The BIT which is entitled "*Agreement Between The Republic of India And The Republic Of Mauritius For The Promotion And Reciprocal Protection Of Investments*" entered into force on September 4, 1998.[37]

[79] The ROI relied on an extremely narrow construction of the activity at issue, rather than acknowledging that it in fact breached the BIT, clearly being a commercial treaty.

[80] The ROI disputed that the Plaintiffs' approach and favoured instead a somewhat narrower outlook by inviting the Court to conclude that the Treaty Awards were not based on any commercial activity involving the ROI – making a distinction with Antrix, the India State-owned company that dealt directly with Devas - but was rather based on the exercise of a sovereign act being a policy decision taken by the Government of India via the ROI's Cabinet Committee on Security (the "**CCS**").

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[37] **P-23**.

[81] The CCS is a select Cabinet committee comprised of the Prime Minister, the Minister of Home Affairs, the Minister of External Affairs, the Minister of Finance, and the Minister of Defence of the ROI, that deals with, among other matters, issues related to defence, law and order, internal security, as well as economic and political issues impinging on national security.

[82] In other words, being a sovereign act made by the ROI, the policy decision itself that ultimately led to Antrix repudiating the Devas Agreement on the basis of *force majeure*, did not entail any elements of a commercial nature and all consequences or ramifications thereof cannot be assimilated to a commercial activity pursuant to the purview of the SIA.

[83] However, the entire contextual approach favoured by the Plaintiffs is supported by the decision of the Supreme Court of Canada in *Re Canada Labour Code*[38], in which the Court set out the correct analytical approach to determine if the foreign state activity falls under the Commercial Activity Exception:

> Before delving into the specific questions posed by this case, it is useful to consider first the common law antecedents of the *State Immunity Act*, and then to compare Canada's codification of the common law with the statutory model in the United States. As will become apparent, the law in this area reveals a consistent pattern of development that has arrived at a point where state activity can be characterized only after appreciating its entire context. Rigid dichotomies between the "nature" and "purpose" of state activity are not helpful in this analysis.
>
> […]
>
> It seems to me that a contextual approach is the only reasonable basis of applying the doctrine of restrictive immunity. The alternative is to attempt the impossible — an antiseptic distillation of a "once-and-for-all" characterization of the activity in question, entirely divorced from its purpose. It is true that purpose should not predominate, as this approach would convert virtually every act by commercial agents of the state into an act *jure imperii*. However, the converse is also true. Rigid adherence to the "nature" of an act to the exclusion of purpose would render innumerable government activities *jure gestionis*.
>
> I would draw one simple lesson from the common law and the American experience in applying a statutory restrictive immunity model: the proper approach to characterizing state activity is to view it in its entire context. This approach requires an examination predominantly of the nature of the activity, but its purpose can also be relevant. As at least one Canadian academic has suggested, if a consideration of the purpose of an activity is helpful in determining its nature, Parliament has not excluded the possibility of doing so; see Emanuelli,

[38] *Re Canada Labour Code, [*1992] 2 S.C.R. 50 at pages 70, 73 & 74.

> "Commentaire: La Loi sur l'immunité des États" (1985), 45 *R. du B.* 81, at pp. 100-101.
>
> [Emphasis added]

[84] Subsequently, in *Kuwait Airways v. Iraq*, the Supreme Court reiterated that in order to determine the character of the foreign state's activity, one needs to look at the entire context of the activity. The Court also insisted that it would be erroneous to only ask if the acts performed by the state were done to fulfill a public policy objective or to preserve a public interest, as this would inevitably give the activity a sovereign character.[39]

[85] The Court shares the view of the counsel for the Plaintiffs that when looking at the *"entire context of the activity",* deference must be given to the finding of facts of the PCA Tribunal. Indeed, since the ROI's state immunity claim arises in the context of an Application for the recognition and enforcement of a foreign arbitration award, this Court is not called to "*retry the case and therefore must not reassess the facts"*.[40]

[86] Therefore, upon a proper determination of the activity at issue – namely, the ROI's breaches of a commercial treaty arising from its annulment of a commercial contract without *fair and equitable compensation* - it is clear in the Court's opinion that the ROI is not immune from the jurisdiction of this Court since the Commercial Activity Exception can be validly invoked by the Plaintiffs.

[87] The activity at issue is properly determined in light of the following context.

[88] However, the present context requires that the Court considers the findings made by the PCA Tribunal in the Treaty Awards which are the basis of the present legal proceedings in Québec.

5.3 Facts relevant to the issue

[89] On January 28, 2005, Devas, an Indian company in which the original Plaintiffs were shareholders, and Antrix, an Indian state-owned company, entered into the Devas Agreement which purported to the *Lease of Space Segment Capacity on ISRO/ANTRIX S-Band Spacecraft*[41] as its title indicated.

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[39] *Kuwait Airways Corp. v. Iraq,* 2010 SCC 40, paras. 30-33.
See also: *Homburg v. Stichting Autoriteit Financiële Markten*, 2017 NSCA 62; *Produits métalliques AT inc. c. Province du Nouveau-Brunswick*, 2017 QCCS 627, paras. 27-29; *Bombardier Inc. v. AS Estonian Air*, 2013 ONSC 3039 para. 45.

[40] *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, paras 23 and 31; *Greenkey Ltd. c. Trovac Industries* Ltd., 2017 QCCS 3270, para. 4.

[41] **P-24**.

[90] Antrix is the commercial arm of the ISRO, the Indian Space Research Organisation which is wholly owned by the Government of India and coming under the administrative control of the Department of Space.[42]

[91] As previously indicated, the counsel for the ROI insisted that his client was not a party to the Devas Agreement, which was entered into solely between Devas and Antrix and that when entering into the Devas Agreement, Antrix was not acting as an organ of the ROI. Accordingly, the Devas Agreement itself would not constitute in itself an obligation entered into by the ROI.

[92] Nobody is disputing that fact.

[93] The ROI's argument goes further. Not being a party to the Devas Agreement, the ROI submitted that it cannot be considered as having been involved in a commercial activity vis-à-vis the Plaintiffs.

[94] With respect, the Court disagrees. The analysis does not stop there.

[95] The focus must be placed on the BIT and the Treaty Awards that are at the core of the legal proceedings instituted in Québec by the Plaintiffs against the ROI.

[96] The Treaty Awards which led to a monetary condemnation against the ROI, result directly from the ROI's failure to honour its contractual obligations and undertakings under the BIT – not the Devas Agreement - that was entered into to, *inter alia*, incite the citizens of Mauritius to make financial and commercial investments in India.

[97] Pursuant to the Devas Agreement, Antrix leased spectrum capacity in the S-band to Devas and agreed to provide, via the ISRO, two satellites to broadcast in that spectrum for commercial purposes.

[98] The Court understands that the S-band is a portion of the electromagnetic spectrum found at 2500-2690 MHz. The S-band is a scarce and highly desirable spectrum due to its specific characteristics – its frequencies have low attenuation (i.e., the signal does not fade) and the signal can be sent and received by small units, such as mobile phones and laptop computers, without requiring the antenna on such units to be pointed directly at the satellite.[43]

[99] The ROI was allocated a specific proportion of the S-band capacity by the International Telecommunications Union (the "**ITU**"), the United Nations specialized agency for information and communication technologies.[44]

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[42] The SCI Judgment, para. 3.1.
[43] The Merits Award (**P-6**), para. 72.
[44] The Merits Award (**P-6**), para. 71.

[100] According to the ROI's counsel, his client's role was strictly limited to that of a regulator without any involvements in commercial activities.

[101] Again, it may be so from a narrow standpoint. But the foregoing cannot negate the ROI's contractual obligations under the BIT which purported to promote and protect foreign direct investments made in India by investors from Mauritius.

[102] A fact that the ROI cannot deny is that the goal sought by entering into the Devas Agreement and allocate a portion of the S-band was to ultimately enable Devas to offer to the citizens of India various multimedia and telecommunication services (television, Internet, etc.) against remuneration. This venture was clearly a commercial venture.

[103] With all due respect, the Court fails to see how this venture concluded with Antrix should not be characterized as one of a commercial nature.

[104] In light of the foregoing, by becoming shareholders of Devas, the Plaintiffs from Mauritius were investing in Devas being a commercial venture who in turn invested in India to realize a commercial project that would offer multimedia and telecommunication services to the citizens of India who were expected to pay for such services.

[105] In other terms, by investing in Devas, the Plaintiffs were financing a commercial activity in India that was covered by the financial protection offered by the BIT.

[106] The Treaty Awards, which Plaintiffs seek to enforce, resulted from the breaches of the ROI to the BIT, being itself a commercial investment treaty.

[107] The ROI's breaches to the BIT arise from the way and the reasons for which the ROI caused the annulment or repudiation of the Devas Agreement, a commercial contract.

[108] The considerations and findings that led the PCA Tribunal to conclude that the ROI was involved in the termination of the Devas Agreement and that its contractual liability towards the Plaintiffs was triggered as a result thereof pursuant to the provisions of the BIT, are highly relevant for the purposes hereof.

5.3.1 The CCS decision to annul the Devas Agreement

[109] As previously mentioned, six years after the execution of the Devas Agreement, on February 17, 2011, the CCS adopted a policy decision to reserve the S-band for national and societal needs, having regard to the needs of the country's strategic requirements, thereby deciding not to provide orbit slot in the S-band to Antrix for its commercial activities.

[110] Paragraph 146 of the Merits Award clearly reveals that it was the ROI who decided to annul unilaterally the Devas Agreement:

> 146. On February 17, 2011, the CCS took the decision to annul the Devas Agreement. On the same day, the Government of India issued a press release announcing that the CCS had decided to annul the Devas Agreement. The press release reads in full:
>
> CCS Decides to Annul Antrix-Devas Deal
>
> Cabinet Committee on Security (CCS) has decided to annul the Antrix-Devas deal. Following is the statement made by the Law Minister, Shri M. Veerappa Moily on the decision taken by the CCS which met in New Delhi today:
>
> "Taking note of the fact that Government policies with regard to allocation of spectrum have undergone a change in the last few years and there has been an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S band to Antrix **for commercial activities**, including for those which are the subject matter of existing contractual obligations for S band.
>
> In the light of this policy of not providing orbit slot in S Band to Antrix for commercial activities, the 'Agreement for the lease of space segment capacity on ISRO/ Antrix S-Band spacecraft by Devas Multimedia Pvt. Ltd.' entered into between Antrix Corporation and Devas Multimedia Pvt. Ltd. on 28th January, 2005 **shall be annulled forthwith**." [45]
>
> [Emphasis added]

[111] On February 25, 2011, citing the decision of the CCS, Antrix gave notice to Devas that the Devas Agreement was terminated pursuant to the provisions of Article 11 entitled "*Force majeure*".

[112] Following Antrix's repudiation of the Devas Agreement, Devas pursued relief from Antrix pursuant to the Devas Agreement and commenced the ICC Arbitration under the auspices of the ICC, the International Chamber of Commerce on July 1, 2011.

[113] On September 14, 2015, the ICC Tribunal rendered the ICC Award[46] and unanimously rejected Antrix's defence of *force majeure*, held that Antrix had wrongfully repudiated the Agreement and awarded Devas USD 562.5 million in damages plus 18% interest *per annum*.

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[45] Press Information Bureau, Government of India, Cabinet, *CCS Decides to Annul Antrix-Devas Deal,* February 17, 2011 (Ex. C-134/JCB-220). *See also Prime Minister Manmohan Singh's Interaction with Editors of the Electronic Media,* The Hindu, February 16, 2011, pp. 6-7.

[46] **P-13**.

[114] Having seen the Devas Agreement repudiated by Antrix as a direct result of a decision made by the ROI on February 17, 2011, the Original Plaintiffs, as Mauritius shareholders of Devas, sought to be indemnified by the ROI pursuant to the provisions of the BIT and the undertakings of the ROI made therein.

[115] The decision of the ROI that led directly to Antrix's repudiation of the Devas Agreement prevented the materialization of a commercial venture involving Devas in India.

[116] The CCS Decision leaves no doubt in the mind of the Court as to its commercial ramifications and adverse consequences on Devas, the commercial operations of Devas in India and on its shareholders.

[117] It is crucial to bear in mind that according to Article 6 of the BIT entitled "*Expropriation*", the parties provided for an exception enabling the ROI to expropriate an investment of eligible Mauritius investors (or to subject the same to measures having effects equivalent to nationalization or expropriation).

[118] The PCA Tribunal considered that an expropriation for public purposes constituted an exception to the ROI's contractual obligation of providing a f*air and equitable compensation* as a result thereof. Otherwise, the expropriation had to be made *against fair and equitable compensation which should amount to the market value of the investment expropriated immediately before the expropriation*.

[119] Article 6 of the BIT pertaining to the issue of *Expropriation*, reads as follows:

> (1) Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation. or expropriation except **for public purposes**, under due process of law, on a non-discriminatory basis and **against fair and equitable compensation**. **Such compensation shall amount to the market value of the investment expropriated** immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a fair and equitable rate until the date of payment, shall be made without unreasonable delay and shall be effectively realizable and be freely transferable.
>
> (2) The investor affected by the expropriation shall have right, under the law of the Contracting Party making the expropriation, to review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph,
>
> (3) Where a Contracting Party expropriates, nationalises or takes measures having effect equivalent to nationalisation or expropriation against the assets of a company which is incorporated or constituted under the laws in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this article are applied

> to the extent necessary to ensure fair and equitable compensation as specified therein to such investors of the other Contracting Party who are owners of those shares.
>
> [Emphasis added]

[120] The Court finds it highly relevant that the majority of the PCA Tribunal in its appreciation of the evidence adduced by both parties at the time found that as a direct result of the CCS Decision, only 60% of the S-band spectrum allocated under the Devas Agreement was expropriated for *public purposes* as it related to essential national security imperatives and concerns that were excluded from the investment protection offered to eligible investors under the BIT.

[121] The majority of the PCA Tribunal nevertheless found that the expropriation of the remaining 40% of the S-band spectrum allocated to Devas was for *other public interest purposes* and was indeed subject to the expropriation protection under Article 6 of the BIT:

> 373. On the basis of the evidence submitted to it as described above and bearing in mind that the Respondent had already reserved to itself 10% of the spectrum in question, the Tribunal, by majority, is of the view that a reasonable allocation of spectrum directed to the protection of the Respondent's essential security interests would not exceed 60% of the S-band spectrum allocated to the Claimants, the remaining 40% being allocated for other public interest purposes and being subject to the expropriation conditions under Article 6 of the Treaty. It will be up to the Tribunal, in the next phase of this arbitral process (damages), to establish the compensation due to the Claimants in that respect.
>
> 374. This is independent of any liability Antrix may have incurred for contractual breach of the Devas Agreement.[47]
>
> [Emphasis added]

[122] The USD 111 million awarded to the Plaintiffs pursuant to the Quantum Award represented what the PCA Tribunal considered to be a *fair and equitable compensation* amounting to 40% of to the market value of their investment immediately before the expropriation.

[123] For the PCA Tribunal to conclude as it did, it had to analyze the CCS Decision and determine whether the ROI policy decision involved consequences that went beyond the *public purposes* exception contemplated in the BIT.

[124] The PCA Tribunal found that 40% of the expropriation of the Devas investment was not for *public purposes* within the meaning of Article 6 of the BIT, thus constituting a breach of the ROI's contractual obligations towards the Plaintiffs under the BIT. As a

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[47] **P-6**.

direct result of the foregoing, the expropriation of that 40% portion of the Devas investment required *a fair and equitable compensation*.

[125] Upon determining the market value of the Devas investment, the PCA Tribunal came to the conclusion that the market value of the expropriated 40% portion amounted to some USD 111 million. Establishing the market value of a commercial investment at a certain date had a commercial connotation as well for sure.

[126] With all due respect, the Court fails to see how this entire exercise could be carried out in a context that would only be considered a commercial activity from the standpoint of the Plaintiffs while the ROI was concurrently only exercising a sovereign act by way of a policy decision taken by the Government of India via its Cabinet Committee on Security.

[127] The CCS Decision may have been a policy decision at the outset but given the contractual obligations and undertakings made by the ROI upon executing the BIT, the ramifications and consequences of the aforesaid policy decision definitely had a commercial impact insofar as the Plaintiffs who were directly affected and who benefitted from the protection provisions of the BIT, were concerned.

[128] For the purposes hereof, the CCS Decision being a policy decision of the ROI cannot be considered in a vacuum without the BIT, a commercial treaty pursuant to which the ROI not only accepted to promote investments in India by Mauritius and its citizens but also offered a certain form of financial protection should their investments be expropriated in whole or in part under specific circumstances more fully set out in the BIT.

[129] There is no doubt in the eyes of the Court that by executing the BIT, the ROI decided and accepted to conduct commercial activities within the meaning of Section 5 of the SIA, to promote investments in India.

[130] The Court shares the view of counsel for the Plaintiffs that indeed, in the Merits Award, the PCA Tribunal found that the Plaintiffs were qualified investors under Article 1(1)(b) and Article 1(1)(a) of the BIT.[48] The PCA Tribunal stated that these investments consisted of the “time and money” that Plaintiffs invested in Devas.[49] Indeed, the Treaty Arbitration arose from the conclusion and subsequent annulment of the Devas Agreement, a commercial contract between Devas and Antrix, a State-owned commercial corporation, described as the “commercial arm” of the DOS.[50]

[131] The Devas Agreement was therefore the vehicle of the Plaintiffs’ commercial investment under the BIT, and the ROI’s unilateral annulment of the Devas Agreement resulted in the expropriation of the Plaintiffs’ commercial investment under the BIT.

[48] Merits Award, **P-6**, par. 210.
[49] Merits Award, **P-6**, par. 207-208.
[50] Merits Award, **P-6**, par. 67(h).

[132] The ROI understandably wanted to stay clear of the Devas Agreement which it described as "a *contract to which the ROI was not a party and any alleged breach of which is not the object of the Treaty Arbitration*."[51] However, a simple reading of the Merits Award makes it clear that the ROI's decision to annul the Devas Agreement was at the root of the PCA Tribunal's conclusion that the ROI breached the BIT.

[133] In other terms, had the ROI not annulled the Devas Agreement, there would have been no Treaty Arbitration.

[134] Moreover, the PCA Tribunal concluded that part of the ROI's decision to terminate the Devas Agreement was motivated by objectives "*which had nothing to do with national security*,"[52] and therefore ordered the ROI to compensate the Plaintiffs for the expropriation of their investment.

[135] The activity at stake herein is predominantly commercial: the ROI breached a commercial treaty by annulling a commercial contract without offering a *fair and equitable compensation* to the investors being the Plaintiffs.

[136] In conclusion, the subject matter of the dispute before the PCA Tribunal was plainly a commercial investment dispute involving the ROI, and the PCA Tribunal found that the ROI breached its obligation under a commercial treaty not to expropriate the investments of investors of Mauritius except for public purposes and only upon *fair and equitable compensation*.

[137] Thus, the nature, the purpose and the entire context of the ROI's actions giving rise to the Treaty Arbitration are commercial.

[138] Consequently, Section 5 of the SIA applies to the present Québec Superior Court recognition and enforcement proceedings and the ROI does not benefit from its state immunity in the present proceedings.

[139] As one exception raised by the Plaintiffs clearly finds application in the case at hand, it is sufficient, in the opinion of the Court, to dispose of the issue of the state immunity invoked by the ROI in the present instance.

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[51] The ROI Reply, par. 21.

[52] Merits Award, **P-6**, par. 371:

371. The Tribunal, by majority, therefore concludes that, although the CCS decision of 2011 appears to have been in part "directed to the protection of its essential security interests," that part remained undefined and several other objectives were included in that decision, which had nothing to do with national security. In the circumstances, the Tribunal rules that, although the Respondent was fully entitled to reassign the S-spectrum to non-commercial use, the part which was not reserved for military or paramilitary purposes would be subject to the provisions of Article 6 of the Treaty concerning expropriation. [Emphasis added]

[140] The two exceptions invoked by the Plaintiffs do not have to be necessarily established by the Plaintiffs in order to enable the Court to determine if the ROI is immune from the jurisdiction of the Superior Court in Canada in the present instance.

[141] Once one of the exceptions stipulated in the SIA is found to be applicable, it is sufficient to enable the Court to determine that the ROI cannot oppose to the Plaintiffs its state immunity in the present instance.

[142] The foregoing conclusion reached by the Court regarding the Commercial Activity Exception raised by the Plaintiffs justifies in itself the dismissal of the ROI Application to dismiss by the sole operation of Section 5 of the SIA, without having to determine whether the Waiver Exception of Subsection 4(2)(a) of the SIA also applies.

[143] Be that as it may, without affecting in any manner whatsoever its decision to dismiss the ROI Application to dismiss, the Court will nevertheless discuss the issues related to the Waiver Exception and the Objection taken under reserve.

6. THE WAIVER EXCEPTION OF SUBSECTION 4 (2) (a) OF THE SIA AND THE OBJECTION

[144] The Plaintiffs have argued that the Waiver Exception stemming from Subsection 4(2)(a) of the SIA, which reads as follows, also applies to deny the status of immunity claimed by the ROI herein:

> **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; […]

6.1 Conclusions

[145] Although this Exception is not necessary to deny the ROI Application to dismiss, the Court nevertheless agrees with the Plaintiffs.

[146] For the reasons that follow, the Court finds that the Waiver Exception of Subsection 4 (2) (a) of the SIA, also applies herein and can be validly opposed to the ROI by the Plaintiffs.

[147] With respect to the Objection of the Plaintiffs to the filing by the ROI of the SCI Judgment[53] and its proposed use to establish as a proven and binding fact that the Devas Project was *tainted by fraud*, as a subsidiary argument to nullify, to all intents and purposes, the Waiver Exception invoked herein by the Plaintiffs, the Court shall dismiss the Objection but in part only.

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[53] **D-6**.

[148] Therefore, the Court shall permit the production of the SCI Judgment but solely to evidence the fact that the SCI affirmed the legality of the process of the liquidation of Devas in India in the circumstances more fully set out in said judgment, no more, no less. Moreover, the SCI Judgment may potentially have a certain relevancy in the context of a future hearing on the merits.

6.2 Discussion

[149] According to the Plaintiffs, the second exception namely the Waiver Exception also applies independently of the Commercial Activity Exception to deny the ROI's immunity claim, as the latter waived its immunity by consenting and by participating actively to the Treaty Arbitration that took place in The Hague pursuant to the provisions of Article 8 of the BIT entitled "*Settlement of disputes between an investor and a contracting party*"[54].

[150] The Court notes that Article 8 of the BIT provides, *inter alia*, that:

> (iii) The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding on the parties to the dispute.
>
> [Emphasis added]

[151] The counsel for the Plaintiffs argued that by concluding an arbitration agreement governed by the provisions of the BIT and by actively participating in the Treaty Arbitration, the ROI not only consented to have the Treaty Awards rendered but executed against it as well. The execution portion of the Treaty Arbitration did not require a separate consent from the ROI.

[152] As the Plaintiffs are seeking to enforce the Treaty Awards resulting from the ROI's agreement to arbitrate and from the ROI's participation to the Treaty Arbitration, the Court finds that the ROI has explicitly submitted itself to the jurisdiction of this Court for enforcement of the Treaty Awards by expressing its consent *otherwise* than *by written agreement before the present proceedings commenc*ed within the purview of Subsection 4(2)(a) of the SIA.

[153] The Court notes that Subsection 4(2)(a) of the SIA is the only section in the SIA where, the words *or otherwise* were added after the words *by written agreement.* Clearly, the legislator did not limit the state's *explicit* consent to a *written agreement*.

[154] Yet, in other sections of the SIA, the legislator adopted a different and somewhat stricter wording which must necessarily have an incidence herein:

- At Section 11(1) dealing with injunctions, the state simply has to consent in writing to the relief sought against it - "*unless the state consents in writing to that relief*[55]";

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[54] **P-23**.

[55] « *Sauf dans le cas et dans la mesure où celui-ci y a consenti par écrit* » in the French version.

- At Section 12 (1) (a) dealing with execution of judgments, the state must have "*either explicitly or by implication*[56]" waived its immunity from such executions;

- At Section 12 (5), dealing with *Waiver of immunity* of a foreign central bank, such a waiver only applies if the bank, authority or its parent foreign government "*has explicitly*[57] *waived the immunity*".

[155] Therefore, instead of relying on the "*explicit*" or "*implicit*" character of a state's submission to the courts' jurisdiction, foreign and Canadian case law have both looked at whether a waiver was "*clear*" and "*unambiguous*" in order to apply Subsection 4(2) of the SIA.[58]

[156] The Court shares entirely the view of the Plaintiffs in that regard as in its opinion, states agreeing to international arbitration under bilateral investment treaties necessarily consent to have orders made against them and necessarily waive claims to state immunity, unless, of course, the state specifically reserved its right to raise its jurisdictional immunity at the execution level in the bilateral investment treaty, which is not the case herein.

[157] Since Subsection 4(2)(a) of the SIA specifies "*by written agreement or otherwise*", such waiver does not necessarily have to be expressed explicitly made in writing[59], but it must nevertheless "*be clear and unequivocal; it cannot be presumed*".[60]

[158] To determine whether the unwritten agreement or consent is *clear and unequivocal*, the Court must take into consideration the purpose of the SIA in order to achieve a reasonable and fair result, rather than being limited to the plain and ordinary meaning of the wording of the statute.[61]

[159] Therefore, the question that the Court must determine is whether the ROI's agreement to arbitrate claims under the BIT constituted a *clear and unequivocal* waiver of its jurisdictional immunity in enforcement proceedings resulting therefrom.

[160] The Court will answer this question in the affirmative. The ROI's agreement to proceed with the Treaty Arbitration pursuant to the provisions of the BIT and its participation to the arbitration process thereunder constituted a *clear and unequivocal* waiver of its jurisdictional immunity in subsequent enforcement proceedings.

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[56] « *De façon expresse ou tacite* » in the French version.
[57] « *Expressément* » in the French version.
[58] *Defense Contract Management Agency – Americas (Canada) v. Public Service Alliance of Canada*, 2013 ONSC 2005, par. 45; Xiaodong Yang, *State Immunity and International Law*, (Cambridge: Cambridge University Press, 2012) p. 342.
[59] "*De manière expresse*" in the French version.
[60] *United States of America v. Friedland,* 1999 CanLII 2432 (ON CA), par. 15.
[61] *Smith v. Chin,* 2006 CanLII 34347 (ON SC), par 33.

[161] In Canada, courts have concluded that, by entering into bilateral investment treaties and by participating in arbitration under such treaties, a state consents to have arbitral awards issued and enforced against it:

> The Canadian State Immunity Act (Canada SIA) does not contain a specific arbitration waiver, but like many States, including France, Switzerland and Sweden, and the UNCSI, Canada considers arbitration agreements to be waivers of immunity over proceedings in support of arbitration.[62]

[162] In *Collavino Incorporated v. Yemen (Tihama Development Authority)*, the Alberta Queen's Bench found that the state entity TDA, by agreeing to an arbitration clause, taking an active role in the arbitration proceedings carried out under the UNCITRAL Rules, had waived its immunity for enforcement purposes.[63]

[163] The same result should apply in the present instance, where the PCA Tribunal which adjudicated the Plaintiffs' claims pursuant to the arbitration agreement in the BIT ruled that a state, namely the ROI had expropriated investors in breach of a bilateral investment treaty.

[164] The Court also shares the view of counsel for the Plaintiffs that having ratified the New York Convention, the ROI confirmed again its *clear and unequivocal* waiver of immunity in the present proceedings.

[165] The New York Convention contemplates the recognition and enforcement of arbitral awards by the courts of signatory states:

> "[it] shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought"[64] and;
>
> "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."[65]

[166] The New York Convention is incorporated in Canadian[66] and Québec law.[67] As an international treaty, the New York Convention must be interpreted "*in good faith in*

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[62] Mark A. Cymrot, "Enforcing Sovereign Arbitral Awards – State Defences and Creditor Strategies in an Imperfect World", in Tom Ruys, Nicolas Angel and Luca Ferro, Eds, *The Cambridge Handbook of Immunities and International Law* (England: Cambridge University Press, 2019) at p. 356.

[63] *Collavino Incorporated v. Yemen (Tihama Development Authority)*, 2007 ABQB 212, par. 136-139; see also *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 2016 ONSC 4693, par. 40-41; *Sunlodges Ltd. v. The United Republic of Tanzania*, 2020 ONSC 8201, par. 10.

[64] New York Convention, Article I.

[65] New York Convention, Article III; see also Gary Born, *International Commercial Arbitration*, Third Edition (New York: Kluwer Law International, 2020), pp. 3727-3728.

[66] *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 1985, c. 16 (2nd Supp.).

[67] Article 652 of the *Code of civil procedure*.

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[68]

[167] Article III of the New York Convention provides that "*Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon*", unless a party demonstrates valid grounds upon which recognition and enforcement can be denied.[69]

[168] Canadian courts have found that, by agreeing to the New York Convention and by participating in arbitration proceedings in a country that is also a signatory of the New York Convention without reserving its right to claim jurisdictional immunity, a state entity should be considered to have known and to have accepted that any resulting award could be subject to enforcement proceedings, and thus, should be considered to have waived jurisdictional immunity under the SIA in relation to the enforcement proceedings of the award.[70]

[169] The foregoing position is consistent with other common law jurisdictions, such as the United States and Australia, which held that a state concluding an international convention which recognizes mutual obligations to recognize arbitration awards must have contemplated arbitration-enforcement actions in other signatory countries when entering into an arbitration agreement.[71]

[170] The ROI's attempt to sidestep the effect of the Treaty Awards by claiming state immunity in jurisdictions where the ROI may have assets on which to enforce the arbitration awards runs afoul of the ROI's obligations under the New York Convention and the BIT:

> 14. By agreeing to the UNCITRAL rules in the Bilateral Investment Treaty, Tanzania also agreed to the possibility of interim or interlocutory awards being made against it.
>
> 15. To allow an arbitral tribunal to make interlocutory awards against Tanzania but then deny a court before whom enforcement is sought the power to make interlocutory awards strikes me as being inconsistent with the agreement Tanzania

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[68] *Vienna Convention on the Law of Treaties*, CTS 1980 No. 37 (entered into force January 27, 1980), art. 31(1).

[69] New York Convention, Article V, Tab 3 and Article 653 of the *Code of civil procedure*; see also Gary Born, *International Commercial Arbitration*, Third Edition (New York: Kluwer Law International, 2020), pp. 3727-3728.

[70] *TMR Energy Ltd. v. State Property Fund of Ukraine*, 2003 FC 1517, par. 65; *Sunlodges Ltd. v. The United Republic of Tanzania*, 2020 ONSC 8201, par. 33-34.

[71] *Creighton Ltd v. Government of State of Qatar,* 181 F.3d 118 at 125 (DC Cir 1999). *Tatneft v. Ukraine,* 2019 U.S. App. LEXIS 15787, US Supreme Court; certiorari denied by *Ukraine v. Tatneft*, 140 S. Ct. 901, 205 L. Ed. 2d 466, 2020 U.S. LEXIS 392, 2020 WL 129630 (U.S., Jan. 13, 2020); *Eiser Infrastructure Ltd v. Kingdom of Spain* [2020] FCA 157 (Australia), par. 192.

> made and strikes me as an unduly narrow interpretation of the State Immunity Act.[72]

[171] Incidentally, counsel for the Plaintiffs rightfully so pointed out to the Court a recent decision of the High Court of Delhi who also affirmed that, in the context of a commercial arbitration (such as the Treaty Arbitration), it would be illogical for require the consent of a foreign state to the enforcement of an arbitral award issued against it, while ignoring the fact that the arbitral award is the culmination of the very process of arbitration which the foreign state has admittedly consented to:

> 49. Arbitration being a consensual and binding mechanism of dispute settlement, it cannot be contended by a Foreign State that its consent must be sought once again at the stage of enforcement of an arbitral award against it, while ignoring the fact that the arbitral award is the culmination of the very process of arbitration which the Foreign State has admittedly consented to.
>
> 50. This proposition is in consonance with the growing International Law principle of restrictive immunity, juxtaposed with the emergence of arbitration as the favored mechanism of international dispute resolution in the past few decades. It needs no gainsaying that International Commercial Arbitration has witnessed increasing adoption across the world over the past few decades on account of it being a flexible yet stable, efficient, and legally binding mechanism of dispute resolution for entities engaging in global and cross-border transactions while eschewing the particularistic difficulties and complexities encountered in domestic legal systems.[73]
>
> [Emphasis added]

[172] The reasoning above resonates with the application of Section 4(2) SIA of Canadian courts in *Collavino*[74], *Sunlodges*[75], *TMR*[76] and in the *Yaiguaje*[77]*.*

[173] With all due respect, the ROI's position circumvents Canada's and Québec's law and international commitments under the New York Convention with regard to the recognition and enforcement of international arbitration awards. Ultimately, it interferes with the good functioning of the international arbitration system which allows parties to have reasonable expectations that an arbitration award may be rendered and enforced:

> The second argument against state immunity from execution is that it interferes with the optimum performance of national courts in the international legal order. More specifically, in the context of arbitration, immunity from execution interferes

[72] *Sunlodges Ltd. v. The United Republic of Tanzania*, 2020 ONSC 8201.
[73] *KLA Const Technologies Private Limited v. The Embassy of Islamic Republic of Afghanistan,* OMP (ENF) (COMM) 82/2019 & I.A. No. 7023/2019.
[74] See Note 60.
[75] See Note 67.
[76] See Note 67.
[77] *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, paras. 43-44.

> with the optimum performance of national courts in the network of multilateral treaties and national laws that render awards arising out of arbitration enforceable and executable, virtually anywhere in the world. This makes the role of the state as a participant in the international arbitration network particularly significant. **It can be argued that, when the state is a contracting party to the New York Convention, it has necessarily contemplated the transportable execution of arbitral awards under its regime and considered it desirable as a key feature of a system of international justice**.[78]
>
> [Emphasis added]

[174] Therefore, the Court finds that as it is a signatory of the New York Convention, the ROI's consent to arbitrate also amounts to a *clear and unequivocal* submission of the jurisdiction of the courts seized with the resulting enforcement action under Section 4(2)(a) of the SIA.

[175] In the present instance, this *clear and unequivocal* submission that tantamount to an express waiver was evidenced when: (i) while being a signatory of the New York Convention, the ROI entered into an agreement to arbitrate under the BIT and (ii) the ROI chose the Netherlands, another signatory of the New York Convention, as the seat where the Treaty Arbitration unfolded.

[176] Article 8 of the BIT evidences the ROI's acceptance to arbitrate any investment claim without any reserve as to an eventual defence of state immunity. Article 8(2)(d) specifically provides that when a dispute cannot be settled amicably, an eligible investor may submit the dispute to an *ad hoc* arbitral tribunal set up under the UNCITRAL Rules.

[177] By executing the BIT, the ROI has not only acknowledged that an award resulting from the dispute settlement clause would be final and binding on the parties[79], but the ROI also agreed to be bound by the UNCITRAL Rules[80], which stipulate the following:

> 32(2). The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

[178] The ROI's undertakings under the BIT and the UNCITRAL Rules further demonstrate its *clear and unequivocal* agreement that arbitration awards such as the Treaty Awards, could be rendered and enforced against it as a result thereof.

[179] With all due respect, the Court does not agree with the ROI when the latter claims that it "*never submitted to the jurisdiction of the PCA Tribunal*",[81] in a further attempt to

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[78] Mees Brenninkmeijer and Fabien Gélinas, "*Execution Immunities and the Effect of the Arbitration Agreement*", in Maxi Scherer (ed), Journal of International Arbitration, (Kluwer Law International; Kluwer Law International 2020, Volume 37 Issue 5) pp. 549–588.

[79] As provided in subsection 8(2)(d)(iii) of the BIT: "*The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding on the parties to the dispute*."

[80] Subsection 8(2)(d) of the BIT.

[81] India's Reply, par. 75.

deny that it waived any immunity defence by submitting to arbitration under the BIT. In fact, the Court noted that the ROI argued the same before the PCA Tribunal, which rejected its argument, concluding that it had jurisdiction over the Plaintiffs' claims.

[180] The ROI subsequently participated to the entire Treaty Arbitration.

[181] The present proceedings to execute the Treaty Awards are not "*new or distinct*" from the Treaty Arbitration in which the ROI took an active part.

[182] The ROI's waiver to its jurisdiction immunity was specific to the Treaty Arbitration proceedings, as well as the enforcement proceedings arising therefrom, as such enforcement proceedings are a necessary extension of the arbitration proceedings in order to give effect to the Treaty Awards.[82]

[183] The ROI willingly participated in the Treaty Arbitration and accepted the jurisdiction of the PCA Tribunal, only to, after having lost its case, refuse to submit to the Canadian courts' jurisdiction at the enforcement stage.

[184] Therefore, the Waiver Exception can be validly invoked against the ROI.

[185] There is a further argument that will be dealt with later in this judgment that, in any event, the Waiver Exception can only benefit the Original Plaintiffs and not the Plaintiffs in continuance of proceedings.

[186] That being said, can the SCI Judgment be produced as an Exhibit in order to serve to nullify the Waiver Exception based on its findings of "*fraud*" as proposed by the ROI's counsel, thus justifying its filing herein?

6.3 The Waiver Exception cannot stand with the Devas Project tainted by fraud and the Objection taken under reserve

[187] In its reply to the Plaintiffs' Contestation to the ROI Application to dismiss, the ROI raised for the first time a subsidiary argument that since the Devas Project resulting from the repudiated Devas Agreement was *tainted by fraud*, the Waiver Exception cannot possibly benefit to the Plaintiffs under such circumstances.

[188] In other words, having been involved in a Treaty Arbitration based on agreements found to be *tainted by fraud*, the consent previously given by the ROI must be considered as invalid and cannot serve the Plaintiffs in their endeavour to invoke the Waiver Exception herein.

[82] *New Jersey (Department of the Treasury of the State of), Division of Investment v. Trudel*, 2009 QCCA 86, par. 35; *Mallat v. Autorité des marchés financiers de France,* 2021 QCCA 1102, par. 95.

[189] The ROI bases its *tainted by fraud* allegations solely on the SCI judgment rendered by the Supreme Court of India (the SCI) on January 17, 2022[83].

[190] Let us recall that the SCI Judgment dismissed the appeal from the decision of the NCLAT[84], who had confirmed the decision of the NCLT[85] to appoint a liquidator to Devas and proceed to its immediate winding up, pursuant to a request filed by Antrix being Devas' most important debtor on the basis of the ICC Award in excess of USD 500 million.

[191] With the filing of a certified copy of the SCI Judgment, the ROI invited the Court to conclude that the same was sufficient to establish as a proven fact the existence of "*illegalities*" and "*fraud*" tainting the Original Plaintiffs' investment in Devas which should be sufficient to neutralize the Waiver Exception and justify the ROI's objections to the enforcement in Québec of the Treaty Awards rendered by the PCA Tribunal.

[192] Ostensibly, with its late argument that the "*Devas Project is tainted by fraud*", the ROI is trying to introduce new conclusions to support its ROI Application to dismiss by filing by using the SCI Judgment rendered in 2022 in an attempt to characterize the Original Plaintiffs' investments in Devas as fraught with "*fraud*" and "*illegalities*", voiding by the same token the entire Treaty Arbitration and Awards.

[193] According to the ROI, the comments and findings of the SCI in the 2022 SCI Judgment relating to the "*fraud*" allegedly committed in connection with the Devas Agreement essentially invalidated the Treaty Awards and by the same token the ROI's participation to the Treaty Arbitration.

[194] Therefore, under such circumstances, the ROI's participation to the Treaty Arbitration could not serve as the basis for the Waiver Exception since the ROI could not have given a valid consent to the Treaty Arbitration, a process *tainted by fraud*.

[195] Counsel for the Plaintiffs vigorously objected to the unexpected late filing of the SCI Judgment especially in light of the ROI's attempt to rely upon the findings and comments made in the SCI Judgment which would support the allegations of *tainted by fraud* in the present instance.

[196] In a nutshell, the Plaintiffs argued that first and foremost, the SCI Judgment is neither binding on the Court nor is it relevant or useful in the context where the main objective of the proceedings is to ultimately recognize and homologate the Treaty Awards for the purpose of enforcement in Québec, a legal process with limited and narrow applicable rules.

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[83] **D-6**.
[84] The National Company Law Appellate Tribunal.
[85] The National Company Law Tribunal.

[197] The SCI Judgment is also irrelevant in the context of state immunity proceedings as that the judicial process that led to the SCI Judgment is not only totally foreign to the enforcement proceedings filed in Québec by the Plaintiffs.

[198] It also does not have the authority of "*chose jugée* (*res judicata*)".

[199] Moreover, the judicial process that led to the SCI Judgment essentially served to "*railroad*" Devas – and indirectly, its shareholders, the Original Plaintiffs – into a "*forced*" liquidation to ultimately save Antrix from having to pay substantial amounts in excess of 500M USD due under the ICC Award.

[200] In fact, in its decision of May 25, 2021, to immediately appoint a liquidator to Devas[86], the NCLT shed some light on the ultimate goal for Antrix owing enormous amounts of money to Devas pursuant to the ICC Award:

> 38 (7) The Liquidator is directed to take expeditious steps to liquidate the Company in order **to prevent** it from perpetuating its fraudulent activities and **abusing the process of law in enforcing the ICC Award**;[87]
>
> [Emphasis added]

[201] The Plaintiffs argued that given the fact that the fundamental rule of *audi alteram partem* was not honoured from the outset at the NCLT level and perpetrated up to the SCI, they should be allowed to offer evidence herein to counter the erroneous and misleading comments and findings of the SCI, something that they were denied from doing before the courts of India at all levels.

[202] Therefore, counsel for the Plaintiffs indicated that should the Court dismiss their objection to the filing of the SCI Judgment and allow the use of the same for the purposes sought by the ROI's counsel, they would have no other choice but to introduce substantial new evidence to counter the allegations of fraud.

[203] Under such circumstances, this outcome would force the Court to suspend its *délibéré* to receive and consider the additional evidence before ruling on the ROI Application to dismiss.

[204] Needless to say, that had the Court dismissed the Objection and permitted the production of the SCI Judgment for the express purpose of establishing as a proven fact the findings of the SCI regarding the alleged fraudulent activities of Devas in concluding the Devas Agreement, such a decision would have potentially required that a trial on the same be held within the present trial on the state immunity claimed by the ROI.

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[86] **AD-15**.
[87] *Ibid*.

[205] With all due respect, such an avenue is not only irrelevant, but it just does not make any sense as well in the context of the present proceedings dealing exclusively with the state immunity of the ROI.

[206] It will not happen.

[207] Be that as it may, counsel for the ROI invited the Court to treat the comments and findings of the SCI in the SCI Judgment as "*binding*" in the present proceedings since the SCI Judgment would have the authority of "*chose jugée*" (*res judicata*).

[208] The Plaintiffs saw it differently. In their view, the judicial process carried out in India that led to the SCI Judgment could not be a better illustration of a process aiming to "*railroad*" Devas – severely handicapped by the court-appointed liquidator - and its shareholders namely the Original Plaintiffs, where the fundamental rule of *audi alteram partem* was not respected at every level of the Indian judicial system for one purpose, ensure that neither Antrix nor the ROI would have to execute their obligations stemming from the ICC Award and the Treaty Awards.

[209] In any event, the Court finds that the SCI Judgment does not have the authority of "*chose jugée* (*res judicata*)" within the meaning of article 2848 of the *Civil Code of Québec* ("**C.C.Q.**"):

2848. L'autorité de la chose jugée est une présomption absolue; elle n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement, lorsque la demande est fondée sur la même cause et mue entre les mêmes parties, agissant dans les mêmes qualités, et que la chose demandée est la même.	**2848.** The authority of *res judicata* is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.
Cependant, le jugement qui dispose d'une action collective a l'autorité de la chose jugée à l'égard des parties et des membres du groupe qui ne s'en sont pas exclus.	However, a judgment deciding a class action has the authority of *res judicata* with respect to the parties and the members of the group who have not excluded themselves therefrom.

[210] Firstly, the Court is not in the presence of litigation between the same parties.

[211] The parties before the SCI were Devas – who was controlled by a court-appointed liquidator - versus Antrix in the context of an appeal of the decision ordering the winding up of Devas issued at the behest and instigation of Antrix in 2021 since the latter had failed to overturn the ICC Award of 2015 until then.

[212] Since January 2021, Devas was under the control of a court-appointed liquidator who had fired all lawyers representing the interests of Devas throughout the world involved in enforcing the ICI Award and the Treaty Awards.

[213] DEMPL[88], one of the Devas shareholders and one of the Original Plaintiffs in the present proceeding, sought to intervene in the Antrix's Petition for winding up Devas, but its application was expressly rejected by the NCLT, a decision maintained by the appellate tribunal, NCLAT. Their decisions were ultimately affirmed by the SCI who again refused to allow the intervention of the shareholder.

[214] In short, DEMPL was never allowed to formally intervene at all three levels.

[215] Given the absence of identity of the parties in the Indian proceedings and the current proceedings, the doctrine of *res judicata* cannot be relied upon by the ROI to assert that the Plaintiffs are bound by the SCI Judgment.

[216] As to the second criteria, the demands are not based on the same cause.

[217] The right sought for each matter is different and therefore the object is not the same, nor does it lead to the same result.

[218] Indeed, the decision of the NCLT was to order the winding up and the liquidation of Devas while the proceedings before this Court aim to recognize and execute the Treaty Awards.

[219] The ROI argued that the PCA Tribunal's finding that the Devas Agreement was a valid and binding contract upon the parties was in retrospect wrong, because the PCA Tribunal did not have the benefit of the SCI Judgment confirming the liquidation of Devas. However, neither the NLCT nor the SCI rendered a decision on the validity of the Devas Agreement. On the contrary, in its decision of May 15, 2021, the NLCT clearly stated that it was not deciding on this matter:

> 21. […] Though the validity of Agreement in question is not the subject matter in the instant case, the fraudulent and unlawful purpose behind incorporation of Devas, would be relevant factors to be taken into consideration by the Tribunal, while deciding the case.[89]
>
> [Emphasis added]

[220] Therefore, even though the SCI rendered its own decision on the issue of the liquidation and the winding up of Devas in India, it does not bind Québec courts in the present proceeding other than it serves to evidence that Devas is in liquidation in India as a result thereof.

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[88] Devas Employees Mauritius Private Limited.
[89] **AD-15**, page 90.

[221] Moreover, the Court agrees with counsel for the Plaintiffs that the SCI Judgment is, in any event, irrelevant in the context of the present immunity proceedings, as subject matters giving rise to the SCI Judgment are completely different from the subject matters in the present proceedings.

[222] The SCI had no say on the validity of the Treaty Awards or on the correctness of the PCA Tribunal's findings as it was not seized of any application regarding these awards. It is important to note that the Treaty Awards were confirmed in The Hague, Netherlands, which is the seat of the Treaty Arbitration.

[223] The SCI Judgment did not rule on the validity of the arbitration agreement contained in the BIT and any insinuation made by the SCI in its judgment in that regard is at best *obiter dicta*.

[224] The ROI relied mainly on the SCI Judgment in an attempt to contradict *ex post facto* the PCA Tribunal's finding of competence and arbitrability in the Merits Award, although the PCA Tribunal had already ruled on similar allegations of fraud following the Central Bureau of India's investigations against Devas that were raised by the ROI in the PCA Arbitration in an attempt to stay the proceedings in 2016.

[225] Contrary to the ROI's allegation that PCA Tribunal "*did not have the benefit of the SCI Judgment (nor the NCLT's or NCLAT's judgments), nor did it consider the matter of fraud for the reasons detailed above*"[90], the ROI pleaded exactly the same arguments of fraud and illegality before the PCA Tribunal in its Request for Suspension of the Proceedings submitted on October 27, 2016, following the issuance of India's Central Bureau of Investigation's (the "**CBI**") Charge sheet dated October 11, 2016[91].

[226] On December 21, 2016, the PCA Tribunal dismissed the Request of the ROI to stay the arbitration proceedings as follows:

> 16. The Tribunal notes that the CBI Charge Sheet contains no charge against any of the Claimants in the present case. The Devas-related defendants under the Charge Sheet are designated as: (1) Devas Multimedia Private Ltd.; (2) Mr. R. Viswanathan, President and CEO of that company; (3) Mr. M. G. Chandrasekhar, Director of the same company; (4) Mr. D. Venugopal, Director of the same company; (5) Mr. M. Umesh, Chartered accountant. While the Tribunal is aware of the corporate structure used for the Claimants' investments in India, the Tribunal cannot disregard the fact that the Claimants are not legally identical with Devas Multimedia Private Ltd.
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> 17. In addition, although Messrs. Viswanathan, Chandrasekhar and Venugopal were witnesses in the present arbitration, the first two having been the subject of cross-examination by the Respondent, **no evidence of wrongdoing on their part or on the part of Devas Multimedia Private Ltd. was adduced**. Moreover, **no**

[90] The ROI's Reply, par.112.
[91] **LB-11**.

> **request for relief to the present Tribunal was made by the Respondent on the basis of alleged criminal activities by the Claimants under the Indian Penal Code or the Prevention of Corruption Act**.
>
> 18. The Partial Award on Jurisdiction and Merits was issued by the Tribunal on 25 July 2016. **That Award was final and binding** under Article 32(2) of the UNCITRAL Arbitration Rules in respect of the matters decided in it by the Tribunal.
>
> 19. Finally, the CBI investigation was initiated in 2014 and its Charge Sheet was issued on 11 August 2016. The Respondent was therefore aware of its contents when it agreed to the timetable for the determination of damages as contained in Procedural No. 6 of 29 September 2016.
>
> 20. In the present circumstances, the Tribunal concludes that the Respondent's application for a stay must be denied, and that this arbitration shall proceed on the basis of the timetable set forth in Procedural No. 6.[92]
>
> [Emphasis added]

[227] The Court also understands that, outside that specific instance mentioned above, during the Treaty Arbitration, the ROI never raised the argument that the arbitration agreement under the BIT was in any way vitiated or null. On the contrary, from the beginning of the Treaty Arbitration, the ROI participated in the entirety of the arbitration proceedings in accordance with the UNCITRAL Rules.

[228] The ROI also argued that Article 3155[93] C.C.Q. creates a presumption of validity in favour of foreign decisions.

[229] Firstly, the presumption of validity of the SCI Judgment is rebuttable.

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[92] Procedural Order No. 07 in Arbitration matter PCA Case No. 2013-09 dated December 21, 2016 (**P-159**).

[93] **3155.** A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases:
1° the authority of the State where the decision was rendered had no jurisdiction under the provisions of this Title;
2° the decision, at the place where it was rendered, is subject to an ordinary remedy or is not final or enforceable;
3° the decision was rendered in contravention of the fundamental principles of procedure;
4° a dispute between the same parties, based on the same facts and having the same subject has given rise to a decision rendered in Québec, whether or not it has become final, is pending before a Québec authority, first seized of the dispute, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec;
5° the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
6° the decision enforces obligations arising from the taxation laws of a foreign State.

[230] Secondly, and most importantly, it is notable that the ROI did not seek to enforce or to execute the SCI Judgment in Québec. This can be understood since the ROI does want to submit to the jurisdiction of the Courts of Québec.

[231] The ROI merely wants to rely on the foreign decision as a means of proof, without having it recognized in Québec.

[232] With all due respect, Article 3155 C.C.Q. is of no assistance to the ROI herein.

[233] Since it is not seized with a formal demand on the part of the ROI to recognize the SCI Judgment in Québec, the Court shall not examine this argument further.

[234] The ROI raised the other argument that the certified copy of the SCI Judgment constituted a semi-authentic act within the meaning of Article 2822 C.C.Q.

[235] By definition, a semi-authentic act is a document made outside of Québec that was apparently issued by a competent foreign public officer.[94]

[236] The qualification of "*semi-authentic act*" simply means, as stated by the Court of Appeal, that the party that intends to use such a document in court does not have the obligation of establishing the veracity of the signature of the judge that has signed the document, nor its authority.[95]

[237] Generally, the simple filing of a document apparently issued by a competent foreign official is *prima facie* evidence of the semi-authentic character of the document and its contents, without it being necessary to prove the quality or the signature of the competent public officer, the act proves, *prima facie*, the truthfulness of the facts they relate.[96]

[238] However, a recent Court of Appeal decision confirmed that the facts referred to in semi-authentic act are not binding to the Québec Courts and that evidence established before the judge can be taken into account to contradict the facts reported in the foreign judgment:

> [64] There is little doubt that the decision of the Court of Appeal of Athens is binding and executory as between Eurobank and the Greek Ministry of National Defense. However, it does not necessarily bind Bombardier, the National Bank or this Court. Indeed, when foreign judgments are received in evidence without being formally recognized in Québec, they are *prima facie* proof of the reported facts, of the good application of the foreign law and of the foreign court's jurisdiction on the matter. **[36]** They are not, however, necessarily binding on Québec courts.

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[94] Jean-Claude ROYER and Catherine PICHÉ, *La preuve civile*, 6e éd., Ed. Yvon Blais, Cowansville, 2020, no. 338, EYB2020PRC30.

[95] *Cohen v. Hill Samuel & Co.,*1989 CanLII 845 (QC CA), page 3.

[96] Jean-Claude ROYER and Catherine PICHÉ, *La preuve civile*, 6e éd., Ed. Yvon Blais, Cowansville, 2020, no. 344, EYB2020PRC30.

> [65] In this case, the trial judge decided to place no weight upon the decision of the Greek court of first instance presided by Judge Kostis which, on December 16, 2013, dismissed Eurobank's injunction proceedings in Greece. The trial judge was of the view that this decision was not consistent with the conduct of the Greek Ministry of National Defense as had been established before him at the hearing of this case. In the trial judge's view, this conduct clearly amounted to fraud since it sought to circumvent, through clumsy and obvious means, both the Interim Order and the Final Award of the ICC Arbitral Tribunal. Likewise, no weight should be given to the decision of the Court of Appeal of Athens.[97]
>
> [Emphasis added, references omitted]

[239] The SCI Judgment is a foreign judgment and therefore is a semi-authentic act.

[240] In light of the applicable law, the SCI Judgment proves simply that Devas was liquidated pursuant to the laws of India and that while they may be considered, the facts contained therein are not binding before the Québec Court, especially when there has been no attempts to seek the recognition of the SCI Judgment in order to get the same enforceable in Québec.

[241] All in all, the Court finds that the ROI cannot successfully rely on the SCI Judgment for the purpose of excluding the application of the Waiver Exception invoked by the Plaintiffs.

[242] The Court is not bound by the facts and findings contained therein which, with all due respect, are not relevant at this juncture for the purposes hereof.

[243] The Court shares the view of counsel for the Plaintiffs that the relevance principle aids in avoiding confusion and unnecessary extensions of debates that pertain to a non-relevant fact. Evidence that shifts the debate or opens the door to discussions that would not advance the debate will be refused:

> [18] L'article 2857 C.c.Q. pose la règle que tout fait pertinent est recevable :
>
> > 2857. La preuve de tout fait pertinent au litige est recevable et peut être faite par tous moyens.
>
> [19] La pertinence d'un fait s'évalue au regard de l'objet du litige. Il s'agit de vérifier si la preuve du fait tend à établir l'existence ou non du droit réclamé. Elle s'apprécie en fonction de l'obligation qui incombe aux parties de faire la preuve des éléments sur lesquels repose la réclamation. Comme l'indique le professeur Jean-Claude Royer « un fait est notamment pertinent lorsqu'il s'agit d'un fait en litige, s'il

[97] *Eurobank Ergasias v. Bombardier inc.,* 2022 QCCA 802.

> contribue à prouver de façon rationnelle un fait en litige ou s'il a pour but d'aider le tribunal à apprécier la force probante d'un témoignage »[98].
>
> [20] Le fondement de la règle de la pertinence vise à restreindre la preuve à ce qui est nécessaire au litige pour éviter la confusion et la prolongation inutile des débats associés à l'administration d'une preuve non pertinente.[99]
>
> [Emphasis added]

[244] Again, the confirmed decision of the NCLT was to order the winding up and liquidation of Devas while the proceedings before this Court aim to recognize and execute the Treaty Awards.

[245] In conclusion, the fact that Devas is now wound up pursuant to Indian legislation and to judicial decisions including the SCI Judgment, has no bearing whatsoever on whether the ROI is entitled to immunity under the SIA.

[246] The SCI did not in any way, confirm or set aside the Treaty Award rendered against the ROI. In such context, any insinuation made the SCI regarding the validity of the arbitration agreement contained in the BIT is at best *obiter dicta*.

[247] It should also be noted that the ROI is not challenging the validity of the Treaty Awards for lack of jurisdiction under Article 653(5) of the *Code of civil procedure*. Instead, it attempts to bypass the high threshold imposed on a party moving to annul an arbitration award by the legislator by introducing an argument of illegality at a preliminary debate on immunity.

[248] In the present specific context involving the determination of the state immunity claimed by the ROI, it is not relevant, necessary nor useful for the Plaintiffs to adduce any additional evidence seeking to contradict the facts and findings of the SCI Judgment.

[249] Given the foregoing, it will not be necessary for this Court to deal with the additional argument raised by the ROI that adducing any evidence to contradict the facts and findings of the SCI Judgment with respect to allegations of fraud made therein would constitute an abuse of process by relitigation on the part of the Plaintiffs.

[250] The Court shall therefore dismiss in part the Objection of the Plaintiffs and allow the ROI to file the SCI Judgment as a semi-authentic act to evidence at this juncture that Devas is in the process of being liquidated under the laws of India.

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[98] Jean-Claude Royer, *La preuve civile*, 3e éd., Cowansville, Éditions Yvon Blais, 2003, p. 745.
[99] *Association des propriétaires de Boisés de la Beauce v. Monde forestier,* 2009 QCCA 48.

[251] In light of the foregoing, the Court finds that it will not be necessary to authorize the Plaintiffs to present additional evidence in connection with the SCI Judgment for the purpose of rendering judgment of the ROI Application to dismiss.

[252] Finally, the Court must determine whether the Plaintiffs in continuance as assignees of the rights and recourses of the Original Plaintiffs under the Treaty Awards can invoke the Waiver Exception against the ROI.

6.4 The assignment of the Treaty Awards to the Plaintiffs in continuance

[253] The Court finds that the ROI has indeed waived its immunity pursuant to the Waiver Exception regardless of the assignments of the Treaty Awards to the Plaintiffs in continuance.

[254] Incidentally, such a finding has no incidence on the Commercial Activity Exception which applies regardless of the assignments.

[255] Notwithstanding the above, on January 5, 2022, the Original Plaintiffs filed three Notices of continuance of proceedings following the transfer of all the Original Plaintiffs' rights, title and interest in the Treaty Awards to the Plaintiffs in continuance, along with copies of the transfer deeds in support thereof. Such assignments were not contested by any party in the present proceedings.

[256] The assignment of the claims in the Treaty Awards rendered against the ROI constitutes an assignment of claim as per Article 1637 C.C.Q. which stipulates:

> A creditor may assign to a third person all or part of a claim or a right of action which he has against his debtor. […]

[257] The assigned rights to the Treaty Awards are not litigious rights, in that they are not "*uncertain, contested or contestable by the debtor, whether an action is pending or there is reason to presume that it will become necessary*" within the meaning of Article 1782 C.C.Q. Indeed, the original Mauritius shareholders' rights to the USD 111 million awarded in the PCA Arbitration against the ROI are not contested by the parties. The rights of the Mauritius shareholders (the Original Plaintiffs) to the damages awarded in the PCA Arbitration have been crystallized since the PCA Arbitration has adjudicated on their claims on the merits[100].

[258] Article 1637 C.C.Q. provides that the assignment of a claim includes its accessories. Case law has long established that a valid arbitration agreement between the assignor and the debtor is an accessory of the claim which is transferred to the assignee.[101]

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[100] *Helou v. Entreprises Louis Cayer inc. (Royal Lepage Dynastie),* 2013 QCCA 1262, par. 19.
[101] *PS Here, l.l.c. c. Fortalis Anstalt*, 2009 QCCA 538, par. 30-33.

[259] Therefore, by way of the assignments, all the positive legal attributes of the Treaty Awards to which the Mauritian investors (the Original Plaintiffs) were entitled to are also available to the Plaintiffs in continuance who can also invoke the Waiver Exception against the ROI herein.

CONCLUSION

[260] In conclusion, the ROI is not immune from the jurisdiction of this Court in the current proceedings.

FOR THOSE REASONS, THE COURT:

[261] **DISMISSES** the Republic of India's Application *de bene esse* to dismiss pursuant to the *State Immunity Act*;

[262] **DECLARES** that the Republic of India is not immune from the jurisdiction of the Superior Court of Québec in court file no. 500-11-060766-223;

[263] **DECLARES** that despite the application of the Waiver Exception (as defined in the present Judgment), the Commercial Activity Exception was sufficient to justify the dismissal of the Republic of India's Application;

[264] In light of the foregoing and for greater certainty, **DISMISSES** in part the Plaintiffs' Objection to the filing of the SCI Judgment of January 17, 2022, as Exhibit **D-6**, which, at this juncture, only served as evidence for the limited purposes stated in the present judgment;

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

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