Michaelmas Term
[2021] UKSC 57
On appeal from: [2020] EWCA Civ 1249

JUDGMENT

"Maduro Board" of the Central Bank of Venezuela (Respondent/Cross-Appellant) *v* "Guaidó Board" of the Central Bank of Venezuela (Appellant/Cross-Respondent)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Hamblen
Lord Leggatt

JUDGMENT GIVEN ON
20 December 2021

Heard on 19, 20 and 21 July 2021

Guaidó Board
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Sir Daniel Bethlehem QC
Andrew Fulton QC
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Maduro Board
Sir Jeffrey Jowell QC
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Intervener (Secretary of State for Foreign, Commonwealth and Development Affairs)
Sir James Eadie QC
Sir Michael Wood
Jason Pobjoy
Belinda McRae
(Instructed by The Government Legal Department)

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LORD LLOYD-JONES: (with whom Lord Reed, Lord Hodge, Lord Hamblen and Lord Leggatt agree)

Introduction

1. This appeal raises fundamental issues concerning the recognition of a foreign head of state, the foreign act of state doctrine and their inter-relationship.

2. The central question arising on this appeal is which of two contending claimants is entitled to give instructions to financial institutions within this jurisdiction on behalf of the Central Bank of Venezuela (the "BCV") and to represent the BCV in a London Court of International Arbitration ("LCIA") arbitration. The Bank of England (the "BoE") holds gold reserves of about US$1.95 billion for the BCV, while Deutsche Bank ("DB") has paid the proceeds of a gold swap contract owed to the BCV in the sum of about US$120m to court-appointed receivers (the "Receivers") to hold on behalf of the BCV. The two competing claimants to the funds held by the BoE and the Receivers have been referred to in these proceedings as the "Maduro Board" and the "Guaidó Board". They each claim to be entitled to represent the BCV in relation to the assets of the BCV in this jurisdiction.

3. The Maduro Board claims to be the only validly appointed board of the BCV, appointed by Mr Nicolás Maduro Moros ("Mr Maduro") as President of Venezuela, and, as such, authorised to give instructions on behalf of the BCV in respect of BCV assets held within Venezuela and also, for present purposes, in respect of BCV assets held in financial institutions in England. The Guaidó Board claims to be an ad hoc board of the BCV, appointed by Mr Juan Gerardo Guaidó Márquez ("Mr Guaidó") as interim President of Venezuela, and authorised to give instructions on behalf of the BCV, including in respect of BCV assets held in financial institutions in England. The Maduro Board denies the Guaidó Board has the authority it claims to have. The Maduro Board has challenged Mr Guaidó's right to appoint the Guaidó Board and a Special Attorney General. The Maduro Board contends that Mr Guaidó's acts of appointment are null and void under Venezuelan law, and notes that they have been held to be null and void by the Venezuelan courts.

4. The dispute as to who is entitled to give instructions on behalf of the BCV concerning the assets held in England involves two issues:

   (1) Whether Mr Guaidó or Mr Maduro is recognised as the President of Venezuela; and

(2) If the answer is that Mr Guaidó is the President and Mr Maduro is not, the validity of Mr Guaidó's appointment of the Guaidó Board and of the Special Attorney General.

5. The parties identified a large number of issues arising from the pleadings. On the Guaidó Board's application, and against the Maduro Board's objections, the Commercial Court ordered a trial of two preliminary issues which were addressed by the courts below:

(1) The "recognition issue" namely:

Does Her Majesty's Government ("HMG") (formally) recognise Juan Guaidó or Nicolás Maduro and, if so, in what capacity, on what basis and from when? In that regard:

(i) Has Her Majesty's Government formally recognised Mr Guaidó as interim President of Venezuela by virtue of the Foreign and Commonwealth Office (FCO) letter dated 19 March 2020 to the Court and/or the public statements made by Her Majesty's Government?

(ii) If so, is that recognition as both head of state and head of government? and

(iii) Is any such recognition conclusive pursuant to the "one voice" doctrine for the purpose of determining the issues in these proceedings?

(2) The "act of state issue" namely:

Can this Court consider the validity and/or constitutionality under Venezuelan law of (a) the Transition Statute; (b) Decrees Nos 8 and 10 issued by Mr Guaidó; (c) the appointment of Mr Hernández as Special Attorney General; (d) the appointment of the Ad Hoc Administrative Board of BCV; and/or (e) the National Assembly's Resolution dated 19 May 2020, or must it regard those acts as being valid and effective without inquiry? In that regard:

(i) Does the "one voice" doctrine preclude inquiry into the validity of such matters?

(ii) Are such matters foreign acts of state and/or non-justiciable?

(iii) Does the Court lack jurisdiction and/or should it decline as a matter of judicial abstention to determine such issues?

Factual background

6. In April 2013, Mr Maduro was elected President of Venezuela.

7. In December 2015, there were elections for Venezuela's legislature, the National Assembly. A dispute arose as to the validity of the election of four deputies for the State of Amazonas. The Supreme Tribunal of Justice of Venezuela (the "STJ"), the highest Venezuelan constitutional court, granted provisional relief suspending the implementation of the election of these deputies. However, the opposition coalition, which claimed victory in the elections, decided that the four deputies should be sworn in anyway.

8. There is a dispute between the Guaidó Board and the Maduro Board in relation to all of the judgments of the STJ upon which the Maduro Board relies from 2016 onwards. The Guaidó Board's pleaded case is that the STJ's judgments were issued in violation of principles of due process and that the members of the STJ are not impartial and independent but were acting corruptly to support Mr Maduro.

9. On 1 August 2016, the STJ issued a judgment in which it declared that all decisions taken by the National Assembly would be null and void for so long as it was constituted in breach of the judgments and orders of the STJ. Subsequently, other judgments were issued to the same or similar effect.

10. In May 2017, a National Constituent Assembly was established on Mr Maduro's initiative and an election was held for its members. This was essentially a rival legislature to the National Assembly.

11. In May 2018, a Presidential election took place which Mr Maduro claims to have won. The United Kingdom considered that this election was deeply flawed.

12. On 19 June 2018, Mr Maduro appointed Mr Ortega as President of the BCV. On 26 June 2018, the National Assembly passed a resolution declaring Mr Ortega's

appointment to be unconstitutional. The STJ in turn has declared the National Assembly Resolution unconstitutional.

13. On 10 January 2019, Mr Maduro was sworn in before the STJ for a second term as the President of Venezuela.

14. However, on 15 January 2019, the National Assembly and the President of the National Assembly, Mr Guaidó, announced, relying upon article 233 of the Venezuelan Constitution, that Mr Maduro had usurped the office of President and that Mr Guaidó was the interim President of Venezuela by virtue of his position as President of the National Assembly.

15. On 26 January 2019, the United Kingdom joined European Union partners in giving Mr Maduro eight days to call fresh elections, in the absence of which those countries would recognise Mr Guaidó as interim President "in charge of the transition back to democracy". Mr Maduro did not call such elections.

16. On 4 February 2019, the then Foreign Secretary, the Rt Hon Jeremy Hunt MP, issued the following statement:

> "The United Kingdom now recognises Juan Guaidó as the constitutional interim President of Venezuela, until credible presidential elections can be held.
>
> The people of Venezuela have suffered enough. It is time for a new start, with free and fair elections in accordance with international democratic standards.
>
> The oppression of the illegitimate, kleptocratic Maduro regime must end. Those who continue to violate the human rights of ordinary Venezuelans under an illegitimate regime will be called to account. The Venezuelan people deserve a better future."

17. This was followed by an exchange of letters between Tom Tugendhat MP, Chair of the House of Commons Select Committee on Foreign Affairs and Sir Alan Duncan MP, Minister of State for Europe and the Americas, which has been made public. Mr Tugendhat asked for an explanation of the legal basis for this act of recognition.

18. On 25 February 2019, Sir Alan explained that the decision to recognise Mr Guaidó was a "case specific exception to our continuing policy of recognising states not governments" and was based on two points. First, Mr Guaidó and the National Assembly were acting consistently with the Venezuelan constitution when they declared the Presidency vacant following the May 2018 elections which were "deeply flawed". Secondly, the circumstances in Venezuela were "exceptional": 3.6m people had fled the country and the regime, which was "holding onto power though electoral malpractice and harsh repression of dissent", had been referred to the International Criminal Court by six countries for its abuse of human rights.

19. Meanwhile, on 5 February 2019 the National Assembly passed the "Transition Statute". This was described in its preamble as a statute that "governs a Transition to democracy to restore the full force and effect of the Constitution of the Bolivarian Republic of Venezuela." The translation before the court records that it was "issued, signed and sealed at the Federal Legislative Palace, seat of the National Assembly of the Bolivarian Republic of Venezuela, in Caracas, on February 5, 2019." The signatories were Mr Guaidó, as President of the National Assembly, two vice-presidents, a secretary and an under-secretary of the National Assembly. It bears the seal of Mr Guaidó as President of Venezuela.

20. Article 4 of the Transition Statute provides that "The present Statute is a legal act in direct and immediate execution of article 333 of the Constitution of the Bolivarian Republic of Venezuela."

21. Article 14 of the Transition Statute provides that, in accordance with article 233 of the Constitution, the President of the National Assembly (ie, Mr Guaidó) is "the legitimate Interim President of the Bolivarian Republic of Venezuela."

22. Article 15 of the Transition Statute provides:

> "The National Assembly may adopt any decisions necessary to defend the rights of the Venezuelan State before the international community, to safeguard assets, property and interests of the state abroad, and promote the protection and defense of human rights of the Venezuelan people, all in accordance with Treaties, Conventions, and International Agreements in force.

In exercising the powers derived from article 14 of this Statute, and within the framework of article 333 of the Constitution, the Interim President of the Bolivarian Republic of Venezuela shall exercise the following powers, subject to authorisation and control by the National Assembly under the principles of transparency and accountability.

a. Appoint ad hoc administrative boards to assume the direction and administration of public institutes, autonomous institutes, state foundations, state associations and state civil societies, state companies, including companies established abroad, and any other decentralized entity, for the purpose of appointing administrators and, in general, adopting the measures necessary to control and protect their assets. The decisions adopted by the Interim President of the Republic shall be executed immediately, with full legal effect.

b. While an Attorney General is validly appointed in accordance with article 249 of the Constitution, and within the framework of articles 15 and 50 of the Organic Law of the Attorney General of the Republic, the Interim President of the Republic may appoint a special attorney general to defend and represent the rights and interests of the Republic, state companies and other decentralized entities of the Public Administration abroad. The special attorney general shall have the power to designate judicial representatives, including before international arbitration proceedings, and shall exercise the powers set forth in article 48, paragraphs 7, 8, 9 and 13, of the Organic Law of the Attorney General of the Republic, subject to the limitations derived from article 84 of that Law and this Statute. Such representation shall be especially oriented toward ensuring the protection, control, and recovery of state assets abroad, as well as executing any action required to safeguard the rights and interests of the state. The attorney general thus appointed shall have the power to execute any action and exercise all of the rights that the Attorney General would have, with regard to the assets described

> herein. For such purposes, such special attorney general shall meet the same conditions that the Law requires to occupy the position of Attorney General of the Republic."

23. On 5 February 2019, Mr Guaidó purported, as interim President, to appoint Mr José Ignacio Hernández as Special Attorney General. He purported to do so pursuant to articles 233, 236 and 333 of the Venezuelan Constitution and article 15b of the Transition Statute. The decree was "issued at the Federal Legislative Palace in Caracas".

24. On 8 February 2019, the STJ issued a judgment holding that the Transition Statute was unconstitutional, a nullity and of no legal effect. This was followed on 11 April 2019 by a judgment holding that the appointment of Mr Hernández was also unconstitutional, a nullity and of no legal effect.

25. On 18 July 2019, Mr Guaidó purported, as interim President, to appoint an ad hoc board of the BCV (ie, the Guaidó Board) by "Decree No 8". The decree was expressed to be "issued at the Federal Legislative Palace in Caracas".

26. Article 3 of Decree No 8 purports to provide that the Ad Hoc Board would represent the BCV abroad in connection with agreements relating to the management of international reserves, including gold.

27. Article 7 of Decree No 8 purports to provide that the acts that resulted in the appointment of the person who currently occupies the Presidency of the BCV (ie, Mr Ortega) were declared null and void.

28. On 25 July 2019, the STJ issued a judgment holding that the appointment of the Guaidó Board was unconstitutional, a nullity and of no legal effect.

29. On 13 August 2019, Mr Guaidó, as interim President, passed "Decree No 10" appointing an additional member to the Guaidó Board and naming Mr Ricardo Villasmil as Chairman of the Guaidó Board.

30. On 5 January 2020, Mr Guaidó was re-elected President of the National Assembly.

31. On 19 May 2020, the National Assembly passed a resolution stating that the BCV was a "*decentralised entity*" and that the BCV's assets abroad may only be administered by the Guaidó Board. This resolution was declared unconstitutional by the STJ on 26 May 2020.

32. The Maduro Board contends that the STJ has declared that all decisions taken by the National Assembly since 2016 are null and void, including the appointment of Mr Guaidó as interim President, the Transition Statute, the appointment of Mr Hernández as Special Attorney General and the appointment of the Guaidó Board. The Maduro Board also contends that the STJ has ruled that the BCV is not a "decentralised entity", a term referred to in the Transition Statute.

33. The courts below have not made any findings of fact about (1) the status of the STJ judgments or (2) the issue of who actually exercises effective control within Venezuela. These issues fall outside the scope of the two preliminary issues quoted at para 5 above.

34. The Maduro Board's case is that in practice Mr Maduro continues effectively to exercise all the powers of head of state and head of government, through the government of which he is the head, and that Mr Guaidó does not and has never done so. The Guaidó Board accepts that the Maduro regime exercises at least a degree of effective control in Venezuela, although the manner and extent of such control is disputed. In particular, the Guaidó Board does not accept that the Maduro regime enjoys the habitual obedience of the bulk of the population of Venezuela with a reasonable expectancy of permanence. Nevertheless, the Guaidó Board's position is that these considerations are irrelevant to the preliminary issues.

35. It is common ground that there has been no change in diplomatic relations between the United Kingdom and Venezuela in the period after 4 February 2019. Mr Andrew Soper, who was originally appointed in October 2017, remained the Ambassador of the United Kingdom to Venezuela until March 2021 when he was replaced by Ms Rebecca Buckingham OBE as chargée d'affaires ad interim. Venezuela's Ambassador to the United Kingdom has remained Mrs Rocío Maneiro, who was originally appointed in November 2014.

36. HMG declined to grant diplomatic status to Mr Guaidó's (former) official representative in the UK, Ms Vanessa Neumann, or to establish diplomatic relations with Mr Guaidó, although there have been contacts between Ms Neumann and UK ministers including the Prime Minister.

37. On 6 December 2020, National Assembly elections took place in Venezuela. Mr Guaidó did not stand for election. Mr Guaidó and his political allies boycotted the elections on the basis that they considered that the conditions under which they were being held were neither free nor fair.

38. On 7 December 2020, the Foreign, Commonwealth and Development Office ("FCDO"), as the FCO had now become, released the following statement:

> "The Venezuelan National Assembly election on 6 December was neither free nor fair. It did not meet internationally accepted conditions, as called for by the International Contact Group on Venezuela including the UK, the Organisation of American States, the European Union, and others; nor did it meet the requirements of Venezuelan law. The UK considers the election to have been illegitimate and does not recognise the result. The UK recognises the National Assembly democratically elected in 2015 and recognises Juan Guaidó as interim constitutional President of Venezuela. It is vital that Venezuelans are given the opportunity to vote soon in presidential and legislative elections that are free, fair and effectively overseen. The UK considers that restoring democracy is an essential step towards ending the political, economic and humanitarian crises afflicting Venezuela's long-suffering people and calls on all its leaders to commit to supporting a solution to this end."

The proceedings

39. On 13 May 2019, DB issued an Arbitration Claim Form seeking the appointment of receivers to hold and manage the proceeds of a gold swap contract concluded with the BCV (the "DB Proceedings"). The swap contract was governed by English law and provided for disputes to be resolved by LCIA arbitration in London. The DB Proceedings were commenced in support of DB's LCIA arbitration proceedings against BCV. The confidential arbitral proceedings are effectively stayed, pending resolution of the question of who is entitled to represent the BCV.

40. The claim was issued because DB had received conflicting instructions with regard to the payment of the proceeds of the gold swap contract. The court appointed the Receivers and DB transferred the proceeds of the gold swap contract to the Receivers.

41. Between September and October 2019, the Guaidó Board and the Maduro Board served statements of case setting out, respectively, the entitlement of Mr Hernández and Mr Ortega to give instructions on behalf of the BCV in the LCIA Arbitration which DB had commenced against the BCV.

42. On 14 February 2020, after hearing argument in the arbitration application, Robin Knowles J wrote to the then Foreign Secretary, The Rt Hon Dominic Raab MP, inviting HMG to provide a written certificate on two questions:

> "(i) Who does HMG recognise as the head of state of the Bolivarian Republic of Venezuela?
>
> (ii) Who does HMG recognise as the head of government of the Bolivarian Republic of Venezuela?"

43. On 19 March 2020, a reply was sent by Mr Hugo Shorter, Director for the Americas at the FCO. Mr Shorter referred to the two questions and to the policy statement issued by Lord Carrington in 1980 explaining that the UK would no longer recognise governments. He continued:

> "The policy of non-recognition does not preclude Her Majesty's Government from recognising a foreign government or making a statement setting out the entity or entities with which it will conduct government to government dealings, where it considers it appropriate to do so in the circumstances.
>
> In this respect we refer you to the statement of the then Foreign Secretary, the Rt Hon J Hunt, on 4 February 2019, recognising Juan Guaidó as constitutional interim President of Venezuela until credible elections could be held, in the following terms: …"

The statement made by the then Foreign Secretary on 4 February 2019 (see para 16 above) was then quoted and Mr Shorter ended by confirming that this remained the position of HMG.

44. On 30 March 2020, Robin Knowles J ordered that the recognition issue and the act of state issue be determined as preliminary issues in the DB Proceedings. On 29 April 2020, Flaux LJ refused the Maduro Board permission to appeal from that decision.

45. On 14 May 2020, a separate claim form was issued in the name of the BCV, upon the instructions of the Maduro Board, against the BoE, claiming that the BoE was in breach of its contractual obligation to accept instructions from the Maduro Board with regard to payment of the gold reserves held by it (the "BoE Proceedings").

46. Two applications were then issued in the BoE Proceedings:

(1) First, also on 14 May 2020, an application by the Maduro Board for an expedited hearing of the entire claim on Covid-19 grounds; and

(2) Second, on 19 May 2020, a stakeholder application issued by the BoE (who, like DB, had received conflicting instructions) seeking an order under CPR rule 86.1 for the court to determine upon whose instructions (as between the Maduro Board or the Guaidó Board) the BoE was authorised to act in respect of the gold reserves held by the BoE on behalf of the BCV.

47. Both applications were heard by Teare J on 21 and 28 May 2020. Teare J considered the preliminary issues in both the DB Proceedings and the BoE Proceedings and ordered that the individual members of the Guaidó Board and the Maduro Board be joined as stakeholder claimants in the BoE Proceedings. After the BoE had made an application for a stay on 25 May 2020, Teare J also ordered a stay of the BCV's action against the BoE.

48. The preliminary issues were heard by Teare J over four days between 22-25 June 2020. Teare J handed down his judgment on 2 July 2020 ([2020] EWHC 1721 (Comm); [2021] QB 455). He resolved both preliminary issues in the Guaidó Board's favour.

49. On the recognition issue he held (at para 42) that HMG had recognised Mr Guaidó in the capacity of the constitutional interim President of Venezuela by virtue of the FCO's 19 March 2020 letter to the court and/or the public statements made by HMG and, it must follow, does not recognise Mr Maduro as the constitutional interim President of Venezuela. It recognised Mr Guaidó on the basis that such recognition is in accordance with the Constitution of the Republic of Venezuela and had done so since 4 February 2019. This recognition was as head of state but not as head of government. It

was conclusive pursuant to the "one voice" principle for the purpose of determining the issues in these proceedings.

50. On the act of state issue Teare J held (at para 93) that it was not open to the court to consider the validity and/or constitutionality under Venezuelan law of (a) the Transition Statute; (b) Decrees No 8 and 10 issued by Mr Guaidó; (c) the appointment of Mr Hernandez as Special Attorney General; (d) the appointment of the Ad Hoc Administrative Board of BCV; and/or (e) the National Assembly's Resolution dated 19 May 2020. The court was required to regard those acts as being valid and effective without inquiry. The one voice principle precluded inquiry into the validity of such matters, but only in so far as the challenge is based upon decisions of the STJ which are themselves based upon Mr Guaidó not being the constitutional interim President of Venezuela. Such matters were foreign acts of state and non-justiciable. The court lacked jurisdiction because of subject matter immunity.

51. Teare J granted the Maduro Board permission to appeal to the Court of Appeal on one ground relating to act of state. The Maduro Board then sought and obtained permission to appeal (from Hickinbottom LJ) against Teare J's Judgment. The appeal, which was directed to be expedited, was heard over three days between 22-24 September 2020 by Lewison, Males and Phillips LJJ. The Court of Appeal allowed the appeal and handed down its judgment on 5 October 2020 ([2020] EWCA Civ 1249; [2021] QB 455. Males LJ gave the leading judgment with which Lewison and Phillips LJJ agreed.

52. On the recognition issue, Males LJ held (at para 126) that "HMG has since 4 February 2019 formally recognised Mr Guaidó as the de jure President of Venezuela, that is to say as the person entitled to be regarded as the President of Venezuela". HMG had formally recognised Mr Guaidó as interim President of Venezuela by virtue of the FCO's 19 March 2020 letter to the court and/or other public statements. That recognition was as head of state but not as head of government. Such recognition was not conclusive pursuant to the "one voice" principle for the purpose of determining the issues in these proceedings. While such recognition was conclusive for the purpose of determining who is the de jure President of Venezuela, it leaves open the possibility that HMG may impliedly recognise Mr Maduro as the de facto President of Venezuela. He held (at para 127) that before a definitive answer could be given on the recognition issue, it was necessary to determine whether (1) HMG recognises Mr Guaidó as President of Venezuela for all purposes and therefore does not recognise Mr Maduro as President for any purpose or (2) HMG recognises Mr Guaidó as entitled to be the President of Venezuela and thus entitled to exercise all the powers of the President but also recognises Mr Maduro as the person who does in fact exercise some or all of the powers of the President of Venezuela. In his view these questions were best

determined by posing a further question or questions to the FCO and the matter was remitted to the Commercial Court for this purpose.

53. Males LJ held (at paras 138-139) that the act of state issue was not capable of being answered at that stage without seeking further clarification from the FCO or, in the absence of such clarification, determining whether HMG continues by necessary implication to recognise Mr Maduro as the President of Venezuela de facto. Furthermore, the act of state issue was not capable of being answered at that stage because there was an unresolved issue as to whether the various judgments of the STJ should be recognised by courts in this jurisdiction. In his view this was an issue which the English court can and must investigate.

54. Applications by the Guaidó Board and the Maduro Board for permission to appeal to the Supreme Court were refused by the Court of Appeal.

55. On 9 December 2020, the Supreme Court granted the Guaidó Board's application for permission to appeal on all grounds. The Supreme Court refused the Maduro Board's application for permission to cross-appeal in relation to the recognition issue.

56. On 10 December 2020, Cockerill J ordered a stay of the proceedings in the Commercial Court to await the outcome of the present appeal to the Supreme Court.

57. On 18 January 2021, the Maduro Board applied for permission to cross-appeal on the act of state issue, but on a contingent basis, indicating that its preferred course was that if the Guaidó Board's third ground of appeal were to succeed, act of state issues should be remitted to the Court of Appeal for reconsideration, rather than be decided in the Supreme Court in the absence of a full Court of Appeal decision and against an undetermined factual background. The Guaidó Board resisted the proposal for remittal but consented to the alternative basis of the Maduro Board's application, namely that the Supreme Court should give permission to cross-appeal. On 22 April 2021, the Supreme Court granted the Maduro Board's application for permission to cross-appeal.

58. On 14 May 2021, the Supreme Court granted an application by the Secretary of State for Foreign, Commonwealth and Development Affairs ("the Foreign Secretary") for permission to intervene in the appeal.

Recognition

The submissions of the parties

59. The Guaidó Board, the appellant in these proceedings, submits that on the correct application of the one voice principle and the act of state doctrine, courts in this jurisdiction must conclude that the Guaidó Board is entitled to give instructions on behalf of the BCV. In particular, it submits that:

> (1) Mr Guaidó has been expressly and unequivocally recognised by HMG as the President of Venezuela, as evidenced by a formal statement provided by the FCO dated 19 March 2020, in response to a request from the Commercial Court.
>
> (2) In that capacity Mr Guaidó has appointed the Guaidó Board as an ad hoc board of the BCV and has also appointed a Special Attorney General.
>
> (3) These appointments by Mr Guaidó were executive acts undertaken in the exercise of sovereign authority by the person formally recognised by HMG as the President of Venezuela, which acts courts in this jurisdiction are bound to treat as valid and effective under the foreign act of state doctrine, subject only to a public policy exception which has no application in this case.

60. The Maduro Board responds that the meaning of the executive statement was clear. It is a formal recognition of Mr Guaidó as the person HMG considers entitled to exercise the powers of interim President of Venezuela, but it does not go further than that. At the very least, it leaves open the possibility of a continuing express or implied recognition of Mr Maduro as President. The Maduro Board submits, further, that the absence of any statement withdrawing recognition from Mr Maduro and the continued maintenance of diplomatic relations and consular dealings with persons appointed by Mr Maduro show clearly and unambiguously that HMG continues to recognise Mr Maduro as in fact exercising the powers of President of Venezuela. In reliance on *Bank of Ethiopia v National Bank of Egypt* [1937] Ch 513, at p 519 per Clauson J, and *Banco de Bilbao v Sancha* [1938] 2 KB 176, at pp 195-196 per Clauson LJ, it submits that such de facto recognition “trumps” de jure recognition and effect should therefore be given to the acts of the de facto President. Further or alternatively, the Maduro Board says that, even if the courts were to decide that there was an absence of any relevant express or implied de facto recognition of Mr Maduro, the court would then need to decide who in fact exercises the powers of President. However, it accepts that these further points would have to await remission of the

case to the Commercial Court because of what it maintains is the unsatisfactory way in which the preliminary issues were drawn.

61. At first instance, Teare J held that the executive statement amounted to an unequivocal express recognition of Mr Guaidó as the constitutional interim President of Venezuela by which the court was bound under the one voice principle. He further held that the challenges by the Maduro Board to the appointment by Mr Guaidó of the Guaidó Board and the Special Attorney General were therefore barred by the foreign act of state doctrine.

62. The Court of Appeal held that while Mr Guaidó had been recognised by HMG as the de jure President of Venezuela, that had left open the possibility that HMG may impliedly recognise Mr Maduro as the de facto President. Accordingly, it considered that it was appropriate for a further question or questions to be posed to the FCDO and for proceedings to be remitted to the Commercial Court for further consideration.

Recognition of states and governments in international law

63. Recognition of a foreign state or government is a political act by the state granting recognition which has legal consequences on both the international and municipal planes.

> "The grant of recognition is an act on the international plane, affecting the mutual rights and obligations of states, and their status or legal capacity in general. Recognition also has consequences at the national level, as where the application of rules of municipal law is affected by a decision to recognise a new state or government." (Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, 9th ed (1992), p 128)

Recognition of a state must be distinguished from recognition of a government. Recognition of a state is an acknowledgement that the entity concerned has attained the status of statehood. In the present case, no question arises as to the continuing existence of Venezuela as a state. Rather, these proceedings concern the recognition of an individual as head of state of Venezuela which, as the Foreign Secretary expresses it in his written case, "signifies the recognising state's willingness to deal with that individual as representing the state concerned on the international plane".

FCDO practice in recognition

64. The recognition of foreign states, governments and heads of state is, under the constitutional arrangements in force within the United Kingdom, one element of the conduct of foreign relations which is entrusted to the executive and which is performed in large part pursuant to the royal prerogative.

65. The practice of the FCDO in relation to the recognition of foreign governments has changed over the years. Prior to 1980 it was the long-standing practice of HMG to make and announce decisions formally recognising a new government following an unconstitutional regime change. Recognition would be granted if specific criteria were met. In an answer to a question in the House of Commons on 21 March 1951 the Secretary of State for Foreign Affairs, Mr Herbert Morrison, stated:

> "The question of the recognition of a state or government should be distinguished from the question of entering into diplomatic relations with it, which is entirely discretionary. On the other hand, it is international law which defines the conditions under which a government should be recognised de jure or de facto, and it is a matter of judgment in each particular case whether a régime fulfils the conditions. The conditions under international law for the recognition of a new régime as the de facto government of a state are that the new régime has in fact effective control over most of the state's territory and that this control seems likely to continue. The conditions for the recognition of a new régime as the de jure government of a state are that the new régime should not merely have effective control over most of the state's territory, but that it should, in fact, be firmly established. His Majesty's Government consider that recognition should be accorded when the conditions specified by international law are, in fact, fulfilled and that recognition should not be given when these conditions are not fulfilled. The recognition of a government de jure or de facto should not depend on whether, the character of the régime is such as to command His Majesty's Government's approval." (Hansard (HC Debates), 21 March 1951, vol 485, cols 2410-2411)

66. Following a review of that practice, on 28 April 1980, the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, stated in a written answer in the House of Lords:

> "… we have conducted a re-examination of British policy and practice concerning the recognition of governments. This has included a comparison with the practice of our partners and allies. On the basis of this review we have decided that we shall no longer accord recognition to governments. The British Government recognise states in accordance with common international doctrine.
>
> Where an unconstitutional change of régime takes place in a recognised state, governments of other states must necessarily consider what dealings, if any, they should have with the new régime, and whether and to what extent it qualifies to be treated as the government of the state concerned. Many of our partners and allies take the position that they do not recognise governments and that therefore no question of recognition arises in such cases. By contrast, the policy of successive British Governments has been that we should make and announce a decision formally 'recognising' the new government.
>
> This practice has sometimes been misunderstood, and, despite explanations to the contrary, our 'recognition' interpreted as implying approval. For example, in circumstances where there might be legitimate public concern about the violation of human rights by the new régime, or the manner in which it achieved power, it has not sufficed to say that an announcement of 'recognition' is simply a neutral formality.
>
> We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to governments. Like them, we shall continue to decide the nature of our dealings with regimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the state

> concerned, and seem likely to continue to do so." (Hansard (HL Debates), 28 April 1980, vol 408, cols 1121-1122)

67. On 23 May 1980, in answer to a question as to how in future, for the purposes of legal proceedings, it may be ascertained whether, on a particular date, HMG regarded a new regime as the government of the state concerned, the Lord Privy Seal, Sir Ian Gilmour replied:

> "In future cases where a new régime comes to power unconstitutionally our attitude on the question whether it qualifies to be treated as a government will be left to be inferred from the nature of the dealings, if any, which we may have with it, and in particular on whether we are dealing with it on a normal government to government basis." (Hansard (HC Debates), 23 May 1980, vol 985, col 385W)

68. Notwithstanding this announced policy, there have been occasions since 1980 on which HMG has, exceptionally, recognised or formally declined to recognise a foreign government where it considers it appropriate to do so. Nor has the policy prevented HMG from informing the courts of such recognition. In *Kuwait Airways Corpn v Iraqi Airways (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883, paras 349-350, the Court of Appeal made clear that, despite the 1980 statement, there is nothing to prevent HMG, if it thinks it appropriate, from tendering to the courts an unequivocal certificate of recognition or non-recognition of the existence of a foreign government. In that case the United Kingdom was under a positive obligation under UN resolutions not to recognise any regime other than the legitimate government of Kuwait. More recently, on 27 July 2011, HMG withdrew recognition from the Government of Libya led by Muammar Muhammad al-Qadhafi and recognised the National Transitional Council of the State of Libya as the "sole governmental authority in Libya" (*British Arab Commercial Bank plc v National Transitional Council of the State of Libya* [2011] EWHC 2274 (Comm), paras 1-6). On those occasions when HMG does issue a formal statement of recognition or non-recognition of a foreign government, the certificate will be taken by the court as conclusive. (*Veysi Dag v Secretary of State for the Home Department* (2001) 122 ILR 529, paras 17, 18; *British Arab Commercial Bank plc v National Transitional Council of the State of Libya*, para 25 per Blair J. See also *R (HRH Sultan of Pahang) v Secretary of State for the Home Department* [2011] EWCA Civ 616, paras 14, 30.)

Recognition and the courts

69. As the conduct of foreign relations is entrusted to the executive branch of government, this is a field where the judiciary must normally defer to the executive which alone is competent to determine foreign policy. This is embodied in the "one voice principle" which finds its classic formulation in the speech of Lord Atkin in *The Government of the Republic of Spain v SS "Arantzazu Mendi"* [1939] AC 256, 264:

> "Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognise as a fellow sovereign in the family of states: and the relations of the foreign state with ours in the matter of state immunities must flow from that decision alone."

As a result, courts in this jurisdiction accept as conclusive statements made by the executive relating to certain questions of fact in the field of international affairs. These questions include the sovereign status of a state or government and whether an individual is to be regarded as a head of state (*Mighell v Sultan of Johore* [1894] 1 QB 149; *Carr v Fracis Times & Co* [1902] AC 176).

70. While the existence of the one voice principle is today not open to question, it has taken a long time to coalesce as an established rule. Its origins can be traced at least as far back as the early 19th century. (See, generally, Lyons, "The Conclusiveness of the Foreign Office Certificate" (1946) 23 BYIL 240; Parry*, A British Digest of International Law*, (1965), Part VII, pp 186-216.) Although some indication of a willingness on the part of the judiciary to be guided by the executive can be detected in the judgment of Lord Mansfield in *Heathfield v Chilton* (1767) 4 Burr 2016, concerning entitlement to diplomatic immunity, the need for an identity of view between the branches of government becomes more apparent in several judgments of Lord Eldon early in the next century where he stated that the courts could not take notice of a foreign government not recognised by the Government. The first of these cases arose out of the Swiss Revolution (*City of Berne v Bank of England* (1804) 9 Ves Jun 347; *Dolder v The Bank of England* (1805) 10 Ves Jun 352; *Dolder v Lord Huntingfield* (1805) 11 Ves Jun 283). Later cases arose out of the revolt of the Central and South American colonies against Spain in the 1820s (*Jones v Garcia del Rio* (1823) Turn & R 297; *Thomson v Byree*, The Times, 29 May 1824; *In re Colombian Bonds*, The Times, 21 January 1823; *In re Government of Peru*, The Times, 13 February 1823: "I know of no government but such as is acknowledged by my Sovereign". See also *Kinder v Everett*, The Times, 22 December 1823 (Abbott CJ); *Thompson v Powles* (1828) 2 Sim 194 (Shadwell VC).) In *Taylor v Barclay* (1828) 2 Sim 213, the first reported case in

which the court itself applied to the Foreign Office for an executive statement, Shadwell VC stated (at p 220) that he was "authorised to state that the Federal Republic of Central America has not been recognised as an independent government by the Government of this country" and he therefore disregarded the averment of the plaintiff that the Republic had been recognised.

71. The conclusive nature of the executive certificate seems, however, to have been a later development. In the early cases cited above, the question appears to have been treated as a question of evidence. Similarly, in *The Charkieh* (1873) LR 4 A & E 59 Sir Robert Phillimore seems to have concluded on the basis of his own researches that the Khedive of Egypt was not a sovereign prince, but he also communicated, as an afterthought, with the Foreign Office whose statement supported his conclusion (Parry (para 70 above), pp 203-204). In *Mighell v Sultan of Johore* (at p 158), however, where the issue once again was whether the defendant was an independent sovereign power, a different view was taken. It was submitted that the judge ought not to have been satisfied with the letter on behalf of the Secretary of State for the Colonies stating that Johore was an independent state and that the defendant was the present sovereign ruler, but should have informed himself from historical and other sources as to the status of the Sultan. Lord Esher MR responded (at p 158):

> "It was said that Sir Robert Phillimore did so in the case of *The Charkieh*. I know he did; but I am of opinion that he ought not to have done so; that, when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent sovereign."

Similarly, Kay LJ observed (at pp 161-162):

> "It was contended that that letter was not sufficient, and did not satisfactorily establish the status of the defendant as an independent sovereign. I confess I cannot conceive a more satisfactory mode of obtaining information on the subject than such a letter. Proceeding as it does from the office of one of the principal secretaries of state, and purporting to be written by his direction, I think it must be treated as equivalent to a statement by Her Majesty herself, and, if Her Majesty condescends to state to one of her courts of justice, that an individual cited before it is an independent sovereign, I think that statement must be taken as conclusive."

In an earlier passage in his judgment, however, Kay LJ had observed that the status of a foreign sovereign is a matter of which the courts take judicial cognisance, "a matter which the court is either assumed to know or to have the means of discovering, without a contentious inquiry" (at p 161).

72. In *In re Suarez* [1918] 1 Ch 176 the Court of Appeal held that the defendant had ceased at the relevant time to be the Bolivian Minister, on the basis of a letter to that effect from the Foreign Office to the plaintiff's solicitors. However, once again the reasoning differed. Warrington LJ referred (at p 195) to the letter as "sufficient evidence", while Scrutton LJ referred (at p 199) to "the Foreign Office through whom this court obtains conclusive information as to the status of foreign dignitaries".

73. In *The Gagara* the Esthonian National Council applied to set aside proceedings on the ground that it was a sovereign power. The Attorney General appeared in court on behalf of the Foreign Office and stated that HMG had provisionally recognised the Esthonian Government. At first instance (1919) 35 TLR 243 Hill J considered himself bound to recognise the sovereign rights of the Esthonian Government because HMG did so. On appeal [1919] P 95 the Court of Appeal considered itself bound to decline jurisdiction lest there should be "a divergence of action as between the courts of this country and the statements that have been made by the Government of the country as to the attitude which this country was prepared to take" (per Bankes LJ at p 104).

74. *Aksionernoye Obschestvo AM Luther v James Sagor & Co* ("*Luther v Sagor*") concerned title to movable property which had been expropriated by the Soviet Government in Russia and which had subsequently been brought to England. At first instance [1921] 1 KB 456, Roche J received statements from the Foreign Office as to the status of the Soviet Government which he described as "guarded". He concluded that he could not be satisfied that HMG had recognised the Soviet Government. "I therefore am unable to recognize it, or to hold it has sovereignty, or is able by decree to deprive the plaintiff company of its property" (at pp 477-478). On appeal [1921] 3 KB 532 a further Foreign Office certificate was produced stating that HMG now recognised the Soviet Government as the de facto government of Russia. Warrington LJ (at p 548) considered this "clearly conclusive as to the status of the Soviet Government". Similarly, Scrutton LJ stated (at p 556) that "the courts in questions whether a particular person or institution is a sovereign must be guided only by the statement of the sovereign on whose behalf they exercise jurisdiction". In his view the court was bound to hold that the acts of expropriation and sale were acts of a sovereign state.

75. The one voice principle was considered and affirmed by the House of Lords in *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797. The appellant

obtained an order in the High Court giving leave to enforce an arbitration award it had secured against the Government of Kelantan. The Government of Kelantan applied to set the order aside on the ground that it was a sovereign independent state. The Master in the King's Bench Division asked the Secretary of State for the Colonies to provide information as to the status of Kelantan and received in reply an official letter stating that Kelantan was an independent state, that its Sultan was the sovereign ruler and that the King did not exercise or claim any rights of sovereignty over Kelantan. Documents enclosed with the reply showed that Kelantan had formerly been recognised as a dependency of Siam, that the Siamese Government had by a treaty transferred to the British Government all its rights over Kelantan and that by an agreement of 1910 the Rajah (subsequently styled the Sultan) of Kelantan had engaged to have no political relations with any foreign power except through the medium of His Majesty the King of England and to follow in all matters of administration (save those touching the Mohammedan religion and Malay custom) the advice of an adviser appointed by His Majesty.

76. While their Lordships agreed on the existence of a principle that the executive and the judiciary should speak with one voice on the status of Kelantan and its Sultan, it was described in widely varying terms. Viscount Cave, Viscount Finlay and Lord Carson seem to have been in substantial agreement as to the basis of the principle.

> "First, it was argued that the Government of Kelantan was not an independent sovereign state, so as to be entitled by international law to the immunity against legal process which was defined in *The Parlement Belge*. It has for some time been the practice of our courts, when such a question is raised, to take judicial notice of the sovereignty of a state, and for that purpose (in any case of uncertainty) to seek information from a Secretary of State; and when information is so obtained the court does not permit it to be questioned by the parties." (Per Viscount Cave at pp 805-806)

> "It is settled law that it is for the court to take judicial cognizance of the status of any foreign government. If there can be any doubt on the matter the practice is for the court to receive information from the appropriate department of His Majesty's government, and the information so received is conclusive. … There are a great many matters of which the court is bound to take judicial cognizance, and among them are all questions as to the status and boundaries of foreign powers. In all matters of which the court takes judicial

> cognizance the court may have recourse to any proper source of information. It has long been settled that on any question of the status of any foreign power the proper course is that the court should apply to His Majesty's Government, and that in any such matter it is bound to act on the information given to them through the proper department. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his ministers upon a matter which is peculiarly within his cognizance." (Per Viscount Finlay at p 813)

> "… I agree with your Lordships that the courts of this country are bound to take judicial notice of the status of any other country in accordance with the information afforded to them by the proper representative of the Crown. … Indeed, it is difficult to see in what other way such a question could be decided without creating chaos and confusion, …" (Per Lord Carson at p 830)

Lord Dunedin considered that the source of the principle was in international comity.

> "If our sovereign recognizes and expresses the recognition through the mouth of his minister that another person is a sovereign, how could it be right for the courts of our own sovereign to proceed upon an examination of that person's supposed attributes to examine his claim and, refusing that claim, to deny to him the comity which their own sovereign had conceded?" (Per Lord Dunedin at p 820)

Lord Sumner, however, found the source of the principle in the best evidence rule.

> "The status of foreign communities and the identity of the high personages who are the chiefs of foreign states, are matters of which the courts of this country take judicial notice. Instead of requiring proof to be furnished on these subjects by the litigants, they act on their own knowledge or, if necessary, obtain the requisite information for themselves. I take it that in so doing the courts are bound, as they would be on any other issue of fact raised before them, to act on the best evidence and, if the question is whether some new

> state or some older state, whose sovereignty is not notorious, is a sovereign state or not, the best evidence is a statement, which the Crown condescends to permit the appropriate Secretary of State to give on its behalf. It is the prerogative of the Crown to recognize or to withhold recognition from states or chiefs of states, and to determine from time to time the status with which foreign powers are to be deemed to be invested. This being so, a foreign ruler, whom the Crown recognizes as a sovereign, is such a sovereign for the purposes of an English court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed. I think this is the real judicial explanation why it was held that the Sultan of Johore was a foreign sovereign. In considering the answer given by the Secretary of State, it was not the business of the court to inquire whether the Colonial Office rightly concluded that the Sultan was entitled to be recognized as a sovereign by international law. All it had to do was to examine the communication in order to see if the meaning of it really was the Sultan had been and was recognized as a sovereign.
>
> …
>
> I conceive that, if the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the court might be entitled to accept secondary evidence in default of the best, …" (Lord Sumner at pp 823-825)

77. Lord Sumner's view of the principle as one of evidence and of an executive certificate as the best evidence available to the court has not found favour. In *Duff Development* itself, Viscount Finlay expressly rejected the suggestion (at p 813 cited at para 75 above). In *The Arantzazu Mendi* [1939] AV 256, 264 Lord Atkin rejected "the opinion implied in the speech of Lord Sumner … that recourse to His Majesty's Government is only one way in which the judge can ascertain the relevant fact". In Lord Atkin's view it was for the domestic sovereign to decide whom he will recognise and questions of status before the courts necessarily flowed from that decision alone.

78. I consider that the most satisfactory explanation of the one voice principle lies in the view that certain matters are facts of state in the sense that they are peculiarly

within the cognisance of the executive which has the conduct of foreign relations. Where, as here, the issue is recognition of a foreign head of state, what matters is the attitude of the executive, of which the executive statement can be the only authoritative source and which should therefore be treated as conclusive. This is a point made by Viscount Finlay in *Duff Development* (at p 813, cited above) and taken up by Professor Clive Parry in *A British Digest of International Law*, (para 70 above), pp 215-216:

> "it is clear that the executive certificate commonly relates to the question whether or not the Crown has done a particular act or adopts or has adopted a particular attitude: whether, for instance, the Crown has or has not recognised a foreign state or government, or has declared war, or has claimed or claims jurisdiction or territorial sovereignty with respect to a given place. Where such a matter is in question, the statement of the Crown, in the form of the executive certificate, would seem to be necessarily conclusive. In such a case the matter is indeed 'peculiarly within [the] cognizance' of the Crown, as Lord Finlay expressed it in *Duff Development Co v Government of Kelantan*. In such a case also the certificate itself, or its equivalent, may constitute the very act of the Crown which is certified, as for instance in *The Fagernes* [1927] P 311 …, where the Crown's disclaimer of jurisdiction over a place in the middle of the Bristol Channel was made by the Attorney General in open court …, or in *Duff's* case … where the Attorney General maintained in argument that the Colonial Office's statement in relation to the status of Kelantan 'amounted to a recognition'. And cases where the certificate has been refused or appears ambiguous, or where it has not been considered to be conclusive, may be found upon analysis to be generally cases where the question put has related to something other than an act of the Crown itself, which is not 'peculiarly within [its] cognizance'."

79. In the United Kingdom it is for the executive to decide with which entities or persons it will have relations on the international plane. Where the executive makes an express statement of recognition of a government or head of state the courts will speak with the same voice, in accordance with the one voice principle.

Express and implied recognition

80. On the plane of international law recognition of states and governments may be express or implied. (See, generally, J Crawford, *Brownlie's Principles of Public International Law*, 9th ed (2019), p 139; *Oppenheim*, pp 169ff; H Lauterpacht, *Recognition in International Law*, (1947), pp 370ff, 406.) Implied recognition will depend on the existence of a subjective intention to recognise.

> "Recognition is primarily and essentially a matter of intention. Intention cannot be replaced by questionable inferences from conduct." (H Lauterpacht, above, p 371)

81. On the municipal plane, the adoption by the FCO of its new policy on recognition of governments in 1980 created a potential problem for courts in the United Kingdom. Hitherto, when asked to take cognisance of the acts of an entity or person claiming to be a government or a head of state, the courts had followed the one voice principle and had deferred to the view of the executive. (See, generally, D P O'Connell, *International Law*, 2nd ed (1970), Chapter 6.) The 1980 policy statement announced, however, that the executive would no longer accord recognition to governments. In future, the voice of the executive would be silent on such issues. As we have seen, this prompted a question in the House of Commons as to how thereafter the attitude of HMG towards a foreign regime might be ascertained for the purposes of legal proceedings which led to an answer from the Lord Privy Seal that the attitude of HMG would be left to be inferred from the nature of the dealings, if any, which HMG may have with it, and in particular on whether it was dealing with the foreign regime on a normal government to government basis (see para 67 above).

82. In the light of these statements, a number of academic writers suggested, perhaps understandably given the terms of the answer, that the courts should continue to seek to ascertain whether Her Majesty's Government had recognised a foreign entity as a government as a matter of inference from the dealings HMG had with it. (See, for example, J Crawford, "Decisions of British courts during 1985-1986 involving questions of public international law" (1986) 57 BYIL 405; Brownlie, "Recognition in Theory and Practice" (1982) 53 BYIL 197, p 209; cf F A Mann, *Foreign Affairs in English Courts* (1986), pp 42ff; Warbrick, "The New British Policy on Recognition of Governments" (1981) 30 ICLQ 568.) This approach was, however, rejected by Hobhouse J in *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA* [1993] QB 54. In his view the impracticability of the "inferred recognition" theory as a legal concept for forensic use was obvious and it could not be thought that that was the intention of the Government in giving the Parliamentary answers. The use of the phrase "left to be inferred" was designed to fulfil a need for information in an

international or political, not a judicial context. Hobhouse J then went on to identify (at p 68) the factors by reference to which a court should decide not whether a government is recognised but rather whether it exists as the government of a state. Similarly, in *Kuwait Airways Corpn v Iraqi Airways Co (No 5)* [1999] CLC 31 Mance J concluded (at p 65) that "the government did not intend in 1980 to replace clear statements of binding intention with coded language from which courts would then struggle invidiously to derive an inferred intention".

De jure and de facto recognition

83. It is necessary to say something about a further distinction, namely that between recognition of a government as the government de jure and recognition of a government as the government de facto. This distinction, to which no reference is made in the executive statements in the present case, has undoubtedly complicated the present proceedings and was central to the approach adopted by the Court of Appeal.

84. Great caution is necessary in employing these concepts as they are not precise terms of art and their meaning may vary according to context. Judge Crawford expresses the matter as follows:

> "General propositions about the distinction are to be distrusted: everything depends on the intention of the government concerned and the general context of fact and law. On the international plane, a statement that a government is recognized as the 'de facto' government of a state may involve a purely political judgement, involving a reluctant or cautious acceptance of an effective government, lawfully established in terms of international law and not imposed from without, or an unwarranted acceptance of an unqualified agency. On the other hand, the statement may be intended as a determination of the existence of an effective government, but with reservations as to its permanence and viability." (J Crawford*, Brownlie's Principles of Public International Law*, p 143)

Professor Talmon identifies six different senses in which states and scholars have used the term "de facto government".

> "Thus, the term de facto government has been used to describe (1) an effective government, ie a government wielding effective control over people and territory, (2) an unconstitutional government, (3) a government fulfilling some but not all the conditions of a government in international law, (4) a partially successful government, ie a belligerent community or a military occupant, (5) a government without sovereign authority, and (6) an illegal government under international law." (Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (1998), p 60)

85. In the present proceedings the Court of Appeal distinguished between two different uses of the terminology. The first, which it referred to as "the *Luther v Sagor* sense" is taken from the observation of Warrington LJ in *Luther v Sagor* (at p 551) that:

> "a de jure government in international law means 'one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them'; while a de facto government is one which is 'really in possession of them, although the possession may be wrongful or precarious'."

The second, which it referred to as "the Oppenheim sense" is derived from the 1951 statement on recognition by the then Foreign Secretary, set out at para 65 above. The conditions for recognition of a new regime as the de facto government are that it has in fact effective control over most of the state's territory and that this control seems likely to continue. The condition for recognition of a new regime as the de jure government are that it should not merely have effective control over most of the state's territory but that it should be firmly established. Support for the use of the distinction in this sense is provided by *Oppenheim* (see para 63 above) (at pp 154-155):

> "States granting recognition often distinguish between de jure recognition and de facto recognition. These terms are convenient but elliptical: the terms de jure or de facto qualify the state or government recognised rather than the act of recognition itself. Those terms are in this context probably not capable of literal analysis, particularly in terms of the ius to which recognition de jure refers. The distinction between de jure and de facto recognition is in essence that the former is the fullest kind of recognition while the latter is a lesser

> degree of recognition, taking account on a provisional basis of present realities. Thus de facto recognition takes place when, in the view of the recognising state, the new authority, although actually independent and wielding effective power in the territory under its control has not acquired sufficient stability or does not yet offer prospects of complying with other requirements of recognition."

86. The Foreign Secretary's written case makes the following submissions in relation to de jure and de facto recognition.

(1) In modern times, and certainly by the time of the 1980 policy, the terms de jure and de facto were no longer in wide usage. The more recent practice of HMG has been to accord recognition without using these terms at all.

(2) When a distinction of this kind is sought to be drawn, and no doubt reflecting the rarity of doing so in modern practice, the relevant terms are expressly used by the recognising state. Where no such term is used in a formal announcement, the assumption is that "recognition" refers to full recognition.

(3) As a matter of international law, in general terms, de jure is full recognition whereas de facto is lesser recognition. This is reflected in early UK practice where de facto recognition preceded fuller de jure recognition, eg Soviet Government (de facto 1921; de jure 1924); Spanish Nationalist Government (de facto 1937; de jure 1939); PRC Government (de facto 1949; de jure 1950). It is also consistent with Lord Wilberforce's comment in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, p 957 that:

> "De jure recognition in all cases but one is the fullest recognition which can be given: the one exception is the case where there is concurrently some other body de facto exercising a rival authority to that of the 'de jure' sovereign (as in the case of *Banco de Bilbao v Sancha*)."

(4) The Foreign Secretary also objects to the use of the terms in the *Luther v Sagor* sense as "not an ordinary or correct use of this term". Nevertheless, he accepts that several cases have adopted "this alternative, lesser meaning", referring to *Bank of Ethiopia v National Bank of Egypt* [1937] Ch 513 and *Banco de Bilbao v Sancha* [1938] 2 KB 176. He submits that its application is limited to

the specific and unusual situation where HMG chooses to recognise rival governments and he states that HMG has no modern practice of dual recognition of rival governments of the kind at issue in those cases.

Application of the principles to this case

87. Before Teare J and the Court of Appeal there were two executive statements. The statement by the Rt Hon Jeremy Hunt MP dated 4 February 2019 ("the Hunt statement") is set out at para 16 above. It is incorporated in the letter from Mr Hugo Shorter dated 19 March 2020 ("the Shorter letter") which is set out at para 43 above. I refer to them together as "the certificate".

88. Teare J concluded ([2021] QB 455, para 42) on the basis of the certificate that HMG recognises Mr Guaidó in the capacity of the constitutional interim President of Venezuela and does not recognise Mr Maduro as the constitutional interim President of Venezuela.

89. In the Court of Appeal Males LJ, with whom Phillips and Lewison LJJ agreed, referred in detail to express and implied recognition, de jure and de facto recognition and the one voice principle. He considered that there was no doubt that the certificate meant at least that HMG recognises Mr Guaidó as the person entitled to be the head of state of Venezuela and thus as head of state de jure in the *Luther v Sagor* sense. However, in his view this left open the question whether HMG continues to recognise Mr Maduro as President de facto (at paras 121-122). In the view of Males LJ, the Hunt statement was not saying that Mr Guaidó was exercising effective control over the territory of Venezuela and that such control was firmly established ie he was not recognising Mr Guaidó as President de jure in the Oppenheim sense, so as to leave no room for the possibility of continuing to recognise Mr Maduro as President de facto. The Hunt statement might have said in terms that HMG did not recognise Mr Maduro in any capacity, but it did not. When its language was viewed in context, it was ambiguous or at any rate less than unequivocal. He continued (at para 123):

> "That context includes:
>
> (1) the pre-existing recognition of Mr Maduro as President of Venezuela in the fullest sense, or perhaps more accurately, HMG's unequivocal dealings with him as head of state;

> (2) the acknowledgement in the statement that the Maduro regime continues to exercise substantial, albeit 'illegitimate', control over the people of Venezuela;
>
> (3) the continued maintenance of diplomatic relations with the Maduro regime, including through an ambassador accredited to Mr Maduro as President of Venezuela;
>
> (4) the fact that HMG has declined to accord diplomatic status to Mr Guaidó's representative in London; and
>
> (5) the established existence of a distinction between recognition de jure (ie that a person is entitled to a particular status) and de facto (ie that he does in fact exercise the powers that go with that status)."

Accordingly, in his view the certificate left open the possibility that HMG continues to recognise Mr Maduro as President de facto. That was best determined by posing further questions of the FCDO and the matter was remitted to the Commercial Court for that purpose.

90. I consider that the approach of the Court of Appeal was erroneous in a number of respects.

91. The starting point is that it is for HMG to decide with which entities or individuals it will have dealings in the conduct of foreign relations. While its usual practice under the 1980 policy statement is not to recognise foreign governments or heads of state, it reserves the right to do so where it considers it appropriate to do so in all the circumstances. In the present case it took that exceptional course and the certificate drew attention to this fact. It is the duty of the receiving court to interpret and to give effect to such a certificate in accordance with the one voice principle. What matters here is the subjective intention of the executive as disclosed by the certificate.

> "The practice of obtaining the Executive's certificate and the rationale supporting it cannot be justified, unless the courts take every possible step to ensure that their interpretation of the certificate accords with the Executive's intentions." (F A Mann, *Foreign Affairs in English Courts* (1986), p 57)

92. First, I consider that the Court of Appeal erred in concluding that the language of the certificate was ambiguous or less than unequivocal. It is necessary to seek to ascertain the intention of HMG from the words used in the certificate in the light of the request to which it responds. Here the letter dated 14 February 2020 from Robin Knowles J to the Foreign Secretary expressly asked who is recognised by HMG as the head of state of Venezuela and who is recognised by HMG as head of government of Venezuela. The answer was unequivocal. It referred to and set out the Hunt statement:

> "The United Kingdom now recognises Juan Guaidó as the constitutional interim President of Venezuela, until credible presidential elections can be held."

It said nothing about the recognition of Mr Maduro. There was no need for it to do so. The certificate was a clear and unequivocal recognition of Mr Guaidó as President of Venezuela. This recognition necessarily entailed that Mr Maduro was not recognised as President of Venezuela.

93. Secondly, the Court of Appeal erred in interpreting the certificate by reference to extrinsic evidence and in permitting that extrinsic evidence to found an argument that the certificate was ambiguous when no ambiguity was apparent on the face of the certificate. In its judgment ([2021] QB 455, para 123, set out above at para 89) the Court of Appeal referred to five extraneous factors which were clearly influential in its reasoning. These included the dealings of HMG with Mr Maduro prior to the recognition of Mr Guaidó, diplomatic relations with the Maduro regime and the absence of accreditation of Mr Guaidó's representative in London. It was not appropriate for the Court of Appeal to look beyond the terms of the certificate in this way. I agree with the submission on behalf of the Foreign Secretary that an interpretative approach which has regard to HMG's wider conduct is capable of undermining the very purpose of a certificate and the constitutional allocation of functions which is reflected in the one voice principle. The dealings which HMG may have had or may continue to have with different persons or entities within Venezuela are irrelevant to the question of recognition which turns on the intention of HMG as stated in the executive certificate. The matter was stated by Lord Reid in *Carl Zeiss* in the following terms ([1967] 1 AC 853, 901E):

> "It is a firmly established principle that the question whether a foreign state ruler or government is or is not sovereign is one on which our courts accept as conclusive information provided by Her Majesty's Government: no evidence is admissible to contradict that information."

(See also at p 925C-D per Lord Hodson, at p 941B-D per Lord Upjohn; at p 957F-G per Lord Wilberforce; *Gur Corpn v Trust Bank of Africa Ltd* [1987] QB 599, 623A-B per Sir John Donaldson MR; 625F-G per Nourse LJ.)

94. A striking example is provided by *Duff Development* where it was argued on behalf of the appellant that the statement in the letter of the Secretary of State for the Colonies must be held to be qualified by the terms of the documents enclosed with it and that, taking the information as a whole, the true result was that Kelantan was not an independent but a dependent state and that accordingly the Sultan was not immune from process in the English courts. This submission was unanimously rejected by the House of Lords, notwithstanding the contents of the documents enclosed with the certificate. Viscount Cave stated ([1924] AC 797, 808-809):

> "In the present case the reply of the Secretary of State shows clearly that notwithstanding the engagements entered into by the Sultan of Kelantan with the British Government that government continues to recognize the Sultan as a sovereign and independent ruler, and that His Majesty does not exercise or claim any rights of sovereignty or jurisdiction over that country. If after this definite statement a different view were taken by a British court, an undesirable conflict might arise; and, in my opinion, it is the duty of the court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point."

Viscount Finlay stated (at pp 814-816):

> "In the present case it is obvious that the Sultan of Kelantan is to a great extent in the hands of His Majesty's Government. We were asked to say that it is for the court and for this House in its judicial capacity to decide whether these restrictions were such that the Sultan had ceased to be a sovereign. We have no power to enter into any such inquiry.
>
> …
>
> While there are extensive limitations upon its independence, the enclosed documents do not negative the view that there

> is quite enough independence left to support the claim to sovereignty. But, as I have said, the question is not for us at all; it has been determined for us by His Majesty's Government, which in such matters is the appropriate authority by whose opinion the courts of His Majesty are bound to abide."

Similarly, Lord Carson (at p 830) expressed the view that if it was open to him to disregard the statements contained in the letter from the Secretary of State, he "would find great difficulty in coming to that conclusion of fact, having regard to the terms of the documents enclosed in the letter". However, he considered that the courts were bound to decide the issue in accordance with the evidence provided by the Crown.

95. In this regard it is necessary to say something about the recent decision of the Court of Appeal in *Mohamed v Breish* [2020] EWCA Civ 637 which appears to have influenced the approach of the Court of Appeal in the present case (see Males LJ at para 75). The litigation arose out of competing claims by the appointees of rival governments in Libya to control the assets of the Libyan Investment Authority in this jurisdiction. Two formal letters were issued by the FCO for use in the litigation. In the first letter the FCO stated that HMG supported the Government of National Accord ("GNA") and the Presidency Council as the legitimate executive authorities of Libya. In the second it stated that it continued to recognise those appointed by the GNA. These letters did not use the word "recognise" in relation to the GNA itself. Popplewell LJ, delivering the judgment of the Court of Appeal considered (at paras 30-39) that the question whether there had or had not been an unequivocal recognition fell to be determined from the terms of the two FCO letters and the public stance HMG had taken in its statements and conduct, including the fact that "HMG has full diplomatic relations with representatives of the GNA and has maintained them throughout the relevant period" (para 38). On this basis, the Court of Appeal concluded (at paras 39) that there was "no room for any doubt that HMG has recognised the GNA as the executive arm of government with sole oversight of executive functions". (By contrast, the Foreign Secretary has maintained in the present proceedings that *Breish* was not a case in which HMG deliberately departed from the 1980 policy.)

96. On its face, the resort by the Court of Appeal in *Breish* to such extraneous materials is inconsistent with the one voice principle. The Guaidó Board submits, however, that this is not the case because the Court of Appeal in *Breish* was not concerned with the meaning of a certificate but with the logically prior question as to the status of the letters ie whether HMG had made a statement of recognition which engaged the one voice principle or merely a statement of political support. But, even if that is accepted, it leaves a further difficulty. The Court of Appeal seems to have

engaged in a process of inferring recognition from the dealings between HMG and the relevant Libyan entities. For reasons developed below I consider it inappropriate for courts in this jurisdiction to rely on notions of implied recognition. If the FCDO has departed from its usual practice by issuing an express statement of recognition, any ambiguity in the statement should be resolved by a further request to the FCDO for clarification. In the absence of such an express statement of recognition by HMG, the issue of recognition does not arise and the courts are left to conduct an inquiry as to whether the entity in fact carries out the functions of a government in accordance with *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA*.

97. Thirdly, the Court of Appeal erred in introducing the concept of implied de facto recognition and in addressing the possibility that HMG might recognise Mr Guaidó as President de jure, while also impliedly recognising Mr Maduro as President de facto.

98. Implied recognition is a concept of international law and its function on the international plane is widely acknowledged. However, there is no scope for the application of any notion of implied recognition by courts in this jurisdiction. In the present case, exceptionally, Her Majesty's Government departed from its 1980 policy and made an express statement in relation to the status of a person claiming to be head of state of Venezuela. That statement must be interpreted and applied by the courts and is determinative. No question of implied recognition arises. Where there is no such express statement, Hobhouse J in *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA* and Mance J in *Kuwait Airways Corpn v Iraqi Airways Co (No 5)* have demonstrated that it is not open to the courts to infer recognition from the conduct of HMG. Quite apart from the practical difficulties of doing so, to infer the intention of HMG in relation to recognition would be to trespass into an area which is constitutionally within the exclusive competence of the executive. In such circumstances recognition ceases to be the determinative criterion and the court must identify who may be the government or head of state by making its own findings of fact as indicated in *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA*.

99. Reliance by the Court of Appeal on the concepts of de jure and de facto recognition was also misplaced. HMG has on occasions in the past used the terms de facto and de jure to describe concurrent recognition of two different authorities in situations where the de facto regime had usurped power against the will of the de jure sovereign, most notably during Italy's invasion and occupation of Ethiopia between 1935 and 1939 (*Bank of Ethiopia v National Bank of Egypt; Haile Selassie v Cable and Wireless (No 2)* [1939] Ch 182) and during the Spanish Civil War between 1936 and 1939 (*Banco de Bilbao v Sancha*; *The Arantzazu Mendi*). The Foreign Secretary has also drawn attention to periods of concurrent recognition of two governments in Greece in 1916 (Hansard (HC Debates), 14 November 1916, Vol 87, col 551) and in China

between 1949 and 1950 (*Civil Air Transport Inc v Central Air Transport Corpn* [1953] AC 70, 86-89). In all of these instances the terms de jure and de facto were used expressly by HMG in formal statements of recognition. However, we have been told by the Foreign Secretary that by the time of the 1980 policy statement the terms de jure and de facto recognition were no longer in wide usage and that the more recent practice of HMG, on the exceptional occasions when it has accorded recognition to a government at all, has been to accord recognition only, without using these terms. I doubt, therefore, that the distinction between de facto and de jure recognition, in any of its forms, has a useful role to play any longer before courts in this jurisdiction.

100. The executive certificate in the present case did not include any reference to de jure or de facto recognition. On the contrary, its only statement of recognition was an express unequivocal statement that Mr Guaidó was recognised as the constitutional interim President. It was not appropriate for the Court of Appeal to infer from the statement in the certificate that "the oppression of the illegitimate, kleptocratic Maduro regime must end" that this might amount to the recognition by HMG of the Maduro regime as the de facto government of Venezuela. Still less was it appropriate for the Court of Appeal to infer from the references to Mr Guaidó as "constitutional interim President of Venezuela until credible elections could be held" that HMG might recognise Mr Guaidó as the person entitled to exercise all the powers of the President, while also recognising Mr Maduro as the person who does in fact exercise some or all of the powers of the President.

101. For these reasons, I consider that the certificate was an unambiguous and unqualified statement by the executive that it recognises Mr Guaidó as interim President of Venezuela. That statement is binding on courts in this jurisdiction.

Subsequent events

102. Subsequent events have placed beyond doubt the conclusion that Mr Guaidó is recognised by HMG as the interim President of Venezuela. The Foreign Secretary has intervened before the Supreme Court on the hearing of these appeals and has made further statements to the court through his counsel. There is no requirement that an executive statement be in the form of a formal certificate (Parry (para 70 above), pp 186-187, 206-207; Wilmshurst, "Executive Certificates in Foreign Affairs: The United Kingdom" (1986) 35 ICLQ 157, pp 168-169). In *The Gagara* (1919) 35 TLR 243 the Attorney General appeared to support a written statement of the Foreign Office and stated that HMG had provisionally recognised the Esthonian Government. In *The Fagernes* [1927] P 311 information as to the extent of the realm was provided by the Attorney-General on instructions from the Home Office. On the present appeals, the

Supreme Court has received a written case and oral statements on behalf of the Foreign Secretary.

103. The Foreign Secretary's written case made detailed submissions in relation to the executive certificate in the form of the Shorter letter of 19 March 2020. In particular he submitted:

> "The Certificate was clear and not ambiguous. The Certificate expressly stated that HMG recognised Mr Guaidó as the interim President of Venezuela on 4 February 2019 and continued to do so. Its language communicated HMG's recognition of Mr Guaidó, in place of Mr Maduro, from that date onwards. The consequence is that, from that date, Mr Guaidó and no other was the individual recognised by HMG as having the authority to act on behalf of Venezuela in the capacity of head of state."

The interpretation of the executive certificate is, of course, a matter for the court. However, the Foreign Secretary then further stated (at para 41):

> "In addition, the Foreign Secretary, on behalf of HMG, hereby confirms that the UK recognised Mr Guaidó as the interim President of Venezuela on 4 February 2019 and continues to recognise him in that capacity. From that date, the UK no longer recognised Mr Maduro as the Venezuelan Head of State, whether de facto or de jure."

This further statement not only reaffirms that Mr Guaidó is recognised as the interim President, but also eliminates any possibility that Mr Maduro is recognised as President for any purpose.

104. Furthermore, Sir James Eadie QC, continuing the practice established in *The Gagara* and *The Fagernes*, stated in the course of his oral submissions before us:

> "The UK now recognises Mr Guaidó as President of Venezuela until credible elections can be held. Of the choices open, the Foreign Secretary has given, on behalf of the Government, a single and unqualified answer. He recognises Mr Guaidó, one President and one President only is recognised, and it is

> 'President' that is the key, covering both of the questions that were asked, but splits it out between head of state and head of government. The answer was given by reference to the Presidency, … but one President and one President only is recognised out of a field of two. By contrast, and the flipside is just as important as the positive, there is no recognition of Mr Maduro at all."

105. These further statements leave the issue of recognition beyond doubt.

Head of government

106. Finally in this regard, it is necessary to refer to an issue which has unnecessarily complicated the issue of recognition. In his letter of 14 February 2020 to the Foreign Secretary Robin Knowles J asked two questions: (1) who does HMG recognise as the head of state of Venezuela? and (2) who does HMG recognise as the head of government of Venezuela? The response contained in the Shorter letter of 19 March 2020 simply referred to the Hunt statement of 4 February 2019 which stated that "the United Kingdom now recognises Juan Guaidó as constitutional interim President of Venezuela until credible elections can be held". Teare J ([2021] QB 455, paras 33-36) considered the response to be a clear and unequivocal statement that Mr Guaidó was recognised as President of Venezuela and that Mr Maduro was not recognised as President of Venezuela. In his view, the statement of recognition concerned not the Government of Venezuela but the President of Venezuela. It was confined to the position of Mr Guaidó as constitutional interim President of Venezuela. This was reflected in the answers given by Teare J to the preliminary issues, to the effect that recognition of Mr Guaidó was as head of state but not as head of government. It was also reflected in his observation that counsel for the Maduro Board, in advancing argument as to whether HMG had recognised a government, was "shooting at the wrong target". Teare J also noted, however, that it was common ground between the parties that pursuant to article 226 of the Venezuelan Constitution the President is the head of state and head of the national executive, in which latter capacity he directs the actions of the Government. Argument on behalf of the Guaidó Board had concentrated on the President of Venezuela not only because of the language used by HMG but also because the appointments which were challenged by the Maduro Board were appointments made by Mr Guaidó as President of Venezuela. There had been, on the case of the Guaidó Board, a change in the person recognised by HMG as the President of Venezuela. It was unnecessary for the Guaidó Board to say that there had been a change of government and they had not said that. In oral submissions it had been made clear that no case was advanced concerning the Government of Venezuela.

107. There was no appeal against the decision of Teare J that Mr Guaidó was not recognised by HMG as head of government. Following the judgment of Teare J the Guaidó Board amended its pleadings to delete the averment that HMG had recognised Mr Guaidó as head of government. In the Court of Appeal Males LJ noted ([2021] QB 455, para 112) that it was unnecessary to decide whether the executive certificate meant that HMG recognised Mr Guaidó as the person entitled to be head of government, a role accorded to the President under the Constitution of Venezuela, because the judge's answer to the preliminary issue had been that the recognition of Mr Guaidó was as head of state only, a ruling from which there was no appeal. Males LJ also noted that Mr Fulton QC, on behalf of the Guaidó Board, had been content to take his stand on the recognition of Mr Guaidó as head of state, submitting that it was irrelevant for the purpose of these proceedings whether HMG had also recognised Mr Guaidó as head of government.

108. In his oral submissions before this court, Sir James Eadie on behalf of the Foreign Secretary, informed the court that "the answer that was given by the Secretary of State was given to the dual question [posed by Robin Knowles J] … and was given by reference to who was recognised as the President of Venezuela". He also stated that the focus on head of state as opposed to head of government in the Foreign Secretary's written case simply reflected this understanding of the context of the proceedings.

109. The key question is whether or not Mr Guaidó is recognised as the head of state, it being irrelevant for the purposes of the proceedings whether HMG had also recognised Mr Guaidó as head of government. It has been common ground between the parties that article 226 of the Venezuelan Constitution provides:

> "The President of the Republic is the head of state and of the National Executive, in which latter capacity he directs the action of the Government."

Similarly, article 236 provides that the attributions and duties of the President include "to direct the activity of the Government" (article 236(2)) and "any others vested in the President under this Constitution and law" (article 236(24)). The appointments which are challenged by the Maduro Board were purportedly made by Mr Guaidó in his capacity as President of Venezuela. The material issue for the court in this part of the proceedings is not the existence or identity of any government of Venezuela but the identity of the President of Venezuela. That question has been unequivocally answered by the executive statements.

Conclusion on recognition

110. I would therefore answer the questions on the recognition issue as follows:

(1) HMG has since 4 February 2019 recognised Mr Guaidó as the constitutional interim President of Venezuela until credible presidential elections can be held.

(2) HMG has since 4 February 2019 not recognised Mr Maduro as President of Venezuela for any purpose.

(3) These conclusions follow from the Hunt statement dated 4 February 2019, the Shorter letter dated 19 March 2020 and the further statements made to the court on behalf of the Foreign Secretary, which statements are conclusive under the one voice principle.

Act of state

111. One consequence of this outcome on the recognition issue is that interim President Guaidó's appointments of public officials are sovereign acts of the Venezuelan state. On behalf of the Guaidó Board it is submitted that, the acts of appointment having taken place within Venezuela, those acts are not open to challenge as to their validity under Venezuelan law in a court in this jurisdiction and, as a matter of English law, must be treated as valid and effective without inquiry. So much, it is said, is the result of the foreign act of state doctrine.

112. The foreign act of state was famously described by Dr F A Mann as "one of the most difficult and most perplexing topics which, in the field of foreign affairs, may face the municipal judge in England" (F A Mann*, Foreign Affairs in English Courts* (1986), p 164). The foreign act of state doctrine, which must be distinguished from its domestic cousin Crown act of state (see *Nissan v Attorney General* [1970] AC 179; *Serdar Mohammed v Ministry of Defence* [2017] UKSC 1; [2017] AC 649), was considered by the Supreme Court most recently in the linked appeals in *Belhaj v Straw; Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 3; [2017] AC 964. The judgments in those appeals reveal widely differing views on a number of aspects of the topic. While there was agreement, foreshadowed by Lord Reid in *Nissan* at pp 211-212 and Lord Wilberforce in *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888, 930-931, that act of state in fact comprises a number of discrete principles, there was a lack of unanimity on their classification. As it appears that the ratio decidendi of the case is to be found

in the judgment of Lord Neuberger, it is convenient to start by taking Lord Neuberger's classification. (Lord Wilson agreed with Lord Neuberger. Lady Hale and Lord Clarke agreed with the reasoning and conclusion in the judgment of Lord Neuberger, but did not consider it necessary to express a view on issues which did not strictly arise for decision.)

113. Lord Neuberger considered that the domestic cases suggested that there may be four possible rules which had been treated as aspects of the doctrine.

> (1) The first rule ("Rule 1") is that the courts of this country will recognise and will not question the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state ([2017] AC 964, para 121).
>
> (2) The second rule ("Rule 2") is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state (at para 122).
>
> (3) The third rule ("Rule 3") has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not to rule on it. Examples are making war and peace, making treaties and the annexation and cession of territory. Similarly, the courts of this country will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs (para 123).
>
> (4) A possible fourth rule ("Rule 4"), described by Rix LJ in *Yukos Capital SARL v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855; [2014] QB 458, para 65, is that "the courts will not investigate acts of a foreign state where such an investigation would embarrass the government of our own country: but that this doctrine only arises as a result of a communication from our own Foreign Office" (para 124).

In this part of the present appeal we are directly concerned only with the first and second manifestations of the act of state doctrine.

The issues raised

114. The principal submissions made in relation to foreign act of state on these appeals may be summarised as follows.

(1) The Guaidó Board maintains that the Transition Statute passed by the Legislative Assembly is a legislative act of the State of Venezuela which authorised Mr Guaidó to appoint members of the board of the BCV and to appoint a Special Attorney General.

(2) The Maduro Board maintains that

(a) the Transition Statute is a nullity;

(b) there are other constitutional reasons why the appointments of the Guaidó Board and the Special Attorney General are invalid; and

(c) in any event the BCV is not a "decentralized entity" within the meaning of the Transition Statute.

Accordingly, it submits that Mr Guaidó's purported appointments are ineffective as a matter of Venezuelan law.

(3) The Guaidó Board responds that these facts engage the first two rules stated by Lord Neuberger in *Belhaj*. The appointments are executive acts of state which engage Rule 2 with the result that they cannot be challenged. Alternatively, the Transition Statute cannot be challenged because of Rule 1.

(4) The Maduro Board raises a range of points in reply, in particular

(a) The act of state doctrine is unclear, unprincipled and unnecessary and should be strictly confined to circumstances in which it has already been applied.

(b) The appointments are not properly characterised as acts of state for the purposes of the act of state doctrine.

(c) If Rule 2 exists, it does not apply in this case because the relevant acts have been ruled unlawful by the STJ and/or because they are unlawful.

(d) If Rule 2 exists, it applies only to executive acts affecting property and not to acts of appointment.

(e) If Rule 2 exists, it does not apply in this case because the relevant acts, although taking effect in Venezuela, affect assets in the United Kingdom.

(f) If Rule 2 exists, it does not apply where allegations of unlawfulness or invalidity arise incidentally rather than directly.

(g) To the extent that it becomes necessary to consider Rule 1, it cannot rule out an enquiry into whether the Transition Statute is a legislative act within the meaning of the doctrine.

(h) The act of state doctrine cannot preclude consideration of whether or not the BCV is a "decentralized entity" within the meaning of the Transition Statute.

115. On the hearing of this appeal, argument focussed predominantly on issues relating to the existence and applicability of Rule 2 concerning acts of the executive of a foreign state. I therefore propose to address those issues first.

Rule 2: An act of a foreign state's executive

116. The Guaidó Board places its reliance on Rule 2 at the forefront of its submissions. While it maintains that Mr Guaidó acted lawfully under Venezuelan law in making the appointments under the Transition Statute, in the face of what it describes as "the Maduro Board's barrage of Venezuelan law challenges in these proceedings" it submits that it is entitled to succeed under Rule 2 by virtue of the sovereign character of the acts of appointment, a matter to which the lawfulness of the conduct in Venezuelan law is irrelevant.

117. The Guaidó Board relies on the following appointments by Mr Guaidó.

(1) On 5 February 2019 Mr Guaidó appointed a Special Attorney General "for the defense and representation of the rights and interest of the Republic, as well as the rights and interests of companies of the state and other decentralized entities of the Public Administration abroad". The appointee was originally Mr Hernández and subsequently, with effect from 1 July 2020, Mr Sánchez Falcon.

(2) On 18 July 2019 and 13 August 2019 Mr Guaidó appointed an ad hoc board of BCV (ie the Guaidó Board) to represent the BCV in connection with agreements relating to the management of international reserves, including gold.

After each appointment, the STJ issued rulings declaring the appointments unconstitutional and of no legal effect.

118. The initial question for consideration here is whether there exists a rule which prohibits courts in this jurisdiction from questioning an act of the executive of a foreign state, regardless of whether the act is lawful or unlawful by the law of that state. Despite judicial statements to the effect that the courts of this country will not sit in judgment on the lawfulness or validity of an executive act of a foreign state, the existence of such a rule has often been doubted. In particular, it has been suggested that many of the cases in which these pronouncements have been made are explicable on other grounds, for example on grounds of sovereign or state immunity (*Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1) or the application of conventional choice of law rules governing title to movable property (*Luther v Sagor*; *Princess Paley Olga v Weisz* [1929] 1 KB 718).

119. Although not directly in point in *Belhaj*, Lord Neuberger's judgment in that case ([2017] AC 964, paras 136-143) included an extended consideration of the validity of Rule 2 in relation to property and property rights. He began by accepting that in so far as the executive act of a state confiscating or transferring property, or controlling or confiscating property rights, within its territory is lawful, or not unlawful, according to the law of that territory, the rule is valid and well-established. So much is uncontroversial. Such a rule would involve no more than a conventional application of foreign law when indicated by choice of law rules in private international law. More difficult is the question whether courts in this jurisdiction are obliged to give effect to an executive act of a foreign state notwithstanding that it is unlawful by the law of that state. On this issue, Lord Neuberger observed that, in so far as the executive act is unlawful according to the law of the territory concerned, he was not convinced, at least in terms of principle, why it should not be treated as unlawful by a court in the United Kingdom and noted that if it were not so treated there would appear to be

something of a conflict with the first rule. Turning to the authorities, he considered that there were, at best, some obiter dicta which supported the notion that the second rule could apply to executive acts which are unlawful by the laws of the state concerned. He accepted that there was a pragmatic attraction in the argument that an executive act within the state, even if unlawful by the laws of that state, should be treated as effective in the interest of certainty and clarity, at least in so far as it relates to property and property rights. There was also practical sense, at any rate at first sight, if when confiscated property was transferred to another territory following a sale or other transfer by the state, the transferee was treated as the lawful owner by the law of the other territory. However, he continued in a passage of some importance to the present case (at para 142):

> "However, there are potential difficulties: if the original confiscation was unlawful under the law of the originating state, and the courts of that state were so to hold, or even should so hold, it is by no means obvious to me that it would be, or have been, appropriate for the courts of the subsequent state to treat, or have treated, the confiscation as valid."

As the point did not arise directly in that appeal and had, therefore, not been fully argued, he considered it right to keep the point open.

120. In his judgment in *Belhaj* Lord Mance proposed a three-fold classification of foreign act of state. His second category comprises a possible rule that a domestic court will not normally question the validity of any sovereign act in respect of property within the foreign state's jurisdiction, at least in times of civil disorder ([2017] AC 964, paras 11(iii)(b), 38). In his view, to the extent that it exists at all, this type of foreign act of state is and should be limited to acts relating to property within the jurisdiction of the foreign state (paras 11(iv)(a), 74-78). He did not consider it necessary on those appeals for the Supreme Court to reach or endorse a conclusion that this variety of act of state exists in any form at all (at para 65).

121. By contrast, Lord Sumption's judgment in *Belhaj* (a judgment with which Lord Hughes agreed) is a ringing endorsement of Rule 2 as a rule of English law. Lord Sumption identified a principle of foreign act of state "that the courts will not adjudicate upon the lawfulness or validity of certain sovereign acts of foreign states". Unlike state immunity it is not a personal but a subject matter immunity. While it proceeds from the same premise as state immunity, namely mutual respect for the equality of sovereign states, it is wholly the creation of the common law. It is not required by international law. "The foreign act of state doctrine is at best permitted by

international law" ([2017] AC 964, paras 199-200). He adopted (at para 227) the essential distinction made by Lord Wilberforce in *Buttes Gas* [1982] AC 888 between "those cases which are concerned with the applicability of foreign municipal legislation within its own territory and with the examinability of such legislation" (p 931A-B) and cases concerning "the transactions of sovereign states" (p 931G-H). The former principle, which Lord Sumption termed "municipal law act of state", "is that the English courts will not adjudicate on the lawfulness or validity of a state's sovereign acts under its own law" (para 228). Citing *Duke of Brunswick* and *Princess Paley Olga*, Lord Sumption considered that municipal law act of state applies not just to legislative expropriations of property, but to expropriations by executive act with no legal basis at all.

> "These transactions are recognised in England not because they are valid by the relevant foreign law, but because they are acts of state which an English court cannot question."
> ([2017] AC 964, para 230)

122. There exists a substantial weight of judicial authority in support of such a rule. In *Duke of Brunswick* (1848) 2 HL Cas 1, the deposed Duke of Brunswick, sought to challenge in the Court of Chancery the validity of the appointment of a guardian over his property by William IV of England, in his capacity as King of Hanover, and the deposed Duke's brother, William. The action was brought against the current guardian, the successor of William IV as King of Hanover. The House of Lords held that the appointments had been made in the exercise of sovereign authority and therefore could not be challenged in an English court, whether or not they were lawful under the laws of either Brunswick or Hanover. Lord Cottenham LC stated, at p 17:

> "The whole question seems to me to turn upon this … that a foreign Sovereign coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the courts of this country cannot sit in judgment upon the act of a Sovereign, effected by virtue of his Sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign."

> "It is true, the bill states that the instrument was contrary to the laws of Hanover and Brunswick, but, notwithstanding that it is so stated, still if it is a sovereign act, then, whether it

> be according to law or not according to law, we cannot inquire into it. If it were a private transaction, … then the law upon which the rights of individuals may depend, might have been a matter of fact to be inquired into, and for the court to adjudicate upon, not as a matter of law, but as a matter of fact. But, …, if it be a matter of sovereign authority, we cannot try the fact, whether it be right or wrong." (At pp 21-22)

The decision may be explained on the ground of the personal sovereign immunity (immunity ratione personae) of the defendant, the King of Hanover. This is clearly one basis of the decision: "no court in this country can entertain questions to bring Sovereigns to account for their acts done in their sovereign capacities abroad" (per Lord Cottenham at p 22). However, the decision is of wider import. First, the claim was resisted on two distinct grounds, sovereign immunity and non-justiciability. Secondly, Lord Campbell observed (at p 26) that had the proceedings been brought against the Duke of Cambridge, the original guardian who was not a sovereign, "it would equally have been a matter of state". Thirdly, the statement of principle by Lord Cottenham, cited above, with which the rest of the House agreed, is clearly intended to be of wider effect and to relate to the subject matter of the claim (immunity ratione materiae). (See *Buttes Gas* at p 932E-F per Lord Wilberforce; *Belhaj* at para 205 per Lord Sumption.)

123. In *Johnstone v Pedlar* [1921] 2 AC 262, a case on Crown act of state, Lord Sumner, distinguishing Crown act of state from foreign act of state, described the latter principle at p 290 in very broad terms:

> "Municipal courts do not take it upon themselves to review the dealings of state with state or of sovereign with sovereign. They do not control the acts of a foreign state done within its own territory, in the execution of sovereign powers, so as to criticise their legality or to require their justification."

While features of Lord Neuberger's Rule 2 and Rule 3 are both present in this formulation, it certainly provides support for the existence of the former.

124. There are also statements in *Luther v Sagor* supporting the existence of such a rule. Bankes LJ ([1921] 3 KB 532, p 545) proceeded on the basis that title to the confiscated timber was governed by the lex situs and the expropriatory decree was a

part of that law. However, Warrington LJ, citing the decision of the US Supreme Court in *Oetjen v Central Leather Co* (1918) 246 US 297, 548 considered:

> "It is well settled that the validity of the acts of an independent sovereign government in relation to the property and persons within its jurisdiction cannot be questioned in the courts of this country."

In his view the appellants (at p 549):

> "are resisting an endeavour on the part of the respondents to induce the court to ignore and override legislative and executive acts of the Government of Russia and its agents affecting the title to property in that country; it is that which, in my opinion, we are not at liberty to do."

Scrutton LJ observed (at pp 558-559), in a passage supportive of Rule 1, that "it appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality'" and considered that this was a matter for the executive and not the judiciary.

125. The question arose once again in *Princess Paley Olga*. All three members of the Court of Appeal held that effect was to be given to the Russian decree as part of the lex situs which, under domestic choice of law rules governed title to movable property. However, on this occasion all three members of the court also upheld an alternative argument that even if the decree did not justify the confiscation of the property it was an act of state into which the court could not enquire. Citing *Oetjen*, Scrutton LJ ([1929] 1 KB 718, pp 723-725) accepted a submission that if the seizure of the property began without any legal justification, or only by revolutionary right, it was ultimately adopted by a government, which was recognised by the British Government as the lawful government of the territory in which the property was, and that "this was an act of state into the validity of which the court would not inquire". Sankey LJ (at pp 729-730) also cited *Oetjen* at length and concluded that "the Princess was dispossessed of this property by an act of state behind which our courts will not go." Russell LJ also held that the defendants were entitled to succeed on the act of state point. The evidence clearly established a seizure of the property in 1918, either by a section of revolutionaries, whose act was subsequently adopted by the Government, or by a usurping power which subsequently became the Government. He concluded ([1929] 1 KB 718, p 736):

> "This court will not inquire into the legality of acts done by a foreign government against its own subjects in respect of property situate in its own territory."

The Court of Appeal clearly founded its decision on this alternative basis.

126. In *Piramal v Oomkarmal* (1933) 60 LR Ind App 211 the Indore Government had seized a debt situated in Indore. The appellants obtained a decree in proceedings against the original creditor and sought to attach the debt. The Judicial Committee of the Privy Council held that it was not for the court to enquire whether the Indore Government in seizing property situate in its own territory had acted within the law of that state. Lord Atkin, delivering the judgment of the Privy Council, stated that their Lordships found themselves in complete agreement with the appellate court in accepting the law laid down in *Luther v Sagor* and *Princess Paley Olga*. Having cited the statement by Russell LJ in *Princess Paley Olga* set out in the preceding paragraph he continued (at p 223):

> "This is not the case of an action against an individual for a wrongful act done to the plaintiff. In such a case it may be that if the defendant seeks to justify under an order of a foreign state, the courts may inquire into the scope of the authority: their Lordships express no opinion upon such a topic. The present case is one of property seized and taken into possession by the government of the foreign territory in which it is situate. In such a case the court will not examine whether the government acted validly or not within its own domestic laws."

127. The question is no more than touched on in the judgment of Lord Wilberforce in *Buttes Gas*. The decision there turns on the non-justiciability of certain transactions between states taking place on the international plane (Rule 3). Although Lord Wilberforce made an oblique reference to executive acts ([1982] AC 888, p 931D), this does not advance the present debate.

128. Further support for Rule 2 as a rule of English law can be found in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* where Lord Steyn stated ([2002] 2 AC 883, para 112):

> "it is well established that courts must not sit in judgment on the acts of a foreign government within its own territory."

and Lord Hope stated at para 135:

> "There is no doubt as to the general effect of the rule which is known as the act of state rule. It applies to the legislative or other governmental acts of a recognised foreign state or government within the limits of its own territory. The English courts will not adjudicate upon, or call into question, any such acts."

129. In *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458, para 66, Rix LJ described the act of state doctrine in the following terms:

> "The various formulations of the paradigm principle are apparently wide, and prevent adjudication on the validity, legality, lawfulness, acceptability or motives of state actors. It is a form of immunity ratione materiae, closely connected with analogous doctrines of sovereign immunity and, although a domestic doctrine of English (and American) law, is founded on analogous concepts of international law, both public and private, and of the comity of nations. It has been applied in a wide variety of situations, but often arises by way of defence or riposte: as where a dispossessed owner sues in respect of his property, the defendant relies on a foreign act of state as altering title to that property, and the claimant is prevented from calling into question the effectiveness of that act of state."

130. In *Reliance Industries v Union of India* [2018] EWHC 822 (Comm); [2018] 2 All ER (Comm) 1090, para 105, Popplewell J considered, correctly in my view, that he was bound by *Princess Paley Olga* to hold that the act of state doctrine includes the principle that the English court will not question the effect of a foreign state's executive acts in relation to property situated within its territory, and will not adjudicate upon whether such acts are lawful.

131. In a parallel development the foreign act of state doctrine also took root in the United States where the principle stated in *Duke of Brunswick* was adopted in a series

of judicial decisions of high authority. Initially, it was established in the late 19th and early 20th centuries as a principle based on the equality and independence of sovereign states which prevented domestic courts sitting in judgment on the legality or validity of the acts of a foreign sovereign (*Underhill v Hernandez* (1897) 168 US 250; *Oetjen v Central Leather Co* (1918) 246 US 297; *Ricaud v American Metal Co* (1918) 246 US 304). Its subsequent development in that jurisdiction was influenced by the very different constitutional context and it came to reflect its constitutional underpinnings and the separation of powers under the US Constitution. In *Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398, 423 Harlan J referred to "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder 'the conduct of foreign affairs'". More recently the US Supreme Court has affirmed the doctrine as a rule of decision which applies only where the validity of a foreign sovereign act is at issue.

> "The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." (*WS Kirkpatrick v Environmental Tectonics* (1990) 493 US 400, p 707 per Scalia J)

132. The early US cases constitute a clear affirmation of *Duke of Brunswick*. In the first such case to come before the US Supreme Court, *Underhill v Hernandez*, the claimant sued the local commander of the revolutionary army in Venezuela for false imprisonment, assault and battery during a revolution which led to the establishment of the Government of Crespo which was subsequently recognised by the United States. The Supreme Court upheld the decision of the Second Circuit Court of Appeals that the acts of the defendant were the acts of the Government of Venezuela and as such were not properly the subject of adjudication in the courts of another government. Fuller CJ stated the principle as follows:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

133. *Oetjen v Central Leather Co* concerned a revolution in Mexico during which forces loyal to Carranza had seized a quantity of hides in Mexico which were subsequently sold to a Texan company. After the United States had recognised Carranza's Government, the assignee of the original owner of the hides sued to recover them. Clarke J, delivering the opinion of the Supreme Court considered that this was an act of state and was non-justiciable. Having cited the passage from *Underhill* set out above, he continued:

> "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations'."

134. The influence of the early US cases, in turn, on developments in this jurisdiction is apparent from *Luther v Sagor* (at p 549) where Warrington LJ cited *Oetjen* and considered that it reflected the position in English law. In *Princess Paley Olga* Scrutton LJ cited *Underhill*, *Oetjen* and *Ricaud*. Similarly, the decision of the House of Lords in *Buttes Gas* was substantially influenced by both the US act of state doctrine and the US political question doctrine to which it is closely linked.

135. It appears therefore that a substantial body of authority, not all of which is obiter, lends powerful support for the existence of a rule that courts in this jurisdiction will not adjudicate or sit in judgment on the lawfulness or validity under its own law of an executive act of a foreign state, performed within the territory of that state. The rule also has a sound basis in principle. It is founded on the respect due to the sovereignty and independence of foreign states and is intended to promote comity in inter-state relations. While the same rationale underpins state immunity, the rule is distinct from state immunity and is not required by international law. It is not founded on the personal immunity of a party directly or indirectly impleaded but upon the subject matter of the proceedings. The rule does not turn on a conventional application of choice of law rules in private international law nor does it depend on the lawfulness of the conduct under the law of the state in question. On the contrary it is an exclusionary rule, limiting the power of courts to decide certain issues as to the

legality or validity of the conduct of foreign states within their proper jurisdiction. It operates not by reference to law but by reference to the sovereign character of the conduct which forms the subject matter of the proceedings. In the words of Lord Cottenham, it applies "whether it be according to law or not according to law". I can, therefore, see no good reason to distinguish in this regard between legislative acts, in respect of which such a rule is clearly established (see paras 171-179 below), and executive acts. The fact that executive acts may lack any legal basis does not prevent the application of the rule. In my view, we should now acknowledge the existence of such a rule.

Limitations and exceptions

136. The various manifestations of foreign act of state in English law are undoubtedly subject to limitations and exceptions. These were considered in detail by Rix LJ in *Yukos* ([2014] QB 458, paras 68-115) and may be summarised as follows:

(1) "[T]he act of state must, generally speaking, take place within the territory of the foreign state itself". This limitation may not always apply to Rule 3 (*Yukos*, para 68).

(2) "[T]he doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights". (*Oppenheimer v Cattermole* [1976] AC 249, 277–278, per Lord Cross; *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883; *Yukos* at paras 69-72.)

(3) Judicial acts will not be regarded as acts of state for the purposes of the act of state doctrine. (*Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804; *Yukos* at paras 73-91.)

(4) The doctrine does not apply where the conduct of the foreign state is of a commercial as opposed to a sovereign character. (*Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The Playa Larga)* [1983] 2 Lloyd's Rep 171; *Korea National Insurance Corpn v Allianz Global Corporate & Specialty AG* [2008] EWCA Civ 1355; [2008] 2 CLC 837); *Yukos* at paras 92-94.)

(5) The doctrine does not apply where the only issue is whether certain acts have occurred, as opposed to where the court is asked to inquire into them for

the purpose of adjudicating on their legal effectiveness. (*WS Kirkpatrick & Co Inc v Environmental Tectonics Corpn International*; *Yukos* at paras 95-104.)

(6) For the doctrine to apply, challenges to foreign acts of state must arise directly "and not be a matter of merely ancillary or collateral aspersion". (*Yukos* at para 109.)

(7) The act of state doctrine should not be an impediment to an action for infringement of foreign intellectual property rights, even if validity of a grant is in issue, simply because the action calls into question the decision of a foreign official. (*Lucasfilm Ltd v Ainsworth* [2011] UKSC 39; [2012] 1 AC 208, para 86 per Lord Collins and Lord Walker; *Yukos* at paras 63-64.)

Appointments as acts of state

137. The executive acts of appointment relied on by the Guaidó Board have been summarised at para 117 above. The Guaidó Board accepts that they did not purport to alter any rights of ownership or any contractual rights of the BCV. Rather, the appointments involved a mere change of control and rights of representation in relation to a Venezuelan public law entity which was already and which remains part of the Venezuelan state apparatus.

138. On behalf of the Maduro Board, Mr Vineall QC submits that if Rule 2 exists it is limited to cases of executive acts affecting property and can, therefore, have no application to conduct such as the making of these appointments. In support of this submission, he is able to point to observations by Lord Neuberger and Lord Mance in *Belhaj* in relation to the scope of Rule 2. Lord Neuberger, proceeding at this point on the assumption that his Rule 2 can apply to executive acts in relation to property which are unlawful by the laws of the state in which they occurred, expressed himself unconvinced that it would apply in so far as the act resulted in injuries to the person. While he accepted that there was a serious practical argument in favour of Rule 2 applying to unlawful executive acts in so far as they related to interference with property and property rights, in his view that argument did not apply to personal harm, whether physical or mental. He considered, therefore, that the court should hold that Rule 2 does not apply where a foreign state executive has caused physical or mental harm to a claimant through an act in the territory of that state which was unlawful under the laws of that state. He also drew attention in this regard to *Lucasfilm Ltd v Ainsworth* where Lord Walker and Lord Collins said, at para 161, that "in England the foreign act of state doctrine has not been applied to any acts other than foreign legislation or governmental acts of officials such as requisition". In the

result, Lord Neuberger concluded in *Belhaj* ([2017] AC 964, para 169) that Rule 2 could not be relied on because the alleged wrongdoing involved harm to individuals and not property and the public policy exception would apply in any event. Similarly, in *Rahmatullah* he considered that Rule 2 was not engaged because the allegations were of extra-territorial conduct resulting in physical and mental harm ([2017] AC 964, para 170). These conclusions had the support of a majority of the court. Similarly, Lord Mance was willing to proceed for the purposes of the appeals in *Belhaj* on the assumption that Rule 2 existed, because of the special characteristics of property, and the special considerations applying to it, in particular the need for security of title and of international trade. However, in his view similar considerations did not apply to individuals who had been the victim of personal torts. Recognising title to property was different from refusing to enquire into the justification for the infliction of personal injury. Rule 2 could and should therefore be limited as a matter of principle to sovereign acts seizing or affecting (i) property which was (ii) within the jurisdiction of the state in question at the time when the act took effect. He could see no reason for giving the doctrine any wider effect (at para 74).

139. I am, nevertheless, not persuaded that we should accept that Rule 2 can have no application to conduct such as the exercise of a power of appointment in issue here. First, there is no support in the pre-*Belhaj* case law in the United Kingdom for limiting the operation of Rule 2 in this way to cases of expropriation of property and it is inconsistent with the much broader statements of principle in cases such as *Duke of Brunswick* and *Princess Paley Olga*. Moreover, *Hatch v Baez* (1876) 7 Hun 596 and *Underhill v Hernandez*, early examples of the application of the act of state doctrine in the United States, were cases concerning imprisonment and personal torts.

140. Secondly, there is no identifiable reason of principle why the rule should be limited to seizures of property. As Lord Sumption observed in *Belhaj* (at para 231) there is no rational reason to distinguish in this regard between seizures of property and injury to other interests equally protected by the municipal law of the place where they occurred. (See also the observations of Teare J in the present proceedings at para 69.)

141. Thirdly, while there is undoubtedly a "serious practical argument" identified by Lord Neuberger (at paras 142, 160) in favour of the application of Rule 2 to unlawful executive acts in so far as they relate to interference with property and property rights, referred to at para 119 above, it may be thought that corresponding practical advantages may arise from the application of Rule 2 to the exercise of a power of appointment to the board of a public body functioning within the territory of the foreign state.

142. Fourthly, the specific question of the application of Rule 2 to the exercise of a power of appointment by the executive did not arise for consideration in *Belhaj*. The Guaidó Board is, however, able to point to other decisions in this field which touch on the point. In *Dobree v Napier* (1836) 2 Bing NC 781 Sir Charles Napier, a British subject, had been appointed an admiral in the navy of Queen Donna Maria of Portugal. In that capacity he captured a British steamship, "Lord of the Isles", while it was trying to run a blockade of the Portuguese coast. The ship was forfeited as prize by a Portuguese prize court. On his return to England Napier was sued for trespass in the Court of King's Bench. Tindal CJ dismissed the action on the ground that the decree of the prize court was conclusive. However, he also rejected an argument that Napier was prevented from relying on the authority of the Queen of Portugal because he had entered her service in breach of the Foreign Enlistment Act. Tindal CJ held that that breach of English law could not make the acts of the Portuguese state justiciable:

> "Again no one can dispute the right of the Queen of Portugal, to appoint in her own dominions, the defendant or any other person she may think proper to select, as her officer or servant, to seize a vessel which is afterwards condemned as a prize; …" (At p 796)

The decision on this point was approved by Lord Halsbury LC in *Carr v Fracis Times & Co* at pp 179-80. (See also *Belhaj* per Lord Sumption at para 204.)

143. *Duke of Brunswick v King of Hanover* itself is a case concerning the exercise of a power of appointment. Charles, the deposed Duke of Brunswick, sought, inter alia, to challenge the validity of the appointment of a guardian over his property. As we have seen, the House of Lords held that, notwithstanding the allegation that the instrument was contrary to the laws of Hanover and Brunswick, "still if it is a sovereign act, then whether it be according to law or not according to law, we cannot inquire into it" ((1848) 2 HL Cas 1, per Lord Cottenham LC at p 21).

144. On behalf of the Guaidó Board Mr Fulton fairly accepts that *Dobree v Napier* and *Duke of Brunswick* can be regarded as direct appointments over property and so can be analysed as property cases. Nevertheless, as he submits, there seems to be no principled reason to distinguish between direct appointments of that kind and an appointment over a legal entity which owns or controls property.

145. The more recent authorities to which we have been referred in relation to powers of appointment do not take the matter any further. *Bank of Ethiopia v National Bank of Egypt* concerned the disputed appointment of a liquidator and *Banco de Bilbao*

v Sancha concerned the disputed appointment of a replacement board. In neither case was reference made to the act of state doctrine presumably because, as Popplewell LJ pointed out in *Breish* [2020] EWCA Civ 637, para 69), "In those cases the one voice principle was determinative of the legal consequences because it identified the appropriate government from whom the relevant law to be applied flowed". Similarly, in *Breish* itself, no point seems to have been taken on the application of the act of state doctrine to the disputed appointment of the Chairman of the Libyan Investment Authority.

146. For these reasons, I consider that Rule 2 applies to an exercise of executive power such as the power of appointment to the board of the BCV.

Territoriality

147. On behalf of the Maduro Board, Mr Vineall further submits that if Rule 2 exists it is limited to acts the direct consequences of which are felt only in the foreign state. He submits that Rule 2 cannot apply in the present case because the relevant acts, although they took effect in Venezuela, affect assets in the United Kingdom. Indeed, he submits that this was the intended consequence and very purpose of the impugned acts and that the expressed motivation in making the appointments was to ensure the "protection … of state assets abroad". In his submission, the acts of appointment are concerned and concerned only with who could represent the BCV in its external dealings outside Venezuela and, in particular, in Threadneedle Street.

148. Although the principle of non-justiciability reflected in Lord Neuberger's Rule 3 may not invariably be limited to intra-territorial acts (*Yukos* [2014] QB 458, para 66, per Rix LJ considering *Buttes Gas*; *Belhaj* per Lord Sumption [2017] AC 964, para 236), his Rule 2 is undoubtedly subject to a territorial limitation. This was made clear in the formulation of the rule in the earliest cases. The principle stated by Lord Cottenham in *Duke of Brunswick* is that "a foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country" ((1848) 2 HL Cas 1, p 17). In *Belhaj*, Lord Neuberger's Rules 1 and 2 were expressed to apply "to any acts which take place or take effect within the territory of that state". (See also para 135 per Lord Neuberger; para 36 per Lord Mance; para 229 per Lord Sumption.) Relying in particular on Lord Neuberger's reference to the effect of the conduct of a foreign state, Mr Vineall seeks to expand this limitation on the act of state principle so as to exclude from the operation of the principle conduct which has repercussions outside the territory of the state concerned. There is no warrant for such an extension. The reason for the territorial limitation is that the principle applies only to sovereign acts of a foreign state performed within its proper jurisdiction, which is usually limited to the territory of that state. There can be no justification for according

such preferential status to sovereign acts of a foreign state where they exceed the jurisdictional limits imposed by international law. As Lord Sumption explained in *Belhaj* (at para 229), what he termed municipal law act of state is by definition confined to sovereign acts done within the territory of the state concerned, since as a general rule neither public nor private international law recognises the application of a state's municipal law beyond its own territory. However, this cannot provide a basis for an unprincipled extension of the limitation simply on the ground that effects of the relevant conduct, whether intended or not, are felt extra-territorially. Sovereign acts legitimately performed within the territory of a state will not fall outside the ambit of Lord Neuberger's Rule 2 simply because they may have extra-territorial effect.

149. In the present case, the relevant acts of appointment were made within Venezuela and were not in excess of the jurisdiction of Venezuela in international law. Here, I gratefully adopt the analysis of Teare J at first instance in the present proceedings in relation to the appointment of both the Special Attorney General and the Guaidó Board ([2021] QB 455, paras 80-81):

> "When the interim President appointed Mr Hernandez on 5 February 2019 he did so by means of a document 'issued at the Legislative Federal Palace in Caracas'. Thus the appointment was made in Venezuela. The act of state doctrine is based upon the court's lack of jurisdiction over the internal affairs of a sovereign state; see *Buck v Attorney General* [1965] Ch 745, 770 per Diplock LJ quoted above and *Yukos Capital v Rosneft (No 2)* at paras 53 and 54 where Rix LJ quoted from *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147. The appointment by a head of state of a Special Attorney General is surely to be characterised as part of the internal affairs of Venezuela. Mr Hernandez derives his authority from an executive act of the President in Caracas, Venezuela. In making the appointment the President was not seeking to exercise power over the territory of another state. The ownership of the proceeds of the London arbitration remained with the BCV. Although the effect of that appointment could be said to be felt in Washington DC (if that is where Mr Hernandez was) or in London (where he gave instructions to DB) it would not accord with the principles underlying the act of state doctrine to regard the appointment as breaching the territorial requirement of that doctrine.

> When the interim President appointed the Ad Hoc Board of BCV and declared the appointment of the previous President of BCV as null and void pursuant to Decree No 8 he did so at the Federal Legislative Palace in Caracas. The decree concerned BCV which is a Venezuelan entity. Its Board and President were changed. That took effect in Venezuela because BCV is a Venezuelan entity. Again, although the effect of that appointment could be said to be felt wherever the board members are (it was suggested in the United States) or in London, where gold was held for BCV by BoE, the reality is that the appointment, which concerned a Venezuelan entity, was made or took place in Venezuela and had its most obvious effect there by reason of the change in the Board and President of BCV. In making the appointment the President was not seeking to exercise power over the territory of another state. The ownership of the gold held by the BoE remained with the BCV. The President was concerned with an internal matter, the governance of Venezuela's central bank. In my judgment, to regard the appointment of the Ad Hoc Board as extra-territorial and so beyond the scope of the act of state doctrine would be inconsistent with the principles underlying that doctrine."

150. Finally in this regard, I note that in *Jimenez v Palacios* No 2019-0490-KSJM, 250 A 3d 814 (Delaware Chancery Court), a case which concerned the appointment by Mr Guaidó of the board of the Venezuelan oil company PDVSA, the judge rejected a submission that the appointment was an extra-territorial assertion of sovereign authority because of its effect on Delaware corporations headquartered in Houston. McCormick VC concluded (at p 841):

> "In this case the official act is the replacement of the PDVSA board. That act occurred within Venezuela's territorial boundaries and the plaintiffs do not contend otherwise. The knock-on effects of that act which took place outside Venezuela do not render the original act extraterritorial."

That decision was upheld by the Supreme Court of Delaware: *Jimenez v Palacios* No 399, 2019, 237 A 3d 68 (Del SC, 22 July 2020).

Incidental issue

151. On behalf of the Maduro Board, Mr Vineall submits that it can rely on an exception to the act of state doctrine which applies where the allegations of unlawfulness or invalidity arise incidentally rather than directly. Such an exception finds support in the authorities. In *Buck v Attorney General* [1965] Ch 745, which concerned a challenge to the validity of the constitution of Sierra Leone, Diplock LJ considered (at p 770) that the validity of that law did not come in question incidentally in proceedings in which the High Court undoubtedly had jurisdiction, "as, for instance, the validity of a foreign law might come in question incidentally in an action upon a contract to be performed abroad". (Cf *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758; [2011] QB 773, para 189 per Elias LJ.) In *Buttes Gas* [1982] AC 888, a case concerned essentially with transactions of sovereigns on the international plane and the extent of the territory of a foreign state, Lord Wilberforce accepted that a question relating to foreign land, even to the title to foreign land, may arise incidentally or collaterally to some other question and may therefore be decided (at pp 926-927, citing *British South Africa Co v Companhia de Mocambique* [1893] AC 602, 626; *Tito v Waddell (No 2)* [1977] Ch 106, 262, 263). However, in that case he considered that the question of title to the location did not arise incidentally or collaterally but was at the heart of the case. This was taken up by the Court of Appeal in *Yukos* where Rix LJ observed ([2014] QB 458, para 109):

> "Now in our judgment we would agree that challenges to foreign acts of state, in order to invoke the act of state doctrine, must, as Lord Wilberforce put it, lie at 'the heart' of a case, and not be a matter of merely ancillary or collateral aspersion: and that a test of necessity to a decision may therefore be a useful test."

Similarly, in *Belhaj* [2017] AC 964 Lord Neuberger stated (at para 140) that it did not appear to him that the common law regards it as inappropriate for an English court to decide whether a foreign state's executive action infringed the law of that state, "at least where that is not the purpose of the proceedings". Lord Sumption, citing the decision of the US Supreme Court in *WS Kirkpatrick & Co Inc v Environmental Tectonics Corpn International*, stated (at para 240):

> "[The act of state doctrine] applies only where the invalidity or unlawfulness of the state's sovereign acts is part of the very subject matter of the action in the sense that the issue cannot be resolved without determining it."

152. Applying the test formulated by Rix LJ in *Yukos*, there can be little doubt that the present proceedings involve a direct attack upon the lawfulness and validity of Presidential appointments made by Mr Guaidó, as advanced by appointees of his political opponent, Mr Maduro. The essential dispute is between the Guaidó Board and the Maduro Board and the focus of that dispute is on the validity of Mr Guaidó's appointments which undoubtedly lie at the heart of the case. In these circumstances, it is not necessary to seek to resolve the issue raised by Mr Vineall as to whether Lord Sumption's formulation of the exception is unduly narrow.

The judgments of the STJ

153. If Rule 2 forms part of English law, as in my view it does, it might appear that since Mr Guaidó is recognised by HMG as the President of Venezuela it is not open to UK courts to challenge the lawfulness or legality of his appointments to the board of the BCV. However, this reasoning fails to take account of the existence of judgments of the STJ to contrary effect.

154. On behalf of the Guaidó Board it is submitted that the validity of the acts of appointment under Venezuelan law are of no relevance because the act of state doctrine requires acknowledgement of the executive acts of appointment by Mr Guaidó as acts of sovereign power. As a result, it is further submitted, it is likewise irrelevant that the STJ has in a series of rulings declared invalid both the appointments themselves and the legislation pursuant to which they were made.

155. Where it applies, the foreign act of state doctrine holds national courts incompetent to adjudicate upon the lawfulness or validity of the sovereign acts of a foreign state. However, within most modern states sovereign power is shared among the legislative, executive and judicial branches of government and it cannot be assumed that the conduct of the executive is the sole manifestation of sovereign power or that it should necessarily prevail over the position taken by the legislature or the judiciary. As a result, in seeking to respect the sovereignty of a foreign state, it will not always be appropriate for courts in this jurisdiction to focus exclusively on acts of the executive. In *Belhaj* [2017] AC 964 both Lord Neuberger and Lord Mance touched on the difficulties which can arise in this regard if sovereignty is equated with executive activity. Thus, Lord Neuberger explained (at para 137) that where an executive act is unlawful by the law of the state concerned, a failure by a court in the United Kingdom to treat it as unlawful by the application of Rule 2 might conflict with Rule 1 which requires courts in the United Kingdom to recognise and not question a foreign state's legislation and other laws which take effect within its territory. In a further passage (at para 142), cited at para 119 above, he observed that if a confiscation was unlawful under the laws of the foreign state and its courts were so to

hold, it was by no means obvious to him why it would be appropriate for the confiscation to be treated as valid by the courts of another state to which the property had been transferred. Similarly, Lord Mance (at para 65) warned against equating sovereignty with executive activity.

> "In states subject to the rule of law, a state's sovereignty may be manifest through its legislative, executive or judicial branches acting within their respective spheres. Any excess of executive power will or may be expected to be corrected by the judicial arm. A rule of recognition which treats any executive act by the government of a foreign state as valid, irrespective of its legality under the law of the foreign state (and logically, it would seem, irrespective of whether the seizure was being challenged before the domestic courts of the state in question), could mean ignoring, rather than giving effect to, the way in which a state's sovereignty is expressed. The position is different in successful revolutionary or totalitarian situations, where the acts in question will in practice never be challenged. It is probably unsurprising that the cases relied upon as showing the second kind of foreign act of state are typically concerned with revolutionary situations or totalitarian states of this kind."

156. The present case is indeed unusual by comparison with other cases which raise issues of justiciability in that here both the executive and judicial branches within Venezuela have spoken. Mr Guaidó, recognised by HMG as the President of Venezuela, has made appointments to the board of the BCV which the STJ, as a part of the judicial branch of government, has declared to be unlawful and of no effect. As a result, this court is confronted with conflicting positions adopted by the executive and the judiciary of Venezuela. The question arises, therefore, whether in such circumstances the foreign act of state doctrine in the form of Rule 2 requires courts in this jurisdiction to defer to acts of the executive of a foreign state, in priority to recognising the rulings of its judiciary. It should be noted in this regard that it is the pleaded case of the Guaidó Board that the STJ is not to be regarded by an English court as an independent court of law. That issue, however, falls outside the preliminary issues in this appeal and consideration of it, if necessary, would have to be deferred. At this stage of the proceedings we are concerned with the submission by the Guaidó Board that it is entitled to succeed on the basis of act of state, quite apart from the position in the municipal law of Venezuela.

157. Although judicial rulings of a foreign state are manifestations of state sovereignty, it is now clear that they do not themselves attract the operation of any rule of foreign act of state applicable in this jurisdiction and, as a result, are not entitled to the deference which may be shown to legislative and executive acts of a foreign state. So much was established by Lord Collins delivering the judgment of the Judicial Committee of the Privy Council in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, para 101:

> "The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence. That, and not the act of state doctrine or the principle of judicial restraint in *Buttes Gas & Oil Co v Hammer (No 3)* …, is the basis of Lord Diplock's dictum in *The Abidin Daver* … and the decisions which follow it. Otherwise the paradoxical result would follow that, the worse the system of justice in the foreign country, the less it would be permissible to make adverse findings on it."

158. Rix LJ was able to build on this foundation when delivering the judgment of the Court of Appeal in *Yukos*, which held justiciable the issue whether judicial acts had been part of a "campaign waged by the Russian state for political reasons against the Yukos group and its former CEO" ([2014] QB 458, paras 29(ii), 90). This difference of approach does not reflect any hierarchical inferiority of judicial acts but rather reflects a shared understanding of how courts should behave under the rule of law. As Lord Mance put it in *Belhaj*, para 73(ii):

> "If one believes in justice, it is on the basis that all courts will or should subscribe to and exhibit similar standards of independence, objectivity and due process to those with which English courts identify."

159. As a result, courts in this jurisdiction are more willing to investigate whether a foreign court is acting in a way that meets the standards expected of a court and whether there has occurred or is likely to a occur a failure of substantial justice. For this reason, foreign judgments fall to be assessed under different rules from those applicable to legislative and executive acts and are simply less impervious to review. The matter is admirably expressed by Rix LJ in *Yukos* [2014] QB 458, para 87:

“So the position is, to put the matter broadly, that whereas in a proper case comity would seem to *require* (at any rate as a principle of restraint rather than abstention) that the validity or lawfulness of the legislative or executive acts of a foreign friendly state acting within its territory should not be the subject of adjudication in our courts, comity only *cautions* that the judicial acts of a foreign state acting within its territory should not be challenged without cogent evidence. If then the question is asked - Well, why should acts of a foreign judiciary be treated differently from other acts of state, and what is the basis of that difference? - the answer, in our judgment, is that judicial acts are not acts of state for the purposes of the act of state doctrine. The doctrine in its classic statements has never referred to judicial acts of state, it has referred to legislative or executive (or governmental or official) acts of a foreign sovereign. … It is not hard to understand why there should be a distinction. Sovereigns act on their own plane: they are responsible to their own peoples, but internationally they are responsible only in accordance with international law and internationally recognised norms. Courts, however, are always responsible for their acts, both domestically and internationally. Domestically they are responsible up to the level of their supreme court, and internationally they are responsible in the sense that their judgments are recognisable and enforceable in other nations only to the extent that they have observed what we would call substantive or natural justice, what in the United States is called due process, and what internationally is more and more being referred to as the rule of law. In other words the judicial acts of a foreign state are judged by judicial standards, including international standards regarding jurisdiction, in accordance with doctrines separate from the act of state doctrine, even if the dictates of comity still have an important role to play. As Lindley MR said in *Pemberton v Hughes* [1899] 1 Ch 781, 790:

> ‘If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, *unless they offend against English views of substantial justice*’.” (Emphasis added)

In the result, the Court of Appeal therefore agreed with the holding of Hamblen J at first instance, [2011] EWHC 1461 (Comm); [2012] 1 All ER (Comm) 479, para 201, that "there is no rule against passing judgment on the judiciary of a foreign country".

160. Similarly, the US act of state doctrine does not apply to foreign court judgments (*Timberland Lumber Co v Bank of America*, NT & SA, 549 F 2d 597, 608 (9th Cir 1976); The American Law Institute, *Restatement of the Law Fourth, the Foreign Relations Law of the United States* (2018), para 441, pp 313-314). The commentators to the US Restatement note that, were the rule otherwise, courts in the United States would face a significant conflict between the doctrines governing the recognition and enforcement of foreign judgments, on the one hand, and the act of state doctrine on the other. *Philippine National Bank v United States District Court for the District of Hawaii* (2005) 397 F 3d 768 (9th Cir) in which the act of state doctrine was applied to the judicial acts of a foreign court is disapproved in the US Restatement (at p 314) as confusing the question whether a foreign judgment could be an act of state with the question whether the existence of a foreign judgment would preclude a US court from giving effect to the foreign official act on which the judgment rested. It was not followed by the Court of Appeal of England and Wales in *Yukos* [2014] QB 458, paras 88-89, where Rix LJ noted that in *Altimo Holdings* [2012] 1 WLR 1804, para 102, Lord Collins cited a number of US federal court decisions in which allegations of impropriety against foreign courts had been adjudicated in the context of forum non conveniens and enforcement of judgments.

161. There is therefore no rule requiring an unquestioning acceptance by courts in the United Kingdom of the validity or legality of a foreign judgment. Rather, the status of a foreign judgment is left to be determined in accordance with domestic rules on the recognition and enforcement of foreign judgments.

162. Mr Andrew Fulton QC on behalf of the Guaidó Board submits that the correct approach in situations where such a conflict arises between the executive and the judiciary in a foreign state is to apply Lord Neuberger's Rule 2 and to give effect to the executive act, subject only to the domestic public policy exception in cases where that applies. If the executive act is a sovereign act and if recognition of the act would not offend English public policy, then an English court should treat it as valid and effective under the act of state doctrine, without further inquiry. He submits that in the present case this requires effect to be given to the executive acts of Mr Guaidó and the Guaidó Board since there are no grounds of public policy which require UK courts to decline to do so. It does not necessarily follow, however, that when confronted with such conflicting positions by the executive and the judiciary of a foreign state, courts in this jurisdiction are required to accept the lawfulness and validity of the executive act in preference to recognising the foreign judgment, save in cases where to do so would

conflict with the public policy of the forum. No doubt situations will arise in which the act of the executive has been quashed by the foreign court on grounds which would also attract the operation of UK public policy, such as a gross violation of human rights. However, there are likely to be other situations in which the executive act has been quashed on some less egregious ground, such as a failure to follow the correct procedure, and it is not immediately obvious that effect should nevertheless be given to the executive act. In this regard, I note by way of analogy that in *Oppenheimer v Cattermole* [1976] AC 249 the House of Lords gave effect to a 1968 decision of the German Federal Constitutional Court both with regard to the discriminatory National Socialist decree which had purported to deprive the appellant of his German nationality, which it held to be "Unrecht" and not law, and with regard to the Federal Basic Law of 1949 (see Lord Hailsham LC at pp 262, 263; Lord Cross at pp 270-273). In this way the House of Lords followed a decision of the Federal Constitutional Court in order to determine the effect of a constitutional provision on prior legislation (see H W Baade, "The Operation of Foreign Public Law" (1995) 30(3) Texas International Law Journal 429, 461).

163. The question for consideration here is, to my mind, a more fundamental one. It is necessary to ask whether Rule 2 has any application to a situation in which an executive act of a foreign state has been quashed by the judiciary of that state. In order to answer this question, it is necessary to have regard to the rationale of that rule.

164. In *Belhaj* Lord Sumption noted ([2017] AC 964, para 225) that the English decisions had rarely tried to articulate the policy on which the foreign act of state doctrine is based and had never done so comprehensively. However, he discerned two main considerations underlying the doctrine. The first was what is commonly called "comity" but which he preferred to call "an awareness that the courts of the United Kingdom are an organ of the United Kingdom". Like any other organ of the United Kingdom, its judiciary must respect the sovereignty and autonomy of other states. Secondly, the act of state doctrine is influenced by the constitutional separation of powers, which assigns the conduct of foreign affairs to the executive. I agree.

165. As we have seen, the authorities supporting the existence of Rule 2, proceed on the basis that courts in this jurisdiction should not sit in judgment or adjudicate upon the lawfulness or validity of a foreign state's sovereign acts within its own territory. On closer examination it appears that what is considered objectionable in such a course of conduct is the intrusion into the internal affairs of a foreign state which such an examination or passing of judgment would involve. While international law does not in general require states to apply rules of act of state such as those identified here, there can be little doubt that such rules, where they exist, are rooted in the concept of

mutual respect for the sovereignty and independence of states and are intended to promote international comity. This is apparent, for example, in the following observation of Diplock LJ in *Buck v Attorney General* [1965] Ch 745, 770, where the claimants sought to challenge the legality and validity of the Constitution of Sierra Leone, an independent sovereign state:

> "As a member of the family of nations, the Government of the United Kingdom (of which this court forms part of the judicial branch) observes the rules of comity, videlicet, the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law.
>
> … For the English court to pronounce upon the validity of the law of a foreign sovereign state within its own territory, so that the validity of that law became the res of the res judicata in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rule of comity. In my view, this court has no jurisdiction so to do."

166. Similarly, in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, a case concerning a claim of immunity by General Pinochet, a former head of state of Chile, Lord Millett referred to the close relationship between state immunity ratione materiae (ie subject matter immunity) and the Anglo-American act of state doctrine. He observed (at p 269F):

> "The immunity finds its rationale in the equality of sovereign states and the doctrine of non-interference in the internal affairs of other states: see *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1; *Hatch v Baez*, 7 Hun 596; *Underhill v Hernandez* (1897) 168 US 250. These hold that the courts of one state cannot sit in judgment on the sovereign acts of another …"

167. In the same case, Lord Phillips explained that there were two explanations for immunity ratione materiae. The first was that to sue an individual in respect of the

conduct of the state's business was indirectly to sue the state. He continued (at p 286B-D):

> "The second explanation for the immunity is the principle that it is contrary to international law for one state to adjudicate upon the internal affairs of another state. Where a state or a state official is impleaded, this principle applies as part of the explanation for immunity. Where a state is not directly or indirectly impleaded in the litigation, so that no issue of state immunity as such arises, the English and American courts have none the less, as a matter of judicial restraint, held themselves not competent to entertain litigation that turns on the validity of the public acts of a foreign state, applying what has become known as the act of state doctrine."

168. A further statement to similar effect is to be found in *Oetjen v Central Leather Co* (1918) 246 US 297 (see para 133 above).

169. The act of state principle under consideration would therefore prohibit courts in this jurisdiction from questioning or adjudicating upon the lawfulness or the validity of certain executive acts of a foreign state on the ground that to do so would constitute an objectionable interference with the internal affairs of that state. This rationale can have no application, however, where courts in this jurisdiction merely give effect to a judicial decision whereby the courts of the foreign state concerned, acting within their proper constitutional sphere, have previously declared the executive acts to be unlawful and nullities. If a UK court were to give effect to such a foreign judgment, it would not itself be sitting in judgment on the executive act but giving effect to the view of it taken by the judicial branch of government within the foreign state. Lord Neuberger's Rule 2 could therefore have no application to such a situation. Furthermore, although judicial acts of that foreign state do not enjoy before UK courts the protection of any such rule of non-justiciability, it may in certain circumstances nevertheless be appropriate to recognise or give effect to them in accordance with domestic rules of private international law. If, for example, an executive act of the US President were to be declared unconstitutional by a judgment of the US Supreme Court, recognition of that judgment (if it were otherwise entitled to recognition before UK courts) would not involve any investigation into or adjudication upon the internal affairs of the United States so as to bring the act of state principle into operation. The matter was neatly expressed by Males LJ in the Court of Appeal in the present case ([2021] QB 455, para 150):

> “There is, however, no want of comity in holding that the act of state doctrine does not require the English court to treat as valid and effective as a sovereign act of executive power that which the foreign court has held to be unlawful and therefore null and void, while recognition of the separation of powers should operate both ways. To recognise the decision of the foreign court, acting within its own sphere of responsibility under the constitution of the foreign state, is in accordance with principles of comity and the separation of powers.”

170. The focus of the present case therefore shifts to the status of the judgments of the STJ on which the Maduro Board relies. These judgments do not themselves attract the protection of any act of state rule. The question becomes whether, and if so to what extent, they should be recognised or given effect by courts in this jurisdiction. These are matters which fall outside the preliminary issues and which have not been addressed in argument before us. It will, accordingly, be necessary to remit this issue for further consideration by the Commercial Court. One matter, however, is clear. Courts in this jurisdiction will refuse to recognise or give effect to foreign judgments such as those of the STJ if to do so would conflict with domestic public policy. On this appeal we have not been taken to the judgments in question and the Commercial Court will have to address this issue among others when the matter is remitted to it. It is important to note at this point, however, that the public policy of the forum will necessarily include the fundamental rule of UK constitutional law that the executive and the judiciary must speak with one voice on issues relating to the recognition of foreign states, governments and heads of state. As a result, if and to the extent that the reasoning of the STJ leading to its decisions that acts of Mr Guaidó are unlawful and nullities depends on the view that he is not the President of Venezuela, those judicial decisions cannot be recognised or given effect by courts in this jurisdiction because to do so would conflict with the view of the United Kingdom executive.

<u>Rule 1: A foreign state’s legislation or other laws</u>

171. Although the principal focus of the appeals before us has been on executive acts which the Guaidó Board submits must, by virtue of Rule 2, be given effect as sovereign acts regardless of their status in the law of Venezuela, the Guaidó Board relies, in the alternative, on Rule 1 as prohibiting a challenge before courts in this jurisdiction to the validity or lawfulness of the legislation or other laws of a foreign state. On this basis, the Guaidó Board submits that the Transition Statute which conferred the powers of appointment must be treated as valid and effective and that the challenges to it made by the Maduro Board must be treated as non-justiciable. It submits that the Maduro

Board is advancing a head-on challenge to the validity of a sovereign legislative act of a foreign state which is precluded by Rule 1.

172. There can be no doubt as to the existence of Rule 1. Normally, courts in this jurisdiction will recognise and will not question the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state (*Belhaj* [2017] AC 964, para 121 per Lord Neuberger). As Lord Neuberger explained in *Belhaj* (at para 135) there is ample authority in support of Rule 1, at least in relation to property situated within the territory of the state concerned. (See *Duke of Brunswick* (1848) 2 HL Cas 1, p 17 per Lord Cottenham LC; *Carr v Fracis Times & Co* [1902] AC 176, 179 per Lord Halsbury LC; *Luther v Sagor* [1921] 3 KB 532, 549 per Warrington LJ; at p 545 per Bankes LJ; *Princess Paley Olga* [1929] 1 KB 718, 722-723 per Scrutton LJ; at pp 730-732 per Sankey LJ; at pp 732-736 per Russell LJ; *Buttes Gas* [1982] AC 888, 937 per Lord Wilberforce.) In *Belhaj* Lord Sumption (at para 228) stated the principle as follows:

> "The principle is that the English courts will not adjudicate on the lawfulness or validity of a state's sovereign acts under its own law."

In *Belhaj* Lord Neuberger observed (at para 135):

> "Sovereignty, which founds the basis of the Doctrine, 'denotes the legal competence which a state enjoys in respect of its territory' (*Brownlie's Principles of Public International Law*, 8th ed (2012), p 211), and there is no more fundamental competence than the power to make laws."

173. In the Court of Appeal, Males LJ ([2021] QB 455, paras 140-141) carefully explained the significance of the Transition Statute to this part of the Guaidó Board's case. The Guaidó Board does not suggest that Mr Guaidó was entitled, as a matter of Venezuelan law, to appoint members of the board of the BCV or to appoint a Special Attorney General by virtue of his position as interim President. Its case is that the National Assembly was entitled to and did pass the Transition Statute, a legislative act of the state of Venezuela, which authorised Mr Guaidó to make those appointments and that that attracts both Rule 1 and Rule 2. However, Rule 1 can only apply if the Transition Statute is to be regarded as a legislative act of the state of Venezuela.

174. The effect of Rule 1 is that courts in this jurisdiction would not normally entertain a direct challenge to a foreign state's legislation such as that brought by the Maduro Board in relation to the Transition Statute. Teare J accepted ([2021] QB 455, para 64) that there was credible evidence before the court that the Transition Statute is the act of the Venezuelan legislature, namely evidence that it had been issued and signed by the officers of the National Assembly and that it bore the seal of the interim President of Venezuela. That evidence was not challenged. The Maduro Board then submits that the issue as to the lawfulness or validity of the Transition Statute and the subsequent executive acts arise only incidentally. It accepts that this issue has to be decided in order to determine who controls the arbitration and the gold, but submits that determining the lawfulness or validity of this legislative act is not the purpose or object of either claim. I am unable to accept this submission. Applying the test formulated by Rix LJ in *Yukos* (see para 151, above), it is clear that the challenge to the lawfulness and validity of the Transition Statute and the executive acts of appointment taken pursuant to it lie at the heart of this case. This is not a matter of merely ancillary or collateral aspersion. The Maduro Board's case involves a direct attack on legislation passed by the Legislative Assembly.

175. In the present case, however, there exist judgments of the STJ which hold that the Transition Statute is, as a matter of Venezuelan law, a nullity. In particular, that result is said to flow from the judgment of the STJ of 1 August 2016 holding that all decisions taken by the National Assembly would be null and void for so long as the Assembly was constituted in breach of the judgments and orders of the STJ. The Guaidó Board submits that those judgments should not be recognised or given effect in this jurisdiction on grounds of failure of due process and lack of impartiality on the part of the STJ judges.

176. The resulting situation closely resembles that in relation to Rule 2 which has been addressed above. The rationale of Rule 1 is similar to that of Rule 2. For courts in this jurisdiction to rule on the lawfulness or validity of the legislation or other laws of a foreign state would be an unwarranted intrusion into its internal affairs and a breach of comity. This is readily apparent from *Buck v Attorney General*, a case involving a challenge to the constitution of Sierra Leone, in which, as we have seen, Diplock LJ considered ([1965] Ch 745, 770) that to pronounce on the validity of a law of a foreign sovereign state within its own territory, so that the validity of that law became the res of the res judicata in the suit, would be to assert jurisdiction over the internal affairs of that state. However, no such objectionable intrusion would occur where the courts of one state were merely recognising or giving effect to judgments by the courts of another. In my view, such a situation would fall outside the scope of Rule 1.

177. Rule 1 would prohibit a challenge to the lawfulness or validity of the Transition Statute, save to the extent that a judgment of the STJ is to be recognised or given effect in this jurisdiction. Such a judgment would not itself attract any enhanced status by virtue of the act of state doctrine which has no application to judicial decisions. The question then becomes whether, and if so to what extent, courts in this jurisdiction should give effect to judgments of the STJ, a matter which falls outside the scope of the preliminary issues raised on this appeal and which will have to be addressed by the Commercial Court when this matter is remitted to it. That hearing will have to take account of and rule upon the Guaidó Board's challenge to the decisions of the STJ on grounds of failure of due process and lack of impartiality. Furthermore, it must be emphasised once again that effect could only be given to such foreign judgments subject to the overriding operation of the public policy of the forum which will necessarily include the effective application of the one voice principle. As a result, no recognition or effect could be given to a judgment of the STJ if and to the extent that to do so would conflict with the recognition by HMG of Mr Guaidó as the interim President of Venezuela.

178. The Maduro Board maintains that there are other constitutional reasons why the appointments of the Special Attorney General and the Guaidó Board are invalid. The only one which has been developed at all before us - and that only in the Maduro Board's written case - is its submission that the Transition Statute cannot be effective legislation because it has not been published in the Official Gazette as required by article 215 of the Venezuelan Constitution. Once again, Rule 1 would in my view prohibit a challenge on this ground to the lawfulness or the validity of the Transition Statute, save to the extent that there may exist a judicial ruling of the STJ to which effect should be given by courts in this jurisdiction in accordance with domestic rules of private international law and the public policy of the forum.

179. It is necessary to refer to a further submission on behalf of the Maduro Board that the BCV is not a "decentralized entity abroad" within the Transition Statute, with the result that the enabling power in article 15 does not extend to permit appointments in relation to the BCV. This point was not developed before us. It seems to be accepted by both parties that this is not an attack on the validity of the Transition Statute but rather a submission as to its interpretation and applicability and that, as a result, Rule 1 is not engaged. The Guaidó Board then submits that to the extent that this argument is deployed to challenge the validity of the executive acts of appointment it is precluded by Rule 2. The applicability of Rule 2 to the present case has been considered earlier in this judgment. Finally, the Guaidó Board submits that the National Assembly has confirmed by its Resolution dated 19 May 2020 that the BCV is a decentralised entity within the meaning of the Transition Statute and that this Resolution is a legislative act which a court in the United Kingdom will not question. If and to the extent that the Maduro Board may seek to challenge the lawfulness or

validity of the Resolution of 19 May 2020, Rule 1 would prohibit such a challenge, save to the extent that a judgment of the STJ is to be recognised or given effect in this jurisdiction.

180. Finally in this regard, I should point out that in the light of the conclusion to which I have come in relation to Rule 2, Rule 1 is not necessary to the analysis of this case since Rule 2 has the effect (subject to the STJ judgments) that the validity of the executive acts of Mr Guaidó in appointing members of the BCV board cannot be questioned by courts in this jurisdiction. Whether the validity of the underlying legislation can be questioned is, therefore, immaterial.

Conclusion

181. For these reasons I would allow the appeal in part and dismiss the cross-appeal.

(1) Courts in this jurisdiction are bound by the one voice principle to accept the statements of the executive which establish that Mr Guaidó is recognised by HMG as the constitutional interim President of Venezuela and that Mr Maduro is not recognised by HMG as President of Venezuela for any purpose. It is appropriate to grant declaratory relief to that effect.

(2)(a) There exists a rule of domestic law that, subject to important exceptions, courts in this jurisdiction will not adjudicate or sit in judgment on the lawfulness or validity under its own law of an executive act of a foreign state, performed within the territory of that state.

(b) There exists a rule of domestic law that, subject to important exceptions, courts in this jurisdiction will recognise and will not question the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.

Accordingly, subject to (3) below, courts in this jurisdiction will not question the lawfulness or validity of: (i) Decrees Nos 8 and 10 issued by Mr Guaidó; (ii) the appointment of the Special Attorney General; or (iii) the appointment of the Ad Hoc Administrative Board of the BCV (ie the Guaidó Board).

(3) However, in agreement with the Court of Appeal, I consider that, to the extent that the Maduro Board may rely on judgments of the STJ to which

recognition or effect should be given by courts in this jurisdiction in accordance with domestic rules of private international law and the public policy of the forum, the rules identified in para 2(a) and (b) above would not be engaged. It is therefore necessary for the proceedings to be remitted to the Commercial Court for it to consider whether the judgments of the STJ should be recognised or given effect in this jurisdiction.