TMR Energy Ltd. v. State Property Fund of Ukraine, 2003 FC 1517 (CanLII)

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Docket:	T-60-03
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Legislation cited (available on CanLII)

- Civil Code of Quebec, SQ, LRQ, c C-1991
- Code of Civil Procedure, RSQ, c C-25
- Constitution Act, 1867, Constitution — 101 • 92(13) • 92(14) • 92(16)

Decisions cited

- Compania Maritima Villa Nova S.A. v. Northern Sales Co. (C.A.), reflex — [1992] 1 FC 550 • 51 FTR 159

- Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44 (CanLII) — [2001] 2 SCR 460 • 54 OR (3d) 214 • 201 DLR (4th) 193 • 10 CCEL (3d) 1 • 34 Admin LR (3d) 163 • 149 OAC 1
- Drapeau v. Canada (Minister of National Defence), reflex — 119 FTR 146
- Grandview v. Doering, 1975 CanLII 16 (SCC) — [1976] 2 SCR 621
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- Kigowa v. Canada (C.A.), reflex — [1990] 1 FC 804
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- Oag v. Canada, reflex — [1987] 2 FC 511
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- Prudential Assurance Co. v. Canada, 1993 CanLII 2948 (FCA) — [1993] 2 FC 293 • 63 FTR 156
- Regas Ltd. v. Plotkins, 1961 CanLII 71 (SCC) — [1961] SCR 566 • 36 WWR (NS) 481
- The Municipality of the City and County of Saint-John et al. v. Fraser-Brace Overseas Corporation et al., 1958 CanLII 40 (SCC) — [1958] SCR 263
- Wilson v. The Queen, 1983 CanLII 35 (SCC) — [1983] 2 SCR 594 • 4 DLR (4th) 577 • [1984] 1 WWR 481 • 9 CCC (3d) 97

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Docket: T-60-03

Citation: 2003 FC 1517

Ottawa, Ontario, Tuesday, this 23rd day of December, 2003

PRESENT: MADAM PROTHONOTARY MIREILLE TABIB

BETWEEN:

TMR ENERGY LIMITED, a duly incorporated
legal person incorporated under the laws
of Cyprus

Applicant

- and -

STATE PROPERTY FUND OF UKRAINE,

an organ of the State of Ukraine

Respondent

- and -

AVIATION SCIENTIFIC TECHNICAL COMPLEX
NAMES AFTER O.P. (ANTK) ANTONOV

Intervener

REASONS FOR ORDER

TABIB P.

INTRODUCTION

[1] On June 28, 2003, an Antonov AN-124-100 cargo aircraft (the "Aircraft") was seized in Goose Bay, Newfoundland, pursuant to a writ of seizure and sale issued by this Court.

[2] The writ was issued in execution of an order recognizing and registering for enforcement an arbitral award rendered in Stockholm, Sweden in favour of TMR Energy Ltd. ("TMR") a private Cypriot company, against State Property Fund of Ukraine ("SPF"), an organ of the State of Ukraine. The dispute arose out of a joint venture agreement for the operation of an oil refinery in Ukraine. The Aircraft is owned by the State of Ukraine, but held by Aviation Scientific Technical Complex Named After OP (Antk) Antonov ("Antonov") under the "right of full economic management", a legal concept peculiar to former Soviet states.

[3] Both SPF and Antonov having filed objections to the seizure that were held to be effective by the Sheriff of Newfoundland[1], TMR brought the present motion, asking the Court to make a determination as to the validity of the seizure.

[4] The determination of this motion raises several issues, chief among which are the following:

1) Did the Federal Court have jurisdiction to register the arbitral award?

2) Is the State of Ukraine immune from the jurisdiction of this Court under the *State Immunity Act*, R.S.C. 1985, c.16 (2nd Suppl.)?

3) Can the registration order, issued against SPF, be enforced against the assets of the State of Ukraine? In other words, who is the judgement debtor?
4) What are, under Ukrainian law, the respective rights of Ukraine and Antonov in the Aircraft?
5) Is the Aircraft immune from execution as military property under the *State Immunity Act*?

[5] Over the course of the summer, TMR and Antonov marshalled an impressive body of evidence, chiefly in the form of expert affidavit evidence as to Ukrainian institutions and laws, arranged for translation of Ukrainian legal texts and documents, conducted cross-examinations in Paris and Kyiv, many through interpreters, and delivered complete memoranda of fact and law: a Herculean task. The hearing of this motion began on August 25, 2003 and concluded, after seven days of hearing, on September 17, 2003.

THE FACTS

[6] In 1991, shortly before the dissolution of the Soviet Union and Ukraine's declaration of independence from the former Soviet Union, a joint venture was established between the Ukrainian state enterprise Lisichansk Oil Refinery Works ("LOR") and a Swiss company for the modernization and operation of an oil refinery in Lisichansk. The joint venture was eventually organized in the name of Lisoil. In 1992, the Swiss company transferred its interest in the joint venture to TMR, and in 1993, TMR signed a contract entitled Constituent Contract (the "1993 Constituent Contract") with LOR for financing an upgrade of the refinery and repayment of the financing through the operation of the refinery.

[7] In 1993, the State of Ukraine began the process of privatization and corporatisation[2] of LOR. As a result of the corporatisation, LOR ceased to exist

as an entity, and a new open joint stock company, Lisichansknefteorgsintez ("Linos") was formed. SPF owned 67.4% of Linos' shares, while the rest was distributed to various Ukrainian interest. One would have thought that corporatisation had the effect of transferring all of LOR's assets and obligations to Linos, and indeed, Linos continued to perform LOR's obligations under the 1993 Constituent Contract until 1997, when performance was halted in the wake of financial difficulties of Linos. However, in 1999, SPF declared that it, and not Linos, was the legal successor to LOR's participation interest in the joint venture, Lisoil. To formalize this succession, TMR and SPF entered into a new Constituent Contract, (the "1999 Constituent Contract"). SPF, as Linos had, failed to perform its obligations under the 1999 Constituent Contract. The 1999 Constituent Contract contained a clause referring disputes to the Arbitration Institute of the Stockholm Chamber of Commerce for final determination.

[8] Pursuant to this clause and to arbitration clauses found in the 1993 Constituent Contract and another agreement between TMR, LOR and Lisoil[3], TMR requested arbitration in July 2000 against Linos, SPF and the State of Ukraine. On January 22, 2001, after the arbitration panel had been duly constituted, TMR terminated without prejudice its arbitration against the State of Ukraine. The arbitrators then ordered the arbitration against Linos under the 1993 Constituent Contract and the M & O Agreement to be conducted separately from the arbitration against SPF under the 1999 Constituent Contract. The final arbitral award in the arbitration between TMR and SPF was rendered on May 30, 2002, (the "Award"), ordering SPF to pay to TMR the amount of US $36,711,475.00, pre- and post-award interest and costs. As of December 31, 2002, the total value of the Award was in the amount of $62,260,697.99 Canadian.

[9] On January 15, 2003, TMR filed an *ex parte* notice of application for registration of the Award, pursuant to the *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 1985, c.16 (2nd Suppl.) and to Rules 327 and 328 of the

Federal Court Rules, 1998. The Respondent to the application is named as "State Property Fund of Ukraine, an organ of the State of Ukraine". By order dated January 17, 2003, (the "Registration Order") the Court granted TMR's application, with the proviso that execution shall not issue for 60 days following service of the Registration Order. The Registration Order was served in Kyiv on SPF "an organ of the State of Ukraine" on March 4, 2003, in accordance with the Hague Convention on Service Abroad, through the Ministry of Justice of Ukraine.

[10] On June 11, 2003, TMR requested the issuance of a writ of seizure and sale of the property of "the State of Ukraine". The Court, however, did not authorize the issuance of such a writ but issued instead a writ against the property of "the Respondent".

[11] On June 28, 2003, the High Sheriff of the Supreme Court of Newfoundland, pursuant to instructions given on behalf of TMR, proceeded to seize the Aircraft as being "property of the State of Ukraine", the judgement debtor being described as "State Property Fund of Ukraine, an organ of the State of Ukraine".

[12] On July 11, 2003, Antonov filed with the Sheriff a notice of objection and a notice of third party interest pursuant to the *JEA*, arguing that the State of Ukraine was not the appropriate judgement debtor under the Registration Order, and that the Aircraft belonged to Antonov and could in any event not be seized in satisfaction of a debt of the State of Ukraine. As the notices filed by Antonov were accompanied by a letter from SPF, the Sheriff considered the notice of objection as having been filed by SPF. The Sheriff, in a decision dated July 17, 2003, found both notices to be effective under Part XII of the *JEA*. This led TMR to file the within motion for a declaration as to the validity of the seizure, pursuant to section 163 of the *JEA*.

[13] Both Antonov and SPF submitted responding materials and appeared at the hearing to oppose TMR's motion. In addition, the State of Ukraine through diplomatic channels asserted jurisdictional immunity in these proceedings (both

for the registration and execution processes) under the *State Immunity Act*, it further asserted a distinct property interest in the Aircraft from that of Antonov and immunity from execution on the basis that the Aircraft is military property pursuant to subsection 12(3) of the *State Immunity Act*. At the hearing of this motion, counsel for the State of Ukraine requested and was granted recognition by the Court for the limited purpose of presenting argument on the issue of state immunity, as provided in paragraph 4(3)(a) of the *State Immunity Act*[4]. The State of Ukraine took no position as to any other issue in this motion.

JURISDICTION OF THE COURT

[14] Both Antonov and SPF have submitted that this Court was without jurisdiction to register and recognize the Award and that, as a result, the writ of seizure and sale issued pursuant to the Registration Order was null and void.

A. Preliminary Issue: Collateral Attack

[15] The Registration Order of January 17, 2003 has not been appealed, and the time provided for doing so has long since passed. While SPF has, on August 8, 2003, filed a motion to set aside the *ex parte* Registration Order, a hearing date for that motion has neither been requested nor set.

[16] The validity of the Registration Order not having been directly attacked by way of appeal or motion to set aside, is it open for SPF or Antonov to raise its invalidity in the context of execution proceedings?

[17] It has been a long-standing principle of law that collateral attacks on judicial orders will not be permitted. The Rule was discussed in the following terms by the Supreme Court of Canada in *R. v. Wilson* 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594, at page 599:

"It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be

described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment."

[18] The key to the appreciation of the rule, however, is that the Court making the order must have had jurisdiction.

[19] The distinction was clearly expressed by the Saskatchewan Court of Appeal in *Volhoffer v. Volhoffer* [1925] 3 D.L.R. 552, at pages 556-557:

"From these authorities, the law would appear to be that, if a tribunal which has jurisdiction over a subject-matter, provided a given state of facts exists, makes an order in respect of that subject-matter in the absence of the existence of that state of facts, and, therefore, without jurisdiction, such order must be treated as valid and binding until it is reversed upon an appeal, and, generally speaking, it cannot be attacked in a collateral proceeding. But where the tribunal has not been given any jurisdiction over the subject-matter, no matter what state of facts may exist, an order made in respect of it is a nullity, and need not be appealed against, and its invalidity may be set up as an answer in any proceeding taken under it."

[20] In *Tufts v. Thomson*, [1929] 1 D.L.R. 896, the Manitoba Court of Appeal (Dennistoun, J.A.), wrote, at page 899:

"The order upon which the jurisdiction was based was regular on its face and the Judge had jurisdiction to admit it as evidence in the subsequent proceeding. Any attack upon the committal order should have been made directly, and not by a side wind in another proceeding. Of course when the want of jurisdiction so clearly appears upon the face of collateral proceedings that the Court is forced to find that the whole matter was *coram non judice* it must act accordingly for to do otherwise would be a violation of the first principles of justice."

[21] And again at page 900:

"In other words, if the want of jurisdiction is obvious upon the face of the judgment the Court should recognize it; but where the Court has jurisdiction if it acts properly, and the proceedings are regular upon their face, the Court will not

re-try the case in a collateral proceeding, in order to ascertain whether the jurisdiction was exceeded or not."

[22] (See also: *Grand v. Maclaren* (1894), 23 S.C.R. 310, *R. v. Komadowski* [1986] M.J. No. 182 (Man. C.A.), *Samson and Samson v. Hynes, Hynes, Doyle and Marchand* [1977] N.S.J. No. 556 (N.S.S.C.A.).

[23] The Federal Court is a statutory Court with limited jurisdiction. If SPF and Antonov are correct that the subject matter of the dispute falls outside the Court's jurisdiction, then the Court had no jurisdiction to entertain the application for registration and the resulting order would therefore be a nullity, its invalidity capable of being raised in any collateral proceedings.

B. Analysis: Jurisdiction of the Court

1. The test:

[24] The Supreme Court of Canada has set out a succinct three-part test to support a finding that the Federal Court has jurisdiction (*ITO - International Terminal Operators Ltd. v. Miida Electronics* Inc. 1986 CanLII 91 (SCC), [1986] 1 S.C.R. 752, (hereinafter "*ITO*") at page 766):

"1. There must be a statutory grant of jurisdiction by the federal Parliament.

2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.

3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the Constitution Act, 1867."

2. The first part of the test: a statutory grant of jurisdiction:

[25] The parties are *ad idem* that the only statute pursuant to which this Court could be granted jurisdiction over the subject matter of this application is the *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 1985, c.16 (2nd Suppl.) (the "*Act*"). Section 6 of the *Act* clearly grants the Federal Court concurrent jurisdiction with the superior, district or county courts of the provinces

to recognize and enforce arbitral awards under the UN convention incorporated in the *Act*:

6. For the purpose of seeking recognition and enforcement of an arbitral award pursuant to the Convention, application may be made to the Federal Court or any superior, district or county court.	6. Une demande de reconnaissance et d'exécution d'une sentence arbitrale aux termes de la Convention peut être faite à la Cour fédérale ou à toute cour supérieure, de district ou de comté.

[26] However, SPF and Antonov argue that the *Act* does not and cannot apply to the Award, because its subject matter falls within the category of "property and civil rights", rather than any area of federal jurisdiction.

[27] The *Act* itself does not define the kind or subject matter of arbitral awards to which it applies (other than arising out of commercial legal relationships). However, it has been held by the Federal Court of Appeal in *Compania Maritima Villa Nova S.A. v. Northern Sales Co. (C.A.)* reflex, [1992] 1 F.C. 550 (hereinafter "*Villa Nova*"), while considering the constitutional validity of the *Act*, that the *Act* can only apply in relation to matters of federal character:

> "Section 6, they say, is to be read as creating a federal cause of action for the recognition and enforcement of foreign arbitral awards falling within federal legislative competence.
>
> [...]
>
> I am persuaded by these submissions. In my view, Parliament did possess the power to adopt the Act as valid federal legislation for the recognition and enforcement in Canada of foreign arbitral awards having a federal character in a constitutional sense. Questions will no doubt arise in individual cases as to whether a particular award is one whose enforcement falls within the proper ambit of the legislation."

[Emphasis mine]

[28] Thus, if SPF and Antonov are correct that the Award is purely a matter of property and civil rights, the *Act*, including section 6, is inapplicable and this Court had no jurisdiction to recognize the Award, since the first part of the *ITO* test cannot be met.

[29] Applying the first part of the *ITO* test will therefore require that I delve into the constitutional applicability of the *Act*, an exercise usually confined to the third part of the *ITO* test.

[30] The question, therefore, is whether the Award has a "federal character in a constitutional sense" so as to be enforceable under the provisions of the *Act*. In other words, does Parliament have power to legislate as to a cause of action for the recognition and enforcement of an arbitral award between a foreign company and an organ of a foreign state? I am of the view that it does, in the exercise of the Crown's prerogative and of its residual power to make laws for the "peace, order and good government of Canada". Indeed, it is through these powers that Parliament has been recognized the right to exercise jurisdiction over external affairs and to implement the rules of public international law in internal laws, including laws recognizing and regulating the immunity of foreign states.

[31] The *State Immunity Act* codifies the common law concept of the immunity of foreign sovereign states from the judicial processes of internal courts, and the circumstances in which this immunity is lost.

[32] Basic principles of international law recognize that all states being sovereign and equal, one state cannot exercise authority over the other. This recognition provides the basis for the original principle of the absolute immunity of foreign states from the jurisdiction of the courts of other states. This principle was incorporated into internal Canadian law as a common law principle, and later evolved into a restrictive theory of immunity. Under this theory, affirmed and codified by the *State Immunity Act*, a sovereign state is held to be immune from

the jurisdiction of the courts of another state, unless that immunity is lost through certain exceptions as provided in the *State Immunity Act*.

[33] Thus, in the exercise of its constitutional power over international affairs and its relations with foreign states, Canada has jurisdiction and has exercised this jurisdiction to legislate as to the manner and circumstances in which sovereign states may be sued before the courts of Canada. It has not been suggested by the parties that Parliament does not have the constitutional power to enact the *State Immunity Act* or to legislate in the field of the amenability to suit or judicial process of foreign states and the applicability of Canadian laws to them. Indeed, the case law would appear to support Parliament's exclusive jurisdiction to recognize, withdraw or regulate sovereign immunity. (See *Foreign Legations Reference* [1943] S.C.R. 208; *St. John (City) v. Fraser-Brace Overseas Corp.*, 1958 CanLII 40 (SCC), [1958] S.C.R. 263).

[34] Nor can it be right that Parliament's constitutional power is limited simply to declaring whether or not a foreign state is subject to the jurisdiction of the courts, stopping short of the power to recognize, establish or regulate the causes of action which may be brought against a foreign state. Sovereign immunity, it seems to me, is not simply a matter of unenforceability of the internal legislation, but of its inapplicability.

[35] The parties have not submitted any authorities on this point. However, the following passage in *Laskin's Canadian Constitutional Law* (5th ed.), Carswell, 1986, at p. 413-414, while pointing to the lack of judicial authority on this issue, also articulates the following position, which I adopt:

"An unexplored constitutional question in the field of foreign relations is the extent to which provincial legislatures may regulate or tax activities or property of foreign governments which have been properly admitted to Canada in consequence of mutual recognition and establishment of diplomatic relations between Canada (acting through the federal government) and such foreign governments. This is a situation not covered by the *Labour Conventions* case,

and it is arguable that even apart from the applicable federal legislation, the foreign states should be in no different position than is the federal Crown vis-à - vis provincial legislatures. The issue is more than one of jurisdiction of provincial courts over a foreign state, though even here it should be clear that it is only the Dominion that may as a matter of domestic constitutional law, modify, abolish or extent the accepted common law rules of immunity: *Diplomatic and Consular Privileges and Immunities Act*, S.C. 1976-7, c. 31. How far the courts recognize, in domestic litigation, the principles of international law respecting immunity of foreign diplomatic representatives from local process and liability, or the immunity of property of a foreign state from local jurisdiction, does not as such touch legislative power but it necessarily presupposes (unless this be another gap in law-making authority) that there is a competent legislature able to deal with those matters; see *Reference re Exemption of U.S. Forces from Proceeding in Canadian Criminal Courts*, [1943] S.C.R. 483. In the *Diplomatic and Consular Privileges and Immunity Act*, the federal Parliament adopted as law certain provision of the *Vienna Convention on Diplomatic Relations*, including Article 23 which exempts foreign states "from all national, regional or municipal dues and taxes in respect of the premises of the mission" and Article 28 which exempts "from *all* dues and taxes" the fees and charges levied by the mission in the course of its official duties. The constitutional value involved is surely a matter of the peace, order and good government of Canada. It would follow, on this basis, that while it is proper to construe provincial taxing legislation as not intended to override tax immunity recognized by international law, it would in any event as a result of federal paramountcy be incompetent to a province to legislate in derogation of such immunity. Cf. *Reference re Powers of Ottawa and Rockcliffe Part to Levy Rates on Foreign Legations and High Commissioners'Residences*, [1943] S.C.R. 208; *Jennings v. Whitby*, [1943] O.W.N. 170 (Co. Ct.)."

(Underlining is mine)

[36] I therefore conclude that Parliament does have power to recognize and regulate the causes of action that can be maintained in Canada against foreign states or their agencies, including a cause of action for the recognition and enforcement of a foreign arbitral award, and that, as a result, the *Act* is applicable to the recognition and enforcement of the Award.

[37] The *Act* being applicable, the first part of the *ITO* test is met by the specific grant of jurisdiction found in section 6 of the *Act*.

3. The second part of the test: a body of federal law nourishing the jurisdiction:

[38] As regard the second part of the test, counsel for SPF has argued, on a reading of the Court of Appeal's reasons in *Villa Nova*, that the *Act*, in and of itself, does not fulfill this part of the test, and that there must be a body of federal law applicable to the original dispute underlying the arbitral award. Key to SPF's argument is the Court's discussion as to how the *ITO* test would apply to the case before it, and the Court's statement that "the existing body of federal law essential to the disposition of the case and nourishing the jurisdiction is found in Canadian maritime law" (at p. 569). From this, SPF extrapolates that the Court did not consider the *Act* as an existing body of federal law essential to the disposition of the case. I cannot agree with SPF's argument.

[39] I first note that the Court's comment as to the application of the *ITO* test is *obiter*. The issues of law to be determined by the Court on that appeal were narrowly defined as a series of four questions, the first of which includes a clearly defined constitutional question:

"[6] The action was instituted in the Trial Division on May 19, 1987, for enforcement of this arbitral award. The pleadings in that action gave rise to the points of law which were formulated as questions by the order of February 1, 1989, being namely:

(a) [I]s the Arbitration Award ("the Award") referred to in paragraph 5 of the statement of claim herein enforceable or maintainable in Canada under the

provisions of the United Nations Foreign Arbitral Award[s] [Convention] Act, Stat. Canada 1986, c. 21?

(b) [C]an the Award be enforced or maintained in Canada if the plaintiff's original cause of action is statute barred under the laws of England?

c) [C]an the Award be enforced or maintained in Canada if the plaintiff has failed to enforce its claim for demurrage under the Charter Party ("the Charter Party") dated the 17th day of January, 1978 against the receiver of the goods carried on board the Grecian Isle[s]?

(d) [D]id the Plaintiff's failure to enforce its claim for demurrage under the Charter Party against the receiver of the goods carried on board the Grecian Isle[s] deprive the arbitrators of jurisdiction?

[...]

[8] After this appeal was launched, the appellant gave notice of the following constitutional question pursuant to Rule 1101 of the Federal Court Rules:

> Is the United Nations Foreign Arbitral Awards Convention Act, S.C. 1986, c. 21 ultra vires The Parliament of Canada by reason of its violation of Sections 92(13), 92(14), 92(16) of the Constitution Act, 1867?"

[40] Questions c) and d) were answered in two short paragraphs. It is the first question, framed as a question regarding the constitutional validity of the *Act*, which forms the bulk of the Court's reasons.

[41] Accordingly, it is clearly the applicability and constitutionality of the *Act* that were put in issue. The jurisdiction of the Federal Court was not directly questioned, at least, no further than as to the constitutional applicability or validity of the entire *Act*, including its section 6.

[42] Indeed, the Court's very brief discussion at pages 568 and 569 as to the manner in which the *ITO* test would apply to the case before it comes after the Court has already concluded, at page 563, that the *Act* was valid in relation to matters of a federal character, and at page 568, that the enforcement

of the particular award before the Court "falls within federal legislative competence over navigation and shipping".

[43] In addition, nothing in the Court's statement would justify the inference that in identifying Canadian maritime law as the body of law nourishing the jurisdiction, the Court intended to exclude the *Act* itself. Indeed, the Court determined that the creation of a cause of action for the recognition and enforcement of the arbitral award in the matter was "legitimate Canadian maritime law" (at p. 567). As the definition of Canadian maritime law includes alterations brought by any Act of Parliament (section 2 of the *Federal Courts Act*), the Court's reference to Canadian maritime law as the body of federal law essential to the disposition of the case must be taken to include rather than exclude the *Act*.

[44] It should perhaps be mentioned here that while the Court of Appeal in *Villa Nova* also considered elsewhere in its reasons the law governing the underlying dispute, it did so in the context of its discussion as to whether the award had a federal character in a constitutional sense.

[45] The relevant passage reads as follows:

"It thus seems to me to be entirely proper for the Court, faced with determining whether an award may be recognized and enforced in accordance with the Act, to have regard to its origin in a charterparty agreement, an undoubted maritime contract [...]

[...]

In my opinion, the creation of a cause of action for the recognition and enforcement of the foreign arbitral award in issue, arising as it does from a breach of the charterparty agreement for payment of demurrage, is a maritime matter or so integrally connected to a maritime matter as to be legitimate Canadian maritime law. The award derives indirectly from the charterparty, and amounts, in reality, to a finding of validity and proper quantification of the demurrage claim. If that agreement had not called for submission to arbitration,

the respondent would have been entitled to sue on the original claim in the Trial Division which, as we shall see, has been invested with express jurisdiction over claims of that kind." (at page 567).

[46] Neither this passage nor the passage cited above from page 569 can be read as a requirement that the underlying dispute to the arbitral award be otherwise within the jurisdiction of the Federal Court in order to meet part two of the *ITO* test. Of course, and as pointed out by the Court of Appeal, it may be useful and proper for the Court to have regard to the nature of the underlying dispute in order to ascertain whether the award has a federal character for the purpose of the constitutional application of the *Act*. And indeed, once it is found that the underlying dispute has this federal character and would, moreover, be within the Federal Court's jurisdiction, it may follow as a matter of course that the award would be clothed of the same federal character. But the reverse need not be true, and nothing in the reasons of the Court in *Villa Nova* leads to the inference that if the underlying dispute is not otherwise within the jurisdiction of the Court, the Court cannot have jurisdiction over the enforcement of the award.

[47] Certainly, and as I made clear in the discussion concerning the constitutional applicability of the *Act* to this matter, the federal character of the Award herein is not dictated by the subject matter of the underlying dispute, but by the identity of the Respondent as an emanation of a foreign sovereign. Consideration of the law governing the underlying dispute in this instance would therefore not be determinative of the federal character of the Award, nor should it be determinative of the jurisdiction of the Court.

[48] Finally, reading the Court's reasons as a judicial determination that it is the law applicable to the underlying dispute which is essential to the disposition of the case would contradict the Court's premise that "the foreign arbitral award, as I have already stated, gave rise to a fresh cause of action" (at p. 569). It would further be at odds with the very economy of the *Act*, which intends that the merits

of an award not be re-considered on an application for recognition and enforcement.

[49] In my view, and as held by the Court of Appeal in *Villa Nova*, an arbitral award constitutes a fresh cause of action, the recognition and enforcement of which is regulated and governed by the *Act*. Save where expressly provided in the *Act*, the underlying dispute and the law governing same have no relevance or application in recognition and enforcement proceedings. The *Act* therefore meets the requirements of the second part of the *ITO* test, as more fully discussed in *Oag v. Canada* reflex, [1987] 2 F.C. 511 and *Kigowa v. Canada* reflex, [1990] 1 F.C. 804, in that it is clearly a "detailed statutory framework" from which the Applicant does derive specific rights and which governs the exercise of these rights.

[50] Even if I am wrong that the *Act*, in and of itself, satisfies the second part of the *ITO* test, I would nevertheless hold that the *State Immunity Act*, which would equally apply to the underlying dispute as to recognition proceedings, independently provides the necessary body of federal law required to nourish the grant of jurisdiction. It has been held on numerous occasions by the Court of Appeal that federal law does not need to exclusively apply to the dispute in order to sustain a grant of jurisdiction (*Bensol Customs Brokers Ltd. v. Air Canada* [1979] 2 F.C. 575, at p. 583):

"It should be sufficient in my opinion that the rights and obligations of the parties are to be determined to some material extent by federal law. It should not be necessary that the cause of action be one that is created by federal law, so long as it is affected by it."

[51] The same principle was upheld in *Prudential Assurance co. v. Canada* 1993 CanLII 2948 (FCA), [1993] 2 F.C. 293 and *The Queen v. Montreal Urban Community Transit Commission* [1980] 2 F.C. 151. The following passage of the latter case is particularly apposite to the present circumstances (at p. 153):

"In the case at bar, I think federal statute has an important part to play in determining the rights of the parties, since without it appellant would not be able to maintain any right against respondent. I cannot agree with counsel for the respondent, who argued, if I understood correctly, that in the circumstances the federal statute has only a secondary role, since all it does is to authorize the Crown to exercise a remedy already existing under [provincial][5] law. It is true that the role of the federal statute may seem secondary to respondent, to whom the identity of its creditor matters little, but the role of that statute is of particular interest to the Crown, since without it it would have no right."

[52] In the same way, but for the application of the exceptions found in the *State Immunity Act*, the Applicant herein would have no right against the Respondent, making the *State Immunity Act* essential to the determination of the case.

4. The third part of the test: "a law of Canada":

[53] Having concluded, as I did in the course of my discussion as to the first part of the *ITO* test, that both the *Act* and the *State Immunity Act* (to the extent the latter is relevant to establishing the jurisdiction of the Court) are constitutionally valid federal legislation, it follows that this third and last part of the *ITO* test is satisfied.

STATE IMMUNITY

A. As affecting the validity of the recognition order

[54] SPF has not asserted on its own behalf immunity under the *State Immunity Act*. Nevertheless, both Antonov and the State of Ukraine have argued that the Registration Order of January 17, 2003 is null because neither the notice of application filed by TMR nor the Registration Order expressly raise or address the issue of state immunity.

[55] Sections 3, 4 and 5 of the *State Immunity Act* read as follows:

3. (1) Except as provided by this Act, a foreign state is immune from the	3. (1) Sauf exceptions prévues dans la présente loi, l'État étranger

jurisdiction of any court in Canada.

(2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.

bénéficie de l'immunité de juridiction devant tout tribunal au Canada.

(2) Le tribunal reconnaît d'office l'immunité visée au paragraphe (1) même si l'État étranger s'est abstenu d'agir dans l'instance.

4. (1) A foreign state is not immune from the jurisdiction of a court if the state waives the immunity conferred by subsection 3(1) by submitting to the jurisdiction of the court in accordance with subsection (2) or (4).

(2) In any proceedings before a court, a foreign state submits to the jurisdiction of the court where it

(a) explicitly submits to the jurisdiction of the court by written agreement or otherwise either before or after the proceedings commence;

(b) initiates the proceedings in the court; or

(c) intervenes or takes any step in the proceedings before the court.

4. (1) L'État étranger qui se soumet à la juridiction du tribunal selon les modalités prévues aux paragraphes (2) ou (4), renonce à l'immunité de juridiction visée au paragraphe 3(1).

(2) Se soumet à la juridiction du tribunal l'État étranger qui_:

a) le fait de manière expresse par écrit ou autrement, avant l'introduction de l'instance ou en cours d'instance;

b) introduit une instance devant le tribunal;

c) intervient ou fait un acte de procédure dans l'instance.

(3) L'alinéa (2)c) ne s'applique pas

(3) Paragraph (2)(c) does not apply to

(a) any intervention or step taken by a foreign state in proceedings before a court for the purpose of claiming immunity from the jurisdiction of the court; or

(b) any step taken by a foreign state in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained before the step was taken and immunity is claimed as soon as reasonably practicable after they are ascertained.

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

(5) Where, in any proceedings before

dans les cas où_:

a) l'intervention ou l'acte de procédure a pour objet d'invoquer l'immunité de juridiction;

b) l'État étranger a agi dans l'instance sans connaître les faits qui lui donnaient droit à l'immunité de juridiction, ces faits n'ayant pu être suffisamment établis auparavant, et il a invoqué l'immunité aussitôt que possible après l'établissement des faits.

(4) La soumission à la juridiction d'un tribunal qui s'opère soit par l'introduction d'une instance soit par l'intervention ou l'acte de procédure qui ne sont pas soustraits à l'application de l'alinéa (2)c), vaut pour les interventions de tiers et les demandes reconventionnelles découlant de l'objet de cette instance.

(5) La soumission à la juridiction d'un tribunal intervenue selon les modalités prévues aux paragraphes (2) ou (4) vaut également pour les tribunaux supérieurs devant lesquels l'instance pourra être portée en totalité ou en partie par voie d'appel

a court, a foreign state submits to the jurisdiction of the court in accordance with subsection (2) or (4), that submission is deemed to be a submission by the state to the jurisdiction of such one or more courts by which those proceedings may, in whole or in part, subsequently be considered on appeal or in the exercise of supervisory jurisdiction.	ou d'exercice du pouvoir de contrôle.
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.	5. L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions qui portent sur ses activités commerciales.

[56] Antonov and the State of Ukraine take the position that on a reading of section 3(2), no court has jurisdiction in any matter involving a foreign state unless the conditions giving rise to the exceptions provided in the *State Immunity Act* are specifically alleged, proven and determined to be applicable by the Court.

[57] While I do agree that subsection 3(2) imposes on the Court the duty to raise and give effect to the *State Immunity Act proprio motu*, I cannot agree with the contention that the failure of the Court or of the parties to address the issue goes to the jurisdiction of the Court *rationae materiae* so as to render its order a nullity. This proposition ignores the fact that some of the grounds upon which the lack of immunity may be founded can only occur after a proceeding is initiated (ie., paragraphs 4(2)(a) or (c), whereby a state may waive immunity by agreement or by intervening in the proceedings). If a court were to lack jurisdiction until such time as an exception provided in the *State Immunity Act* were alleged and recognized, the ability of a foreign state to waive immunity after

the commencement of a proceeding would be nugatory, as, absent another preexisting exception to immunity, there could be no valid proceedings taken to which a foreign state could attorn. It further flies in the face of the principle that a court which lacks jurisdiction *rationae materiae* may not be clothed of such jurisdiction through the consent of the parties.

[58] In my view, the Court had jurisdiction over the subject matter, indeed, it had the requisite jurisdiction to make a determination as to whether or not the exceptions provided in the *State Immunity Act* existed. Whether or not the Court discharged its burden of making a determination, or whether or not it erred in making its determination are matters which do not affect the *prima facie* validity of the order. To reiterate the principles expressed in *Volhoffer v. Volhoffer* cited above regarding collateral attacks:

"if a tribunal which has jurisdiction over a subject-matter, provided a given state of facts exists, makes an order in respect of that subject-matter in the absence of the existence of that state of facts, and, therefore, without jurisdiction, such order must be treated as valid and binding until it is reversed upon an appeal, and, generally speaking, it cannot be attacked in a collateral proceeding."

[59] The Registration Order falls within the type of order described in this passage; Antonov and the State of Ukraine's arguments therefore constitute a collateral attack on the Registration Order that cannot be permitted.

[60] In any event, the fact that the issue of state immunity was not raised in TMR's written submissions and not expressly addressed in the Registration Order should not be conclusive of whether or not the Court considered the issue. There was, on the record before Court, more than enough evidence to conclude that SPF could not benefit from immunity. The Registration Order was issued after the Court requested and heard oral submissions by TMR in addition to the written record. I also note that, although not initially provided for in the draft order submitted with the application for registration, the order eventually issued provides for a 60 day period from the time of service of the Registration Order

before execution proceedings could issue. This addition to the draft order has all the appearances of an amendment designed to conform to the spirit and intent of section 10 of the *State Immunity Act*, which allows 60 days to a foreign state to remedy a default or contest a default judgement.

B. Jurisdictional Immunity of the State of Ukraine

[61] The State of Ukraine has asserted immunity from the jurisdiction of this Court, both as regards the Registration Order - to the extent it is held binding upon it - and as regards TMR's present motion to validate the seizure against assets said to be owned by the State of Ukraine.

[62] It is important, in analysing this issue, to understand clearly the basis upon which TMR asserts that the Registration Order may be enforced against the State of Ukraine. TMR does not seek to add the State of Ukraine as an additional respondent (and debtor) to the Registration Order. The enforcement proceedings before me are not in the nature of a garnishment, whereby TMR would assert that the State of Ukraine stands as guarantor or security for SPF's debts or owes a duty to SPF to put it in funds to pay the Award. Such proceedings as are mentioned above would entail considering the State of Ukraine as a third party, a distinct entity from SPF, whose liability (either to TMR or to SPF) arises discretely from SPF's.

[63] Rather, what TMR urges is that the Court should find that by naming SPF as Respondent, it was effectively also naming the State of Ukraine, that SPF and the State of Ukraine are not separate and distinct entities but one and the same, or in other words, that if SPF were a rose, the State of Ukraine, by any other name, would smell as sweet. Alternatively, although I am not certain that the result is any different, TMR argues that SPF is but a sham to disguise the actions of the State of Ukraine and shield it from liability, such that would entitle the Court to lift the corporate veil and validate the seizure of the State of Ukraine's assets.

[64] I start from the premise that, as I have mentioned above, there is more than enough evidence on the record to conclude that the Award relates to SPF's commercial activity so as to disentitle SPF from asserting immunity (section 5 of the *State Immunity Act*, see *supra* [55]). Indeed, the 1999 Constituent Contract, containing the arbitration clause and filed as an exhibit to the notice of application, clearly expressed its purpose as regarding the commercial operation of an oil refinery. The Award, also filed as an exhibit in support of the notice of application, contains the following specific determination as to SPF's entitlement to assert sovereign immunity, which determination is binding on SPF (at page 29 of the notice of application):

"The arbitrators hold that the 1999 Constituent Contract is a contract of purely commercial contents, which could have been entered into by a private party involving no element of sovereignty. If it is entered into by a state entity there is no valid reason why that entity should not be bound by its undertakings in the contract including the undertaking to arbitrate possible disputes under the contract.

The objection that the arbitrators lack jurisdiction over the dispute due to SPF's immunity is denied."

[65] Indeed, building on to the arbitrator's reasons, by the mere fact that a state entity should have entered into an arbitration agreement providing for arbitration in a country signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, without reserving its right to jurisdictional immunity, it must be taken to have known and accepted that any resulting award could be subject to recognition and enforcement by judicial process, and thus, have waived jurisdictional immunity in relation to the recognition of the award. Counsel for the State of Ukraine at any rate conceded at the hearing that if the State of Ukraine itself had executed the 1999 Constituent Contract with its arbitration clause, it would indeed be taken to have waived jurisdictional immunity in subsequent recognition proceedings.

[66] If then it is so clear that SPF is not immune from the jurisdiction of this Court in these proceedings, does it not just as clearly follow that the State of Ukraine is equally not immune if I find SPF and the State of Ukraine to be one and the same? Would the commercial purpose of SPF not be the commercial activity of the State of Ukraine if they are found to be one and the same? Would SPF's waiver not be the State of Ukraine's waiver if I find that, in fact, whenever SPF was seen or thought to be acting, its actions were those of the State of Ukraine itself? Poser la question, c'est y répondre.

[67] Because the success or failure of TMR's motion, as it relates to the identity of the judgement debtor, rests solely on a determination that by naming SPF as the Respondent, TMR was effectively naming the State of Ukraine as one and the same person, I consider that a positive answer to that question will automatically lead to the conclusion that the State of Ukraine is not immune from the jurisdiction of the Court. Moreover, a negative answer to that question would lead to the conclusion that the seizure is in any event invalid as not attaching to an asset of SPF, and the issue of Ukraine's state immunity would become moot.

[68] I therefore turn to the third issue to be determined: the identity of the judgement debtor.

IDENTITY OF THE JUDGEMENT DEBTOR

A. Preliminary Issues

[69] Not surprisingly, Antonov and SPF have met TMR's motion to determine the validity of the seizure with preliminary arguments to the effect that it is far too late, now that an award has been obtained and an order entered in the name of SPF, to now somehow "rectify" the Award or Registration Order in order to substitute the State of Ukraine as judgement debtor.

[70] These arguments were submitted in a somewhat jumbled form, without a clear articulation of the legal principles involved and how they should apply to the various proceedings leading up to the seizure. The arguments made generally invoked the concepts of *res judicata*, estoppel and procedural invalidity.

As the factual and legal underpinning of Antonov and SPF's objections are effectively centred on the various steps in the process leading from the institution of the arbitration through to the execution of the Registration Order, I have attempted to structure the arguments as I understand them in relation with each procedural step, beginning with the most recent event and working backwards in time. I will then address the question of whether it is appropriate for this Court to make a determination as to the identity of the judgement debtor at the execution stage of the proceeding.

1. Illegality of the seizure:

[71] The seizure was effected by the sheriff pursuant to a writ of seizure and sale issued by this Court in the form provided in Rule 424 of the *Federal Court Rules, 1998* directing him to seize and sell the property "of the Respondent". The Respondent is described in the style of cause appearing on the writ as "STATE PROPERTY FUND OF UKRAINE, an organ of the STATE OF UKRAINE". The sheriff also acted upon instruction from TMR's counsel, including an affidavit of Professor Anatoly Dovgert, stating that the Aircraft is owned by the State of Ukraine. Verbal instructions were also apparently given by TMR's counsel to the sheriff to the effect that the debts of SPF were those of the State of Ukraine[6]. The sheriff understood that the property seized was that of the State of Ukraine, as the notice of seizure issued on June 27, 2003 identified the Aircraft as "Property of the State of Ukraine". The same notice describes the debtor as "State Property Fund of Ukraine an organ of the State of Ukraine". Antonov argues that the sheriff's actions amounted to a modification of the name of the debtor from that contained in the writ and therefore illegal. From there Antonov appears to make the leap that if the seizure is unlawful, it must be null and void and cannot be validated on a motion such as the present.

[72] The only authorities cited by Antonov in support of its position are two cases holding the sheriff liable for wrongfully seizing assets of a person other than the judgement debtor (*Overn v. Strand*, 1931 CanLII 44 (SCC), [1931]

S.C.R. 720 and *Kundi v. Active Bailiff Service Ltd.*, [1996] B.C.J. No. 2036), and cases where seizures were set aside on the basis that the property belonged to a person distinct from the judgement debtor and whose personal liability for the judgement debtor's debt had not been adjudged (*Di-Done-Gagnon v. Di-Done J.E.* 2000-1093 (Qué C.A.), *Hamilton v. British Columbia (Worker's Compensation Board)* 1992 CanLII 360 (BC CA), (1992) 65 B.C.L.R. (2d) 96 (B.C.C.A.)). These authorities do not assist Antonov. In none of those cases was it argued that the nominal owner of the property was the same person as the judgement debtor. A finding holding that a sheriff acted improperly or unlawfully is not the same as a finding that a seizure is a nullity that cannot be cured on a motion to determine the validity of a seizure. And in those cases where it was found that the personal liability of the third party whose property was seized had not been established, it was clear that the third party had a distinct existence from the judgement debtor, and that if his liability had been engaged, it would have been on his own behalf - not as alter ego of the judgement debtor.

[73] I can therefore not find any basis in case law to hold that, at law, the seizure of property said to be owned by a person designated in terms which differ from the strict wording of the writ of seizure and sale is a nullity. At worse, if such a seizure is effected without sufficient grounds to reasonably believe that the goods are properly those of the judgement debtor, the judgement creditor - if not the bailiff or sheriff - could be liable in damages[7]; but it would not, in my view, render the seizure a nullity so that the judgement creditor be deprived of its right to obtain a judicial determination as to the validity of the seizure.

[74] A review of the mechanism for seizure and sale provided for in the *JEA* confirms me in that opinion. Without citing *in extenso* the various provisions of the *JEA*, it is clear that it contemplates, as regards seizure and sale, a system based on the principle of creditor initiation and control, with minimal Court involvement, and with the sheriff acting under legislative authorization, but on the express instructions of the creditor (s. 71 of the *JEA*). Thus, the sheriff is not

required to act until specific instructions are given by the creditor identifying the status of the judgement debt, the nature and location of the property to be seized and providing any other document or information reasonably required by the sheriff (s. 72 of the *JEA*). On the basis of the information provided, subsection 73(2) of the *JEA* sets out as follows the extent of the sheriff's duties and discretionary powers:

73(2) The sheriff may seize personal property in which there are reasonable grounds for believing the debtor has an exigible interest, but shall not seize property that appears to be exempt.

[Emphasis mine]

[75] "Exempt property" is defined as follows (paragraph 2(1)(s) of the *JEA*):

""exempt" means not subject to enforcement proceedings;"

and property subject to enforcement proceedings is in turn identified as follows (paragraph 3(5)(b) of the *JEA*):

3(5)(b) "except as otherwise provided in this or any other Act, all property of a debtor is subject to enforcement proceedings under this Act;"

[Emphasis mine]

[76] Thus, the *Act* empowers the sheriff to seize property, upon reasonable grounds to believe it is subject to enforcement, which grounds are gained primarily from information supplied by the creditor. The prohibition to seize only applies, on my reading of subsection 73(2), where the exempt status of the property is apparent.

[77] Should the debtor, a third party or a person claiming an interest in the property seized have objection to the seizure, Part XII of the *JEA* provides that an objection or a claim to the property can be made by simply delivering the appropriate notice to the sheriff. As to the merits of the reasons given for the

objection or claim, the sole ground for not treating a claim or objection as effective is if it is "frivolous or intended merely to delay or prolong the enforcement proceedings" (paragraphs 159(2)(c) and 162(2)(a)). Thereafter, insofar as merit is concerned, so long as the objection or claim is not frivolous or intended to delay or prolong the enforcement, it is the creditor who has the onus of bringing the matter before the Court for judicial determination (paragraph 163(2)(b) and section 164 of the *JEA*).

[78] When the Court is seized of an application by the creditor (or a claimant), the Court is to "determine the issue" (s. 164(1)). The exercise in which the Court is to engage is therefore not one of judicial review of the sheriff's actions, but one of adjudication on the merits of the seizure.

[79] I cannot discern in the wording, structure or intent of the *JEA* a formal requirement for the validity of a seizure that the name given to the person said to have an interest in the property be formally identical to the judgement debtor identified in the writ of seizure and sale, if the information otherwise provided to the sheriff is to the effect that they are one and the same.

[80] In any event, subsection 77(1) of the *JEA* provides that: "A seizure is valid notwithstanding an irregularity in the procedure by which it was carried out".

[81] Finally, even if I am wrong in finding that the sheriff's seizure of property ostensibly owned by a person whose identity is not exactly as described in the writ of seizure and sale is not a nullity, I find that in the circumstances of the case, there is sufficient ambiguity between these respective designations that it was not unreasonable for the sheriff to effect the seizure, given the additional information given to him by TMR's solicitors. Indeed the Respondent being designated on the face of the writ as "[SPF] an organ of the State of Ukraine", it is far from unreasonable for the sheriff to believe, even in the absence of additional information, that SPF does not have an independent legal existence and that the true debtor is the State of Ukraine, in the same manner as the Queen in Right of Canada is often designated with specific reference to the

responsible Minister, or that corporations often designate themselves with reference to their various divisions ("X, a division of Y Inc.").

2. The writ of seizure and sale:

[82] SPF and Antonov argue that TMR has already requested, and been refused, a determination that the State of Ukraine could be named as a judgement debtor instead of or in addition to SPF and that, presumably on the basis of *res judicata* or estoppel, it may not seek the same relief again. In any event, Antonov submits that the Court would not have the power to issue a writ of seizure and sale in which the designation of the judgement debtor does not conform to the Court's judgement (or in this case, to the Registration Order). The case of *In re Langstaff Estate*, reflex, [1923] 3 W.W.R. 626 is cited in support of that proposition.

[83] As I am of the view that the writ of seizure, on its face, does not diverge from the terms of the Registration Order, there is no need for me to make a determination as to this latter aspect of Antonov's argument. Nevertheless, I will mention that *In re Langstaff* concerned a writ for the execution against "goods and lands" whereas the judgement specifically mentioned only "goods and chattels"; it did not concern the identity of the judgement debtor. Furthermore, the decision of this Court in *Joy Shipping Co. v. Empressa Cubana des Fletes*, [2000] F.C.J. No. 945 and of the Court of Appeal in *Canada (Minister of National Revenue) v. Gadbois*, [2002] F.C.J. No. 836, which shall be more fully discussed later, would appear to cast doubt as to the validity of Antonov's position at law.

[84] I now turn to the first part of SPF and Antonov's submissions as to the circumstances surrounding the issuance of the writ of seizure and sale.

[85] It is true that TMR initially requested that a writ be issued for the seizure and sale of the property of the State of Ukraine. However, as stated in *Joy Shipping*, the process of requisition and issuance of a writ is a purely mechanical or administrative process, involving no judicial determination. A

requisition for a writ is therefore neither a motion nor any specie of application for judicial determination, the making or outcome of which would somehow bind TMR under the rules of *res judicata* or issue estoppel. Nor do I consider that the Court's oral direction dated 11 June 2003 requesting a hearing as to TMR's requisition has the virtue of transforming the requisition into a motion or the resulting direction of the Court authorizing the issuance of the writ against the property "of the Respondent" into a judicial determination.

[86] First, as held by this Court in *Drapeau v. Canada* reflex, (1996), 119 F.T.R. 146 (T.D.), directions issued by the Court to the Registry are not judicial decisions that determine the rights of the parties. Furthermore, the minutes of the hearing that took place as a result of the Court's request for a "hearing" indicate that the Court seemed to be concerned that issuing the writ in the form originally submitted by TMR would require a motion:

"La Cour se prononce sur la possibilité pour Me Desgagnés [TMR's solicitor] de présenter une requête urgente."

[87] In the end, no motion was made, and the Court simply issued a direction to the Registry authorizing the issuance of the writ as indicated. It is abundantly clear that neither the Court nor TMR considered the requisition for a writ to be in the nature of a request for a judicial determination, or the Court's direction as to the form of the writ to be such a determination. The principles of *res judicata* or issue estoppel do not apply in the circumstances.

3. Registration Order:

[88] Antonov submits that the proper moment for considering the issue of the identity of the judgement debtor is at the registration stage. As a result, through the application of the doctrine of issue estoppel, TMR would be precluded from raising at a later stage an issue which could or should have been brought forward at the appropriate time in the exercise of reasonable diligence (see for example *Grandview (Town of) v. Doering*, 1975 CanLII 16 (SCC), [1976] 2 S.C.R. 621). Further, or alternatively, they submit that as the resolution of the

issue properly belonged at the registration stage, any request to rule on this issue should be brought by way of a motion for reconsideration of the Registration Order, to be presented to the Court as constituted when the order was issued. In order to accept Antonov's arguments, I would have to accept that the issue of the judgement debtor's identity could properly have been raised at the time of the application for the Registration Order.

[89] The only authority cited by the parties as to this issue is the English case of *Norsk Hydro ASA v. The State Property Fund of Ukraine et al*, [2000] EWHC 2120 (Comm.). In that case, the plaintiff obtained an arbitral award against *inter alia* "the Republic of Ukraine, through the State Property Fund", and sought and obtained an enforcement order in England against respondents named as The State Property Fund of Ukraine and the Republic of Ukraine, as distinct respondents. The State of Ukraine applied to set aside the enforcement order on the basis that the Court had lacked jurisdiction to issue an enforcement order in terms differing from the arbitral award. The High Court of Justice, (Queen's Bench Div., Commercial Court) agreed.

[90] It should be noted here that although the High Court's reasoning in that decision is useful in understanding the principles that should guide this Court in determining these new issues in an area of international law where comity and international consistency should be observed where possible, it is not binding on this Court. Furthermore, the High Court's decision is in large part dictated by the specific wording of s. 101 of the *English Arbitration Act, 1996* which provision is absent from our own *Act*. This said, the following passage of the Court's decision (at paragraphs 17 and 18) remain, in my view, important policy considerations that are just as applicable to the situation before me:

"There is an important policy interest, reflected in this country's treaty obligations, in ensuring the effective and speedy enforcement of such international arbitration awards; the corollary, however, is that the task of the enforcing court should be as "mechanistic" as possible. Save in connection with the threshold requirements

for enforcement and the exhaustive grounds on which enforcement of a New York Convention award may be refused (ss. 102-103 of the 1996 Act), the enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions. Additionally, the enforcing court seeks to ensure that an award is carried out by making available its own domestic law sanctions. It is against this background that Issue (1) falls to be considered.

Viewed in this light, as a matter of principle and instinct, an order providing for enforcement of an award must follow the award. No doubt, true "slips" and changes of name can be accommodated; suffice to say, that is not this case. Here it is sought to enforce an award made against a single party, against two separate and distinct parties. To proceed in such a fashion, necessarily requires the enforcing court to stray into the arena of the substantive reasoning and intentions of the arbitration tribunal. Further, enforcement backed by sanctions, is sought in terms other than those of the award. Still further, though I do not rest my decision on it, such an approach raises the spectre of unintended consequences should a false step be taken - for example, English domestic law rules as to election and the enforcement of judgments against principals and agents would need to be considered: see, for example, Morel v Westmoreland [1904] AC 11; Moore v Flanagan and Wife [1920] 1 KB 919. In my judgment, this is all inappropriate territory for the enforcing court. The right approach is to seek enforcement of an award in the terms of that award."

and later, (at paragraph 20):

"(2) I am not without sympathy for the efforts of NH's solicitors and, in particular, Mr. Fallon in seeking to grapple with the ambiguity (not, I suspect, of Mr. Fallon's making) in the naming of the relevant Respondent to the award. That said, the court has no jurisdiction to "iron out" the ambiguity by purporting to enforce the award in different terms. This case accordingly underlines the importance of addressing such issues before the stage of the award is reached; if, however, an

ambiguity of this nature remains in an award then (so far as the enforcing court is concerned) it has to be addressed in the course of any argument as to enforcement. What cannot be sought is enforcement other than in terms of the award."

[91] It is not clear, in this last passage, what the Court meant when it stated that the issue ought to be addressed "in the course of any argument as to enforcement", if the enforcement order cannot be sought in terms other than those of the award. I rather think that the Court had in mind any argument that could arise later, in the course of the execution process. Be that as it may, I accept that a registration order (which I understand is termed an "enforcement order" in the *Norsk Hydro* judgement) is designed to incorporate an arbitral award into an order of the Court so as to afford it recognition and execution in accordance with the domestic law of the recognizing Court, without questioning or second-guessing its intentions. As such, I agree that upon being seized of an application for registration, which, in accordance with the specific provisions of Rule 328(1), is more often than not made *ex parte*, the Court should be as "mechanistic" as possible, so as to ensure that the order recognizing the award as an order of the Court be as true to the original award as possible. On that principle, it hardly seems appropriate for the issue of the identity of the judgement debtor to be raised, let alone determined, at that stage. The issues to be considered at the registration stage should, in my view, be restricted to the threshold requirements for registration and the grounds provided in the convention for refusing registration.

[92] I am therefore satisfied that TMR's failure to raise this issue for determination in the context of its application for registration of the arbitral award does not give rise to *res judicata* or issue estoppel, and that TMR was therefore not required to bring the issue up for determination by Prothonotary Morneau upon a motion for reconsideration or rectification of the Registration Order.

4. The style of cause:

[93] Antonov has taken issue with what it construes as an intentional and reprehensible stratagem
by TMR of including, in the original style of cause, the descriptive elements for TMR of "a duly constituted person incorporated under the laws of Cyprus" and for SPF of "an organ of the State of Ukraine", and then of maintaining this element for SPF only in the writ of seizure and sale. This, they say, had the effect of inducing the sheriff in believing that the descriptive element "an organ of the State of Ukraine" was part of the formal designation of SPF, creating an ambiguity of which TMR now tries to take unfair advantage.

[94] It is true, in my view, that the designation of SPF as Respondent with the descriptive element created an ambiguity, and that this ambiguity is likely to have played a part in the manner in which the sheriff exercised his discretion to effect the seizure against an asset of the State of Ukraine. I am, however, not convinced that there was any nefarious premeditation on the part of TMR in the process, nor that the sheriff would have refused to perform the seizure as instructed if the writ had not contained the impugned designation. No evidence was submitted for me to reach this conclusion, and I do not believe such an inference is justified on the bare facts before me.

[95] The Rules of the Court do not require - nor provide for - the style of cause to include a description identifying the parties as an individual, a corporate body, an association or any other type of entity. Yet this practice is prevalent in proceedings filed in Quebec (where the provincial rules of practice require such a description) and it is not unheard of in other provinces. The Registry routinely accepts such filings, and I am not aware of any instance where the practice was challenged. It is neither my intention nor my obligation on the motion before me to comment as to whether this practice is to be discouraged or sanctioned. I simply note its existence and the fact that the notice of application filed herein in Montreal conforms to this accepted practice. It is I think a natural consequence of this practice that any order or writ subsequently issued against "the Respondent"

will incorporate an ambiguity. I use the term "ambiguity" advisedly, as the descriptive element so used is assigned by the Plaintiff or Applicant, often on scant information, and that such descriptive is not necessarily considered to be an allegation to which the opposing party is required to respond. Indeed, it is often the case, as here, that the descriptive element is dropped from the style of cause in further filings. Therein lies the peril that befell this action, that it is not always clear, even to the parties themselves, where the designation of the party ends and where the descriptive begins, as for example in the designations "in his capacity as", "a.k.a.", "carrying on business as" or "a division of".

[96] Antonov makes much of the fact that TMR, in the writ it caused to be issued, maintained the descriptive element only for SPF. I do not see that this proves an intention or constitutes the sole reason for the resulting ambiguity. The words "an organ of the State of Ukraine" can be just as easily construed as part of the designation of the party than as a mere descriptive element; TMR's solicitors are just as likely to have themselves been confused by their own use of it; the sheriff might still have been confused by it, even had TMR's descriptive been kept in the style of cause.

[97] Finally, the above discussion, explaining how the use of a descriptive can be perceived as part of a party's designation, will also explain the apparently contradictory conclusions I have come to in the course of the preceding analysis, to the effect that while the Award is directed against SPF, the Registration Order properly conformed to the Award, and the writ, naming on its face as respondent, "SPF an organ of the State of Ukraine", was in turn in conformity with the terms of the Registration Order.

5. Determining the identity of the judgement debtor on execution:

[98] It is common ground between the parties that the Award contains no determination as to the corporate nature of SPF, its relationship with the State of Ukraine or the alleged identity between SPF and the State of Ukraine. It is also common ground that the issue was not before the arbitration panel for

determination. Indeed, although TMR had initially commenced arbitration proceedings against the State of Ukraine, these were discontinued without prejudice. The principles of *res judicata* therefore do not strictly apply to this issue. Even so, the wider principle of issue estoppel would apply if the issue is one that could or should have been raised at the arbitration stage. The Federal Court of Appeal recently described issue estoppel as follows in *Genpharm Inc. v. Procter & Gamble Pharmaceuticals Canada*, [2003] F.C.A. 467, at paragraph [20]:

"However, issue estoppel "extends to the material facts and the conclusions of law or of mixed fact and law ('the questions') that were necessarily (even if not explicitly) determined in the earlier proceedings" (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 S.C.R. 460 at 476 - 77 [Emphasis added]). The test is "whether the determination on which it is sought to found the estoppel is 'so fundamental' to the substantive decision that the latter cannot stand without the former" (*Angle* at 255, quoting *Spens v. I.R.C.*, [1970] 3 All E.R. 295 at 301 (Ch.))."

[99] and, at paragraph [24], citing *Hoystead v. Hoystead*, [1926] A.C. 155 at 166 (H.L.):

"Thirdly, the same principle - namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the Plaintiff and traversable by the Defendant, has not been traversed. In that case also a Defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

[100] It seems to me from the above passages that issue estoppel will only arise where the matter in issue is in the nature of a substantive right, as opposed to a procedural one. The parties did not address the point of whether the issue of the designation of the judgement debtor is in fact a substantive issue which could

have been brought up for final determination in the arbitration proceeding or whether it is simply a procedural matter which carries no final determination of rights. On the basis of the following passage from the Supreme Court of Canada in *Regas Ltd. v. Plotkins*, 1961 CanLII 71 (SCC), [1961] S.C.R. 566, it appears that the propriety of the designation of the Defendant to the arbitration proceedings as SPF or as the State of Ukraine was procedural in nature:

" The position here is, therefore, that the respondent had a valid, equitable assignment under the laws of Alberta, but that in order to obtain judgment in that jurisdiction he would have had to join, as a party, the person who held the legal right to the debt under The Judicature Act.

However, the respondent did not sue on the debt in Alberta, but in Saskatchewan, where the debt had been incurred for goods sold and delivered in that Province to the debtor, who resided there. The question is whether he can maintain his action there in his own name and that question, in my opinion, falls to be determined by the lex fori, for the question, in the circumstances of this case, is one of procedure and not of substance. It is not a question of the validity of the assignment, or of the capacity of the parties to it, but as to the proper parties to the proceedings in Saskatchewan, which is a question of procedure which should be governed by Saskatchewan law."

[101] I therefore do not consider that the doctrine of issue estoppel is applicable in the circumstances.

[102] Furthermore, it seems to me that an arbitration award must be viewed in the same way as a judgement or order of a Court. In the same way as a judgement may not be re-opened on its merits after it is issued (save as expressly provided by the mechanisms of appeal or reconsideration), an award may not be re-opened after it is rendered, save as provided in the rules governing the arbitration or its recognition. This is consistent with the principles adopted earlier in these reasons to the effect that in the act of recognizing an

award as a judgement of this Court, the Court should be as "mechanistic" as possible so as not to question or interpret the award as pronounced.

[103] However, to the extent that it would be permissible, without re-opening a judgement, to interpret it or issue rulings as to the manner of enforcing it, so should it be for an arbitral award duly recognized as an order or judgement of the Court. If the intent and purpose of the *Act* is to afford to an arbitral award the same recognition as a judgement of the Court and make available for its enforcement the domestic law process of execution, then the award, once recognized, should be given no more and no less deference as to its terms than an order or judgement of the Court.

[104] Considering, therefore, the Award as recognized in the Registration Order on the same basis as a judgement, I find that the true identity of the defendant - or eventual judgement debtor - is an issue that can be addressed in the course of enforcement or execution proceedings.

[105] Apart from the case of *Norsk Hydro v. SPF*, discussed above, neither Antonov nor SPF has cited any case standing for the proposition that it is inappropriate for issues relating to the identity of the judgement debtor being determined in the course of execution proceedings.

[106] On the other hand, several decisions of this Court have determined identity of debtor issues in the context of execution proceeding.

[107] In *Canada (Minister of National Revenue) v. Gadbois*, [2002] F.C.J. No. 836 (F.C.A.) the Court of Appeal specifically answered in the affirmative the following question in the context of garnishment proceedings (at par. [1] of the reasons):

"(c) Does the Trial Division have jurisdiction to order the lifting of the corporate veil between Gilbert Gadbois, the judgement debtor, and 2951-7539 Québec Inc. that belonged to him?"

[108] In *Joy Shipping Co. v. Empressa Cubana des Fletes* (supra), this Court was seized of a motion to set aside a writ of seizure and sale directed against the

ship "Rio Cuyaguateje", owned by Pesquera Cuyagua S.A., a company not named as a defendant to the action and against which no judgement has been entered. Affidavits had been filed to justify the issuance of the writ, containing statements that both the defendants and the owner of the ship were mere instrumentalities of the Government of Cuba. In refusing to set aside the writ, the Court stated:

"[12] Second, I was of the view the rules provided the applicant a specific mechanism to challenge the seizure of the ship on the basis that the judgment debtors were not its owners. Rule 448, in my view, governs the processing of an objection to a seizure on this basis and in this respect the laws of Newfoundland would apply because the ship was seized there. Throughout this process the Federal Court has continuing jurisdiction.

[13] Third, in the context of rule 488, it was not appropriate for me to consider at this stage the merits of the applicant's argument without a full record on whether, in fact, the ship was an asset of the defendants which Joy could look to."

[109] In *Roxford Enterprises S.A. v. Cuba*, [2003] F.C.J. No. 985 (Fed. Proth.) (appeal to a F.C.J. pending), although the specific question was put somewhat differently, the Court stated the issue and its conclusions thereon as follows:

"[23] Cubana submits that in the absence of a body of federal law to nourish jurisdiction, this Court cannot determine that Cubana is liable for the debts of Cuba. Such a determination, it says, would require delving into the complex factual and legal issues of ownership of the assets of Cubana, and its relationship to Cuba. Cubana maintains that decisions of this nature are not within the jurisdiction of this Court. Moreover, it submits that it is inappropriate for the Court to attempt to resolve such issues in a summary procedure, via affidavit evidence.

[24] Similar challenges to this Court's jurisdiction to deal with the merits of objections made in the context of the enforcement of a judgment have been

rejected in the past. In *Le Bois de Construction du Nord (1971) Ltée. v. Guilbault Inc. et. al.* [1986] A.C.F. No. 434 (QL), Pratte J. stated, at 334:

[A] court which has the jurisdiction to order that the property of a debtor be garnished must necessarily have that of ruling on any objections put forward by third parties claiming to own the garnished property. Similarly, the power to garnish debts owed to a debtor in my opinion necessarily implies the power to rule on the existence of the debts garnished. Accordingly I believe that in the case of a garnishment of debt the court has the power, if the garnishor objects to the negative declaration of the garnishee, to rule on the existence of the debt garnished.

[25] More recently, the Federal Court of Appeal confirmed that this Court has broad jurisdiction to decide issues which arise in the enforcement of its judgments, including whether the corporate veil should be lifted: *Canada (Minister of National Revenue) v. Gadbois*, [2002] F.C.J. No. 836 (QL) ("Gadbois"). The Court in Gadbois also concluded that objections to enforcement could adequately be argued on the basis of "documentary evidence in the record, affidavit evidence and cross-examination of affiants".

[26] Cubana has not established that it was in any way prejudiced by having to resort to the usual procedure in connection with motions in the Federal Court. Moreover, leave was never sought to deviate from the general scheme applicable to motions. Consequently, I conclude that this Court has jurisdiction to determine the principal issue in this motion, namely whether Cubana is assimilated to Cuba or a separate juridical personality that is immune from seizure."

[110] In addition to the support found in these cases, I note that the *JEA* and its regulations contain numerous provisions as to the identification of the judgement debtor: section 68, providing means for a creditor to obtain information for the purpose of determining or verifying the identity of the judgement debtor, and the entirety of Part II of the *Judgement Enforcement*

Regulations, 1999 (O.C. 99-476) providing the manner in which various types of judgement debtors are to be designated in a registry of notices of judgement and other enforcement documents, and how the designation is to be modified or corrected. In addition to the provisions of Part XII for the judicial determination of issues arising from notices of claim or objection, section 11 provides a further mechanism whereby any interested person may seek the determination of any matter or issue "that arises out of the enforcement proceedings". Clearly, it is contemplated that the identity of a judgement debtor may become an issue in the course of enforcement proceedings, and the *JEA* provides specific procedures for the due determination of these issues.

[111] I am therefore satisfied that the determination of who may be considered the debtor under a judgement or order is an issue that may properly be raised and determined at the execution stage.

B. Discussion

1. The applicable legal principles:

[112] TMR has urged me, in determining whether the State of Ukraine is to be considered the judgement debtor in this matter, to apply the criteria developed in state immunity cases to determine whether an agency or entity of a foreign state is an alter ego of the foreign state for the purpose of claiming immunity under the *State Immunity Act*. The alter ego test involves the consideration of whether the entity performs functions associated with governmental authority and the effectiveness of the control exercised over it by the state. The alter ego test attaches little significance to whether the particular entity is endowed with a separate juridical personality; it determines the issue with regard to the foreign law under which the entity is created and controlled, but in accordance with domestic law.

[113] It must be remembered that the alter ego test was developed at a time when the *State Immunity Act* had not yet been enacted (see *Ferranti-Packard Ltd. v. Cushman Rentals Ltd. et al* (1980), 30 O.R. (2d) 194, aff'd 31 O.R. (2d)

799, approving and adopting the test refined by Lord Denning in *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529). At that time, the common law recognized the principle of immunity of foreign governments and extended that immunity to "its department of state or any body which can be regarded as an alter ego or organ of the government." (*Trendtex Trading*, at p. 559). The alter ego test was therefore a means of determining whether an entity was an "organ" of the foreign state for the purpose of benefiting from state immunity. It had no use or application to the determination of whether the entity had a distinct legal existence.

[114] The *State Immunity Act* reprises the concept of "organ of the state" in the definition of "agency of a foreign state":

"2. "agency of a foreign state" means any legal entity that is an organ of the foreign state but that is separate from the foreign state."	"2. « organisme d'un État étranger » Toute entité juridique distincte qui constitue un organe de l'État étranger.
"foreign state" includes	« État étranger »
(...)	(...)
(b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state."	b) le gouvernement et les ministères de cet État ou de ses subdivisions politiques, ainsi que les organismes de cet État"

[115] Thus, there are three concepts at play here: First, the concept of agency of a foreign state, which is included in the greater definition of foreign state. Then, there are the two defining characteristics of an agency of a foreign state: (1) that it be an organ of the foreign state (and our Courts in interpreting

this requirement still use the alter ego test) and (2) that it be a legal entity separate from the foreign state. The concept of separate legal entity necessarily refers to a distinct corporate personality. Thus the concept of "organ of a foreign state" continues to refer to the function and control aspects which distinguishes true emanations of a government, regardless of legal status, and a new concept is introduced, that of separate legal entity. The distinction is relevant to the scheme of the *State Immunity Act*. While foreign states at large and the more restricted "agencies of a foreign state" are equally entitled to jurisdictional immunity, subject to the same exceptions (sections 3 to 8), the manner of serving originating documents differs whether the entity to be served is a foreign state other than an agency or an agency of a foreign state. Moreover, whereas foreign states (excluding agencies) remain, subject to exception, generally immune from execution even where they lose jurisdictional immunity, agencies of a foreign state do not have general immunity from execution if they are subject to jurisdiction (subsections 12(1) and (2)). The different treatment afforded to agencies of foreign states and other foreign states is justified and required by the agencies' status as corporate entities distinct from the state itself. For these reasons, I do not think that the alter ego test is determinative of the issue of whether, for the purpose of execution, the State of Ukraine should be assimilated to SPF.

[116] This does not mean that the Canadian law conception of what constitutes a distinct legal entity and the criteria which are comprised in the alter ego test are not relevant to this determination, especially those concerning control, ownership of assets, and conduct of legal proceedings. Ukrainian law is of course essential to the determination of SPF's status as a distinct corporate entity: it governs its manner of creation, its status under Ukrainian law, its duties, powers, ability to own property, to act independently, to sue and be sued, to govern and manage its own affairs. Nevertheless, I do not think Ukrainian law must be considered in vacuum, without regard for Canadian legal concepts. The issue arises for determination in the context of execution proceedings, which are

governed by the *lex fori*, not by foreign law. The purpose for which the status of SPF and its relationship to the State is being determined has less to do with who is liable for SPF's actions, than with SPF's ability to be sued, to own and dispose of property and to be answerable to the process of the Court. Canadian law must therefore by necessity be used to measure the criteria under which Ukrainian law recognizes an entity's status as a distinct legal entity, so that the definition used under Ukrainian law can be ascertained to be relevant to our execution process.

2. The evidence:

[117] The content and meaning of foreign law is a fact, and must be proven by the parties.

[118] In support of its position as to the issue of the identity of the judgement debtor, TMR has submitted the expert affidavit of Professor Anatoli Dovgert, providing his opinion on the matter and attaching the certified translation of a selection of statutes, regulations and decrees governing the constitution, status, duties and powers of SPF and other similar state organs. It has also submitted, through the affidavit of Azim Hussain, various proceedings filed in the United States by or on behalf of SPF, public statements posted on SPF's website and other material which it claims contains admissions opposable to SPF and the State of Ukraine. The expert affidavit of Oleg Batiuk also contains some comments and information relevant to this issue. For its part, on the issue of the identity of the judgement debtor, Antonov has filed the expert affidavit of Professor Valentyn Scherbyna, also providing his opinion and attaching certified translations of legislative material. The affidavit of Igor Zub contains certain statements and refers to certain materials relevant to that issue.

[119] I have analysed the evidence in two steps: first by looking at the legislative texts cited by the experts, and making such observations that appear from them, and then by comparing those preliminary observations with the experts' own opinions and analysis.

a) The legislation

[120] Turning first to legislative texts, I have excerpted or paraphrased hereinafter those which I considered most relevant:

Temporary Regulations on the State Property Fund of Ukraine

(hereinafter "*Temporary Regulations on SPF*")

1. [SPF] is a body of the state which implements national policies in the area of privatization of state-owned property and acts as a lessor of property complexes owned by the state.

2. In the course of its activities, [SPF] shall be subordinated and accountable to the Supreme Rada of Ukraine (...).

3. [SPF] shall establish regional departments in the Republic of Crimea, oblasts, and cities of Kyiv and Sevastopol. [SPF] shall be entitled to establish representative offices in other towns and districts of Ukraine, if necessary.

9. The chairman of [SPF], heads of regional departments and representative offices shall be personally liable for fulfilment of tasks laid upon [SPF] and its regional departments and representative offices and for the discharge of their respective funtions.

14. Expenses for supporting [SPF] personnel and personnel of its regional divisions shall be funded out of the state budget; those of representative offices shall be covered at the expense of the Extra-budgetary Privatization Fund.

15. [SPF], its regional departments and representative offices shall be legal entities and have independent balance sheets, settlement and other accounts with banks, seals with the image of the National Emblem of Ukraine and their respective names.

[Emphasis mine]

Decree of the President of Ukraine on the System of Control of Executive Power

1. (...)

The system of the Ukrainian central organs of executive power shall consist of ministries, state committees (state services) and central organs of executive power with special status.

3. Expenses for securing the activities of the central organs of executive power shall be funded from the State Budget of Ukraine.

The maximum number of employees in the central organs of executive power shall be approved by the Cabinet of Ministers of Ukraine.

[A supplement to this decree designates the State Property Fund of Ukraine as a central organ of central executive power with special status, along with such other organs as the State Customs Service of Ukraine, State Security Service of Ukraine, the Department of State Protection of Ukraine, and the Ministry of Economics of Ukraine].

The Budget Code of Ukraine and the Law of Ukraine on the State Budget

of Ukraine for 2002

[These laws make it clear that the revenues generated by SPF from its privatization activities are to be included in the state's budget].

Decree of the President of Ukraine on Procedures for Effectuation of Protection of Rights and Interests of Ukraine in the Course of Proceedings in Cases Considered by Foreign Jurisdictional Authorities

(hereinafter the "*Procedures for Effectuation of Protection of Rights and Interests of Ukraine*")

[This decree essentially sets up of mechanism for coordinating the defensive actions taken against the state, its ministers, ministries and other central organ of central executive power before foreign courts or arbitration tribunals. It contains the following definition]:

"Claim against Ukraine" shall mean a claim (complaint, petition) against Ukraine as a state, against the President of Ukraine, the cabinet of ministers of Ukraine, a

ministry, against other central organ of central executive power, which has been filed with a foreign jurisdictional authority by a foreign state, a legal entity or a natural person;"

Civil Code of the Ukrainian SSR

(hereinafter the "*Civil Code of Ukraine*")

Article 24. Types of legal entities.

Legal entities are:

State enterprises and other state organizations that are running on a self funded basisand have fixed and current assets and an independent balance sheet;

[...]

Article 32. Liability of legal entities.

A legal entity is liable for its obligations with the property it owns based on the right of ownership (allocated to it), if not otherwise established by Ukrainian legislation.

The founder of a legal entity or the owner of its property is not liable for the obligations of such entity, and a legal entity is not liable for the obligations of its owner or founder, except for cases specifically envisaged by legislation or the foundation documents of the legal entity.

A legal entity financed by the owner and which has property allocated to it based on the right of operational management (institution) is liable for its obligations with the funds that it possesses. In case of lack of such funds, the owner of the property bears liability for the obligations of the institution.

Article 33. Separating the liability of the state and state institutions.

The state is not liable for the obligations of state institutions, which are legal entities, and these institutions are not liable for the obligations of the state.

The conditions and procedures for release of funds to cover the debts of institutions and other state organizations financed from the state budget, where such debt cannot be paid out of their budgets, are established by the laws of the USSR and the Ukrainian SSR.

[Emphasis mine]

The Law of Ukraine on Ownership

(hereinafter the "*Law on Ownership*")

Article 39. Legal status of the property of a state institution.

1. Property which is owned by the state and is allocated to a state institution (organization) and financed from the state budget is owned by the institution based on the right of operational management.

2. State institutions (organizations) financed from the state budget, where allowed in cases envisaged by Ukrainian regulations, may perform economic activities and have the right to independently dispose of the income obtained from these activities and the property purchased with the funds from this income.

3. A state institution (organization) is liable for its obligation with the funds that are at its disposal. In case of lack of such funds, the owner of the organization shall be liable for its obligations.

[Emphasis mine]

[121] Before discussing the opinions of the experts on Ukrainian law, there are a number of observations which can immediately by made from these texts.

[122] Firstly, the use of the term "legal entity" in various legislative texts does not appear to apply equally to all types of organizations, nor to impart the same rights, privileges and liabilities to all such entities. In fact, it doesn't seem clear or consistent from one legal text to another what the defining characteristics of a legal entity might be. For example, the *Civil Code of Ukraine* defines legal entities as state organizations that are running on a self-funded basis. It is common ground between the parties that SPF is a state-funded institution and not a self-funded one. Accordingly, SPF should not fit in the *Civil Code of Ukraine* definition of legal entity. While article 32 of the *Civil Code of Ukraine* defines the liability of a legal entity (presumably self-funded) with reference to the property it owns, it

goes on in its third paragraph to define the liability of a legal entity financed by the owner (and therefore not self-funded) in relation to funds that it possesses. Still further, in specific application to state institutions, article 33 of the *Civil Code of Ukraine* provides that the state is not liable for the obligations of state institutions, which are legal entities. What then of state-funded institutions such as SPF? If, being funded by the state, they are not considered under the *Civil Code of Ukraine* as legal entities, it would follow that article 33 is not applicable to them, and *a contrario*, that the state is directly liable for their obligations.

[123] Pursuant to the *Law on Ownership*, a state-funded institution would not own property otherwise than based on the right of operational management. This right does not include the right to dispose of property allocated to it by the state. The funding of a state institution comes from the state. It is therefore logical that the funds at such an institution's disposal, being essentially those of the state, be available to satisfy the liabilities it incurred. In this context, the provision that a state institution is "liable for its obligations with the funds that it possesses" makes sense, but does not negate the possibility of direct liability of the state in excess of available funds.

[124] Finally, although SPF, being state-funded, would not meet the *Civil Code of Ukraine* definition of a legal entity, the *Temporary Regulations on SPF* designates it as a legal entity. Morever, not only SPF but any of its regional departments and representative offices are to be legal entities. Curiously, the *Temporary Regulations on SPF* imposes personal liability on SPF's chairman for SPF's tasks and functions as well as for it regional departments and representative offices. If, when using the term "legal entity" Ukrainian legislation intends to mean "having a distinct juridical personality", then it seems that the concepts of liability in Ukraine and of the separation of liability that comes from a distinct juridical personality does not meet our understanding of this concept.

b) The experts

[125] The expert affidavit of Professor Dovgert consists merely of a presentation of the relevant legislative texts and of their application and consequences. From there, Professor Dovgert reaches a series of conclusions, as follows:

- SPF was constituted as an organ of executive power of the State of Ukraine.
- SPF's functions are to execute the policy of the State of Ukraine.
- SPF's property is wholly owned by the State of Ukraine and it is not a commercial entity.

- SPF's directors and managers are appointed and its employees are approved by the State of Ukraine.
- SPF's activities are controlled by the State of Ukraine.
- The true owner of SPF's assets is the State of Ukraine and SPF can dispose of such assets only in accordance with the purpose of its activity and within the framework established by Ukrainian legislation.
- Claims against SPF are claims against the State of Ukraine.

[126] Professor Dovgert, in his affidavit, does not analyse these various conclusions so as to come to his own conclusion as to whether SPF actually has a separate juridical existence. He was not asked that question. Where the matter is mentioned, it is as an assumed fact in paragraph 12 of his affidavit: "Although SPF has a separate existence, its property is wholly owned by the State and it is not a commercial entity". While the legal basis for all the other statements in his affidavit is clearly stated, there is no reference to any provision of law to form the basis of this particular assumption. The analysis and comments he provides under cross-examination are far more complete; as will be discussed later, it appears from Professor Dovgert's cross-examination that his statement that SPF has "a separate existence" does not include as a corollary that there is a separation of liabilities or assets between SPF and the state.

[127] The affidavit of Professor Scherbyna, as it relates to the nature of SPF, also states that SPF is a legal entity, based on article 24 of the *Civil Code of Ukraine* and paragraph 15 of the *Temporary Regulations on SPF*. As to ownership of property, he qualifies Professor Dovgert's assertion by saying that SPF has its own separate property, but based on the right of operational management. However, it is clear from other evidence submitted that the right of operational management is far from being a full right of ownership as it precludes the right to sell, dispose of or otherwise alienate the property.

[128] Professor Scherbyna further opines that the definition of "claims against Ukraine" in the *"Procedures for Effectuation of the Protection of the Rights and Interests of Ukraine"* is only applicable for the specific purpose of this decree and should not be applied to change the regime of liability otherwise applicable between SPF and the State. He further acknowledges the extent of supervisory control exercised by the State over SPF's management and activities but states that it should not be determinative of whether the State should be held liable for SPF's obligations. On these last two elements, Professor Scherbyna's points are well taken. However, even if these dispositions are not by themselves conclusive of the issue, they are nevertheless relevant in understanding the general scheme, import and consequences of the Ukrainian legislation.

[129] Finally, Professor Scherbyna recognizes that the obligations incurred by SPF can only be satisfied from the funds held on its account with the Ukrainian State Treasury. In Professor Scherbyna's words: "there is a clear rule of law that each such state institution is responsible for its obligations with its own funds being, in principle, primarily those funds allocated to it by the state in the state budget". He later goes on to state that "only if the funds of a state institution like the SPF prove to be insufficient to satisfy an obligation can the state bear further responsibility for the institution's obligations". This, according to Professor Scherbyna, is not because the state would be directly liable for SPF's debt, but because the state is a guarantor of SPF's debt. The justification he provides for

concluding that the state's liability is secondary rather than primary is based on the Ukrainian procedural requirement that a designated state body (the identity of which is not revealed), be joined as a co-defendant in the initial proceeding or, where the lack of fund is discovered at the enforcement stage, in a subsequent lawsuit.

[130] Try as I may, I cannot find in the documents filed in support of Professor Scherbyna's statement any ground to support his conclusion that the State's liability for claims against a state institution is secondary rather than primary. The procedural requirements for the enforcement of a debt seem to be a poor justification for supporting a conclusion of a substantive nature. In any event, procedural requirements of a foreign state are not applicable to enforcement proceedings in this Court.

[131] It is noteworthy that both experts have approached the question of the identity of the judgement debtor herein from the point of view of the liability of Ukraine for the debts of SPF. Indeed the Ukrainian legislation does use language which is familiar to our legal system when it comes to determining whether a body has a distinct legal personality, namely, whether there is a separation of "liability" between this body and its principals. However, this approach would require that the concept of "liability" in Ukrainian law have the same meaning as we, in the common law tradition understand, that is: a liability that can be quantified in monetary terms and executed by attaching, seizing and selling the assets of the debtor. In common law jurisdictions, the liability of a body having a separate juridical existence is limited. It will not, save exceptional circumstances, give rise to the liability of its owners or of its directors or officers. Ukrainian law appears to be different: The *Temporary Regulations on SPF* provide that the chairman of SPF is "personally liable" for the performance, not only of SPF's functions, but of its regional departments and representative offices as well. The *Civil Code of Ukraine* distinguishes the type of "liability" which various entities may have in direct relation to the type of property, assets, or funds from which

such "liabilities" can be satisfied. As mentioned before, the state is liable for the debts of state institutions when the latter's funds are insufficient. It seems to me that it cannot be assumed that the word "liability" in Ukrainian legislation imparts the same legal meaning as we know.

[132] In the course of hearing this matter, I have reviewed the opinions of the experts and the texts on which they are based; I have grappled with the various translations of the original texts; and I have noted counsel's own frustrations in cross-examination when the same Ukrainian legal term was translated with different English legal terms conveying entirely different common law concepts and definitions. In the end, I am still no closer to fully understanding the Ukrainian concept of "liability", but I have become intimately convinced that it is materially different from our own understanding of it and of its consequences. Had the experts been present at Court, I might have had the opportunity of filling this yawning gap in the proper understanding of Ukrainian law's approach to liability, and how it relates to the concepts of juridical personality and of property as a means of enforcement. As it is, I am left with the difficult task of reconciling the experts' statements, half of them in translation, with the wording of the legal texts as translated by different translators, to ascertain what the Ukrainian concept of "legal entity" consists of, and whether, for the purpose of enforcing a judgement under Canadian law, it has the same meaning and consequences that we ascribe to it.

[133] The concept of a distinct legal personality includes the separation of assets and the separation of liabilities. SPF is funded by the state; its revenues are considered to be part of the state's budget; it is unable to own in full any assets; its liability can be satisfied only from funds that may be allocated to it from time to time by the state. There is, clearly, no separation of assets between SPF and the state. As concerns the separation of liabilities, even though Ukrainian legislation appears to separate the liability of the state and that of its institutions, it at the same time recognizes that the state, who actually owns the

property of such imperfect entities, is liable to satisfy the entity's obligations when the funds it has allocated to the entity are insufficient. The privilege given to SPF in the *Temporary Regulations on SPF* of having an independent balance sheet and accounts with banks does not make these funds its own. Taking into account all of the evidence, I find that the legal and financial provisions under which SPF operates and its rights in respect of the state's property are consistent with those of an administrative sub-division of the state. An administrative sub-division operates out of a distinct budgetary envelope, but it is not a distinct legal entity. This

status is also much more consistent with the degree of financial, administrative, and functional control exercised by the state over SPF[8] and the virtual inability of SPF to independently control legal proceedings taken against it.[9]

[134] I have come to the conclusion that the designation of a body under Ukrainian law as a "legal entity" does not necessarily endow that body with a distinct juridical personality, and that SPF, for the purpose of enforcing in Canada a judgement entered against it, does not have a distinct juridical personality from the State of Ukraine. Consequently, I find that the Registration Order may be satisfied against the assets of the State of Ukraine.

[135] This finding of fact is corroborated by the various statements made by SPF in the context of U.S. enforcement proceedings relating to the same Award, to the effect that SPF required authorization from the Ukrainian government in order to engage counsel and take any step to defend itself in that proceeding. It is further corroborated by the statements made in SPF's own website, filed in evidence, as follows:

"In connection with the information widespread in the mass media on arrest in Canada of the Ukrainian airplane according to the proceedings of TMR Energy Limited against Ukraine represented by SPFU the State Property Fund of Ukraine does here grant the following information.

[...]

The relevant appeal against the award of the arbitration court (Stockholm) has been filed; however, because the said award has taken force, TMR Energy Limited initiated proceedings in many jurisdiction against the State Property Fund and Ukraine as regards to recognition of this award in the territories of other countries.

Therefore, at the moment, the order of the Federal Court of Canada to recognize and enforce in the territory of Canada the arbitration award dated May 30, 2002, has taken effect. In this connection, TMR Energy Limited has the right to perform acts concerning the arrest and charge of the property owned by Ukraine located in the territory of Canada."

[Emphasis mine]

[136] My conclusion dovetails, although perhaps articulated somewhat differently, with the evidence given in cross-examination by Professor Dovgert where he testifies, convincingly in my view, that when performing the functions of privatization and asset management (as it was doing in the circumstances which gave rise to the Award), SPF does not have the capacity to act otherwise than for and on behalf of the state, and can not engage any liability but the state's. In Professor Dovgert's estimation, article 39 of the *Law on Ownership* providing for a state institution's liability "from funds at its disposal" would only apply to acts performed by SPF to ensure or attend to its own needs (such as renting offices, purchasing office supplies, etc). Even then, Professor Dovgert considers that article 39 does not so much recognize or create an independent legal existence of state institutions as perpetuate an old Soviet practice that, then claiming against the state, proceedings had to indicate exactly out of which Treasury fund the money was to be paid.

[137] Antonov has argued that TMR's position that SPF did not have a separate juridical personality is self-defeating because, in that case, no suit or

arbitration proceeding could validly have been instituted against a non-existent entity and only the State of Ukraine could validly have been sued. Such an argument cannot be sustained. TMR began arbitration proceedings against the party named in its arbitration agreement. The *"Procedures for Effectuation of Protection of Rights and Interests of Ukraine"*, which were in force in Ukraine at the time of the arbitration and have been put in evidence before me, provide that the State of Ukraine must be informed of all proceedings involving the central organs of executive powers, such as SPF, and must authorize and approve the defence strategy of these proceedings. The State of Ukraine was therefore aware of and dictated on behalf of SPF the entire process and defence strategy, from the institution of the arbitration proceedings through to the hearing before me. I find that whenever SPF was named in these proceedings and whenever it took any action or failed to take any action, these actions or lack thereof were those of the State of Ukraine. Thus, the Registration Order stands as a valid judgement against the State of Ukraine, regardless of the manner in which the Respondent was named.

OWNERSHIP OF THE AIRCRAFT

A. The issues and applicable legal principles

[138] I have determined that the State of Ukraine is the judgement debtor. It is common ground between the parties that Antonov is a state enterprise (as opposed to a state institution), and that although it is wholly owned by the State of Ukraine, it has a distinct juridical personality. It can own property in its own right, is self-funded, can contract obligations for itself, sue and be sued in its own name, defend legal actions without intervention or interference from the State of Ukraine, and manage its own affairs.

[139] In the affidavits filed on the motion before me, it has not been disputed that the formal ownership of the Aircraft - or its title - rests with the State of Ukraine. However, and again, this is not disputed, the Aircraft "belongs to", "is held by", "is assigned to" or "is possessed" by Antonov under the right of full

economic management.[10] The right of full economic management is not a concept known to western legal systems. In fact, it is a concept created under Soviet legal systems, at a time when private ownership was not permitted, and which is exclusively applicable to state-owned property "assigned" to state enterprises. Ukrainian law does not contemplate that property owned by private interests can be held or shared under the right of full economic management.

[140] Antonov argues that the right of full economic management is an ownership right, and that it is effectively so wide that it reduces the State of Ukraine's "ownership" to a bare legal title. TMR disagrees.

[141] Antonov initially argued but later abandoned the argument that a bare legal title cannot be seized. If that proposition was once true at common law, it is now clear that the *JEA* defines property so broadly as to include any valuable right or interest of the debtor in property, including a bare legal title.

[142] Antonov also initially argued that the seizure could only validly be effected if the judgement debtor is entitled to possession of the thing seized. As will be seen later, the right of full economic management includes the right to possess the asset. Again, the *JEA* clearly discards this ancient notion when it states at subsection 73(2): "The sheriff may seize personal property in which there are reasonable grounds for believing the debtor has an exigible interest". Antonov eventually retreated from its position on this issue, and rightly so.

[143] Thus, as the judgement debtor (the State of Ukraine) is at the very least the owner of the title to the Aircraft, the seizure of the Aircraft was and remains valid, notwithstanding Antonov's actual possession of the Aircraft at the time of seizure or any right it may have, whether absolute or qualified, to possess it.

[144] However, the matter does not end there. Antonov asserts a right in the Aircraft which, if it not sufficient in view of the State of Ukraine's ownership of the legal title to defeat the seizure, still needs to be considered so that can be determined the nature and extent of Ukraine's interest in the Aircraft that can be sold in execution of the Award.

[145] The first issue that must in my view be considered is whether, under Ukrainian law, the State of Ukraine's right of ownership in the Aircraft includes the right to sell the Aircraft itself, as it is indeed trite law that the sheriff may only sell that which the debtor would itself be entitled to sell. If the answer to the first question is affirmative, it will fall to be considered whether the rights enjoyed by Antonov under the right of full economic management are charges or equities in the Aircraft itself such that any sale of the Aircraft must be subject to Antonov's rights.

[146] While there is no issue between the parties as to the applicable conflict of law rules, the analysis made on the subject in McLeod's *Conflict of Laws*[11] is a useful guide when undertaking this intricate exercise:

Rule 86: Title or proprietary rights in a tangible movable validly acquired or retained in accordance with the *lex situs* at the time of the transfer will remain valid and effective regardless of a change in *situs* unless and until such rights are displaced by a superior title or property right validly acquired in accordance with the law of the *situs* at the time of the subsequent transaction.

So long as only one transaction takes place concerning the movable, the situation is clear: the proprietary rights or title rights are to be determined solely by reference to the *lex situs* at the time of the transfer. Where the goods are moved to another *situs*, the rights or title acquired or retained under the *lex situs* at the time of the transfer will be recognized and enforced in the subsequent *situs*. The fact that the transaction would not have been effective to alter the proprietary rights or title rights in the new *situs* is irrelevant.

Where, however, a second transaction takes place concerning the same property, the situation is more confusing. It is generally accepted that the effect of the rule in *Cammell v. Sewell* [(1858), 157 E.R. 1371 (Ex. Ch.)] is that a title or property right over a tangible movable acquired in accordance with the *lex situs* at the time of the transfer is effective and will be recognized throughout the world, regardless of a change in *situs* unless and until the right is displaced by a new

title or property right vested in a third person pursuant to the subsequent transaction in accordance with the *lex situs* at the time of the subsequent transaction.
The original title becomes displaced by the new title whether or not the goods were moved with the true owners' consent.
Accordingly, where a thief removes a tangible movable from one country and disposes of it in a subsequent transaction which is effective, according to the *lex situs* at the time of the second transfer, to transfer rights in the property to the new purchaser, the purchaser obtains good title. The purchaser should not have to investigate the foreign title of his vendor, a process which would slow the free exchange of goods. Thus, if goods, having been moved from country X. to country Y., are sold in country Y., or become subject to a lien in country Y., a new title obtained pursuant to the law of country Y. will override the prior title.
And at pages 213 and 214:

Rule 46: The court will always apply the procedural laws of the forum and will refuse to apply the procedural laws of the *lex causae*.
The division of rules of law into substantive laws and procedural laws is a process common to all systems of conflict of laws. The rule, as stated, contains two separate rules: (1) the forum will apply only the substantive laws of the *lex causae*; and (2) the forum will always apply its own laws exclusively in all matters relating to procedure.
Practically, it would be unacceptable to have different procedural laws for purely domestic cases than for cases containing foreign elements. "Procedure", in this sense, includes matters such as the institution of proceedings, service, form of judgement and enforcement.
[...]
The characterization of a rule of law as substantive or procedural is done in accordance with the definitions of the *lex fori*. The court will determine the nature of the law and its characteristics in its context. It will then decide whether the law

and its characteristics fall within the forum's definition of procedure. The characterization of the rule of law by the foreign courts, although not binding on the local court, is a factor to be considered.

[147] Any right in the Aircraft having been created in Ukraine, it is the law of Ukraine that must be applied to ascertain the respective rights of Antonov and of the State of Ukraine. However, to the extent that these rights are extended, restricted or affected by the application of Ukrainian laws as to unseizability, execution or enforcement, these Ukrainian laws are inapplicable, and resort must be had to the laws of Canada.

[148] As well, while the validity and nature of rights created in favour of Antonov are governed by Ukranian law, the opposability of those rights to third parties who would acquire the Aircraft pursuant to a sale by the sheriff must be subject to Canadian law.

B. The evidence

[149] Professor Dovgert and Mr. Batiuk, for TMR, have filed expert affidavits on that issue. An affidavit of Vladimir N. Zakhvataev was also filed as regards the significance (or lack thereof) of the designation of Antonov as "owner" on the Aircraft's certificate of registration. As the State of Ukraine's status as owner of the Aircraft (at least in title) is no longer contested, this evidence will not be discussed.

[150] For Antonov, the affidavits of Professor Scherbyna and Mr. Zub were submitted as to Ukrainian law, and the affidavit of Dr. Dmytro Semenovych Kyva, the Chief Designer of Antonov, was submitted. The parties have agreed that Dr. Kyva's affidavit should be considered by the Court only as it pertains to factual issues, to the exclusion of any conclusion of law contained therein, as Dr. Kyva was not properly qualified to give opinion evidence.

[151] As I did for the issue of the identity of the judgement debtor, I will begin by setting out those provisions of legislative texts which I consider most relevant,

making preliminary observations, and then comparing these observations with the expert's views as expressed.

1. The legislation:

The *Law on Ownership*

Article 37. Legal status of the property of state enterprises.

1. The property, which is owned by the state and allocated to a state enterprise, belongs to such enterprise under the right of full economic management, subject to the exceptions provided by the effective legislation of Ukraine.

2. While exercising the right of full economic management over its assets, a state enterprise possesses, uses, and disposes of the designated property at its own discretion, undertaking any actions with respect to such property, unless such actions contradict the effective legislation and objectives of the enterprise. The rules governing the ownership are applicable to the right of full economic management, unless otherwise provided by the legislative acts of Ukraine.

Article 48. Legal provisions

1. Ukrainian legislation protects equally the property rights of individuals, organizations, and other owners.

2. An owner may demand the elimination of any infringements to this right, including in cases where the infringement does not deprive him of the ability to use the property, as well as to claim damages.

3. The protection of ownership rights shall be carried out by the courts, arbitration courts or arbitral tribunals.

4. In the case where Ukraine adopts a regulation terminating ownership rights, the state shall pay damages to the owner. The damages shall be paid in full, according to the actual value of the property as of the day of termination, including lost profits.

5. Provisions on the protection of property rights apply to an individual who is not an owner but owns property based on the right of full economic management,

operational management, life-long inheritable possession or any other basis provided by law or by contract. Such person can protect its rights also against the owner of the property.

Article 55. Cases of the deprivation of the right of ownership.

1. An owner may not be deprived of rights to his property, except in cases determined by this law and the other laws of Ukraine.

2. Withdrawal of property from its owner is allowed when collecting against the property under the obligations of the owner in cases and following the procedure determined by this law, the civil code and the code of civil procedure of Ukraine.

The Law of Ukraine on Enterprises in Ukraine

(hereinafter the "*Law on Enterprises*")

Article 2. Types of enterprises.

[This article describes the types of enterprises, including private enterprises, business associations and state-owned enterprises.]

Article 10. Formation and use of property.

1. The property of an enterprise consists of fixed and current assets and other valuables, the value of which is recorded in a separate balance sheet of the enterprise.

2. Under the laws of Ukraine, the charter of an enterprise and concluded agreements, the enterprise owns its property [or the property belongs to it] under the right of ownership, full economic management or operational management.

3. [The first part of this paragraph reprises article 37 of the *Law on Ownership*].

[...]

Alienation from the State of means of production which are in state ownership and fixed with state-owned enterprises shall be made exclusively on a competitive basis (through stock exchanges, tenders, auctions) pursuant to the

procedure to be established by the State Property Fund of Ukraine. Proceeds received from alienation of such property shall be utilized exclusively for investments.

5. Unless otherwise provided by law or its charter, an enterprise has the right to sell and otherwise convey to other enterprises, organizations and institutions, exchange, lease, gratuitously transfer into a temporary use or rent out buildings, constructions, equipment, vehicles, inventory, raw materials and other material valuables and to remove them from its balance sheet.

[Emphasis mine]

Article 13. The guaranties for proprietary rights of an enterprise.

1. The state provides the guaranties for protection of proprietary rights of an enterprise. The expropriation by the state of fixed and current assets of an enterprise, as well as of other assets currently used by such enterprise, may be effected only in cases where provided by laws of Ukraine.

2. Pursuant to a Court ruling, the enterprise may recover damages arising as a result of violation of its proprietary rights by individuals, legal entities and state authorities.

Charter of the State Enterprise

[Antonov]

4.2. The state holds the ownership to the property of the company, over which the company has the right of full economic management. (...)

4.4. Conveyance of the means of production, which belong to the state and are held by the company, is subject to approval by the ministry or other governmental agency that is subordinated to the cabinet of minister of Ukraine and is in charge of managing the state owned property.

The funds obtained as a result of conveyance of such assets shall be used solely for the purpose of investing.

4.7. Any damage inflicted upon the company as a result of an infringement of its property rights by individuals, legal entities and state bodies shall be repaired pursuant to a decision rendered by a court of law or an arbitral tribunal.

[Emphasis mine]

Law of Ukraine on Imposition of Moratorium on Forced Alienation of Property

(hereinafter the "*Moratorium*")

This law is aimed at providing the economic safety of the State, to prevent from destroying the integral property complexes of the state-owned enterprises, to protect the state interests during the alienation of assets of business companies, the state shareholding in the authorized fund of which constitutes no less than 25 percent.

Article 1. Until a mechanism of forced alienation of assets as defined by Ukrainian law has been rectified, a moratorium shall be imposed on exercising forced alienation of assets of state-owned enterprises and business companies.

Article 2. For the purposes of this law, a forced alienation of assets of enterprises shall mean the alienation of immovable property objects and other fixed production assets securing the conduct of production activities of such enterprises [...] where such alienation is effected by means of seizure of assets of the debtor upon decisions subject to enforcement by the State Execution Service.

[Emphasis mine]

[152] On reading these provisions, it appears that the Aircraft is owned by the State of Ukraine. It is allocated to Antonov under the right of full economic management. The right of full economic management applies exclusively to state-owned enterprises. The right of full economic management includes the right to use, possess and dispose of state-owned assets, but, because the

Aircraft is, on the admission of all the parties, a means of production, Antonov's right to dispose of the Aircraft does not include the right to sell it, or to alienate it, without the approval of the State. Furthermore, funds obtained from the sale of the Aircraft may not be used for any purpose other than investing.

[153] The above has not been contradicted by any party. It hardly seems necessary to go further. Clearly, if one defines the right of ownership, for the purpose of enforcement proceedings, as the right to sell property, then that right in relation to the Aircraft appears to belong to the State of Ukraine, not to Antonov. Yet, Antonov and its experts deny that the State of Ukraine has the right to sell the Aircraft of its own accord, so go further I must.

[154] Before going on to consider the experts' analysis, I will note that the legislation put in evidence by the parties does not contain any provision relating to: The mechanism by which the state "assigns" property to state enterprises, and whether the assignment is revocable; or whether a state enterprise may sell, transfer, or alienate the right knows as "full economic management" (although if it could, such transfer would be limited to other state enterprises, as full economic management is not a right that can be enjoyed by other types of juridical persons).

2. The experts:

a) Analysing ownership on the basis of liability and enforcement concepts

[155] The experts called on behalf of Antonov have largely centered their opinion on the concept of liability. More specifically, on the basis of the oft-repeated legal principle that the owner or founder of a legal entity is not liable for the obligations of that entity and that the legal entity is not liable for its owner's obligations, they have concluded that to allow the seizure and sale of property possessed by Antonov under the right of full economic management for the debts of the State of Ukraine would be tantamount to holding Antonov liable for the debts of the State of Ukraine. The forays on that terrain have been led by Mr.

Batyuk, an expert for TMR, when he examined specifically whether Ukrainian law would allow state-owned assets allocated to Antonov to be seized in satisfaction of the debts of the state. Mr. Batyuk found authority to the effect that such a remedy was possible. Antonov employed itself quite thoroughly to discredit Mr. Batyuk's statements. Antonov further upped the ante by examining whether it was in fact possible under Ukrainian law for creditors to seize the assets held by Antonov under the right of full economic management for its own debts. Antonov's experts suggest that, but for the 2001 *Moratorium*, creditors of state enterprises may enforce judgements against state enterprises by seizing and selling the state-owned property fixed with them under the right of full economic management.

[156] I am not at all convinced that the answer to these questions is determinative of who owns the Aircraft for the purpose of these proceedings. As I have mentioned, the laws relating to seizure and enforcement in Ukraine are procedural in nature and are not applicable in this matter. I accept that, without applying Ukrainian law as to the enforcement of judgements, an understanding of whether the respective rights of Antonov and the State of Ukraine in the Aircraft are considered property rights for the purpose of enforcement in Ukraine can shed significant light on the nature of these rights. Nevertheless, as I have mentioned above, it is obvious that the Ukrainian legal concept of liability is not identical to ours. Such an imperfect understanding of the concept of liability under Ukrainian law and of its interplay with the available remedies and enforcement procedures in Ukraine severely limits the usefulness and reliability of this method of analysis. Indeed, where Mr. Batyuk uses the commentary of three eminent authors on the *Civil Code of Ukraine* to support his view that state property assigned to an enterprise under the right of full economic management can be seized in satisfaction of a claim against the state, these three authors write a lengthy rebuttal[12] cautioning against confusing the substantive and

procedural meanings of "seizure", "liability", and "recovery against property". Significantly, the authors conclude their rebuttal text by stating that:
"There are no legal grounds to construe the commentary to Art. 32 of the Civil Code in such a way as to allow for a possibility to seize state-owned property in the absence of a ruling rendered by a court the jurisdiction of which Ukraine has recognized."

[Emphasis mine]

[157] Thus, from that comment, one can appreciate that liability under Ukrainian law, the property against which a finding of liability may be enforced and the specific terms of a judgement granting relief are intricately linked.

[158] Furthermore, to the extent that the issue is relevant to the outcome, I find that the experts' debate on the issue of whether state-owned assets allocated to a state enterprise may be seized and sold in execution of judgements against either the state or the enterprise is purely theoretical. It does not reflect the state of Ukrainian law, for the simple reason that Ukrainian law does not address this issue and does not provide an answer to this question. The transition of the Ukrainian economy to a market economy and its legal system to a system recognizing private enterprise and ownership has simply overtaken its legislative framework and the new laws enacted to support a free market economy do not appear to have followed a planned and comprehensive legislative program. The key Ukrainian legislation cited to me is a mixture of Soviet laws (such as the *Civil Code of Ukraine*, promulgated in 1963) and statutes enacted in 1991 and amended almost yearly by laws and presidential decrees (such as the *Law on Ownership* and the *Law on Enterprise*s). In view of the magnitude of the task of transforming a Soviet-style legal system into a market-based system, and of the speed with which it was done, it is not surprising that the result should appear chaotic, redundant and conflicting. In this context, recognizing that a logical solution to a legal conundrum may not exist is

perhaps more respectful and true to the Ukrainian system than attempting to shoehorn a solution based on the "logic" of our legal institutions into the Ukrainian legislative framework.

[159] While the *Moratorium* is a procedural statute and therefore, under our conflict of law rules, not applicable to a dispute in this Court, it provides, in my view, one of the most enlightening elements to the consideration of the respective rights of the State of Ukraine and of Antonov in the Aircraft for the purpose of enforcing judgements. The *Moratorium* constitutes a recognition by the Ukrainian legislator that the particular status of state-owned property held by state enterprises or state-owned business companies is not appropriately or adequately recognized and protected under the current judgement enforcement legislation in Ukraine. The *Moratorium* specifically invokes the protection of the state's interest in the forced alienation process, and calls for a rectification of the legal mechanism of forced alienation of assets. This suggests that the State of Ukraine considers it has a paramount economic interest in state-owned assets which is imperilled when these assets are subjected to forced execution proceedings and that there is a fundamental conflict or incompatibility between the laws of ownership and the laws of forced execution of judgement as they may apply to these particular assets.

[160] It bears emphasizing again that the right of full economic management is a creation of the Soviet socialist system. The Soviet concept of property did not recognize private ownership, especially as concerns the means and instruments of production. While such property was entrusted or given in the care of enterprises or cooperatives, this allocation was not meant to be for the benefit of the particular enterprise or cooperative, but for the proper and efficient use of resources to the benefit of the entire people. It is hard to conceive of how a system of liability based on the award of monetary damages, enforced through the sale of a debtor's assets can possibly fit into this concept. There could

conceptually be no benefit to an aggrieved party in removing a productive asset from the care of an entity who was presumably thought to be the one most likely to exploit the asset productively; it would be no punishment to the wrongdoer; it would not generate wealth to compensate the injured party since it could not be sold. The *Law on Ownership*'s provisions, designed to consolidate and protect an enterprise's hold over the asset and its ability to deal with the asset as an owner may have been justifiable and desirable to enhance the enterprise's ability to deal productively with the asset; these provisions are compatible with a Soviet-based mode of holding property. Yet, when these same provisions become the yardstick by which ownership is measured for the purpose of enforcing monetary judgements under a market-based legal system, the incompatibility of the legal concepts become apparent. I do not think that the rights of operational management or of full economic management were developed with any contemplation of a system of forced execution of judgements on property. In fact, to the extent that the Ukrainian legislation could have been interpreted or applied so as to permit the seizure and sale of state-owned property held by state enterprises for their own debts, I believe that such a result would have been contrary to the principles and philosophy of the Soviet mode of holding property, and that the *Moratorium* was enacted in recognition of that fact.

[161] Finally, even though I have taken the view that Ukrainian laws as to forced execution of judgements are neither applicable before this Court nor determinative of the nature of the respective rights of Ukraine and Antonov in the Aircraft, I should note that I have not been persuaded by the evidence led by Antonov to the effect that Ukrainian laws do not allow the forced execution of the State of Ukraine's obligations against the Aircraft. Most of the material to support this argument is provided in exhibits to the affidavit of Mr. Zub, in the form of statements of scientific legal expertise obtained from various state institutes, the letter of Messrs. Prytyka, Karaban and Rotan, and judicial decisions. Having carefully reviewed these exhibits, I find that the principal objection to the forced

execution against the Aircraft for debts of the state under Ukrainian law is procedural. It appears from the material put before me that in order for execution against property to be available under Ukrainian law, a judgement must specifically provide for it, and that it must identify the property over which execution can be sought. Thus it seems that the authors of the material relied upon by Mr. Zub concluded to the unseizability of the Aircraft in this case because of the lack of a ruling or judgement of a Ukrainian Court specifically allowing recovery against the Aircraft. I have not found in the material referred to in Mr. Zub's affidavit any unequivocal statement to the effect that a Ukrainian Court could not validly issue such a ruling. Mr. Zub's attempts, in his affidavit, to stretch the meaning of the authorities cited to cover the case appear strained and are ultimately unconvincing.

b) Analysing ownership through substantive provisions

[162] Having set aside from the experts' analysis and statements those elements relating to liability and enforcement, there are only a few more elements that can be gleaned from their testimony and statements to assist in understanding the nature of the State of Ukraine and Antonov's respective rights in the Aircraft.

[163] Professor Dovgert has stated in cross-examination that notwithstanding the provisions of the *Law on Ownership* and of the *Law on Enterprises*, the State could at will withdraw state-owned assets from state enterprises and assign them to other state enterprises, unless, by specific provision in the enterprises' charter, it has limited its right of repossession. In Professor Dovgert's view, the provisions applying the rights of protection of property to "ownership" based on the right of full economic management are designed to make available to such "owners" the remedies *in rem* usually reserved to true owners. But as regards the relationship between the state and state enterprises, the state remains the owner of the assets, and as owner, retains the right to deal with the property as fully as any owner would.

[164] Professor Scherbyna has not opined as to whether the state could withdraw state-owned assets from an enterprise. As for Mr. Zub, his statement to the contrary is based only on the legal expertise of the Legislative Institute of the Supreme Council of Ukraine, (Exhibit "C" to his affidavit) which in turn seems to be based solely on article 13 of the *Law on Enterprises*. Article 13.1 speaks specifically of expropriation. I am not certain expropriation applies to describe the withdrawal of an asset that was allocated by the state and to which the state retains title. Expropriation is a fairly strong and specific word, even taking into account difficulties in interpretation. It conveys the sense of the state taking away private rights of ownership for itself. Article 13 of the *Law on Enterprises* is of general application to all types of enterprise and all types of property, including private enterprises who own their property in full, without deriving their rights from the state. In the absence of specific reference to the extinguishment of the right of full economic management or the reallocation of assets from state enterprises, I would hesitate to construe article 13.1 as broadly as Mr. Zub suggest. The remainder of article 13 allows for reparation of violations of property rights by way of damages. The author (or authors) of the legal expertise could not be cross-examined on their opinions, and their brief statement is not further explained or put in context. On the whole, I again find Professor Dovgert's views more compelling.

[165] The withdrawal of state-owned assets through corporatisation was discussed in cross-examinations of the experts. Antonov has presented that evidence as meaning that the only way in which the state could extinguish Antonov's right of full economic management was through the process of corporatisation, whereby Antonov would become a privately held corporation and its assets, previously held under the right of full economic management, would return to it under full ownership. The evidence of the experts is not so clear. Furthermore, the facts and findings of the Award, as they relate to LOR's corporatisation process, appear to belie this assertion. According to the recitation

of facts found in the Award and the arbitrators' findings, LOR (the Lisichansk Oil Refinery Works) was a state enterprise when it established Lisoil as a joint venture. LOR was corporatised and became Linos, an open joint stock company. Contrary to Antonov's position in this matter, SPF took the initial position and the arbitrators confirmed that LOR's ownership interest in Lisoil had not passed to Linos on corporatisation but to SPF. It therefore appears that when corporate reorganization of state enterprises occurs, the full ownership of state-owned assets reverts to the State.

[166] Both Professor Scherbyna and Mr. Zub have opined that the right of full economic management was, more than a contractual right to use and possess, an "actual property right". While this proposition was not put directly to Professor Dovgert for comment, his position as to the state's right of withdrawal, the state's continuing status as the owner of the assets, and the function of the provisions granting equal protection of rights to those possessing assets under the right of full economic management could indicate a diverging point of view.

[167] Finally, both Professor Scherbyna and Mr. Zub have attempted to draw parallels between the right of full economic management and the concept of trusts in common law, to conclude that the state's interest in the Aircraft was no more than a bare legal title, and Antonov's interest that of a true beneficial owner. It appears from Mr. Zub's affidavit and from the cross-examination of Professor Scherbyna that neither expert fully understood the law of trusts. While they identified Antonov as the beneficial owner, they were confused as to who would, in this analogy, be the trustee and who would be the creator of the trust. In Professor Scherbyna's first explanation, Antonov would also have been the trustee and the creator of the trust. Both experts ascribed to the beneficial owner the right to manage the property subject to the trust. This attempted analysis therefore fails, not merely because the experts did not have a sufficient grasp of the common law concept of trusts, but because in my view, the analogy between the two concepts does not sit comfortably with their historical development and

their purposes. Both experts, in making the attempt, have further, in my view, damaged their credibility. The analogy is unnatural and forced, and one cannot help but surmise that the experts ventured their comments on the suggestion of counsel, without sufficient independent thought or analysis.

[168] A better point of reference than trusts would have been the civil law on the dismemberments of the right of ownership, which are specifically named and recognized, for example, in the *Civil Code of Quebec*. If there is an institution known under western legal systems with which the right of full economic management can usefully be compared to appreciate its substance, it is, in my view, the civil law right of usufruct. It is I think a useful exercise to set out some of the salient provisions of the *Civil Code of Quebec* on usufruct.

Art. 1119. Usufruct, use, servitude and emphyteusis are dismemberments of the right of ownership and are real rights.	Art. 1119. L'usufruit, l'usage, la servitude et l'emphytéose sont des démembrements du droit de propriété et constituent des droits réels.
Art. 1120. Usufruct is the right of use and enjoyment, for a certain time, of property owned by another as one's own, subject to the obligation of preserving its substance.	Art. 1120. L'usufruit est le droit d'user et de jouir, pendant un certain temps, d'un bien dont un autre a la propriété, comme le propriétaire lui-même, mais à charge d'en conserver la substance.
Art. 1123. No usufruct may last longer than one hundred years even if the act granting it provides a longer term or creates a successive usufruct.	Art. 1123. La durée de l'usufruit ne peut excéder cent ans, même si l'acte qui l'accorde prévoit une durée plus longue ou constitue un usufruit successif.
Usufruct granted without a term is granted for life or, if the usufructuary is a legal person, for thirty years.	L'usufruit accordé sans terme est viager ou, si l'usufruitier est une personne morale, trentenaire.

Art. 1125. The usufructuary may require the bare owner to cease any act which prevents him from fully exercising his right.

Art. 1125. L'usufruitier peut exiger du nu-propriétaire la cessation de tout acte qui l'empêche d'excercer pleinement son droit.

The bare owner's alienation of his right does not affect the right of the usufructuary.

L'aliénation que le nu-propriétaire fait de son droit ne porte pas atteinte au droit de l'usufruitier.

Art. 1135. The usufructuary may transfer his right or lease a property included in the usufruct.

Art. 1135. L'usufruitier peut céder son droit ou louer un bien compris dans l'usufruit.

Art. 1136. A creditor of the usufructuary may cause the rights of the usufructuary to be seized and sold, subject to the rights of the bare owner.

Art. 1136. Le créancier de l'usufruitier peut faire saisir et vendre les droits de celui-ci, sous réserve des droits du nu-propriétaire.

A creditor of the bare owner may also cause the rights of the bare owner to be seized and sold, subject to the rights of the usufructuary.

Le créancier du nu-propriétaire peut également faire saisir et vendre les droits de celui-ci, sous réserve des droits de l'usufruitier.

Art. 1162. Usufruct is extinguished

Art. 1162. L'usufruit s'éteint:

(1) by the expiry of the term;

1º Par l'arrivée du terme;

(2) by the death of the usufructuary or the dissolution of the legal person;

2º Par le décès de l'usufruitier ou par la dissolution de la personne morale;

(3) by the union of the qualities of usufructuary and bare owner in the same person, subject to the rights of

3º Par la réunion des qualités d'usufruitier et de nu-propriétaire dans la même personne, sous

third persons;	réserve des droits des tiers;
(4) by the forfeiture or renunciation of the right or its conversion into an annuity;	4º Par la déchéance du droit, son abandon ou sa conversion en rente;
(5) by non-user for ten years.	5º Par le non-usage pendant dix ans.
Art. 1167. At the end of the usufruct, the usufructuary returns the property subject to the usufruct to the bare owner in the condition in which it is at that time.	Art. 1167. À la fin de l'usufruit, l'usufruitier rend au nu-propriétaire, dans l'état où il se trouve, le bien sur lequel porte son usufruit.
The usufructuary is accountable for any loss caused by his fault or not resulting from normal use of the property.	Il répond de la perte survenue par sa faute ou ne résultant pas de l'usage normal du bien.

[169] Similarities between the right of full economic management and usufruct can readily be seen: The right to use and possess the property, but not to alienate it (Art. 1120), the faculty to enforce the rights given against the owner and third parties (Art. 1119 and 1125). The treatment of the right as a right *in rem*, as a component of ownership (Art. 1119). The distinctions are also apparent: The person having full economic management does not have to preserve the substance of the property (cf. Art. 1120 and 1167). There appears to be no limit of duration to the right of full economic management (cf. Art. 1123). The conditions upon which the right of full economic management can be terminated are not provided for, indeed according to Professor Dovgert, the termination by the state is discretionary (cf. Art. 1162). The respective rights of the owner and of the holder of the right of full economic management are not transmissible because it is necessarily a right limited to a state/state enterprise

relation (the state enterprise could conceivably transfer its rights to another state enterprise but there appears to be no provision specifically allowing it.) (cf. Art. 1125, 1135, 1136).

[170] It is striking that the authors of the "Scholarly and Practical Commentary to the Civil Legislation of Ukraine" describe the right of full economic management as follows (Exhibit J to the affidavit of Igor Zub and page 94 of his cross-examination):

"According to its structure, the right of full economic management is similar to the right of ownership, i.e. it includes the right to possess, utilize and dispose of property. Taking that into account, Sec. 1 of Art. 37 of the Law of Ukraine "On Ownership" expressly provides that the rules that govern the ownership are applicable to the right of full economic management, unless otherwise established by the legislative acts of Ukraine.

At the same time, the right of full economic management cannot fully equate to a right of ownership, because a part of the right, directly or indirectly related to the disposition of State, communal, ownership, are fixed with the organs of property management. Thus, the right of full economic management will always be in its scope (contents) narrower than the right of ownership."

[171] Mr. Zub's subsequent analysis goes on to point out that under Ukrainian law, there are three components to the right of ownership: to use, to possess and to dispose of. Under full economic management, the first two components are transferred to the state enterprise while the right of disposal is split between the state and the state enterprise.

[172] The terminology and structure in this analysis is conceptually that of the civil law theory of the dismemberments of the right of ownership, and more particularly, the right of usufruct. The main difference between the two concepts is that under the right of usufruct, the entire right of disposal stays with the bare owner, whereas under the right of full economic management, the right of

disposition by way of wastage is transferred to the state enterprise, with the right of disposition by way of alienation remaining with the state.

[173] Of course, the right of full economic management is not the right of usufruct as we know it in Quebec, and the *Civil Code of Quebec* cannot be used as a source of law to supplement any perceived gap in the Ukrainian legislative provisions or to interpret them. However, the very ease with which comparisons may be made between these two concepts provides a comparative framework from which one can assess the nature of the respective rights of the State of Ukraine and of Antonov and who is the true owner of the Aircraft.

[174] It would be tempting to further analyse the right of full economic management with the tools and constructs of the Quebec civil law, to determine whether this right is a true dismemberment of ownership rights to be given the status of a right *in rem*, or simply a personal right, as was done by this Court in relation to the sale of hunting and fishing rights in the cases of *Boucher v. Canada*, [1981] F.C.J. No. 607 (affirmed at [1984] F.C.J. No. 301) and *Boucher v. Canada*, [1990] F.C.J. No. 710. Under such an analysis, I would likely conclude that because the rights of Antonov are precarious (they can be withdrawn at any time by the State) and because neither party may freely transfer their respective rights to third parties, the right of full economic management cannot be recognized as a true patrimonial right, or ownership right. That, however, would be to ignore the purpose and intent of Ukrainian law, which is to constitute and treat this right as a specie of ownership rights.

[175] In my view, the assignment of the Aircraft to Antonov by the State of Ukraine under the right of full economic management is equivalent to a dismemberment of the right of ownership, whereby both the State of Ukraine and Antonov hold valid ownership rights in the Aircraft. The fact that Antonov might hold the lion's share of the constituent rights of ownership as far as immediate economic value is concerned in no way negates or diminishes the reality, validity and value of the State of Ukraine's rights.

[176] While Antonov's experts might attempt to portray the state's rights as having a purely administrative or oversight function, I do not share that view. The State of Ukraine may be the "bare owner" of the Aircraft, but that right carries with it the right of reversion of the full ownership upon corporatisation, and the right to terminate Antonov's enjoyment of the right of full economic management, to reassign the Aircraft, or, I believe, to simply take it back. Under Ukrainian law, the state remains the owner of the Aircraft. Its rights are no less protected by law than Antonov's. Antonov does not derive its rights over the Aircraft from Ukrainian law, but from the allocation of the Aircraft to it by the state. The law merely recognizes Antonov's rights and protects them while the Aircraft is assigned to it. There has been presented to me no provision of Ukrainian law which would prevent the state from terminating that assignment.

[177] So long as the Aircraft is allocated to Antonov under the right of full economic management, the state does not have the power to order Antonov to sell it, or to interfere with Antonov's use, enjoyment or exploitation of it; the state's power, in that context, is solely to approve or disapprove Antonov's proposals to sell the Aircraft. However, if the Aircraft is sold, value remains with the state, since the proceeds are by law to be used solely for investment, which investment will become state-owned property held under the same right of full economic management. And then, there also remains with the state the ultimate power to terminate the allocation of the Aircraft with Antonov, and thus extinguish all of Antonov's proprietary rights in the Aircraft. The consolidation of the ownership, or reversion into full ownership belongs with the state, not with Antonov.

[178] There is, unquestionably, significant value to the State of Ukraine's right of ownership in the Aircraft: it has the right of full ownership to this Aircraft, subject only to Antonov's right of full economic management, so long as it subsists. The Aircraft is certainly subject to seizure and sale under the *JEA* as property of the State of Ukraine.

PROTECTION OF ANTONOV'S RIGHTS IN A JUDICIAL SALE

[179] Subject to considerations of state immunity from execution, which will be considered below, the question which now arises is whether the sale of the Aircraft must be made subject to Antonov's rights, and if so, how these rights are to be protected. This is a pure question of enforcement procedure to which only the laws of Newfoundland, through subsection 56(3) of the *Federal Courts Act*, can apply.

[180] The relevant provisions of the *JEA* are the following:

48.(1) In this Act, a reference to an interest in property being subordinate to a notice of judgement means subordinate to the rights or interest of the creditor who has registered the notice of judgement.

(2) An interest in property that is subordinate to a notice of judgement is also subordinate to the rights or interest of a representative of creditors, including a trustee in bankruptcy, for the purpose of enforcing rights of the creditor who registered the notice of judgement.

(3) Where an interest in property is subordinate to a notice of judgement,

(a) the property is subject to enforcement proceedings to the same extent that the property would have been if the subordinate interest did not exist; and

(b) a person who acquires the property as a result of enforcement proceedings acquires the property free of the subordinate interest.

(4) An interest in property that is subordinate to a notice of judgement is subordinate to the extent of the amount outstanding on the enforcement debt at the time the enforcement proceedings are taken against the property.

62.(1) Subject to subsection 48(3), sections 107 and 165, when property is sold as a result of enforcement proceedings,

(a) the person who buys the property obtains only the interest of the debtor in the property; and

(b) the sale of the property does not adversely affect the rights or interest of another person in the property.

(2) Notwithstanding subsection (1), a buyer at a sale conducted as a result of enforcement proceedings acquires the interest or rights that the debtor could have conveyed, respecting the property that is sold, to a purchaser in circumstances similar to those at the time of that sale.

[181] The provisions of sections 49 to 61, which identify subordinate interests, are not applicable to the type of interest held by Antonov. They concern: subsequent interests, including sales made after the registration of a notice of judgement; notices of judgement and security interests; fixtures and growing crops; negotiable instruments; market security; rights and interests other than interests in land or personal property; liens; and interests in land.

[182] It therefore does not appear that an interest resulting from the dismemberment of ownership rights acquired prior to the registration of a notice of judgement would be subordinate to the notice of judgement. The other exceptions to section 62 are also inapplicable in this instance (section 107 concerns joint tenancy of land and section 165 applies to claims to property made outside the prescribed period). How then, would section 62 of the *JEA* apply to Antonov's rights upon the sale of the Aircraft?

[183] It is simply not possible to sell the Aircraft subject to Antonov's right of full economic management. The validity and effect of the sale of the Aircraft in these proceedings will be determined in accordance with the laws of Newfoundland. Newfoundland does not recognize dismemberments of ownership rights as rights *in rem*, and has no mechanisms for creating these rights or for effecting a sale of these rights. Even if it were possible to craft an order recognizing these rights and offering some sort of protection to Antonov's rights vis-à-vis a potential purchaser, the mere fact of the sale to a third party would bring an end to Antonov's right of full economic management, as such a right can only exist as between the State of Ukraine and its state-owned enterprises.

[184] Does the legal impossibility of preserving the particular mode of ownership created in the Aircraft under foreign law put the Aircraft beyond the

reach of this Court's execution process? The answer is obvious: it should not, it does not.

[185] The mechanisms of execution of judgement on property attempt to strike a delicate balance between the rights of judgement creditors and the rights of others interested in the debtor's property. The Aircraft is an asset of obvious economic value. It is not only movable tangible property, it is property designed for international movement. Both Antonov and the State of Ukraine have valuable property interests in this asset. The State of Ukraine and Antonov do not deal at arms' length with each other: the latter is wholly owned by the former. The State of Ukraine is not at the mercy of its own laws, it is their author. The Ukrainian legal system does now recognize private ownership and operates under a market economy. Ownership of assets under the right of full economic management, while a throw-back to the by-gone Soviet era, remains a valid and legitimate mode of ownership in Ukraine, and no doubt Ukraine has perfectly legitimate reasons for perpetuating it. Nevertheless, when the State of Ukraine and Antonov choose to send into the world a valuable asset in which their respective rights are indissociably linked under a mode of ownership exclusive to themselves, they take the risk that their rights will either stand together, or fall together.

[186] The international tendency, under the impetus of increased international commerce, has been to strive to recognize and give effect to security interests and rights validly created under foreign laws. Canada has embraced this development. This Court would not hesitate to recognize and give effect to the right of full economic management as between the State of Ukraine and Antonov. However, the recognition of these rights cannot have the effect of putting valuable commercial property legitimately found in Canadian territory outside the reach of legitimate creditors under a judgement of this Court.

[187] I have found that under Ukrainian law, it is within the powers of the State of Ukraine to withdraw the Aircraft from Antonov and thus extinguish

Antonov's rights under full economic management. The judicial sale of the Aircraft will have the same effect. The Aircraft shall therefore be sold as the property of the State of Ukraine, without encumbrance from any rights of Antonov.

IMMUNITY FROM EXECUTION

A. Applicable Law

[188] Notwithstanding Antonov's claim of ownership of the Aircraft, the State of Ukraine has asserted immunity of execution over the Aircraft as military property under subsection 12(3) of the *State Immunity Act*. The relevant parts of section 12 of the *State Immunity Act* read as follows:

12. (1) Subject to subsections (2) and (3), property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action in rem, from arrest, detention, seizure and forfeiture except where	12. (1) Sous réserve des paragraphes (2) et (3), les biens de l'État étranger situés au Canada sont insaisissables et ne peuvent, dans le cadre d'une action réelle, faire l'objet de saisie, rétention, mise sous séquestre ou confiscation, sauf dans les cas suivants_:
(a) the state has, either explicitly or by implication, waived its immunity from attachment, execution, arrest, detention, seizure or forfeiture, unless the foreign state has withdrawn the waiver of immunity in accordance with any term thereof that permits such withdrawal;	a) l'État a renoncé, de façon expresse ou tacite, à son immunité relative à l'insaisissabilité et aux autres mesures mentionnées ci-dessus, toute révocation ultérieure de la renonciation ne pouvant être faite que suivant les termes de la renonciation qui l'autorisent;
(b) the property is used or is intended for a commercial activity; or	b) les biens sont utilisés ou destinés à être utilisés dans le cadre d'une

(c) the execution relates to a judgment establishing rights in property that has been acquired by succession or gift or in immovable property located in Canada.	activité commerciale; c) l'exécution a trait à un jugement qui établit des droits sur des biens acquis par voie de succession ou de donation ou sur des immeubles situés au Canada.
(3) Property of a foreign state (a) that is used or is intended to be used in connection with a military activity, and (b) that is military in nature or is under the control of a military authority or defence agency is immune from attachment and execution and, in the case of an action in rem, from arrest, detention, seizure and forfeiture.	(3) Sont insaisissables et ne peuvent, dans le cadre d'une action réelle, faire l'objet de saisie, rétention, mise sous séquestre et confiscation, les biens suivants de l'État étranger_: a) ceux qui sont utilisés ou destinés à être utilisés dans le cadre d'une activité militaire; b) ceux qui sont de nature militaire ou placés sous la responsabilité d'une autorité militaire ou d'un organisme de défense.

[189] It is not contested that the exception to the general immunity of state property provided for in paragraph 12(1)(b) has been established. Antonov used and intended to use the Aircraft for a commercial activity. The State of Ukraine nevertheless contends that despite Antonov's commercial use of the Aircraft, it falls under the conditions precribed by subsection 12(3) and is immune from execution as military property. The conditions of paragraphs 12(3)(a) and 12(3)(b) are cumulative. The State of Ukraine therefore has to establish that: the Aircraft was also used or intended to be used in connection with a military activity

(paragraph 12(3)(a)) and that it is military in nature, or was under the control of a military authority at the time it was seized (paragraph 12(3)(b)).

B. The Evidence

[190] The relevant facts, derived from the evidence of Dr. Kyva, are the following:

[191] Antonov, as a state enterprise, operates under the sphere of administration of the Ministry of Industrial Policy. Antonov's operations include the construction, upgrade and development of existing and new aircraft and aviation equipment, aircraft operation and maintenance, and the provision of remunerated cargo and passenger transportation services. Antonov does not operate under the authority of the Ukrainian Ministry of Defence or the Ukrainian army. It is not required to provide services to the Ministry of Defence or the Ukrainian army. If it chooses to do so, it is under contract, and Antonov has in the past brought suit against the Ukrainian Ministry of Defence for satisfaction of fees for services performed. In short, Antonov's operation of the Aircraft is purely commercial.

[192] The Aircraft was built in 1987 as an AN-124 type aircraft, a military transport aircraft. Prior to 1991, it "belonged" to the Armed Forces of the USSR and was used for military purposes. In 1992, with a view to using the Aircraft for civil purposes, it was transformed at a cost of US $5 million to an AN-124-100 type aircraft, with its own Type Certificate, distinct from the Type Certificate of the AN-124. The Aircraft is registered under the Ukrainian State Registry of Civil Aircraft, and not under the Registry of State Aircraft of Ukraine. The characteristics of the AN-124-100 type of aircraft are described as follows in Antonov's website (filed in evidence):

The aircraft is intended for the carriage of heavy and oversized cargoes and various special-purpose equipment over strategic distances.

It features a double-deck fuselage layout, the upper deck accommodating the cockpit, relief crew compartment and the cargo attendants' cabin. The lower deck is a pressurized cargo compartment.
The design and dimensions of the forward and rear cargo doors, both equipped with ramps, enables quick and easy loading/unloading operations.
The integral overhead cargo handling system allows loading/unloading without the need for ground cargo handling equipment.
Multi-strut landing gear with rough-field capacity, the availability of two APUs, and the mechanized loading enable self-sufficient operation of the aircraft at poorly equipped airfield.
Simplicity, reliability and safety of aircraft operations are ensured by the redundancy and computerization of its systems. On board computers are combined into four main systems: navigation, auto flight, remote control and monitoring.
The aircraft's unique cargo capabilities and high performance have been proved in commercial operation and have opened up a new segment of the air cargo market for the transportation of oversized and very heavy cargoes.
The AN-124 has been used to deliver 90-tonne hydraulic turbines, Liebherr jumbo crane trucks, US Euclid rock haulers, Tu-204 aircraft fuselage, a 109-tonne hydraulic locomotive, the General Electric GE90 aircraft engines, Lynx antisubmarine helicopters, numerous spacecraft in their containers, and other unique cargoes.
The delivery of a 135-2-tonne stator for a Siemens electric generator was entered in the Guinness Book of Records as the heaviest single cargo item ever carried by air.

[193] The characteristics of the AN-124, the previous type certificate of the Aircraft prior to its upgrade, have not been put in evidence. Nor has evidence been led as to what the characteristics of a "military" transport aircraft would be.

[194] The Aircraft was seized at the Canadian military base of Goose Bay, Newfoundland, where it had delivered military equipment loaded at a military base in Italy pursuant to a commercial charter entered into with the Ministry of Defence of Italy. While there had been discussions as to a possible return cargo, either from the Ministry of Defence of Italy or from the Canadian Department of National Defence, no agreement had been firmed up. The AN-124-100, as a heavy lift cargo aircraft, is well suited to military cargoes, and is regularly used by NATO, and the American, Canadian, French, German and Italian militaries. NATO countries have recently passed a resolution to use aircraft of the AN-124-100 type for strategic airlift capability from 2005 to 2012. It should however be noted that neither the State of Ukraine nor Antonov are a party to that resolution, that the resolution does not identify Antonov or the State of Ukraine as the provider of these aircraft and that no specific contract currently exists in relation to any of Antonov's eight AN-124-100 aircraft or the specific Aircraft under seizure.

[195] Finally, I should mention that the State of Ukraine, through diplomatic channels, did address to the Court a declaration asserting immunity from jurisdiction and execution on, *inter alia*, the following basis:

(a)

(i) the Antonov Airplane was being actually used in connection with a military activity, namely, the transportation of the equipment of the sovereign state of Italy as part of that country's NATO obligations;

(ii) the Antonov Airplane was physically located at a Canadian military base in Goose Bay, Labrador at the time of seizure; and

(iii) the Antonov Airplane was subject to the control of the Canadian military authorities at Goose Bay, Labrador where it could not take off without their approval.

(b) Antonov Airplane is a transport aircraft which is intended to be used for transportation in the field of military activities. At the Meeting of the North-Atlantic Council, held on 13 June 2003 in Brussels, Ministers of Defence of the 11 NATO

member-states, including Canada, signed the Letter of Intent on Implementation of an Interim Strategic Airlift Capability, which stipulate an intention to charter Antonov AN 124 aircrafts for such purposes (enclosed).

[196] Although the State of Ukraine's declaration was delivered by the Department of Foreign Affairs and International Trade of Canada along with a certificate issued pursuant to subsection 14(1) of the *State Immunity Act*, the statements of the State of Ukraine do not constitute evidence before this Court, as they do not fall within the very limited questions for which a certificate issued by the Minister of Foreign Affairs constitutes conclusive proof admissible in evidence:

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,	14. (1) Le certificat délivré par le ministre des Affaires étrangères ou en son nom par la personne qu'il autorise est admissible en preuve et fait foi pour toute question touchant_:
(a) whether a country is a foreign state for the purposes of this Act,	a) la qualité d'État étranger, au sens de la présente loi, d'un pays donné;
(b) whether a particular area or territory of a foreign state is a political subdivision of that state, or	b) la qualité de subdivision politique d'une région ou d'un territoire donnés d'un État étranger;
(c) whether a person or persons are to be regarded as the head or government of a foreign state or of a political subdivision of the foreign state,	c) la ou les personnes à considérer comme chefs d'un État étranger ou d'une de ses subdivisions politiques, ou comme formant leur gouvernement.
is admissible in evidence as	Il n'est pas nécessaire de prouver

conclusive proof of any matter stated in the certificate with respect to that question, without proof of the signature of the Minister of Foreign Affairs or other person or of that other person's authorization by the Minister of Foreign Affairs.	l'authenticité de la signature apposée sur ce certificat ni l'autorisation accordée au signataire.

[197] Neither Canada nor Italy have intervened to assert sovereign immunity in relation to execution proceedings against the Aircraft or to support the State of Ukraine's position.

C. Analysis

1. Use or intended use in connection with a military activity:

[198] From the point of view of the State of Ukraine and of Antonov, the Aircraft was clearly not, at the time of seizure, in use or intended to be used in connection with a military activity.

[199] The State of Ukraine was not using the Aircraft, and had not developed a specific or general intention to use the Aircraft at all. It was content to allow Antonov to use the Aircraft for commercial purposes. The fact that the State of Ukraine had the power to withdraw the Aircraft from Antonov if it so chose and to use it for military purposes does not amount to an intention.

[200] Antonov's performance of the charter with the Ministry of Defence of Italy was not, from its point of view, a military activity, but a purely commercial one. The charter agreement, filed in evidence, does not identify the nature or specifications of the cargo nor the purpose of the transportation. As far as Antonov is concerned, the Ministry of Defence of Italy could have loaded up to 75,000 kg of oranges, all that would have mattered to Antonov was that it would not have been liable for the risks attendant to perishable cargoes. In fact, the only evidence we have on the record that the cargo was military equipment is the assertion of Dr. Kyva. There is no evidence of Italy's purpose in so doing. Since

Dr. Kyva's assertion as to the nature of the cargo was not contradicted, I will take it that from the point of view of Italy, the Aircraft was being used, shortly before it was seized, for transportation of military equipment.

[201] Is this sufficient to meet the criteria of paragraph 12(3)(a) of the *State Immunity Act*? Is the appreciation of the military activity in connection with which an asset is used or intended to be used subjective or objective? Must it be a military activity in which the State claiming immunity is engaged or intends to be engaged or can a State benefit from the immunity afforded for military assets when, in the course of a purely commercial transaction, it allows one of its assets to be used by a third party for military purposes?

[202] There have not been cited to me any case directly in point. The decision of the Supreme Court of Canada in *Re Canada Labour Code* [1992] 2 S.C.R., while it considers the question of the characterisation of the activity of a foreign state for the purpose of the exception to the jurisdictional immunity provided in section 5 of the *State Immunity Act*, provides useful guidance as to the considerations which enter into the interpretation and application of the *State Immunity Act*. The case concerned the characterization of the labour relations between the U.S. Navy and the Canadian civilian support staff hired at a U.S. Navy base in Newfoundland. If those relations were considered to be a commercial activity of the U.S. Navy, the Courts would have jurisdiction over the labour dispute. In its discussion leading to the conclusion that the characterization of the activities of a foreign state should be made using a contextual approach, Justice La Forest cited the speech of Lord Wilberforce in *I Congresso del Partido*, [1983] 1 A.C. 244 (H.L.) as follows (at page 72):

"The conclusion which emerges is that in considering, under the "restrictive" theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or

commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity."

[203] He later stated, in analysing the specific issue before the Court (at p. 76):

In determining the nature of the activity in question, it is useful to begin by acknowledging that employment at a military base is a multi-faceted relationship. It is simply not valid to isolate one aspect of this activity and label it as either "sovereign" or "commercial" in nature. A better approach is to determine which aspects of the activity are relevant to the proceedings in issue, and then to assess the impact of the proceedings on these attributes as a whole.

[204] In finally adopting the wider point of view of the foreign State's purpose in hiring the employees, the Court held, at pages 80 - 81:

Section 5 of the *State Immunity Act* requires that the proceedings in question relate to the activity at issue. For me, it is not enough that the proceedings merely "touch on" or "incidentally affect" the hiring of civilian labour at the base. Acceptance of such a minimal requirement would broaden the "commercial activity" exception to the point of depriving sovereign immunity of any meaning. Such an approach is equivalent to the "once a trader, always a trader" approach rejected by Lord Wilberforce in *I Congreso*. Instead, the entire context of the activity at Argentia must be considered. In this regard, it is not enough to take the employment contracts in isolation, and decide that bargaining unit certification proceedings will have some bearing on these contracts. A more substantial connection is needed. Of relevance is the competing nexus between the proceedings and the sovereign aspects of the employment activity at the base. Also of importance is the breadth of scope of the proceedings of the Board, which I have outlined earlier. Finally, at this stage of the analysis, it will again be useful to consider the purpose of the activity in question.

[205] The wider purpose and intent of the *State Immunity Act* must not be forgotten: it aims to uphold a restrictive theory of sovereign immunity, recognizing immunity of foreign states when they are engaged in sovereign acts, but not when they act as private parties engaged in commercial activities. The extension of immunity to execution against property of foreign states follows the same logic. The dual criteria attaching to the exemption for military property is eloquent of that intent: military property is not exempt strictly on the basis of its nature or of the fact that it is under the control of a military authority, but on the basis of the context within which it is present in Canadian territory. It must be in use or intended to be used in connection with military activities. The purpose of its presence in Canada must be examined, and it would be in my view against the intent and purpose of the *State Immunity Act* to extend immunity to assets of a foreign state where the purpose of their use or intended use is purely commercial for the foreign State.

[206] The conclusion I reach does not derogate from the position Antonov and the State of Ukraine have taken to the effect that the military use exemption of paragraph 12(3)(a) remains paramount to the commercial use exception contained in paragraph 12(1)(b). While I do not decide this point (as I have no need to do so), I can conceive that an asset may be in use for a commercial activity and at the same time be intended to be used for a military activity, or vice-versa, in which case the exemption could override the exception. What I do find is that for the purpose of determining whether an asset of a foreign state is used or intended to be used in connection with a military activity, the military activity must be one in which the state claiming immunity is engaged or intends to engage in its capacity as a sovereign. It is not sufficient that the property be used pursuant to purely commercial private arrangements for the military activities of a third party with which the foreign state claiming immunity has no involvement.

[207] Here the connection with military activities was purely incidental. It had nothing to do with the will, intent or purpose of the State of Ukraine as a sovereign, it did not involve the State of Ukraine in an act *jure imperii*. Any connection between the State of Ukraine and any military activity is thrice removed: Ukraine, for commercial purposes, allowed Antonov, a state enterprise pursuing commercial activities, to use the Aircraft for commercial purposes. Antonov, in a commercial contract, allowed Italy to use the Aircraft to transport military cargo. The transportation itself was not part of a military operation or exercise. It merely allowed the Italian military to have its equipment at a certain place for unspecified purposes.

[208] In any event, it is worth noting that at the time the seizure was effected, the military cargo had been discharged and the charter agreement with the Italian Ministry of Defence was at an end. While further engagements had been discussed, there were no firm agreements, and it has not been established that there was any intent on the parts of the State of Ukraine, Antonov or any other person or state, that the Aircraft should be used "in connection with military activities": any cargo would have done. The mere possibility that property could be used for military activities does not equate to an intention to use for the purpose of paragraph 12(3)(a). The French version "destinés à être utilisés" conveys the sense of an intention in its strongest sense: that of a fully formed, definitive intent. In my view, in order to meet the criteria of paragraph 12(3)(a), it must be established that property, if not currently in use in connection with a military activity, must essentially be earmarked for such use. On the evidence before me, I find that the Aircraft was neither used nor intended to be used in connection with a military activity at the time of the seizure.

2. Under the control of a military authority or defence agency:

[209] The State of Ukraine, in its diplomatic declaration, states that the Aircraft was under the control of the Canadian military authorities at Goose Bay because it required the authorization of the Canadian military authorities to take-

off. First, that assertion has not been established by evidence. More importantly though, "control" as used in paragraph 12(3)(b) of the *State Immunity Act*, requires effective control over the property, not merely incidental, punctual control over the manner in which the property is operated. In French, the terms used "placé sous la responsabilité d'une autorité militaire" impart a degree of control over the operational use and management of the property. By no stretch of the imagination can it be said that an airfield's control over the take-off, landing or circulation of aircraft constitutes control over the aircraft themselves.

[210] I find that at the time of the seizure, the Aircraft was under the control of (placé sous la responsabilité de) Antonov, and no one else.

3. Military in nature:

[211] The Aircraft is a heavy lift cargo aircraft. That is its essential characteristic and purpose. While it can certainly be used, and indeed, is particularly well suited for carrying military cargoes, it is no less well-suited to carrying industrial or commercial cargoes.

[212] It may have been built as a "military transport aircraft", but it has since been substantially altered, so that it now corresponds to an entirely different Type Certificate. In any event, I still am no further enlightened as to what makes a "military transport aircraft" any different in nature from any transport aircraft.

[213] The State of Ukraine and Antonov have referred me to the American case of *All American Trading Corp. v. Cuartel General Fuerza Aera Guardia Nacional de Nicaragua*, 818 F. Supp. 1552; 1993 U.S. Dist. (U.S. Dist. Court, 2nd Dist. of Florida). That case involved the very characterization of, *inter alia*, a Cessna Aircraft used to transport military personnel. The Aircraft was not painted with military camouflage and had a civilian interior configuration; it was not a combat plane. The evidence appears to have been limited to a statement that it was essential to Nicaragua's National Defence in that it was used to transport senior military commanders across the country due to Nicaragua's vast territory and few roads.

[214] The applicable provision of the US *Foreign Sovereign Immunities Act* (FSIA), 28 U.S.C.S. states:

1611(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if:

(2) The property is, or intended to be, used in connection with a military activity and

(A) is of military character, or

(B) is under the control of a military authority or defence agency.

[215] The Court found as follows:

"(...) the evidence establishes that the aircraft are used to transport senior military personnel which is essential to military operations. The fact that the aircraft were being altered for more luxurious accommodations does not render them non-military. If this were the case then Air Force One, and many of the other more luxurious military planes used to transport military officials, would not qualify as property used in military activity and of military character."

[216] I do not find in this passage or anywhere else in the decision a discussion as to what constituted the "military character" required under the relevant provision of the *FSIA*. It appears that the Court assumed that military use and the fulfilment of essential military needs equated to military character.

[217] I suspect, however, that the Florida Court's conclusion was predicated in large part by the legislative history of the *FSIA*, cited at page 16 of the report in the form of the Report of the House Judiciary Committee which provides that "property is of military character if it consists of equipment in a broad sense, such as weapons, communication equipment or military transport. The property satisfies the second condition if it is intended to protect other military property and is essential to military operations.".

[218] There is no such expressed intention of Parliament in the case of the *State Immunity Act*, and I cannot find any justification to conclude that a piece of equipment which is otherwise indistinguishable from ordinary civilian or commercial equipment should be considered military in nature simply because it is also essential to conducting military operations.

[219] In my view, to do so would be to inappropriately subsume the requirement of military nature of the property with the separate and distinct requirement of actual or intended use in connection with military activities.

[220] The *Canadian Oxford Dictionary*, defines "nature" as: "a thing's or person's innate or essential qualities or character". *Black's Law Dictionary*, 7th ed., West Group, St. Paul. Minn., 1999 defines it as: "A fundamental quality that distinguishes one thing from another; the essence of something".

[221] I can find nothing in the evidence which would point to something in the essential qualities of the Aircraft which would distinguish it as military, as opposed to any other cargo aircraft. It has not been alleged or shown that it has camouflage painting, that it is armoured, that it carries defensive weapons or features, that its communication equipment is calibrated for specific military use, or that its operational characteristics somehow limit it to military use or perform functions which are required particularly for military uses or purposes and are of no or limited usefulness in a civilian context. It appears to be the very same characteristics and qualities that make the Aircraft desirable and suited for use as a commercial or civilian aircraft that make it desirable or suited for use as a military transport plane.

[222] I conclude that the Aircraft is, in nature, no more and no less than a cargo aircraft. The State of Ukraine has not established that the Aircraft is military in nature. Accordingly, the Aircraft meets none of the requirements of subsection 12(3) of the *State Immunity Act*, and is therefore not immune from the execution proceedings herein.

"Mireille Tabib"

Prothonotary

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FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-60-03
STYLE OF CAUSE:	TMR ENERGY LIMITED v. STATE PROPERTY FUND OF UKRAINE
DATE AND PLACE OF HEARING:	OTTAWA, ONTARIO AUGUST 27, 28, 29, SEPTEMBER 5, 10 AND 17, 2003 MONTREAL, QUEBEC SEPTEMBER 15, 2003
REASONS FOR ORDER:	MADAM PROTHONOTARY MIREILLE TABIB
DATED:	DECEMBER 23, 2003

APPEARANCES:

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GEORGE POLLACK JODY SHUGAR	FOR RESPONDENT
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[1]Under the *Newfoundland Judgement Enforcement Act*, SNL 1996, c. J.-1.1 (the "*JEA*").

[2]The process under Ukrainian law whereby a state enterprise becomes a joint stock company whose share can then be owned by private investors.

[3]The 1993 contract for Modernization and Operating of the Lisichansk Refinery (the "M & O Agreement").

[4](See citation at paragraph [55], infra).

[5]As correctly translated from the original French reasons.

[6]Affidavit of Christine Kark, Intervener's motion record dated July 18, 2003, Tab 3, p. 15.

[7](See ss. 16(1) of the *JEA* recognizing a cause of action for loss arising from a person's failure to comply with the *JEA*, but exempting the sheriff himself).

[8](See for example section 2 of the *Temporary Regulations on SPF*. The full text of these Regulations is even more eloquent as to the degree of control exercised by the State of Ukraine over SPF's activities).

[9]The *Procedures for Effectuation of Protection of Rights and Interests of Ukraine* clearly set out how the control of foreign proceeding brought against, *inter alia*, SPF are to be centrally controlled by the State.

[10] The relevant legislative provisions have been put in evidence by several witnesses, but in versions translated by different interpreters. All the words in quotation marks have been used, apparently interchangeably, to translate the

relevant Ukrainian words used to describe Antonov's relationship to the Aircraft. The same translation difficulty occurred during cross-examinations.

[11]McLeod, James G., *The Conflict of Laws*, Carswell Legal Publications, Calgary, Alberta, 1983, at pages 337 and 338.

[12]Mr. Zub, as exhibit "I" to his affidavit, has introduced a letter written by D. Prytyka, V. Karaban and V. Rotan commenting on Mr. Batyuk's use, in his affidavit, of their previously published work "Scholarly and Practical Commentary to the Civil Legislation of Ukraine". TMR has not formally objected to the admissibility of this letter. Accordingly, even though the letter amounts to an unsworn statement of expert opinion, it is in evidence before me.
