IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

BETWEEN: **UKSC 2020/0195**

THE "GUAIDÓ BOARD" OF THE CENTRAL BANK OF VENEZUELA
Appellant

– and –

THE "MADURO BOARD" OF THE CENTRAL BANK OF VENEZUELA
Respondent

– and –

THE SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS
Intervener

– and –

BANCO CENTRAL DE VENEZUELA
Claimant in the BoE Proceedings

– and –

THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND
Defendant in the BoE Proceedings

– and –

DEUTSCHE BANK AG, LONDON BRANCH
Claimant in the DB Proceedings

– and –

RECEIVERS APPOINTED BY THE COURT
Receivers in the DB Proceedings

– and –

CENTRAL BANK OF VENEZUELA
Defendant in the DB Proceedings

CASE FOR THE GUAIDÓ BOARD

TABLE OF CONTENTS

I. INTRODUCTION[1]

1. This appeal arises out of two sets of proceedings: the Bank of England proceedings (the "**BoE proceedings**") and the Deutsche Bank proceedings (the "**DB proceedings**"). It concerns the identification of the persons entitled to give instructions on behalf of the Central Bank of Venezuela ("**BCV**") to financial institutions in respect of the BCV's assets in this jurisdiction. The assets in issue comprise: c. US$2 billion worth of gold reserves held in the name of the BCV at the Bank of England (the "**BoE**") and the subject of the BoE proceedings; and c. US$120 million owed to the BCV by Deutsche Bank AG ("**DB**") under a gold swap contract and paid by DB to Court-appointed Receivers pending a determination of the dispute as to authority in the DB proceedings.

2. The Appellant (the "**Guaidó Board**") contends that on a proper application of the 'one voice' doctrine, as articulated in cases such as *The Arantzazu Mendi* [1939] AC 256, as well as the foreign act of state doctrine, the English Courts must conclude that it is the Guaidó Board that is entitled to give instructions on behalf of the BCV. The Guaidó Board says this for three reasons:

   (1) First, Mr Juan Gerardo Guaidó Márquez ("**Mr Guaidó**") has been expressly and unequivocally recognised by Her Majesty's Government ("**HMG**") as the President of Venezuela, as evidenced by a formal statement provided by the Foreign and Commonwealth Office ("**FCO**")[2] dated 19 March 2020 in response to a request from Court (the "**FCO Statement**").

   (2) Secondly, in that capacity, Mr Guaidó has appointed the Guaidó Board as an Ad Hoc Board of the BCV and Mr Guaidó has also appointed a Special Attorney General.

   (3) Thirdly, the appointment by Mr Guaidó of the Guaidó Board and of a Special Attorney General were executive acts undertaken in the exercise of sovereign

[1] References in the footnotes below are to the Appendix in the form **[Tab/Page]**.

[2] **[77/905-906]**. The FCO is now known as the Foreign, Commonwealth and Development Office ("**FCDO**").

authority (acta *jus imperii*) by the person formally recognised by HMG as the President of Venezuela, which acts the English Courts are bound to treat as valid and effective under the foreign act of state doctrine, subject only to a public policy exception of no application.

3. The Respondent (the "**Maduro Board**") claims, instead, that it is the Board of the BCV and that it is entitled to give instructions to financial institutions in respect of the BCV's assets in this jurisdiction. The Maduro Board contends that HMG's recognition of Mr Guaidó was no more than *de jure* in nature, and it signified only that HMG considered Mr Guaidó entitled to be the President of Venezuela. It says that HMG impliedly recognises Nicolás Maduro Moros ("**Mr Maduro**") as the *de facto* President of Venezuela by virtue of HMG's conduct and diplomatic dealings. It argues that the appointment of the Maduro Board dates back to 2015 and remains unaffected by Mr Guaidó's acts of appointment. It also contends that Mr Guaidó's acts must be treated as nullities. It maintains this position despite the fact that the FCO Statement made no reference to HMG having recognised Mr Maduro in any capacity. Indeed, the FCO Statement made no reference to Mr Maduro as an individual at all and the only mention of his name was in the reference to *"the Maduro regime"* describing it as both *"illegitimate"* and *"kleptocratic"*.

4. At first instance, Mr Justice Teare accepted the Guaidó Board's case. He held that the FCO 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' doctrine. He also held that the Maduro Board's challenges to the validity of the appointment of the Guaidó Board and of the Special Attorney General were barred by a proper application of the foreign act of state doctrine.

5. The Court of Appeal took a different approach both to the 'one voice' doctrine and the foreign act of state doctrine. It held that while Mr Guaidó had been recognised by HMG as the *de jure* President of Venezuela, such recognition had left open the possibility that HMG may impliedly recognise Mr Maduro as the *de facto* President. In these circumstances it concluded that it was appropriate for a further question, or questions, to be posed to the FCDO, and for the proceedings to be remitted to the Commercial Court for further consideration. The Guaidó Board submits that the

Court of Appeal's approach to both recognition and foreign act of state was flawed, and that the Orders made by Teare J should be reinstated.

6. The Guaidó Board has advanced three grounds of appeal. These correspond with the first three issues identified in the Statement of Facts and Issues at [71]. Issues 1 and 2 relate to what is referred to as the Recognition Issue and Issue 3 relates to what is referred to as the Act of State Issue. The Maduro Board has been granted permission to cross-appeal on Issues 4-8 in relation to the Act of State Issue, and which are set out in the Statement of Facts and Issues at [72]. By agreement with the Maduro Board, this written case sets out the Guaidó Board's submissions in relation to both the appeal and the cross-appeal.

II. THE FCO STATEMENT

7. On 14 February 2020, after hearing argument in the DB proceedings, Mr Justice Robin Knowles wrote to the Foreign Secretary in the following terms:[3]

> *"The Commercial Court is presently seized of the above proceedings. There are related arbitration proceedings within the supervisory jurisdiction of the Commercial Court.*
>
> *The proceedings and the arbitration include the issue of who is entitled and authorised to act for and represent the Central Bank of Venezuela in the arbitration.*
>
> *Having heard argument, the Court considers it appropriate to invite Her Majesty's Government, by Her Majesty's Secretary of State for Foreign and Commonwealth Affairs, to provide a written certificate on the questions:*
>
> *(1) Who does Her Majesty's Government recognise as the Head of State of the Bolivarian Republic of Venezuela?*
>
> *(2) Who does Her Majesty's Government recognise as the Head of Government of the Bolivarian Republic of Venezuela?*
>
> *In either case, if it is possible to indicate from what date the recognition commenced, that would be of assistance. Her Majesty's Government is also free to make any*

[3] **[76/904]**. The letter was written in the context of the DB Proceedings and before the BoE Proceedings were launched by the Maduro Board in May 2020. However, Teare J gave permission for the FCO statement to be used in both the BoE Proceedings and the DB Proceedings: see his Order dated 28 May 2020 at [4] **[26/442]**.

other observations."

8. On 19 March 2020, Mr Shorter, Director for the Americas at the FCO replied in the following terms (the "**FCO Statement**"):[4]

> *"Thank you for your letter of 14 February 2020 inviting Her Majesty's Government (HMG) to provide a written certificate on the following 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?*
>
> *It is HMG's policy not to afford recognition to Governments. The HMG policy of non-recognition of Governments was the subject of a formal statement to Parliament by the then Foreign Secretary, Lord Carrington, on 28 April 1980. Lord Carrington's statement to Parliament explained the policy as follows:*
>
> *[…]*
>
> *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 to you the statement of the then Foreign Secretary, the Rt Hon J Hunt, on 4 Feb 2019, recognising Juan Guaidó as constitutional interim President of Venezuela until credible elections could be held, in the following terms:*
>
> > *The United Kingdom now recognises Juan Guaido 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.*
>
> *I can confirm that this remains the position of Her Majesty's Government."*

9. The Guaidó Board submits that the following particular aspects of the FCO

[4] **[77/905-906]**.

Statement show that Teare J was correct to conclude that it was an unambiguous, unequivocal and unqualified recognition of Mr Guaidó as President of Venezuela and that the Court of Appeal's approach and conclusion to the contrary was flawed:

(1) It was made in response to two questions expressly asking (i) who HMG *"recognise[d]"* as Head of State of Venezuela and (ii) who HMG *"recognise[d]"* as Head of Government of Venezuela. Indeed, the letter from Mr Justice Robin Knowles, to which the FCO was responding, had expressly stated that the proceedings included *"the issue of who is entitled and authorised to act for and represent the Central Bank of Venezuela"*. The potential significance of the answers given for the purpose of the 'one voice' doctrine was accordingly obvious.

(2) It was clear from the terms of the FCO Statement itself that it was being provided by way of exception to the 1980 Policy, *i.e.* that HMG was taking the opportunity envisaged by the Court of Appeal in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at [350] to *"inform the court of a more categorical attitude"*.

(3) The FCO Statement made no reference to the identity of any government of Venezuela and did not purport to answer who was, in HMG's view, the Head of any such government. It focused only on the identity of the President, which is the material question for the Court in this case because the disputed appointments were made by Mr Guaidó as President of Venezuela.[5]

(4) It is inherently implausible that HMG would have sought to embed a hidden meaning in a statement intended to be *"categorical"* and it makes no sense for the Court to be told that HMG's 1980 Policy is not to recognise, that an exception was being made to that Policy, and yet to read the FCO Statement as tacitly qualifying what was said about Mr Guaidó and allowing for the

[5] See in this regard the CA's Judgment at [4], [25] **[2/42, 45]**; Teare J's Judgment at [34]-[36] **[5/108-109]**; and the formulation of the Recognition Issue and the Act of State Issue in the Statement of Facts and Issues at [8].

possibility of a recognition of Mr Maduro (let alone an implied recognition).

(5) The FCO Statement referred in terms to the Foreign Secretary's 4 February 2019 statement *"recognising"* Mr Guaidó *"as constitutional interim President until credible elections could be held"* and confirmed that the position set out in that earlier statement *"remain[ed] the position of [HMG]"*. That was only capable of being read as a statement that Mr Guaidó was in fact recognised by HMG as the President of Venezuela, not merely that he was *"entitled to be the President of Venezuela"* (*cf.* the CA Judgment at [112], [127(2)]).

(6) The Foreign Secretary's 4 February 2019 statement (then quoted in the FCO Statement) stated that *"The United Kingdom <u>now</u> recognises Juan Guaido <u>as</u> the constitutional interim President of Venezuela"* (emphasis added). The word *"now"* made it clear that this had represented a significant change of position and the word *"as"* did likewise. There was again no suggestion that HMG considered that Mr Guaidó only 'ought' to become the President, or was merely 'entitled' to become the President. He was being recognised as President with effect from 4 February 2019.

(7) Mr Guaidó's status was *"constitutional"* because in HMG's stated view he had assumed his interim role constitutionally. Far from being a qualification (as the Court of Appeal appeared to contemplate as explained further below), this adjective, if anything, added further force to the Statement.

(8) Mr Guaidó was recognised as *"interim"* President because he had not been elected for a term of office, but rather was filling a vacancy in the office pending fresh presidential elections. Again, the concept of *"interim"* underscored the immediacy of Mr Guaidó's enjoyment of his status.

(9) The reference in the FCO Statement to it being *"time for a new start, with free and fair elections"* contemplated that Mr Guaidó, during his now recognised and extant interim Presidency, would be seeking to bring about the elections by which he or another candidate would receive a democratic

mandate.

(10) Despite the express opportunity presented by the questions posed to state that some form of recognition applied to Mr Maduro there was no such statement. On the contrary, he was not referred to as an individual at all, and his name was referred to only in the concluding paragraph stating that *"the oppression of the illegitimate, kleptocratic Maduro regime must end."* The reference to such oppression and illegitimacy explained why HMG was expressly and unequivocally recognising Mr Guaidó, and illustrated the threat that the Maduro regime still posed. It is also evident from the materials referred to at fn. 12 below that HMG uses the term *"regime"* to embrace entities which enjoy no recognised governmental status under the 1980 Policy. The same is true of international organisations, as illustrated by the UN Security Council Resolutions considered in the *Kuwait Airways* litigation also addressed below.[6] Such language provided no hint of any formal recognition of Mr Maduro as an individual, or any qualification of what had been said about Mr Guaidó. Furthermore, as pointed out at [46] below, and on the basis of the approach of the Court of Appeal in *Mahmoud v Breish* [2020] EWCA Civ 637 to the significance of the word *"legitimate"*, the use of the term *"illegitimate"* in the FCO Statement further underscored that there was no question of *de facto* recognition of Mr Maduro; the converse was instead the case.

III. THE COURT OF APPEAL'S CORE CONCLUSION AND REASONING: RECOGNITION

10. As already indicated, the Court of Appeal accepted that the effect of the FCO Statement was, at least, formally to recognise Mr Guaidó as the *"de jure President of Venezuela"* but it held that, while it was conclusive to that extent, it left *"open the possibility that HMG may impliedly recognise Mr Maduro as President de facto*" (see CA Judgment at [124], [126]). The Court summarised its reasoning for reaching this conclusion in the following terms at [123]:

[6] See UN Security Council Resolution 661 dated 6 August 1990 and the Berman letter quoted by the Court of Appeal in *Kuwait Airways* at [255] and [264].

"The Foreign Secretary's statement (or more likely, the FCO's letter to the court) might have said in terms that HMG did not recognise Mr Maduro in any capacity, but it did not. When its language is viewed in context, it is to my mind ambiguous, or at any rate less than unequivocal. 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 (i.e. that a person is entitled to a particular status) and de facto (i. e. that he does in fact exercise the powers that go with that status)."

11. The Court concluded at [127] that, before a definitive answer could be given to the recognition issues, it would be necessary to determine whether:

    (1) HMG recognises Mr Guaidó as President of Venezuela for all purposes and therefore does not recognise Mr Maduro 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.

12. In these circumstances, the Court of Appeal stated that those questions were *"best determined by posing a further question or questions to the FCO"* but, in the event that HMG failed to provide a response, *"the Commercial Court will have no alternative but to determine for itself whether HMG recognises Mr Maduro as de facto President by necessary implication"* (see [128]-[129]).

IV. ISSUE 1: THE PROPER INTERPRETATION OF THE FCO STATEMENT

13. The Guaidó Board contends that there were four errors in the Court of Appeal's approach to the interpretation of the FCO Statement:

    (1) A failure to give effect to the plain and unambiguous meaning of the words used, as explained at [9] above.

    (2) A flawed approach to the admission of extraneous evidence in that exercise of interpretation.

    (3) An unjustified reliance in a judicial context on a notion of implied *de facto* recognition, which notion has no established basis, and in circumstances where the concepts of *de facto* and *de jure* recognition have no useful role to play in a judicial context today.

    (4) An unjustified conclusion that, even if it were permissible to have regard to them at all, any of the five contextual matters relied upon at [123] of the CA Judgment rendered the FCO Statement *"ambiguous, or at any rate less than unequivocal"*.

14. The Court of Appeal's conclusion deprived HMG's express statement—clearly intended, in context and on is own terms, to have legal effect and consequence for the purposes of the 'one voice' doctrine—of any such effect or consequence. Further, it did so by placing excessive weight on *prior* dealings with Mr Maduro, and on questions of diplomatic accreditation, neither of which were addressed in the FCO Statement at all, and neither of which was on a proper analysis of any relevance to the issue before the Court as to the current President of Venezuela.

15. Before elaborating on these four errors, it is useful to set out some of the key principles relating to the 'one voice' doctrine, the approach to the interpretation of an executive statement, HMG's 1980 Policy and its domestic law implications, the most recent Court of Appeal decision prior to the present case to consider these issues (*Mahmoud v Breish* [2020] EWCA Civ 637), and the concepts of *de jure* and

de facto recognition more broadly.

(1) The 'one voice' doctrine

16. 'Formal' recognition is the exercise by HMG of the Royal prerogative to recognise a foreign State, ruler or government. In every case, the decision whether or not to recognise is exclusively a matter for HMG. Proof of the exercise of the prerogative is by special means in the form of an executive statement issued by the FCO[7] or other authoritative statement to the Court of the position of HMG. Once such a statement has been made, the 'one voice' doctrine applies to require the Courts to follow the lead of HMG.[8]

17. The nature of the prerogative, and the special means of proof, are a reflection of the fact that, under our constitution, the responsibility for the conduct of foreign affairs is allocated to the executive. It is for that reason that, when HMG makes a statement to the Court as to the recognition of a foreign State, ruler or government, the Court is bound by the 'one voice' principle to proceed on that basis in the determination of disputes before it: see the CA Judgment at [95], quoting Popplewell LJ in *Breish.* The potential need to have regard to a range of sensitive, nuanced and multi-faceted factors in political decisions as to whether, and in what terms, to make statements of recognition, or to refuse to do so, also informs the need for caution and rigour in the approach to the interpretation of executive statements when they are made. When interpreting an executive statement, the Court is not undertaking a wide interpretive exercise embracing all aspects of the factual background that might be appropriate when interpreting a commercial contract. The executive statement is

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[7] In the field of State immunity and diplomatic immunity, Parliament has laid down a statutory certification mechanism: see section 21 of the State Immunity Act 1978 and section 4 of the Diplomatic Privileges Act 1964.

[8] See *Taylor v Barclay* (1828) 2 Sim 213, 57 ER 769; *Mighell v Sultan of Johore* [1894] 1 QB 149, 158 per Lord Esher MR, 161-162 per Kay LJ; *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797, 824 per Lord Sumner; *The Arantzazu Mendi* [1939] AC 256, 263-264 per Lord Atkin; *Gdynia v Boguslawski* [1953] AC 11, 27-28 per Lord Porter; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853, 901-904 per Lord Reid; *Gur Corporation v Trust Bank of Africa* [1987] QB 599 at 625F-G per Nourse LJ; *R (HRH Sultan of Pahang) v Secretary of State for the Home Department* [2011] EWCA Civ 616 at [2], [14]-[16] per Maurice Kay LJ and [31]-[32] per Moore-Bick LJ; *Secretary of State for the Home Department v CC* [2012] EWHC 2837 (Admin), [2013] 1 WLR 2171 at [114]-[117] per Lloyd Jones LJ; *Mahmoud v Breish* [2020] EWCA Civ 637 at [1], [16], [57] per Popplewell LJ.

intended to be both conclusive and exclusive.

(2) The interpretation of an executive statement

18. Two decisions of the House of Lords (*Duff Development Co Ltd v Government of Kelantan* [1924] AC 797 and *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853) and one decision of the Court of Appeal (*Gur Corporation v Trust Bank of Africa* [1987] QB 599) emphasise that when interpreting an executive statement of this kind the Court must consider the questions asked and apply the plain words used by HMG in response, and must disregard extraneous evidence of HMG's conduct which might contradict, or render ambiguous, their natural and ordinary meaning.

19. In *Kelantan*, the House of Lords, when considering a plea of State immunity, accepted as conclusive a letter from the Secretary of State for the Colonies which stated that *"Kelantan is an independent State in the Malay Peninsula and that His Highness the Sultan […] is the present Sovereign Ruler thereof"* (see 806). Documents attached to the Secretary of State's letter had included a treaty concluded between Kelantan and Great Britain which cast doubt on whether Kelantan could properly be described an independent sovereign State. It was argued on that basis that the Secretary of State's letter was *"ambiguous"* (see 800).

20. The House of Lords rejected any such reference to extrinsic evidence of conduct on the international plane and treated the letter as conclusive (even though the material had been attached to the letter itself). See in particular:

(1) Viscount Cave at 808-809:

> *"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."*

(2) Viscount Finlay at 813:

> *"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."

(3) Lord Dunedin at 820:

"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 his claim, to deny him the comity which their own sovereign had conceded?"

(4) Lord Sumner at 824:

"[…] 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 Her Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed […] In considering the answer given by the Secretary of State, it was not the business of the Court to inquire into 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 examine the communication in order to see if the meaning of it was really that the Sultan had been and was recognized as a sovereign."

(5) Lord Carson at 830, who explained that, on the basis of the documents attached to the Secretary of State's letter, he would *"find great difficulty"* concluding that Kelantan was an independent sovereign State. He nonetheless concluded that it was not open to him to disregard or qualify what had been said in the letter itself, even by reference to material annexed thereto. The whole point of the executive statement was to avoid a contentious inquiry[9] as to whether a foreign State, ruler or government had sovereign status and, as Lord Carson explained, it was *"difficult to see in what other way such a question could be decided without creating chaos and confusion"*.

21. The House of Lords in *Carl Zeiss* adopted an equivalent approach to the exclusion of extrinsic evidence. The Foreign Secretary had certified that HMG had not granted any recognition *de jure* or *de facto* to the 'German Democratic Republic'

[9] See per Kay LJ in *Mighell v Sultan of Johore* [1894] 1 QB 149 at 161 (*"without a contentious inquiry as to whether the person cited is or is not in the position of an independent sovereign."*).

or its 'Government' and, further, that HMG had recognised the USSR as *"de jure entitled to exercise governing authority in respect of [East Germany]"* (at 859A-D). This was treated as conclusive as to the status of the East German government under the 'one voice' doctrine. The House of Lords declined to look outside the four corners of the certificates to consider evidence which might have contradicted the natural and ordinary meaning of the words used. See in particular:

(1) Lord Reid at 901-904, after explaining (at 900) that he was prepared to assume both that the USSR had purported to confer independence on East Germany and that it operated as an independent State, held (at 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."*

(2) Lord Hodson at 925C-D and Lord Guest at 933C (agreeing with Lord Reid).

(3) Lord Upjohn at 941B-D:

> *"Lord Reid […] has advanced very powerful reasons for preferring the view that the answers of Her Majesty's Secretary of State for Foreign Affairs, to the requests for information submitted to him […] must lead to the conclusion that so far as the courts of this country are concerned, we ought to assume that, whatever may be thought to be common knowledge on this point, the German Democratic Republic is a subordinate body set up by the U.S.S.R. as the de jure Government of East Germany to act upon its behalf".*

(4) Lord Wilberforce at 956F-957 emphasised that the first question for a court when presented with a certificate was *"to consider whether it completely states the facts and whether there is any ambiguity in it"* before stating (at 957F-G):

> *"I have no temptation, in a matter of this kind, to speculate or to read into the certificate anything which is not there, but I cannot find that the certificate is either incomplete or ambiguous."*

22. It was thus necessary to disregard not only any *"common knowledge"* as to facts on the ground, but also any declarations from the German Democratic Republic or

from the USSR which contradicted the certificate from HMG.[10] Although the USSR was in principle entitled to cede sovereignty over East Germany and had purported to do so, the certificate compelled the court to hold that it had not done so.[11]

23. *Gur* engaged questions similar to those in *Carl Zeiss*. It concerned two issues, the first of which was the subject of what was described by the Court as executive certificates, the second of which was not. The issue that was the subject of the executive certificates was whether the proclaimed 'Republic of Ciskei' was recognised by HMG as an independent sovereign State. The issue that was not the subject of the executive certificates was whether there was any evidence pointing to the authority of the so-called 'Government of the Republic of Ciskei' to undertake executive, administrative or legislative acts.

24. On the first issue, both Sir John Donaldson MR and Nourse LJ concluded that the statements by HMG were conclusive and controlling, in particular:

(1) Sir John Donaldson MR referred to the certificates and HMG's 1980 Policy as the *"raw materials"* upon which the Court had to base its decision (at 620A) and then stated (at 623A-B):

> *"In each case the certificates are conclusive that the G.D.R. or, as the case may be, the Republic of Ciskei are not recognised as independent sovereign states. It follows from this that the courts must hold that neither the G.D.R. or its government nor the Republic of Ciskei or its government was in law capable of an executive, administrative or legislative act at the relevant times, unless enabled by some superior authority."*

(2) Addressing the issue of which State HMG had recognised as entitled to exercise, or as exercising, governmental authority in the territory known as Ciskei, Nourse LJ stated as follows (at 625B-C):

> *"[…] we can only inform ourselves of the answer to the question [of recognition of a state] by referring to the letters of 1 and 16 May 1986, which, so far as material, contained the following information: (1) […] Her Majesty's Government does not recognise the Republic of Ciskei as an independent*

[10] Lord Reid at 905F-906C.

[11] Lord Reid at 905F-G.

sovereign state, either de jure or de facto […]."

(3) On the primacy of the language used in an executive statement, Nourse LJ added (at 625F-G):

> *"The rule that the judiciary and the executive must speak with one voice presupposes that the judiciary can understand what the executive has said. In most cases there could hardly be any doubt in the matter. But in a case like the present, where there is a doubt, the judiciary must resolve it in the only way they know, which is to look at the question and then construe the answer given. It is not for the judiciary to criticise any obscurity in the expressions of the executive, nor to inquire into their origins or policy. They must take them as they stand."*

25. The second issue in *Gur*, concerning the issue of governmental authority, was addressed by the Court by reference to HMG's 1980 Policy. Given the terms of the executive certificates in that case, and in keeping with the 1980 Policy, the Court had regard to wider considerations relating to South African legislation and the undisputed status of South Africa as a sovereign State, before concluding (as the House of Lords had done in *Carl Zeiss*) that the Government of the Republic of Ciseki was a subordinate body set up by South Africa to act on its behalf.

(3) The 1980 Policy

26. As indicated above, HMG's 1980 Policy of non-recognition was referenced in the FCO Statement in the present case. As is apparent from the terms of the Statement, and as further explained below, it is clear that the FCO considered its Statement to be by way of exception to the operation of the 1980 Policy. The present case is therefore one of very few occasions over the past four decades when such an exception has been made. HMG has otherwise invariably declined to accord recognition to foreign governments or presidents when invited to state its position.[12]

27. The Court of Appeal was right to identify the importance of HMG's 1980 Policy of

[12] See *e.g.* UK Materials on International Law (2001) 71 BYIL 517 at 577: *"HMG recognise states not governments or particular regimes"* and referring to the *"Taliban regime"*; UK Materials on International Law (2002) 72 BYIL 551 at 559 *"The United Kingdom's long-standing policy is to recognise states, not individuals or governments"*.

non-recognition to foreign governments (or heads of state or government).[13] However, in all four of the errors identified at [13] above and addressed further below, the Court of Appeal failed to have proper regard to the significance and implications of the departure from the 1980 Policy that the FCO Statement in the present case involved.

28. The implications of the 1980 Policy were considered by Hobhouse J in *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA* [1993] QB 54, by Mance J in *Kuwait Airways Corp v Iraqi Airways Co (No. 5)* [1999] CLC 31, and by the Court of Appeal in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883. Each of these cases is addressed in turn.

(4) *Somalia v Woodhouse*

29. The issue in *Somalia v Woodhouse* was whether an 'interim government' of Somalia could, in the aftermath of a coup, be regarded as the Government of Somalia in order to lay claim to funds held in Court which belonged to the Republic of Somalia. HMG having been invited to take a position, the FCO quoted the 1980 Policy and stated: *"The question of whether to recognise the purported 'interim government' in Mogadishu thus does not arise for us"* (see 64E). Hobhouse J observed that, prior to the 1980 Policy, recognition by HMG had been the *"decisive matter"* and, in a case of uncertainty, the courts had *"no role save to inquire of the executive whether or not it had recognised the government in question"* (see 63C).

30. Hobhouse J then considered, and rejected, an academic theory that the 1980 Policy meant that the Court should in a judicial context still seek to ascertain whether HMG had recognised the foreign government as a matter of inference (*i.e.* implication) from HMG's dealings. Hobhouse J held: *"The impracticality of the 'inferred recognition' theory as a legal concept for forensic use is obvious and it cannot be thought that that was the intention of Her Majesty's Government in giving the Parliamentary answers. The use of the phrase 'left to be inferred' [in the 1980 Policy] is designed to fulfil a need for information in an international or political,*

[13] CA Judgment at [69]-[70].

not a judicial, context" (at 63E-F).

31. Having determined that recognition was *"no longer the criterion of the locus standi of a foreign 'government' in the English courts and the possession of a legal persona in English law"* (at 63F), Hobhouse J then went on to identify (at 68E-F) the criteria by reference to which a court should decide not whether a government was recognised but rather whether it exists, namely: (a) whether it is the constitutional government; (b) the degree, nature and stability of administrative control, if any, that it exercises over the territory of the state; (c) whether HMG has any dealings with it and, if so, what is the nature of those dealings; and (d) in marginal cases, the extent of international recognition. Since the Somali 'interim government' did not qualify having regard to these factors, Hobhouse J held that its solicitors did not have the requisite authority of the Republic of Somalia and so had no authority to receive and deal with the funds held in Court.

32. Hobhouse J also observed (at 66B-C[14]) that the case before him did not involve *"any accredited representative of a foreign state in this country"* and said that different considerations would have applied if it did. By definition, an accredited representative of the foreign state (*e.g.* an ambassador) would have been entitled to represent Somalia and so, on the facts in that case, lay claim to the funds in Court on its behalf. In the present context, however, Venezuela is not a party to the proceedings and there is no dispute over the accreditation or authority of Mrs Rocío Maniero (appointed by Mr Maduro in 2014) as Venezuela's Ambassador to the United Kingdom. The public policy considerations to which Hobhouse J adverted are therefore not engaged, and he was in any event contemplating a situation where (in accordance with the 1980 Policy) there was no statement of recognition.

(5) ***Kuwait Airways***

33. The *Kuwait Airways* litigation arose out of Iraq's invasion and occupation of Kuwait between 1990 and 1991, condemned as a flagrant breach of international law by the UN Security Council. In response to a question as to whether HMG

[14] In a passage quoted in the CA Judgment at [74].

recognised at any time that the State of Iraq exercised *de facto* sovereign power in Kuwait, the FCO informed the Court, by letter, that HMG had not at any time recognised Iraqi occupation or control over the territory of Kuwait: see [1999] CLC 31 at 65C-E. HMG's letter then referred to UN Security Council Resolutions which determined that Iraq had usurped the authority of the legitimate Government of Kuwait and called upon all States not to recognise any regime set up by the occupying power and declaring Iraq's purported annexation to be null and void.

34. Mance J treated the FCO letter as conclusive on the question of whether Kuwait had ever ceased to exist as a State (65F). He then examined whether the Government of Iraq could nevertheless be treated as the *de facto* Government of Kuwait and he held that it could not (65F-69C). After referring to the 1980 Policy, and to the potential issue of inferred recognition raised by the words *"left to be inferred"* in HMG's 1980 Policy, he reached the same conclusion as Hobhouse J in *Somalia v Woodhouse* (at 65H): *"It seems clear 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."*

35. It should be noted at this point that the bald statement from *Oppenheim*,[15] to the effect that *"recognition can be express or implied"*, is unaccompanied by any citation of English authority, and was made in 1992 and hence before Hobhouse and Mance JJ had rejected the concept of implied recognition in a judicial context.

36. Whereas Hobhouse J had not envisaged any scope for departure from the 1980 Policy, Mance J also made clear (at 67C-E) that HMG *"must remain free to take and to inform the court of a more categorical attitude regarding recognition, or non-recognition"*, precisely as it had done in the case before him.

37. The Court of Appeal in *Kuwait Airways* agreed, holding that *"despite the 1980 statement, there is nothing to prevent the UK Government, if it thinks appropriate, to tender to the courts an unequivocal certificate of recognition or non-recognition*

[15] Jennings and Watts *Oppenheim's International Law* Vol 1 (OUP, 9th ed, 1992) §50, as quoted in the CA Judgment at [71].

of the existence of a foreign government" (see [2002] 2 AC 883 at 980, [350]).

38. *Kuwait Airways* also illustrates that an executive statement will prevail over facts on the ground, which had included a *"considerable measure of control"* (albeit on a fragile and temporary basis) exercised by Iraq in Kuwait, including through the establishment of laws, courts, currency and imposition of car number plates and a finding that Kuwait was *"governed and administered as an integral part of Iraq"*: see the Court of Appeal's judgment at [355] adopting Mance J's findings at 68.

(6) ***Mahmoud v Breish***

39. The next significant case to consider is the Court of Appeal's recent decision in *Breish*. The litigation arose out of rival claims to control the assets of the Libyan Investment Authority (LIA) in this jurisdiction by the appointees of rival governments in Libya which had emerged following the fall of Colonel Gaddafi. The Court directed the trial of a preliminary issue as to who was the Government of Libya for the purposes of the Libyan law empowering such a government to appoint a Board of Trustees of the LIA. Four rival claimants asserted their right to be regarded as Chairman, reflecting rival claims by different Boards of Trustees.

40. The FCO issued two formal letters for use in the litigation. A key and obvious distinction between the letters in *Breish* and the FCO Statement in the present case is that in *Breish* the FCO letters did not use the word '*recognise*' in relation to the Libyan Government of National Accord itself. The FCO instead said in its first letter that HMG *"support[ed]"* the Government of National Accord and the Presidency Council as the *"legitimate executive authorities of Libya"* and in the second letter that it *"continue[d] to recognise those appointed by the GNA"* (see *Breish* at [10]-[11] and [13]).

41. In circumstances where there was a dispute as to whether the FCO's letters constituted a statement of recognition at all engaging the 'one voice' doctrine, it was unsurprising that the Court of Appeal in *Breish* was willing to look to other evidence to establish whether HMG was in fact making a statement of recognition, or merely an expression of political support (see at [30]-[39] per Popplewell LJ)

and see also Males LJ's observation in the CA Judgment in the present case at [75] (emphasis added):[16]

> *"[…] one of the issues was whether FCO letters […] amounted to recognition of the GNA as distinct from being a statement of political support. In holding that the letter was to be construed as a statement of recognition, one of the factors to which this court had regard was the maintenance of full diplomatic relations with the GNA throughout the relevant period".*

42. Reference to extrinsic evidence in *Breish* did not conflict with the 'four corners' approach to interpretation as set out in *Kelantan, Carl Zeiss* and *Gur* because the Court was answering the logically prior question of whether HMG had made a statement of recognition at all, engaging the 'one voice' doctrine. The Court's consideration of the nature and extent of diplomatic relations was also unsurprising in circumstances where the FCO's second letter to the Court had referred in terms to its dealings with *"those appointed by the GNA"*. Nothing in *Breish* justifies recourse to extrinsic evidence when there is no doubt as to the document's status as a statement of recognition and where there is no reference to such extraneous matters in the statement itself. Nor does *Breish* support the submission made below by the Maduro Board that the 'one voice' doctrine is equally concerned with what HMG does as with what it says.[17] Any such proposition is not only unsupported by any of the authorities cited at fn. 8 above but would require precisely the wide-ranging survey of complex terrain and risk the *"chaos and confusion"* which the 'one voice' doctrine is designed to avoid.

43. If, however, *Breish* did purport to lay down any broader principle of interpretation for ascertaining the meaning (as distinct from the status) of an executive statement, allowing the Court to look not only at the terms of the executive statement but also *"the public stance HMG has taken in its statements and conduct"*[18] then this was an unwarranted departure from the approach set out in *Kelantan, Carl Zeiss* and *Gur*. Again, it would risk defeating the purpose of an authoritative executive

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[16] Males LJ was one of the Judges in *Breish*.

[17] Maduro Board Appeal Skeleton at [54].

[18] *Breish* at [34]. But it seems unlikely that this is what Popplewell LJ meant in *Breish*, given the final sentence of [35(2)].

statement to the Court by opening up a whole area of contentious and potentially sensitive inquiry.

44. Given the particular sensitivity applicable to HMG's approach to recognition, and the highly delicate and nuanced policy considerations likely to be involved in any departure from the 1980 Policy, a degree of caution is required in reading across between different executive statements used in different contexts. With that caveat, however, two further aspects of the Court of Appeal's reasoning in *Breish* also stand in the way of the arguments of the Maduro Board on the present appeal.

45. First, the Court noted that HMG had had *"full diplomatic relations with representatives of the GNA and has maintained them throughout the relevant period, appointing an ambassador with letters patent from the Queen addressed to Prime Minister al-Sarraj as early as 18 December 2015"* (at [38]). Despite that uncontested fact, the material date of HMG's recognition was held only to be *"since at least 19 April 2017"* by reference to a public statement made by the UK's Ambassador to the UN Security Council itself referred to in the FCO's letter in the case, and not that earlier date of commencement of diplomatic relations (see [10], [15], [16]). In *Breish*, therefore, the existence of full diplomatic relations was not treated as sufficient to establish governmental recognition in a judicial context for the purpose of the application of the 'one voice' doctrine.

46. Secondly, the Court held that to refer to a body as a *"legitimate"* executive authority conveyed *"at least recognition of de facto status as a government"* (at [35(2)]). The corollary of that reasoning is that the characterisation of the Maduro regime in the present FCO Statement as *"illegitimate"* is hardly indicative of Mr Maduro enjoying such a recognised *de facto* status of the kind contended for by the Maduro Board and contemplated as possible by the Court of Appeal and further explained below.

(7) The *de jure* vs *de facto* distinction

47. Given its centrality to the Court of Appeal's approach, it is important to address the concepts of *de jure* and *de facto* recognition and the distinction drawn between what

was referred to as the '*Luther v Sagor* sense' of *de jure* as opposed to the 'Oppenheim sense'.[19] The Guaidó Board submits that, in the light of the 1980 Policy, these concepts have no useful role to play in a judicial context today. The true question is instead more satisfactorily reduced to a simple binary choice between:

(1) a situation where there has been an express statement of recognition, or non-recognition, by way of departure from the 1980 Policy; or

(2) a situation where the 1980 Policy is being followed, and there has been no statement of recognition or non-recognition, such that the Court must identify who the government or president is, making its own findings of fact by reference to a *Somalia v Woodhouse* type exercise.

48. The first case relied upon by the Court of Appeal in support of its interpretation of the term *de jure* was *Luther v Sagor* [1921] 3 KB 532. But *Luther v Sagor* was not in fact a case involving a statement of *de jure* recognition. Rather, it was a case where HMG had made an express statement of *de facto* recognition of the Soviet Government. Nevertheless, Bankes LJ (at 543) and Warrington LJ (at 551) explained—by reference to Wheaton's *International Law* (5th ed, 1916) at 36—what they understood the terms *de jure* and *de facto* to mean as a matter of international law. The sole authority cited by Wheaton was Montague Bernard's *A Historical Account of the Neutrality of Great Britain during the American Civil War* (London, 1870) at 108. Bernard, however, cited no authority at all, merely expressing his own opinion in the context of a historical discussion about the American Civil War. In any event, both Bankes and Warrington LJJ made clear that, on the facts before them, whether the recognition of the Soviet government was *de jure* or *de facto* made no difference: either way, *"the government in question acquires the right to be treated by the recognizing state as an independent sovereign state"*.[20]

[19] CA Judgment at [77]-[90], [119]-[125].

[20] Per Warrington LJ at 551; see also per Bankes LJ at 543.

49. Distinguished writers in the field of international law have disagreed for decades about the precise meaning of the terms *de jure* and *de facto* in the context of recognition.[21] Accordingly, it cannot be said that Bernard's definition of *de jure* (writing in 1870 and adopted by the Court of Appeal in 1921 in *Luther v Sagor*) reflects a settled usage in the writings of international law. Nor can it be said that the terms *de jure* and *de facto* have any settled or accepted meaning in the contemporary practice of States, particularly in light of the abandonment by HMG and many other States of a practice of recognising foreign governments at all.

50. As to the contrasting definition of *de jure* in *Oppenheim*, this was quoted by the Court of Appeal at [80], including the observation that the terms *de jure* and *de facto* are *"elliptical"* and *"probably not capable of literal analysis"*. The editors suggest (in footnote 2) that in terms of the *"ius"* to which *de jure* refers it is *"probably the constitutional law of the state or government which is of principal importance"*.[22] But that too is at least open to question and hard to reconcile with *de jure* recognition being afforded, albeit after a period of *de facto* recognition, to governments who had first assumed control through revolution (*e.g.* the Soviet Government during the Russian Revolution[23]) or armed invasion (*e.g.* the Italian

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[21] See generally Lauterpacht *Recognition in International Law* (CUP, 1947) at 329-348; Chen *The International Law of Recognition* (Stevens & Sons, 1951) at 270-300; Brierly *The Law of Nations* (6th ed, OUP, 1963) at 146-148; Peterson *Recognition of Governments* (Macmillan Press, 1997) at 92-98 and his conclusion (at 100): *"The attempt to create two distinct degrees of recognition as a government by distinguishing between de facto and de jure forms represented one solution to the problem of indicating that a new regime effectively ruled its state without appearing to endorse its political orientations […] However it collapsed under its own internal confusions. Advocates never managed to agreed on whether the terms 'de facto' and 'de jure' qualified the status being accepted or the recognition being accorded; nor did they agree on the effects of according 'de facto' rather than 'de jure' recognition […] As the twentieth century wore on, governments either returned to treating recognition of governments as a binary distinction between recognized governments and unrecognized regimes or else sought to end the discussion by abandoning recognition of governments entirely."*

[22] Although the same passage in *Oppenheim* also states that *"States granting recognition often distinguish between de jure and de facto recognition"* this was an observation made (in 1992) in relation to international state practice rather than the particular judicial context with which the present appeal is concerned. Moreover, the footnote in support of this assertion contains no reference to any materials post-dating the 1980 Policy. See further in this regard the submissions made at [72] below.

[23] The Soviet Government was first recognised by HMG in 1921 as the *de facto* government of Russia (see *Luther v Sagor*) and then in 1924 as the *de jure* government (see *Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] AC 112).

Government during its invasion and occupation of Abyssinia in 1935-1939[24]).

51. As a matter of English policy and practice in relation to these concepts, there is no recent equivalent of the Herbert Morrison definition of these terms, as set out in HMG's 1951 policy of recognition.[25] But it is notable that in *Carl Zeiss*, the House of Lords was, at least in 1966, prepared to have regard to the Morrison statement when interpreting the term *de jure* in the relevant certificates it was considering: see *Carl Zeiss* per Lord Reid at 906E-G, per Lord Wilberforce at 958A-C and per Lord Hodson at 925C-D.

52. The only two instances of HMG having ever used the terms *de facto* and *de jure* to describe concurrent recognition of two different authorities date from the 1930s where the terms were used expressly in formal statements of recognition issued by HMG to describe situations where the *de facto* regime had usurped power against the will of the *de jure* sovereign, namely:

    (1) during Italy's invasion and occupation of Ethiopia between 1935-1939: *Bank of Ethiopia v National Bank of Egypt* [1937] Ch 513; *Haile Selassie v Cable and Wireless (No 2)* [1939] Ch 182; and

    (2) during the Spanish Civil War between 1936-1939: *Banco de Bilbao v Sancha* [1938] 2 KB 176; *The Arantzazu Mendi* (supra).

53. These 1930s statements of concurrent, divergent recognition used careful and explicit language. There has never been a case involving the 'one voice' doctrine in which it was found that in a judicial context HMG expressly recognised X *de jure* whilst impliedly recognising Y *de facto*. Prior to the Court of Appeal's decision in this case, there had never been a case where such an outcome was contemplated as possible. Indeed, there is no decision based on an implied *recognition* of any

[24] The Italian Government was first recognised by HMG in 1936 as the *de facto* government of the area of Abyssinia then under its control (see *Bank of Ethiopia v National Bank of Egypt* [1936] Ch 513) and then in 1938 HMG recognised the King of Italy as the *de jure* Emperor of Ethiopia (see *Haile Selassie v Cable and Wireless Ltd (No 2)* [1939] Ch 182).

[25] As quoted in the CA Judgment at [78], Hansard (HC Debates), vol 485, 21 March 1951, cols 2410-2411.

foreign government or ruler (let alone by reference to extraneous material) as opposed to a process leading to their *identification*. Moreover, the dicta of Hobhouse and Mance JJ considered at [30] and [34] above reject any such approach.

54. In the light of HMG's 1980 Policy of non-recognition, the Court of Appeal erred in concluding that the FCO Statement in this case may have re-introduced into HMG recognition policy the concepts of *de jure* and *de facto* recognition. Any policy need by HMG to signal approval or disapproval of a particular electoral process or outcome could be limited to a statement merely expressing political support or disapproval of a particular leader or government and need not use the legally significant language of recognition at all, let alone in a judicial context where the 'one voice' doctrine would apply.

55. Moreover, the parallel statements of recognition in the 1930s cases reflected a continuing recognition of the established sovereign status of (respectively) the Emperor Haile Selassie and the Spanish Republican government. The label *de jure* did not, even then, therefore denote some mere entitlement to possess the powers of sovereignty, but no actual possession. On the contrary: Emperor Haile Selassie's recognised status as the *de jure* monarch was the basis of Bennett J's decision at first instance leading to the conclusion that he continued to enjoy the actual right to recover a debt in this country;[26] and the Spanish Republican government remained the recognised *de jure* government of the whole of Spain and, as such, in possession of substantial powers of sovereignty.[27]

56. Given this history and range of views as to the concept of *de jure* recognition, it was inappropriate for the Court of Appeal to place such weight on a term (*de jure*) which was not in fact used in the FCO Statement under consideration at all, and not of any obvious utility since the 1980 Policy. The Court of Appeal then compounded that error by applying a meaning of the term *de jure* which was inconsistent with the prior 1951 FCO policy statement (and adopted in *Carl Zeiss*, the most recent

[26] CA Judgment at [89], referring to *Haile Selassie v Cable and Wireless (No 2)* [1939] Ch 182.

[27] CA Judgment at [82].

decision of the House of Lords to consider the term) in favour of a meaning identified by reference to certain writers of international law in the earlier Court of Appeal case of *Luther v Sagor* from 1921, a case which concerned the status of a government not a President.

(8) The Court of Appeal's four errors

57. As just indicated, this approach to *de jure* recognition was among the four errors which the Guaidó Board submits were made by the Court of Appeal when interpreting the FCO Statement, and summarised at [13] above. Each of these errors is addressed in turn.

(a) Natural and ordinary meaning of HMG's words

58. The Court of Appeal was wrong to treat anything about the language in the FCO Statement as *"ambiguous"* or *"less than unequivocal"*. The Guaidó Board submits that Teare J was correct to find that the Statement was entirely clear for the reasons already set out at [9] above.

59. It is true, as the Court of Appeal observed, that the FCO *"might have said in terms that HMG did not recognise Mr Maduro in any capacity, but it did not"*.[28] However, that cannot render ambiguous what was said about Mr Guaidó and what was not said about Mr Maduro. After all, the FCO had been asked whom it did recognise and it gave the answer that it recognised Mr Guaidó and said nothing about any recognition of Mr Maduro. Moreover, the 1980 Policy of non-recognition to which the FCO Statement referred made it unnecessary for HMG to say anything about Mr Maduro. In the absence of an express recognition by way of departure from the 1980 Policy of non-recognition, Mr Maduro was not recognised by HMG at all (and the Court of Appeal was absolutely right to say that the pre-existing position was

[28] CA Judgment at [123].

more accurately described not in terms of *"recognition"* but of *"dealings"*[29]).

60. Even if the references in the FCO Statement to oppression, kleptocratic conduct and continued violation of human rights on the part of the Maduro regime were taken as some acknowledgment of ongoing power and control in Venezuela, this would not render the Statement ambiguous in relation to what was said about interim President Guaidó. These references should, instead, be most naturally read as providing an explanation for HMG's decision to recognise Mr Guaidó. In any event, no matter how substantial the control exercised by the Maduro regime, it could never mean that Mr Maduro himself was recognised by HMG as the *de facto* President of Venezuela in the absence of an express statement to that effect by way of departure from the 1980 Policy of non-recognition. Finally, as already pointed out at [9(10)] above, the use of the term *"regime"* takes the matter no further.

61. The concept of control is, in any event, more apt for an analysis of the identification of a government, as indicated in the *Somalia v Woodhouse* criteria: see [31] above. But as Teare J pointed out at first instance, this was to shoot at the wrong target.[30] The material question for the Court was not the existence or identity of any government of Venezuela but, rather, the identity of the President of Venezuela. That question was unequivocally answered by the FCO Statement of recognition of Mr Guaidó for the reasons set out above.

62. Although not made explicit in the Judgment, and not featuring in its core conclusion and reasoning at [123], it appears from the answer given to the preliminary issue by the Court of Appeal (at [126]) that some of the ambiguity perceived by the Court of Appeal may have turned upon the use of the word *"constitutional"* which term the Court appears to have equated with *de jure* in the so-called *Luther v Sagor* sense of being possibly *"deprived"* of the powers of sovereignty which he ought to possess, which in its turn might allow for a possibility of a 1930s-style divergent

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[29] CA Judgment at [123(1)]. Conversely, and by virtue of the 1980 Policy of non-recognition, it was not accurate for Teare J to infer at [33] of his Judgment that Mr Maduro was previously *"recognised"*. Of course, the distinction between 'recognising' a foreign president and 'dealing' with one in that capacity makes no practical difference whilst there is no challenge to their status.

[30] Teare J's Judgment at [36].

de jure/de facto recognition, albeit here by implication rather than express statement.

63. The Court of Appeal appears to have contemplated that by using the word *"constitutional"* the FCO might have meant by its Statement that HMG only recognised Mr Guaidó in the *Luther v Sagor* sense of the term *de jure*, and that it might actually (impliedly) recognise Mr Maduro *de facto*, despite the fact that it did not use the verb 'recognise' in relation to him (and indeed had never done so). As a matter of language, this places a very great deal more weight upon *"constitutional"* than that word could possibly bear on its natural and ordinary meaning.

64. If HMG had wished to set up a dichotomy between *de jure* and *de facto* or between 'entitled to exercise' vs 'actually exercising' then it could of course have done so by using far clearer words. If HMG intended to do no more than condemn Mr Maduro and urge a full transfer of power to Mr Guaidó, then it need not have used the verb 'recognise' at all. In these circumstances, no reasonable reader of the FCO Statement would understand HMG to be using the word *"constitutional"* as coded language for *de jure* recognition in contra-distinction to the *de facto* recognition of someone else entirely.

65. Such an interpretation becomes yet more unrealistic once regard is had to the lack of any settled meaning of the term *de jure* and the fact that in the most recent HMG 1951 policy statement and the most recent House of Lords decision to consider the term it was not used in the *Luther v Sagor* sense at all. The decision to attach the label *"constitutional"* to the statement of recognition is, instead, far more readily explicable, not only as an accurate description of Mr Guaidó's status as perceived by HMG, but also to explain why HMG recognised him. As already submitted at [9(7)] above, the use of the term should have been treated as reinforcing and strengthening the recognition rather than qualifying it.

66. Having regard to the questions posed, in the context of specific legal proceedings raising questions of authority, the ordinary meaning of the words used (and not used) in the FCO Statement was accordingly entirely clear. There was no ambiguity

and they were a conclusive statement of the recognition of Mr Guaidó's sovereign status as the interim President of Venezuela.

(b) Extrinsic evidence

67. The Court of Appeal's second error was to interpret the FCO Statement by reference to extrinsic evidence, including dealings 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.

68. None of these matters was mentioned at all in the FCO Statement. They were nevertheless used in the Court of Appeal's central reasoning to suggest doubt about the meaning of the words, and to introduce a perceived ambiguity or equivocation when none was apparent on the face of the FCO Statement. That was an error of law. It was contrary to the approach set out in *Kelantan*, *Carl Zeiss* and *Gur*. It also represented a significant extension beyond the approach in *Breish* to use such extrinsic matters not only for the purposes of determining *whether* there had been a statement of recognition, but for the purposes of *interpreting* such a statement and by allowing consideration of matters not referred to in the relevant statement at all.

69. Once these extrinsic facts are put to one side, the meaning of the FCO Statement remains clear. Indeed, it is apparent from the CA's Judgment at [123] that it was what it referred to as this wider *"context"* which the Court of Appeal considered rendered the FCO Statement *"ambiguous, or at any rate less than unequivocal"*. As further explained at [75] below, that ultimate conclusion was also flawed even having regard to these wider matters of context.

(c) Implied recognition

70. The Court of Appeal's third error was to posit that Mr Maduro might somehow be *impliedly* recognised by HMG as the *de facto* President. As noted above, the idea of the Court in a municipal judicial context embarking on a process of inferring recognition from HMG's conduct was rejected by Hobhouse J in *Somalia v Woodhouse* and by Mance J in *Kuwait Airways*. Where a statement of recognition has been made, it must be interpreted, and where no statement of recognition is

made, the issue becomes one of identification of the relevant entity or person by the Court, rather than whether HMG has recognised the status of that entity or person.

71. As a matter of principle and practicality, the theory of implied recognition provides an unsound basis for an English court to determine whether a foreign government or president has been recognised by HMG:

(1) First, and most fundamentally, it would conflict with HMG's 1980 Policy of non-recognition and with the 'one voice' doctrine. Since the executive's clear general policy is not to recognise governments or presidents, the judiciary would be speaking with a different voice if it were to hold that HMG might have, or has in fact, impliedly exercised a prerogative of recognition when it has not done so expressly and has made it clear that as a general rule it does not do so. There is in this context no need to analyse diplomatic relations or other dealings as a form of implied recognition: they are just another aspect of HMG's conduct of foreign affairs, carried out under the Royal prerogative but separate and distinct from the prerogative of recognition. Indeed, for a court to infer recognition would be to trespass into an area which is constitutionally within the exclusive competence of the executive.

(2) Second, the theory inevitably involves scrutiny of the executive's conduct of foreign affairs, an area which the judiciary is generally reluctant to review in any event: see *CC* at [114] per Lloyd-Jones LJ; *Pahang* at [16] per Maurice Kay LJ. And although a *Somalia v Woodhouse* inquiry involves consideration of government-to-government dealings[31], its purpose is not to divine HMG's intention, but to consider objectively whether such dealings, considered alongside other factors in the inquiry, indicate that a foreign government exists. Such a task is altogether simpler, less sensitive and less prone to error than an attempt by the Court to make findings of fact about HMG's intention and state of mind (however that might be ascertained or proved). These are precisely the sorts of practical difficulties which Hobhouse J had in mind in

[31] As to the fact of which HMG may provide information which may be conclusive: see *e.g. Secretary of State for the Home Department v CC* [2012] EWHC 2837 (Admin), [2013] 1 WLR 2171 at [123]; *Somalia v Woodhouse* at 65G-H.

Somalia v Woodhouse and which underscore the importance of the Court distinguishing between questions of recognition (by reference to the 'one voice' doctrine) and identification absent recognition.

72. Whilst there is some support for a concept of implied recognition on the international plane in international law textbooks,[32] this view is not shared by all writers.[33] Importantly, the court is here of course applying English domestic law—the 'one voice' doctrine—in a specific municipal judicial context. But even if international law were relevant, it is far from clear that the concept of implied recognition of foreign governments or presidents could be said to be a rule of customary international law (*i.e.* a rule evidenced by widespread and uniform State practice accompanied by *opinio juris*) or a general principle of international law:

    (1) As Sir Hersch Lauterpacht pointed out in 1947: *"the doctrine of implied recognition has been more conspicuous in the writings of authors than in the practice of States"*.[34]

    (2) The contemporary practice of States on the recognition of foreign governments varies enormously and often turns on policy rather than legal considerations: see *R v TRA* [2019] UKSC 51, [2019] 3 WLR 1073 at [58]. The UK's 1980 Policy of non-recognition is not unique. The same policy is adopted by many other countries (as the 1980 Policy itself makes clear).

73. Furthermore even if the concept of implied recognition could be said to be a rule of customary international law or a general principle of international law, it would not

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[32] The quotation from *Oppenheim* cited in the CA Judgment at [71] is but one example. See also Crawford *Brownlie's Principles of Public International Law* (OUP, 9th ed, 2019) at 139-140 but noting that *"different considerations ought to apply to different aspects of recognition, yet doctrine tends to generalize about the subject"*.

[33] See McLachlan *Foreign Relations Law* (CUP, 2015) at [10.94] (*"The abandonment of a general policy of express acts of recognition of governments makes nonsense of the notion that the courts must nevertheless proceed to determine questions of representation by divining recognition from the nature of the executive's diplomatic dealings."*) See also Lauterpacht, H., *Recognition in International Law* (CUP, 1947) at 395-396 (noting that a general policy of non-recognition *"has at least the effect of ruling out implied recognition"* — an observation made well before HMG's 1980 Policy of non-recognition but nonetheless applicable following the 1980 Policy.)

[34] Lauterpacht, H., *Recognition in International Law* (CUP, 1947) at 370.

automatically form part of English domestic law. The constitutional and practical objections outlined at [71] above provide compelling reasons why such a concept should form no part of English law.

74. The Guaidó Board's position, therefore, is that in a domestic judicial context there is no scope for any concept of implied recognition of the kind contemplated by the Court of Appeal. If the existence or identity of a government or President is the subject of an express statement from HMG, that is determinative. If there is no such statement and the existence or identity of a government or president is disputed, no doubt the evidence of HMG's dealings with such bodies or individuals will be important in a *Somalia v Woodhouse* type inquiry. But that has nothing at all to do with recognition because, as Hobhouse J explained, recognition is no longer the determinative criterion unless HMG chooses to depart from the 1980 Policy.

(d) The five factors do not render the FCO Statement ambiguous

75. The need to engage with the Court of Appeal's final error only arises if, contrary the Guaidó Board's case above, it were permissible to have regard to facts beyond the FCO Statement and if English law embraces a concept of implied recognition of the kind described above notwithstanding the 1980 Policy. Even on this basis, however, the Court of Appeal erred by concluding that the FCO Statement left open the possibility of an implied *de facto* recognition of Mr Maduro. None of the five factors identified in the CA's Judgment at [123] justified this conclusion, particularly when regard is had to each of the positive factors pointing towards unequivocal recognition set out at paragraphs [9] and [58]-[66] above. Each of the five factors relied upon by the Court of Appeal is addressed in turn.

76. As to the factor identified at [123(1)] and 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"*:

(1) Any dealings with Mr Maduro prior to the watershed date of 4 February 2019 were overtaken by HMG's statement of recognition of a new President.

(2) There was no pre-existing *"recognition"* of Mr Maduro — there were merely

"dealings".

(3) The fact that the 4 February 2019 statement represented a significant change of position reinforced the strength of the recognition afforded to Mr Guaidó rather than the contrary.

77. As to the factor at [123(2)] and the suggested *"acknowledgment in the statement that the Maduro regime continues to exercise substantial, albeit 'illegitimate' control over the people of Venezuela"*:

(1) The FCO Statement said nothing at all about Mr Maduro as an individual, let alone his status, either in isolation, or by way of qualification to what had already been said about Mr Guaidó.

(2) The statement did not in fact use the word *"control"* at all either, let alone in any governmental sense.

(3) Any notion of *"control"* might have been relevant if the Court were concerned with identification of a government, as opposed to recognition of a President, and a case involving application of the 1980 Policy but it was not so concerned. The Statement also did not purport to address the issue of the government of Venezuela and focused only on the question of the President.

(4) The word *"regime"* carried with it no necessary connotation of governmental status.

(5) The condemnation of an illegitimate regime exercising influence and power in a territory through oppression sits uncomfortably with any such recognition, and would run counter to the idea articulated in *Breish* that to treat an authority as *"legitimate"* is indicative of *de facto* recognition, making it difficult to see a label of illegitimacy as indicative of such a state of affairs.

(6) The references to oppression, corruption and human rights abuses were far more readily explicable as providing the rationale for the recognition being afforded to Mr Guaidó than as an indication of some qualification of that recognition, and some residual implied recognition of Mr Maduro.

78. As to the issue of diplomatic relations and accreditation addressed at [123(3)]:

(1) Both the UK and Venezuelan ambassadors were accredited long *before* the recognition of Mr Guaidó and it is well established that, even on the international plane, recognition is not to be inferred from the mere retention and maintenance (as distinguished from the fresh appointment) of diplomatic representatives for an interim period.[35]

(2) This case is concerned with such a period during which an *"interim"* President has been recognised pending elections, as is evident from the FCO Statement itself and also by the content of the correspondence of Sir Alan Duncan, the Minister of State, on 25 February 2019 and addressed further at [83] below.

(3) HMG's decision to maintain such relations and conduct such dealings as it has, including through the UK Ambassador in Caracas, is much more readily explained by a practical desire not to impede the work of the British Embassy in Caracas in relation to British interests and nationals in Venezuela.[36] The threat of oppression and abuse by those associated with Mr Maduro on the ground in Venezuela may well justify, at a policy level, a decision not to insist on the appointment of a new Ambassador to this country, but that is in no way sufficient to qualify the express recognition afforded to Mr Guaidó in the FCO Statement, and merely illustrates the difficulties involved in going beyond the formal categorical statement and seeking to draw inferences by reference to extraneous matters not referred to in an executive statement.

(4) The letter from Robin Knowles J which preceded the FCO Statement had specifically asked if the Foreign Secretary was able to explain when any recognition commenced. In that regard, having provided the express recognition of Mr Guaidó that it did, the FCO Statement referred back to 4

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[35] Lauterpacht, H., *Recognition in International Law* (CUP, 1947) at 405; Jennings and Watts *Oppenheim's International Law* Vol 1 (OUP, 9th ed, 2008) at §50.

[36] After all, this is one of the functions of a diplomatic mission under Article 3(1)(b) of the Vienna Convention on Diplomatic Relations 1961.

February 2019 by stating that HMG's position remained as then set out. This further illustrates the irrelevance of any conduct relating to diplomatic relations or dealings which had, or had not, occurred in the meantime.

(5) The approach adopted in *Breish* referred to at [45] above indicates that the accreditation of an Ambassador does not, in and of itself, establish the recognition of a government (or, for that matter, a foreign president), particularly in the context of a statement such as that involved in the present case which contains no reference whatever to diplomatic relations or dealings with government appointees, let alone with Mr Maduro as an individual.

79. Similar points may be made in relation to the factor identified at [123(4)]:

(1) The failure to accord diplomatic status to Mr Guaidó's (former) Official Representative in London, Ms Neumann, was not referred to in the FCO Statement and did not render ambiguous or qualify the express recognition of Mr Guaidó which it did include.

(2) The single media article relied upon by the Maduro Board in this regard, and referring to the UK Ambassador to Venezuela (Mr Soper), indicated only that in March 2019 it had been made clear to Ms Neumann that while she would be received in London it would not be as an ambassador in circumstances where *"[Mr] Soper's Embassy was doing good work in Venezuela and they had no appetite for reciprocity"*.[37]

(3) This was, again, entirely explicable as, and indicative of, a practical acknowledgement of the risk that those associated with Mr Maduro in Venezuela could prevent or impede the work being done by HMG in Venezuela, including through abuse and oppression, but there was no basis for treating it as any more than that.

(4) As pointed out at [78(4)] above, the FCO Statement confirmed that recognition had commenced in February 2019, and that the position

[37] **[79/910]**.

articulated then remained the same in March 2020, so further illustrating the irrelevance of the events relating to Ms Neumann in March 2019.

80. Finally, as to the suggested *"established existence of a distinction between recognition de jure (i.e. that a person is entitled to a particular status) and de facto (i.e. that he does in fact exercise the powers that go with that status)"* addressed at [123(5)], this too provided no adequate basis for qualifying the FCO Statement for the reasons already addressed above:

(1) The FCO Statement used no such terms.

(2) In the light of the 1980 Policy of non-recognition, these terms have no useful role to play in a judicial context today.

(3) Implied *de facto* recognition in a domestic judicial context is by no means *"established"*, and has instead been rejected in the only two first instance decisions to consider it (*Somalia v Woodhouse* and *Kuwait Airways*).

(4) Concurrent, divergent *de facto* and *de jure* recognition is not *"established"* in a judicial context either, but is confined to two isolated occasions in the 1930s.

(5) The particular notion of *de jure* recognition contemplated by the Court of Appeal as possibly applicable in the present case: (i) is based upon a definition of the term *de jure* as a matter of international law (propounded by writers in 1870 and 1916) which does not reflect a settled usage in the writings of international law or the contemporary practice of States; and (ii) is inconsistent with the most recent (albeit dated) HMG 1951 policy statement as to the meaning of the term, as well as with the most recent House of Lords authority as to its meaning (*Carl Zeiss*).

(6) To interpret an executive certificate as expressly recognising only the entitlement of an individual to sovereign status, whilst leaving open the possibility that another individual is impliedly recognised as the person in fact enjoying such status, would be entirely unprecedented.

81. Moreover, if (contrary to what the Guaidó Board says is the proper approach) regard were had to extrinsic evidence, the Court of Appeal ought to have attached appropriate weight to the evidence which, on analysis, further supported the Guaidó Board's interpretation of an unqualified recognition of a single President only, and made it clear that there was no ambiguity in this regard.

82. Perhaps most potent was the fact that, prior to the Foreign Secretary's 4 February 2019 statement referenced in the FCO Statement, and providing its immediate context, Mr Maduro had been given an explicit ultimatum to call fresh Presidential elections within eight days, in the absence of which the UK and EU partners would recognise Mr Guaidó as interim President *"in charge of the transition back to democracy"* (see the CA Judgment at [20][38]):

    (1) That would have been an empty threat if, upon expiry of the deadline, HMG would simply recognise Mr Maduro as *de facto* President, and Mr Guaidó as someone who *ought* to be, or who was entitled to be, President, as the Court of Appeal appears to have contemplated.

    (2) To analyse the recognition as being of Mr Guaidó's mere entitlement would also be nonsensical given that the National Assembly and Mr Guaidó had already announced that Mr Guaidó was the Interim President of Venezuela on 15 January 2019 (CA Judgment at [19]).

    (3) HMG did not immediately recognise him in that capacity, but on 26 January 2019 gave Mr Maduro the opportunity to call fresh Presidential elections to avert such recognition. If Mr Maduro had taken that opportunity then HMG would have continued to deal with him as President. But since he did not do so, the statement of 4 February 2019 was of the recognition of Mr Guaidó's sovereign status *then* as interim President, as distinct from a mere constitutional entitlement, which status had been asserted by him since 15 January 2019, and which had informed the 26 January 2019 ultimatum.

    (4) The terms of the ultimatum also contemplated that Mr Guaidó would have

[38] See **[53/832]**; **[54/834]**; and **[59/859]**.

real responsibility, and real powers, if and when it came into effect (as it then did). He would, as the warning indicated, be treated as *"in charge of the transition back to democracy"* (emphasis added).

83. Publicly available exchanges between Tom Tugendhat MP, Chair of the House of Commons Select Committee on Foreign Affairs, and Sir Alan Duncan MP, Minister of State at the FCO for Europe and the Americas, are also flatly inconsistent with the idea that Mr Guaidó's recognition should be confined to *de jure* recognition in the *Luther v Sagor* sense, or with implied *de facto* recognition of Mr Maduro as President after 4 February 2019.[39] Faced with an explicit request to explain the legal basis of the recognition, if HMG's stance had been premised upon a 'split' recognition (whereby it recognised no more than Mr Guaidó's entitlement whilst Mr Maduro was simultaneously recognised as the person actually exercising the powers of the Presidency) Sir Alan Duncan would have needed to say so. Instead:

(1) He described the 4 February 2019 statement as *"recognising Juan Guaidó as interim constitutional President of Venezuela"* (emphasis added);

(2) He explained that this was a *"case specific exception to [HMG's] continuing policy of recognising States not Governments"*;

(3) He referred to Mr Guaidó and the National Assembly as *"acting consistent with the constitution"* (emphasis added); and

(4) He stated that Mr Guaidó was *"assuming that role [as the interim President]"* (emphasis added).

84. None of this was consistent with the position of HMG being merely one of approval indicating that Mr Guaidó was merely entitled to act as President, or ought to be President. It was formally recognising his status and the fact that he was so acting, notwithstanding the very significant obstacles he faced in confronting a regime engaged in systematic abuses of human rights and oppression.

[39] See **[58/858]**; and **[59/859-860]**.

85. Moreover, whereas the Maduro Board had presented the issue of diplomatic relations as clear evidence of 'implied recognition' of a '*de facto*' President, even leaving aside the difficulties with such concepts already addressed, this was untenable when the further diplomatic material before the Court included:

(1) a formal Note of Protest from Mr Maduro's Foreign Minister (Jorge Arreaza) to the UK Chargé d'Affaires dated 14 May 2020 which complains not only about HMG's refusal to acknowledge Mr Maduro as *"the legitimate President"* but also that the United Kingdom's Prime Minister—in what was perceived by Mr Arreaza to be a *"hostile action"*—had received Mr Guaidó at No. 10 Downing Street; there was no suggestion here that Mr Maduro considered that he had been impliedly recognised as *de facto* President;[40] and

(2) a letter sent by the British Embassy to Mr Guaidó on 2 July 2020 (addressed to Mr Guaidó in his capacity as Interim Constitutional President of the Republic of Venezuela) enclosing a message of well-wishing from Her Majesty the Queen to the people of Venezuela on the occasion of their Independence Day.[41]

86. Finally in this regard, HMG's publicly stated position in relation to Mr Guaidó's status as President remains unequivocal and entirely consistent with that first articulated in February 2019. On 26 April 2021, a statement issued by the Department of Trade and Industry stated that:[42]

> *"On 4 February [2019] the UK recognised Juan Guaidó, President of the National Assembly, as interim constitutional President of Venezuela. As interim constitutional President, Juan Guaidó is responsible for organising free and fair elections in the country. On 6 December 2020, fraudulent legislative elections were held where the ruling party, Maduro's PSUV, claimed over 90% of the seats. The UK does not recognise the fraudulently elected parliament and continues to recognise the National Assembly elected in 2015, and Juan Guaidó as interim constitutional President."*

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40 **[86/979-981]**.

41 **[90/987-988]**.

42 **[114/1273]**. The statement included an obvious typographical error referring to 2020, not 2019.

(9) Conclusion in relation to Issue 1

87. For all of these reasons, the Supreme Court should conclude that the Court of Appeal was wrong to interpret HMG's express statement of recognition of interim President Guaidó as leaving open the possibility of a continuing implied recognition of Mr Maduro as President. The Supreme Court should reinstate the answer to the Recognition Issue given by Teare J in his Judgment at [42].

V. ISSUE 2: PRESIDENT GUAIDÓ'S ACTS SHOULD NOT BE TREATED AS NULLITIES

88. Issue 2 does not arise if the Guaidó Board succeeds on Issue 1. If the Guaidó Board does not succeed on Issue 1, Issue 2 arises because the Court of Appeal considered it was important to know whether HMG recognised Mr Maduro as President for any purpose before deciding whether Mr Guaidó's acts of appointment were to be regarded in an English court as acts of sovereign authority or as mere nullities.[43]

89. The premise of any such inquiry is that there has been a formal recognition of Mr Guaidó by HMG at least as the person entitled to be the President of Venezuela.[44] The Maduro Board's argument is that if it can establish that HMG has recognised Mr Maduro as the *de facto* President then it is only his acts which matter in an English Court and no account can be taken of the acts of interim President Guaidó. The argument depends entirely on establishing a recognition by HMG of Mr Maduro: mere proof of *de facto* control by Mr Maduro within Venezuela without any accompanying recognition of him by HMG could not detract from the express recognition of the sovereign status of interim President Guaidó.

90. The Court of Appeal concluded that whether there was any such rival recognition of Mr Maduro would be established either by an express clarification from the FCO, or if the FCO declined to clarify, then by a trial on the facts of whether there had

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[43] CA Judgment at [125] (*"if the true position is that Mr Maduro is recognised as President de facto, English law is clear that the acts of a de jure ruler (in the sense of a ruler who is entitled to be so regarded) have to be treated as a nullity"*). As recorded of the Judgment at [54(1)] the Maduro Board has also conceded that the FCO Statement is at least recognition of Mr Guaidó as head of state *de jure*.

[44] CA Judgment at [112].

been implied recognition.[45] The Guaidó Board contends on Issue 2 that any such further steps are unnecessary and inappropriate because even if it is assumed in the Maduro Board's favour (for the purposes only of this appeal) that Mr Maduro is recognised by HMG as a *de facto* President, this would not have the legal consequence that Mr Guaidó's acts in his capacity as *de jure* President are treated as nullities. The Guaidó Board's argument rests on three simple propositions:

(1) Mr Guaidó is on this hypothesis at least the person entitled to be regarded as the President.

(2) Mr Guaidó has in fact taken steps within Venezuela in his presidential capacity to appoint individuals with rights of representation over the BCV.

(3) Mr Guaidó has the practical power to have his status and acts recognised insofar as they relate to BCV assets in London, because his appointees are before the English court, which has undisputed jurisdiction to determine the dispute before it in relation to the BCV's assets held here.

91. The Court of Appeal was correct to point out (at [90]) that the Guaidó Board's position was not on all fours with that considered by Bennett J in *Haile Selassie v Cable & Wireless (No 2)* [1939] 1 Ch 182 because the Guaidó Board's claim derived from the steps taken by interim President Guaidó within Venezuela, rather than as a direct claim to ownership in his name. Nevertheless, Bennett J's underlying logic is equally applicable.

92. Bennett J reasoned (at 191) that when Clauson J had stated in *Bank of Ethiopia v National Bank of Egypt* [1937] 1 Ch 513 that the *de jure* monarch's rights could not be taken into account in any way, this was predicated upon the monarch's rights being only *"theoretical"* because *"ex hypothesi he has no practical power of enforcing them"*. That was a reference to enforcement within the territory from which the *de jure* monarch had fled. By contrast, where the recognised *de jure* monarch was not seeking to enforce rights in his own country, but instead before an English court, Bennett J saw no obstacle to such a claim. As Bennett J put it,

[45] CA Judgment at [128]-[129].

where property in England was concerned, *"if the plaintiff has a title, that title can be enforced".* In other words, rights were no longer *"theoretical"* but real when the recognised sovereign, or those deriving their authority from him, had the *"practical power"* to enforce them.

93. Although the Court of Appeal in *Haile Selassie* left open the correctness of Bennett J's approach (it being unnecessary to decide because the Italian government was by then recognised *de jure*) the Guaidó Board contends that it was correct on the facts before him, and that the rationale applies equally to the enforcement of the rights of the Guaidó Board to give instructions in relation to the BCV's assets within this jurisdiction.

94. The two decisions of Clauson J/LJ in *Bank of Ethiopia* and *Banco de Bilbao v Sancha* [1938] 2 KB 176 as referred to in the CA Judgment at [85]-[90] and [125] are distinguishable on their facts because the *de jure* monarch and *de jure* government had been driven out of the relevant territory by, respectively, an armed invasion and civil war. They were thus in exile (with their sovereignty having been *"oust[ed]"*[46]) when they purported to issue decrees affecting banks which were now under the control of the *de facto* governments as formally recognised by HMG.

95. There is a significant difference between a government or ruler in exile purporting to govern from outside a territory in which the sovereignty of a new government has been recognised, and the present case where President Guaidó has remained in Venezuela throughout and has made official appointments of the Guaidó Board and of a Special Attorney General from the Legislative Palace. The Court of Appeal was thus wrong at [88] to say that the principles decided in *Banco de Bilbao* and *Bank of Ethiopia* operated to nullify acts by the *de jure* rival *"within the territory"*. In both those cases, the acts had taken place outside the territory. Such distinctions are important, given the generally territorial limitation of sovereign acts.

96. It is correct that in *Carl Zeiss* (at 905) Lord Reid cited Clauson LJ's judgment in *Banco de Bilbao* with apparent approval. However, there was no consideration of

[46] The term used by Lord Oaksey in *Gdynia v Boguslawski* [1953] AC 11 at 39.

attempted sovereign acts from exile and *Banco de Bilbao* was cited only as an illustration of *"where subjects of an existing sovereign have rebelled and have succeeded in gaining control of a part of the old sovereign's dominions"* (at 904). This is not this case. As the Court of Appeal observed at [87] caution is also required in relation to the approval because *Carl Zeiss* was using the concept of *de jure* in a different sense to that in which it had been used in *Banco de Bilbao v Sancha*.

97. Alternatively, if *Banco de Bilbao* and *Bank of Ethiopia* do purport to go so far as to deal with the acts undertaken by a *de jure* ruler or government from within the territory, the Supreme Court should now overrule those decisions as being, in that respect, wrong and outmoded. The decisions were viewed unenthusiastically by Sir Hersch Lauterpacht[47] and by Lord McNair and Sir Arthur Watts.[48] Francis Mann went further, arguing that in the context of rival claims to control a foreign corporation, *"de jure recognition should have a substantially higher status and effect than mere de facto recognition"*. He also cautioned that both decisions should be viewed in the light of the *"very special attitudes of mind which prevailed in England in 1937 and 1938, but which should not rule all subsequent generations."*[49]

98. The change in approach since the 1930s is well illustrated by the contrast between Italy's armed invasion of Abyssinia (with HMG recognising the Italian government first *de facto* and then *de jure*) and Iraq's armed invasion of Kuwait in 1990-1991, the UN Security Council's response to which was to declare that Iraq had usurped the authority of the legitimate Government of Kuwait and to call upon all Member States to take measures to restore the legitimate Government and not to recognise any regime set up by the occupying power. This in turn informed HMG's decision to state explicitly in *Kuwait Airways* that it had not at any time recognised Iraqi occupation or control over the territory of Kuwait. Whereas the 1930s view was that the Italian government was entitled to recognition (once it had demonstrated the characteristics of a government in *de facto* control of Abyssinia) by the 1990s

[47] Lauterpacht, H., *Recognition in International Law* (CUP, 1947) at 284-288.

[48] McNair and Watts *The Legal Effects of War* (CUP, 1966) at 396-402.

[49] Mann (1972) 88 LQR 57 at 77-79.

Iraq's gross breach of international law by invading another sovereign State was the basis to withhold recognition.

99. *British Arab Commercial Bank plc v The National Transitional Council of the State of Libya* [2011] EWHC 2274 (Comm) also illustrates the use of recognition as an instrument of foreign policy to promote democracy and human rights. During the Libyan Civil War, HMG recognised the National Transitional Council (*"and not the illegitimate Qadhafi regime"*) as the *"sole legitimate governing authority of Libya"* [14]. Blair J treated the Foreign Secretary's certificate to this effect as conclusive, which thereby gave the NTC the ability to control bank accounts held in this jurisdiction belonging to the Libyan Embassy. The Foreign Secretary explained that the NTC had *"shown a commitment to a more open and democratic Libya […] through an inclusive political process […] in stark contrast to Qadhafi, whose brutality against the Libyan people has stripped him of all legitimacy."*[50]

100. HMG's recognition of interim President Guaidó was similarly a reflection of its commitment to democracy and human rights, those values being reflected in the language of the Foreign Secretary's 4 February 2019 statement and in the FCO Statement itself. HMG must be taken to have intended that a formal recognition of Mr Guaidó's status in response to the Court's request would have legal consequences in this jurisdiction, just as recognition of the NTC permitted access to bank accounts in this jurisdiction. Certainly, the Supreme Court should not regard *Banco de Bilbao* and *Bank of Ethiopia* as obstacles to giving effect to such consequences. There is accordingly no principled reason for an English court to deny sovereign status to interim President Guaidó's acts insofar as they relate to assets in London merely because (assuming this to be the case for the purposes of the argument) HMG in its conduct of foreign policy has for whatever reason perceived a need to maintain a parallel recognition of Mr Maduro.

101. The Supreme Court should therefore hold that the Court of Appeal was wrong to conclude that a *de facto* recognition of Mr Maduro would (even if established)

[50] Warbrick (2012) 71 ICLQ 247 at 252.

require the Court to treat interim President Guaidó's acts as nullities.

VI. ISSUE 3: THE GUAIDÓ BOARD'S APPEAL ON THE ACT OF STATE ISSUE

(1) Overview

102. The short point of Issue 3 is that success for the Guaidó Board on Issues 1 and/or 2 means that interim President Guaidó's appointments of public officials are the sovereign acts of the Venezuelan State. The acts of appointment having taken place within Venezuela, in relation to the representation of an entity (the BCV) incorporated and domiciled in Venezuela, those acts are in an English court not open to challenge as to their validity under Venezuelan law. As a matter of English law, those acts must instead be treated as valid and effective without inquiry, as Teare J correctly held in his Judgment at [51]-[93].

103. Such immunity from the Maduro Board's Venezuelan law challenges is the automatic consequence of HMG's decision to recognise interim President Guaidó, as explained by Lord Atkin in *The Arantzazu Mendi* (at 264): *"Our Sovereign has to decide whom he will recognize 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."*

104. Reference to *"immunities"* plural embraces not only the immunity *ratione personae* of a State itself and its head of state but also the immunity from jurisdiction *ratione materiae* of sovereign acts.[51] The interplay between the 'one voice' doctrine and the act of state doctrine was recently explained by Popplewell LJ in *Breish* at [69]:

> *"There are separate and distinct steps in the inquiry in cases in which the doctrines arise. The first is whether the Court is bound to treat a body as a sovereign government; the second, if it arises, asks whether, in the light of the answer to the first question, issues dependent upon the acts of such a government are justiciable."*

[51] *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888 per Lord Wilberforce at 932E;*R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)* [2000] 1 AC 147 at 269D-H per Lord Millet and at 286B-C per Lord Phillips; *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458 at [66]; *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 at [199]-[200] per Lord Sumption.

105. Those steps correspond to the two preliminary issues in this case and the distinct parts of the present appeal. The principles apply equally where the recognition and acts are not those of a government but of a President. Recognition *"settles the question"*[52] of sovereign status as the first step, with the act of state inquiry then focusing at the second stage upon the exercise of sovereign authority which such sovereign status confers.

106. Contrary to the Maduro Board's submissions below (which the Guaidó Board anticipates will be reprised on appeal), the act of state doctrine is not a relic of absolute monarchies or a less developed conception of the rule of law. It is every bit as relevant within a modern world of constitutional democracy and the separation of powers. Indeed, the distribution of sovereign power amongst executive, legislature and judiciary creates potential for conflict between those organs. The act of state doctrine relieves an English court from the invidious task of having to adjudicate upon such internal affairs of a foreign sovereign state. It matters not to an English court whether an executive act undertaken by a recognised foreign President in relation to persons or property within the foreign territory had a sufficient legislative basis, nor even whether it has been declared invalid by the foreign judiciary. If it is a sovereign act, and if recognition of the act would not offend English public policy, then an English court will treat it as valid and effective without inquiry under the act of state doctrine.

107. With the act of state doctrine having been affirmed at the highest level, including in *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888, *Kuwait Airways* and *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, the issue in this appeal is not as to its existence but its scope. In this regard, the Guaidó Board submits that the Court of Appeal fell into three main errors by:

    (1) declining to adopt Lord Sumption's *obiter* analysis in *Belhaj* as an accurate summary of English law;

    (2) failing to follow the approach in *Princess Paley Olga v Weisz* [1929] 1 KB

[52] *Breish* at [67] per Popplewell LJ.

718; and

(3) relying as a point of factual distinction on the rulings of the Supreme Tribunal of Justice of Venezuela (the "**STJ**"), when those rulings were on a proper analysis irrelevant to the applicability of the act of state doctrine.

108. The Court of Appeal should have here held, just as the Court of Appeal held in *Princess Paley* a century earlier, that it did not matter whether the executive acts were valid under their own law. It was sufficient that they were undertaken by a recognised foreign President in the exercise of sovereign authority, thus falling squarely within Lord Sumption's proposition from *Belhaj*, adopted by Teare J, that the acts 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"*.[53]

109. Since the validity of the appointments under Venezuelan law is irrelevant, it is likewise irrelevant that the STJ has in different rulings purported to declare invalid both (i) the appointments themselves and (ii) the legislation pursuant to which they were made. A third category of STJ decision is also irrelevant, namely those declaring Mr Maduro to be the lawful President, and characterising Mr Guaidó as a *"usurper"*. Any reliance by the Maduro Board on such rulings in an English Court is precluded not by the foreign act of state doctrine, but by the 'one voice' doctrine because HMG has made its own decision, in disagreement with the STJ, as to whom it recognises as Venezuela's President.[54] This demonstrates the potency of HMG's recognition which before an English court overrides anything the foreign courts have to say on the topic.

110. An English Court is not interested in whether a formally recognised foreign president has assumed his position by lawful means,[55] nor in whether once in that

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53 Teare J Judgment at [87], quoting Lord Sumption in *Belhaj* at [230].

54 Teare J Judgment at [53]; CA Judgment at [153].

55 *Breish* at [56]: *"the recognition which the one voice principle requires the Court to respect is not in any way concerned with the constitutional lawfulness of the recognised government."* The reference is to government but there is no reason to treat the recognition of a foreign President and head of state any differently: see CA Judgment at [70].

role his acts are lawful under local law. Subject to the limitations addressed below, both his sovereign status and his sovereign acts are beyond the scrutiny of an English domestic court. His sovereign acts are still *acta jure imperii* even if unlawful under the local law.[56] They therefore engage the act of state doctrine.

111. Nevertheless, there are three crucial limitations to the doctrine:

(1) first, its territorial scope, the doctrine extending only to sovereign acts in relation to property and persons within the foreign territory;[57]

(2) secondly, the availability of a public policy exception, not invoked by the Maduro Board, which means that an English court is never compelled to give legal effect to a foreign sovereign act which is in breach of international law, which involves a grave violation of human rights or which is otherwise offensive to English public policy;[58] and

(3) thirdly, the ultimate fallback of HMG stripping acts of any protected sovereign character by making an unequivocal statement of non-recognition.[59]

112. For an English court to declare ineffective the steps taken within Venezuela by interim President Guaidó to safeguard valuable assets, pending free and fair Presidential elections, would manifestly be to sit in judgment on the internal affairs

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[56] *Pinochet* at 270G per Lord Millett, 287 per Lord Phillips; *Belhaj* at [230] per Lord Sumption. See also *Banco de Espana v Federal Reserve Bank* 114 F. 2d 438 (1940) at 444: "*it matters not how grossly the sovereign has transgressed its own laws*". The position is the same as a matter of public international law(*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* [2012] ICJ Reports 99 at [60]) although breach of international law could engage the public policy exception to the act of state doctrine: see [111(2)] below.

[57] See Lord Neuberger in *Belhaj* at [163]: *"the nature of sovereign power is that it is limited to territory over which the power exists"*. Non-justiciability in relation to State conduct on the international plane (Lord Neuberger's third rule, Lord Sumption's *"international law act of state"* principle and the main focus of *Buttes Gas*) is an altogether separate issue, outside the scope of the Guaidó Board's appeal.

[58] See *e.g. Belhaj* at [153]-[156] (Lord Neuberger) and [253]-[257] (Lord Sumption). See also the possibility referred to by the Privy Council in *Civil Air Transport Inc v Central Air Transport Corp* [1953] AC 70 of declining to recognise the transfer of assets by *"a despot, who knows that previous recognition is just being withdrawn, where it is clear that his purpose was to abscond with the proceeds, or to make away with State assets for some private purpose"* (at 93).

[59] *Luther v Sagor* per Scrutton LJ at 556 and 559.

of Venezuela. The fact that those bringing the legal challenges are the appointees of a former President who collectively refuse to accept the constitutional authority of his successor only reinforces the point. For the United Kingdom, this is fundamentally an issue of foreign policy, conduct of which is, through the Royal Prerogative, vested in the executive. It is not for the English court to second-guess the foreign policy decision of the executive to recognise interim President Guaidó. With recognition resolved, the act of state doctrine merely gives effect to the sovereignty thus recognised. Hence Lord Sumption's observation in *Belhaj* that *"the act of state doctrine is influenced by the constitutional separation of powers, which assigns the conduct of foreign affairs to the executive"* (at [225]).

113. It should be emphasised in relation to this aspect of the appeal that the Guaidó Board does not of course consider that interim President Guaidó has transgressed any law or been guilty of any *"arbitrary exercise of power"*.[60] As Teare J found, he acted under a Transition Statute which *"was issued and signed by the officers of the National Assembly and […] bore the seal of the interim President of Venezuela"*.[61] Moreover, it is the Guaidó Board's pleaded case that the STJ—whose rulings are prayed in aid by the Maduro Board—is not to be regarded by an English court as an independent court of law and that it is a mere puppet of the Maduro regime.[62]

114. Nevertheless, in the face of the Maduro Board's barrage of Venezuelan law challenges in these proceedings, it is open to interim President Guaidó's appointees to say, just as the respondents said in *Princess Paley*, that they are entitled to succeed *"quite apart from any municipal law"*[63] of Venezuela.

115. Whilst the Guaidó Board has every confidence of being able if necessary to persuade the Commercial Court that the STJ is partisan and corrupt,[64] there would

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60 CA Judgment at [142].

61 Teare J Judgment at [64].

62 This view is shared by HMG which has gone so far as to place both the President and the Vice President of the STJ on the UK Sanctions List for having undermined democracy and the rule of law in Venezuela: see further at [142] below.

63 *Princess Paley* at 721.

64 As to which, see *e.g.* the Guaidó Board's Reply, Schedule A **[9/224-227]**.

then be the unappealing prospect of further lengthy delays, including another round of appeals against such a judgment. By contrast, the reinstatement by the Supreme Court of Teare J's conclusions would bring the dispute to an end, have proper regard to the constitutional separation of powers and avoid further delay and expensive and time-consuming litigation.

116. If it is decided, in response to the Act of State Issue, that interim President Guaidó's appointments must indeed be treated as valid and effective without inquiry, it would necessarily follow that DB, the Receivers and the BoE would be entitled to the clarity and protection of declarations as to the specific individuals from whom they could safely receive instructions on behalf of the BCV. The primary focus of the appeal, as it was before the Court of Appeal and at first instance, is therefore upon the executive acts of appointment as distinct from their legislative basis.

(2) The Executive Acts Relied Upon by the Guaidó Board

117. As set out in the CA Judgment at [26] and [28], the Guaidó Board relies upon the following appointments by interim President Guaidó:

(1) on 5 February 2019 of 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"* (originally Mr Hernández and since replaced as from 1 July 2020 by Mr Sánchez Falcon); and

(2) on 18 July 2019 and 13 August 2019 of an Ad Hoc Board of the BCV (*i.e.* the Guaidó Board) to represent the BCV in connection with agreements relating to the management of international reserves, including gold.[65]

118. These acts of appointment were designed to safeguard the BCV's assets from falling into the hands of the illegitimate and kleptocratic Maduro regime. However, the appointments were not specific to either London or any other overseas location.

[65] As noted in the Chronology, after the trial before Teare J, the former Chairman of the Guaidó Board (Dr Ricardo Villasmil) resigned and he was replaced on 28 August 2020 by the appointment of Mr Manuel Rodriquez Armesto **[96/996-997]**.

Nor did they purport to alter any rights of ownership or any contractual rights of the BCV. Instead, the appointments involved a mere change of control and rights of representation in relation to a Venezuelan public law entity which was already (and remains) part of the Venezuelan State apparatus.

119. Within a week of each appointment by interim President Guaidó, the STJ had issued rulings declaring the appointments as unconstitutional and of no legal effect: see the CA Judgment at [27] and [29].[66] Aside from the inevitable concerns of lack of due process which such speed entailed, the perceived need by the STJ to strike down the appointments obviously demonstrates that, as a matter of fact, the appointments occurred.

(3) Appointments as Acts of State

120. There is limited authority applying the act of state doctrine to sovereign acts of appointment but what little exists is supportive of the Guaidó Board's position.

121. *Dobree v Napier* (1836) 2 Bing NC 781 concerned the appointment of Sir Charles Napier.[67] Queen Donna Maria of Portugal had retained him as an admiral in her navy and in that capacity he had captured a British steamship owned by the plaintiff after it had broken a blockade. It was of no assistance to the plaintiff in seeking to hold him personally liable for the value of the ship that by joining the Portuguese navy, Sir Charles Napier may have been committing an English law offence under the Foreign Enlistments Act. Tindal CJ was clear: *"no one can dispute the right of the Queen of Portugal, to appoint in her own dominions, the Defendant […] as her officer […] to seize a vessel which is afterwards condemned as a prize"* (at 796).

122. *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1 was also an appointment case, the plaintiff seeking to challenge the validity of the appointment over his property of a guardian (originally the Duke of Cambridge and subsequently the defendant, the King of Hanover). Since those appointments had been effected in the

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[66] The Guaidó Board's pleaded case is that these rulings were issued by the STJ *ex officio*, without any popular action having been filed and in violation of principles of due process: see Reply at [16(2)], [16(3)] **[9/212-214]** and Schedule A **[9/224-227]**.

[67] *"not to be trusted except in the hour of danger"*, according to Lord Sumption in *Belhaj* at [204].

exercise of sovereign authority, they could not be challenged in an English court, whether or not they were lawful under the laws of either Brunswick or Hanover: see Lord Cottenham at 17 and 20-22; Lord Lyndhurst at 22-23; and Lord Campbell at 27. Quite apart from any personal immunity of the defendant as a foreign sovereign in his own right (a separate point, as Lord Wilberforce later emphasised in *Buttes Gas* at 932D-933C) the acts of appointment were treated as acts of state the validity of which an English court would not question.

123. More recent jurisprudence takes the matter little further. Although there were disputed appointments in *Bank of Ethiopia* (of a liquidator) and *Banco de Bilbao* (of a replacement board), Popplewell LJ explained in *Breish* at [69]: *"In those cases the one voice principle was determinative of the legal consequences"* so there was no need for any act of state inquiry as a second stage.

124. *Re Amand (No. 2)* [1942] 1 KB 445[68] was not an appointment case but a military conscription case but there is an analogy of sorts and the act of state doctrine lay at the heart of the case. Citing *Luther v Sagor, Oetjen v Central Leather Co* (1918) 246 US 297 and *Princess Paley*, a Divisional Court of Wrottesley, Croom-Johnson and Cassels JJ reaffirmed the principle that an English court would not examine the validity of a sovereign act in relation to property and persons within the foreign territory. However, the unusual facts fell outside the doctrine because the Queen of the Netherlands and her government were in exile in England during Nazi occupation. Since Mr Amand was lawfully resident in England and seeking to challenge the validity under Dutch law of the decree which purported to conscript him here, the court considered it could and should entertain that foreign law challenge (ultimately dismissing it).[69] Leaving the territorial aspect to one side, the reasoning confirms that the act of state doctrine is not confined to sovereign acts in relation to property.

125. The disputed appointment of the Chairman of the Libyan Investment Authority

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[68] It is noted that *Re Amand* was neither cited nor referred to in argument in *Belhaj*.

[69] Although Croom-Johnson J and Cassels J also attached weight to the fact that the Dutch courts were not functioning, that was not essential to the act of state reasoning and indeed would confuse act of state with a *forum non conveniens* test of whether the natural forum was available.

considered by Andrew Baker J at first instance[70] and by the Court of Appeal in *Breish* has some parallels with the present case. However, the decisions are of no assistance on this part of the case and are mentioned only because the Maduro Board argued below that if the Guaidó Board's act of state point was sound then it would have been taken in *Breish*. In fact, act of state could have been raised in response to some, but not all, of the multiple Libyan law challenges to the appointment of Dr Mahmoud as Chairman of the LIA. It appears that a pragmatic view may have been taken that it would be quicker to proceed to trial on all Libyan law issues rather than risk a lengthy appellate process in relation to act of state issues applicable only to some of them. That course was in the event vindicated as Dr Mahmoud was able to defend on their merits both the governmental resolutions (acts of state) and the resolutions of the LIA Board of Trustees (plainly not acts of state).

(4) Acts of State in relation to Property

126. Whilst there is little authority applying the act of state doctrine to appointments, the extensive citation in *Belhaj* shows the abundance of cases about property. Indeed, expropriation of property is the paradigm illustration of the act of state doctrine. As explained at [118] above, the present case is not a property case, title to assets in London having remained throughout with the BCV. Nevertheless, if a State expropriation will be treated as valid and effective, there is no principled reason why English law should take a different attitude towards the change of control or representation of an existing State entity. Teare J could see no such reason (see his Judgment at [77]) and none has ever been identified by the Maduro Board.

127. In a case of compulsory acquisition by a foreign State of private property within its territory, the operation of the doctrine is familiar and apparently uncontentious. Indeed, the Maduro Board described in submissions below as *"entirely orthodox"* and a *"classic foreign expropriation case"* the decision of Popplewell J in *Reliance Industries v The Union of India* [2018] EWHC 822 (Comm), [2018] 2 All ER (Comm) 1090, which post-dated *Belhaj*. Addressing Lord Neuberger's first and

[70] *Mahmoud v Breish* [2020] EWHC 696 (Comm).

second rules in *Belhaj* at [121]-[122], the challenge to the Indian legislative act enabling the withholding of payments was precluded by the first rule and a challenge to the executive acts by which such payments were in fact withheld was precluded by the second rule. A submission by the claimant that the legislation, even if valid, was nevertheless inapplicable was not caught by the first rule but fell foul of the second. (The Maduro Board's argument under Issue 5 in its cross-appeal that even if the Transition Statute is valid then it does not apply to the BCV fails for the identical reason: see further at [152] below).

128. In *Reliance Industries*, Popplewell J considered himself bound by *Belhaj* itself in relation to the first rule and by *Princess Paley* in relation to the second (see [105]). In agreement with Lord Sumption in *Belhaj* and noting the passage in which Lord Mance had observed that *"the effect of the relevant act is determined not by law, but regardless of law"*,[71] Popplewell J regarded *Princess Paley* as binding authority for the application of the foreign act of state doctrine to executive acts which were unlawful under their own law. He was unquestionably correct to do so. The alternative ratio of *Princess Paley*[72] had been that the Soviet seizure of privately owned goods was effective to transfer title irrespective of the decrees governing such transfer. That was because the seizure, even if unlawful, was nevertheless an act of state.[73] Although the court also held that the post-revolutionary decrees had provided a proper Russian law basis for the seizures, the alternative ratio made that unnecessary to the outcome. Similarly here, it is unnecessary for the Guaidó Board to rely on the Transition Statute as a legal foundation for interim President Guaidó's appointments: it is sufficient to point to his executive acts of appointment.

129. Indeed, it would not have altered the result in *Princess Paley* if a Russian court, still loyal to the overthrown Tsar, had pronounced the attempted transfer of title to be unlawful and void. The recognition by the English court of title to the goods did not depend on the legality but rather the sovereign character of their confiscation. Interim President Guaidó's appointments in relation to a State entity being also of

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[71] *Belhaj* at [38]. Lord Mance was here assuming, without deciding, that the second rule existed.

[72] Incorrectly downgraded by Lord Neuberger in *Belhaj* at [137] to obiter dicta.

[73] *Princess Paley* at 723-725 per Scrutton LJ; at 726-730 per Sankey LJ; and at 736 per Russell LJ.

a sovereign character, the decisions of the STJ can in the same way be put to one side. The allegations of corruption and lack of independence of the STJ as raised by the Guaidó Board need never be addressed.

130. Lord Sumption in *Belhaj* cited *Princess Paley* amongst the English and US authorities which supported his conclusion at [230] that *"it is well established that municipal law act of state applies not just to legislative expropriations of property, but to expropriations by executive acts with no legal basis at all"* (emphasis added). Another case cited by Lord Sumption was *Duke of Brunswick*, itself analysed by Lord Wilberforce in Buttes Gas (at 932E) as *"still authoritative"* in its identification of a principle of immunity from jurisdiction ratione materiae. Lord Cottenham had there stated: *"whether it be according to law or not according to law, we cannot inquire into it"* (at 21).

131. To this Court of Appeal and House of Lords authority may be added a Privy Council decision in *Piramal v Oomkarmal* (1933) 60 LR Ind App 211[74] where Lord Atkin (a few years prior to giving his leading judgment in *The Arantzazu Mendi*) relied on *Princess Paley* to conclude in relation to the confiscation of property within the foreign territory that the Court *"will not examine whether the Government acted validly or not within its own domestic laws"* (at 223). Lord Sumption also cited the trio of US cases: *Hatch v Baez* (1876) 7 Hun 596, *Underhill v Hernandez* (1897) 168 US 250 and *Oetjen v Central Leather Co* (supra).

(5) Foreign Judicial Decisions

132. The critical reasoning of the Court of Appeal was that this formidable body of jurisprudence (and the *obiter* conclusions drawn from it by Lord Sumption) was factually distinguishable because none of it dealt with, or contemplated, a situation where a foreign court had already declared as unconstitutional and of no legal effect the very appointments which the English Court was invited to treat as valid and effective without inquiry: see the CA Judgment at [147].

133. Whilst it is true that this feature was absent from the decided cases, as a matter of

[74] It is noted that *Piramel v Oomkarmal* was neither cited nor referred to in argument in *Belhaj*.

logic and principle it cannot make a difference. If legality itself does not matter, a finding of illegality by a foreign court cannot matter either. The acts are still *jure imperii* and they engage the act of state doctrine. The STJ rulings are not themselves acts of state[75] but at most evidence of Venezuelan law and only then if the English Court is persuaded to recognise them as such. But the act of state doctrine makes it unnecessary even to look at Venezuelan law, the effect of the sovereign acts being determined by reference to English law which precludes the Venezuelan law challenges.[76]

134. Nor does it make any difference that the rulings declare the acts to be null and void. The acts of appointment still in fact occurred: they were carried out by a recognised foreign President and they were acts of a sovereign character as distinct from acts of private law character. Whether they were legally effective as a matter of Venezuelan law is a separate question into which an English court will not inquire. Rix LJ in *Yukos* explained this critical distinction by reference to the judgment of Scalia J in *WS Kirkpatrick & Co Inc v Environmental Tectonics Corp International* (1990) 493 US 400, the dividing line being between referring to acts of state *"as an existential matter"* and *"asking the court to inquire into them for the purpose of adjudicating upon their legal effectiveness".*[77]

135. After all, the essence of sovereign power is that an independent sovereign State can do as it pleases inside its territorial boundaries. See *Belhaj* at [38], [213], [228] (citing *Johnstone v Pedlar* [1921] 2 AC 262 at 290 per Lord Sumner): *"Municipal courts […] do not control the acts of a foreign state within its own territory, in the exercise of sovereign powers, so as to criticise their legality or to require their justification."*

136. Teare J was correct to characterise the Presidential appointment of a Special Attorney General and of the Guaidó Board of the BCV as aspects of the *"internal*

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[75] See *Belhaj* at [73(ii)] per Lord Mance; *Yukos* at [73] per Rix LJ.

[76] As the Guaidó Board pleaded from the very outset: see Statement of Case at [8(3)] and [8(6)] **[7/165-166]**; Reply at [3], [12] **[9/204-205, 210]**. See also Statement of Case [25], [28], [30], [33] **[7/174-176]** where the exercise of sovereign authority by interim President Guaidó is pleaded.

[77] *Yukos* at [110] per Rix LJ. See also Lord Sumption in *Belhaj* at [267].

affairs of a sovereign state" over which an English Court will not assert jurisdiction.[78] Any legal deficiencies (which are disputed) and any wider tensions and conflicts between factions and organs of the Venezuelan State (which are indisputable) must be left to be resolved within Venezuela. In engaging with the narrow dispute of which the English Court is seised, namely who has authority to represent the BCV in respect of its assets in London, an English court looks no further than the acts of appointment undertaken in the exercise of sovereign authority by the person formally recognised by HMG as the country's interim President.

(6) Revolution, Civil War *etc*

137. Although the act of state doctrine is by no means confined to breakdowns of law,[79] it is unsurprising that the cases in this area have tended to deal with revolutions, civil wars and invasions. The disruption of an established order will often provoke disputes over the legal effectiveness of what has occurred. The foreign act of state doctrine then comes to the fore to resolve the uncertainty. This is not merely a *"pragmatic"* response[80] but a principled one, it being no part of the function of an English domestic court to judicially review the sovereign acts of a recognised foreign President undertaken within his own territory.[81] Nevertheless, the pragmatic attractions perceived by Lord Neuberger are particularly powerful when the foreign domestic legal position is for any reason difficult to establish.

138. Indeed, the doctrine only really matters where it is, for one reason or another, harder than usual to determine the content of foreign law. The answer can otherwise be supplied in every case by ordinary choice of law rules. However, a mere choice of law approach ignores the crucial distinction between sovereign acts and private law

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78 Teare J's Judgment at [69] and [80].

79 See *Belhaj*, per Lord Sumption at [232].

80 See *Belhaj* at [142] per Lord Neuberger.

81 *Buttes Gas* at 932 per Lord Wilberforce, citing *Duke of Brunswick* (*"the courts in England will not adjudicate upon acts done abroad by virtue of sovereign authority"*). See also *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208 at [66] per Lord Walker and Lord Collins, citing *Duke of Brunswick* (*"the courts of this country cannot sit in judgment upon an act of a sovereign, effected by virtue of his sovereign authority abroad"*).

acts. Just as this distinction marks the boundary of state immunity *in personam*, so also it defines subject matter jurisdiction of an English court under the foreign act of state doctrine. Here again, Lord Sumption was correct in *Belhaj* (at [229] and [232]) to distinguish the act of state doctrine from choice of law rules and to emphasise the separate treatment of sovereign acts.

139. Venezuela's constitutional crisis is neither a civil war nor a revolution but has features in common, including competing claims to authority and a dispute as to the very source of Venezuelan law: see for instance the Court of Appeal's reference at [16] to a *"rival legislature"*. The act of state doctrine has an equivalent role to play in resolving the disputed status of interim President Guaidó's appointments in an English Court without trespassing upon Venezuela's sovereignty. The Court of Appeal was wrong to suggest at [148] that the relevant *"mischief"* was avoided if the English Court was not directly adjudicating upon the validity of the appointments, but deciding instead whether to recognise the STJ rulings which struck them down. A judgment by an English court recognising the STJ rulings would *ex hypothesi* be a judgment that the acts of a recognised foreign President were invalid. That is precisely what the act of state doctrine prohibits.

140. Although the Court of Appeal placed reliance at [144]-[145] on dicta of Lord Mance in *Belhaj* at [65] he was in a minority of one and his views on this aspect were both tentative and contrary to the orthodox analysis of Lord Sumption, with whom Lord Hughes agreed. Although a judicial decision is in a sense an expression of sovereignty, it could not be classified as, or equated to, an act of state without the Supreme Court overruling *Yukos* in which Rix LJ drew a clear and correct distinction (at [87D]) between judicial acts on the one hand and legislative and executive acts on the other, observing that *"[s]overeigns 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"*. Moreover, Lord Mance's suggested approach would even on its own terms require an assessment of whether the State in question was subject to the rule of law, as distinct from being in a revolutionary or totalitarian situation where he acknowledged that *"[t]he position is different"* (at [65]). Lord Sumption was right

to reject such distinctions as unprincipled and unworkable (at [232]).

141. It is not therefore out of any disrespect towards the STJ that the English Court ignores its decisions. Rather, it is in deference to the sovereignty and independence of the foreign State, as represented by its recognised President exercising sovereign authority, that the English Court declines to pick a winner in an internal Venezuelan conflict involving head of state, legislature and judiciary. There is nothing at all *"outmoded"*[82] about the English court maintaining a hard-edged rule of subject matter jurisdiction which keeps it firmly out of that arena.

142. If ever it were to cause concern to HMG in its conduct of foreign policy that a foreign President and his appointees were defying the decisions of their own supreme court then that would need to be addressed through diplomacy on the international plane. (No such concern arises on these facts, however: HMG has gone so far as to place both the President and the Vice President of the STJ on the UK Sanctions List for having undermined democracy and the rule of law in Venezuela[83]).

143. It is arguable that the analysis would be different if the Guaidó Board were not seeking to impeach the STJ rulings. There might then be said to be a tension in asking the English Court to treat as valid acts which the STJ had declared invalid in unchallenged decisions.[84] Certainly, the Court of Appeal's observation at [142] about the *"irony"* of interim President Guaidó's stance would then have greater force. But the Guaidó Board advances multiple grounds of attack upon the STJ and its decisions, very much in line with the outspoken condemnation of that institution by HMG, as well as by the United States, the EU, the Organisation of American

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82 CA Judgment at [144] citing Lord Mance in *Belhaj* at [65].

83 Venezuela (Sanctions) (EU Exit) Regulations 2019; HM Treasury – Office of Financial Sanctions Implementation *Consolidated List of Financial Sanctions Targets in the UK* (Regime: Venezuela), Last Updated 25 March 2021.

84 The counter-argument would be that since even admittedly unlawful conduct is subject to state immunity (see Lord Mance in *Belhaj* at [14] and the ICJ's decision in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* at [60]), acts which are admitted to have no lawful basis are still protected from scrutiny under the act of state doctrine. However, it is unnecessary for the Supreme Court to rule on this most extreme version of the argument when there is no admission by the Guaidó Board of the legal nullity of the acts and when the Guaidó Board seeks to impeach the STJ rulings.

States and the United Nations Human Rights Council.[85]

144. Those allegations against the STJ have yet to be proved but their fact and nature illustrate how far the present context is from the hypothetical illustration set out by the Court of Appeal in its Judgment at [151]. There would, no doubt, be the strongest grounds for diplomatic protest to be made at such scenario, but that does not mean that the long established protection afforded by the foreign act of state doctrine to executive acts in a foreign territory should be eroded. Moreover, insofar as the conduct of a foreign government or ruler offends public policy then it will simply not be recognised.

(7) The Transition Statute

145. Although the focus of the appeal is on executive acts, the Guaidó Board also submits that Teare J was correct for the reasons he gave at [56]-[73] to hold that the Transition Statute should be treated as valid and effective and the Maduro Board's challenges were non-justiciable. The Court of Appeal was therefore wrong to hold at [141] that the status of the STJ rulings needed to be resolved in order to establish whether the Transition Statute was a statute at all. The Maduro Board was advancing a *"head on challenge to the validity of a sovereign legislative act of a foreign state"*[86] which was precluded by Lord Neuberger's first rule.

146. Moreover, the Maduro Board's assault upon the Transition Statute by reference to the STJ rulings shares the same flaw as in relation to the executive acts of appointment considered above. In each case, the Maduro Board seeks to elevate the judicial acts of the STJ onto the same plane as sovereign legislative and executive acts, notwithstanding the clear distinction drawn in *Yukos*. The National Assembly's decision to pass the Transition Statute (and the signatures and seals which were applied to it by interim President Guaidó and his fellow legislators[87]) are still *acta jure imperii* which engage the act of state doctrine. Those sovereign

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85 See *e.g.* Wessel 1 at [14] in the BoE Proceedings **[46/783-784]**.

86 *Reliance Industries* at [106] per Popplewell J.

87 See Teare J's Judgment at [64].

acts still took place within Venezuela on 4 February 2019, even though the STJ purported (merely three days later) to declare the Transition Statute unconstitutional and of no legal effect under Venezuelan law. It follows that the Court is precluded by the first rule from examining the constitutionality, validity or legality of the Transition Statute by reference to evidence of Venezuelan law, whether as declared by the STJ or otherwise.

147. Lord Neuberger's first rule is subject to the same public policy exception which exists in relation to the second rule (see [111(2)] above). But the Maduro Board have not sought to engage that exception. It follows that the Court must treat the Transition Statute as valid and effective without inquiry.

(8) Conclusion in relation to Issue 3

148. For all of these reasons, the Supreme Court should:

(1) conclude that the Court of Appeal erred by holding that the Act of State Issue was not capable of being answered without first determining whether the STJ judgments should be recognised by an English Court; and

(2) after dismissing the Maduro Board's cross-appeal (as to which see below) reinstate the answer to the Act of State Issue given by Teare J in his Judgment at [54].

VII. ISSUES 4-8: THE MADURO BOARD'S CROSS-APPEAL

149. Virtually all of the Maduro Board's cross-appeal has been picked up in the articulation of the Guaidó Board's own case above. Issues 4-8 can therefore be dealt with briefly.

(9) Issue 4: the "existential question"

150. Issue 4 only arises in relation to the Maduro Board's challenge to the validity of the Transition Statute. Teare J was correct to hold at [64] that there was credible evidence that the Transition Statute was a piece of Venezuelan legislation (*i.e.* that it was sovereign act of the Venezuelan legislature). That was sufficient to engage

the doctrine. See also Lord Sumption's distinction in *Belhaj* at [267] distinguishing between factual foundation and validity.

151. The Guaidó Board also relies in this regard on Lord Goff's explanation in *Kuwait Airways Corp v Iraqi Airways Co (No. 1)* [1995] 1 WLR 1147 that where a party pleads and relies on a sovereign act, an English court cannot call that act into question and, as a result, the act may be effective as a defence to the merits of a claim (see 1166). This shows that it is sufficient to engage the act of doctrine merely to plead and rely upon a sovereign act. Once the act is characterised as a sovereign act, an English court cannot call that act into question or examine its validity.

(10) Issue 5: "decentralised entity"

152. Since the Maduro Board's argument that the BCV is not a decentralised entity is not an attack on the validity of the Transition Statute but rather its applicability, Lord Neuberger's first rule in *Belhaj* is not engaged. Nevertheless, since the argument is being deployed to challenge the validity of the executive acts of appointment, it is precluded by the second rule, as Teare J correctly held at [65]. Moreover, 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.[88] This Resolution is therefore a legislative act which an English court will not question and which disposes of the argument.

(11) Issue 6: lawfulness under domestic law

153. Issue 6 embraces three distinct points. Issue 6(a) has already been addressed as part of Issue 3 above and the Guaidó Board has nothing further to add.

154. Issue 6(b) raises the issue of whether the Maduro Board can rely on an exception to the act of state doctrine where the allegations of unlawfulness or invalidity arise incidentally rather than directly. As is demonstrated by the centrality of Issue 3 itself, the Maduro Board's allegations of unlawfulness and invalidity did not here arise incidentally. The very *"purpose of the proceedings"* (see *Belhaj* at [140] per

[88] See CA Judgment at [31].

Lord Neuberger) was to establish whether interim President Guaidó's appointments should be regarded as effective and the Maduro Board's entire case on that issue was that they were unlawful and invalid as a matter of Venezuelan law. See also Lord Sumption at [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"*.

155. Lord Wilberforce in *Buttes Gas* also dealt with the issue of incidentality (at 927), and his approach was followed by Rix LJ in *Yukos*, explaining at [109]: *"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 a necessity to a decision may therefore be a useful test"*.

156. That test is amply met here. Indeed, it is hard to imagine any clearer case for the operation of the act of state doctrine than a direct attack upon the validity and effectiveness of Presidential appointments as advanced by the appointees of interim President Guaidó's political opponent (Mr Maduro). Although the issue happens to arise in the context of proceedings involving DB and the BoE, that is only because those two banks, both of whom are neutral as to the outcome, had received conflicting instructions from the rival 'camps'. The real dispute is between the Guaidó and Maduro interests and the focus of that dispute is in turn on the validity of interim President Guaidó's appointments.

157. Issue 6(c) is whether Teare J erred by applying a test of *"apparent lawfulness"*, echoing Lord Neuberger's observations in *Belhaj* at [138].[89] If the Guaidó Board is correct on Issue 3 and domestic lawfulness is irrelevant, then a test of *"apparent lawfulness"* does not arise. But if that is wrong, the Guaidó Board submits that Teare J was correct. The acts of appointment were made at the Legislative Palace pursuant to the Transition Statute. They were apparently lawful, notwithstanding the STJ rulings (which stand on a different plane). Indeed, a test of actual rather than merely apparent lawfulness would be incompatible with the principle of non-

[89] Teare J's Judgment at [88].

examinability of the foreign legislative acts pursuant to Lord Neuberger's first rule.

(12) Issue 7: territoriality

158. The territorial limitation of the act of state doctrine is common ground[90] but the Maduro Board contends that the legislative and executive acts were extra-territorial. This is a hopeless contention, for the reasons given by Teare J at [71]-[72] in relation to the legislative acts, and [78]-[83] in relation to the executive acts.[91]

159. By close analogy, it was submitted in *Williams & Humbert v W & H Trade Marks (Jersey) Ltd* [1986] AC 368 that since the Spanish government was taking control of an English subsidiary and its English assets by expropriating the shares in the Spanish parent company, it was thereby acting extra-territorially. That submission was rejected by the Court of Appeal and the House of Lords. Fox LJ explained at 394C: *"we are dealing with decrees which are in no way in excess of territorial jurisdiction"*; and at 397C-D *"the right to control Williams & Humbert Ltd. [the English subsidiary] is as much a right attached to the expropriated property as was the right of the Soviet Government to give a good title to third parties in [Luther v Sagor] and Princess Paley Olga v. Weisz […] It is not the consequence of extra-territorial legislation at all"*. See also Lord Templeman at 428: *"this territorial limitation on compulsory acquisition is not relevant to the acquisition of shares in a company incorporated in the acquiring state"*.

160. Similarly here, the legislative and executive acts are directed at the rights of representation of a Venezuelan public law entity, governed by Venezuelan law.

161. Teare J's conclusion on the territoriality issue was also entirely consistent with the decision of the Delaware Court of Chancery in *Jiménez v Palacios* No. 2019-0490-KSJM (Del. Ch. Ct. 12 August 2019)[92], a parallel case in the US involving challenges by Mr Maduro's appointees to the appointments made by interim

[90] See *Belhaj* at [121]-[122].

[91] An additional point in relation to the Transition Statute is that the Article 15.a power to appoint ad hoc boards is entirely general and draws no distinction between assets inside or outside Venezuela.

[92] Upheld by the Supreme Court of Delaware: *Jiménez v Palacios* No. 399, 2019 (Del. SC. 22 July 2020).

President Guaidó to the ad-hoc board of Venezuela's state-owned oil company, PDVSA. The Court rejected the submission that the appointment of the ad-hoc board in that case was an extraterritorial assertion of sovereign authority.

162. Finally, none of the Maduro Board's arguments on territoriality engage with the fact that as well as appointing a new board, interim President Guaidó has by Article 7 of Decree No. 8 also removed Mr Ortega from his position as President of the BCV, declaring the acts resulting in his appointment as President of the Maduro Board to be null and void.[93] That was unquestionably an act which took place and took effect within Venezuela and it must be treated as valid and effective without inquiry.

(13) Issue 8: subject matter

163. The Maduro Board seeks within Issue 8 to confine the act of state doctrine to a narrow rule about property. Lord Sumption in *Belhaj* at [231] certainly did not see it in those terms and such a narrow view is inconsistent with the much broader statements of principle in *Luther v Sagor*,[94] *Princess Paley*[95] and the reasoning of *Re Amand (No. 2).* Since *Belhaj* was not addressing appointments over a State entity, and since *Re Amand (No.2)* was not cited, the dicta of Lords Neuberger and Mance do not resolve the issue as Teare J held in his Judgment at [69]. Although the appointments in *Dobree v Napier* and *Duke of Brunswick* were direct appointments over property (and so can be analysed as property cases), there is no principled reason to distinguish between direct appointments of that kind and the appointment over a legal entity which owns or controls property.

(14) Conclusion in relation to Issues 4-8

164. None of the Maduro Board's arguments under Issues 4-8 is of any merit and the Supreme Court is invited to so rule, regardless of the approach taken to Issues 1-3,

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93 Statement of Facts and issues at [31] and **[66/877]**.

94 At 548 per Warrington LJ (*"property and persons"*), 557 per Scrutton LJ.

95 At 724-725 per Scrutton LJ, 728-729 per Sankey LJ. *Underhill v Hernandez* (which was cited in both *Luther v Sagor* and *Princess Paley*) was itself a case about acts against the person.

and in order to determine the full range of foreign act of state issues at this stage. The cross-appeal should be dismissed.

VIII. CONCLUSION

165. In conclusion, the Supreme Court should allow the Guaidó Board's appeal:

(1) As to Issue 1, the Court of Appeal was wrong to interpret the FCO Statement as leaving open the possibility of a continuing implied recognition of Mr Maduro as President because its interpretation:

(a) Failed to give effect to the plain and unambiguous meaning of the words used by HMG in the FCO Statement;

(b) Was based upon a flawed approach to the admission of extraneous evidence in that exercise of interpretation;

(c) Involved an unjustified reliance in a judicial context on a notion of implied *de facto* recognition, which notion has no established basis, and in circumstances where the concepts of *de facto* and *de jure* recognition have no useful role to play in a judicial context today; and

(d) Involved an unjustified conclusion that, even if it were permissible to have regard to them at all, any of the five contextual matters relied upon at [123] of the CA Judgment rendered the FCO Statement *"ambiguous, or at any rate less than unequivocal"*.

(2) As to Issue 2, the Court of Appeal was wrong to conclude that a *de facto* recognition of Mr Maduro would (even if established) require the Court to treat interim President Guaidó's acts as nullities because:

(a) The two decisions relied upon by the Court of appeal (*Bank of Ethiopia* and *Banco de Bilbao*) are factually distinguishable; or alternatively

(b) The Supreme Court should overrule those decisions as being wrong, outmoded and inapplicable.

(3) The Court of Appeal was wrong to conclude that the Act of State Issue was not capable of being answered without first determining whether the STJ judgments should be recognised by an English court because:

(a) Mr Guaidó's acts of appointment (of the Guaidó Board and of a Special Attorney General) were sovereign acts of the Venezuelan State and they must be recognised by an English court irrespective of their validity or legality under Venezuelan law; and

(b) It follows that the STJ judgments (which purport to declare those appointments as unconstitutional and null and void) are irrelevant to the application of the foreign act of state doctrine.

166. Furthermore, the Supreme Court should dismiss the Maduro Board's cross-appeal for the reasons already given at [150]-[163] above.

167. The Supreme Court is accordingly invited to:

(1) Allow the Guaidó Board's appeal;

(2) Dismiss the Maduro Board's cross-appeal;

(3) Set aside the Court of Appeal's order dated 6 October 2020; and

(4) Restore the Orders made by Teare J on 15 July 2020 and 24 July 2020.[96]

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28 May 2021

[96] Pursuant to Rule 47(2) of the Supreme Court Rules 2009 the Guaidó Board wishes to defer making submissions as to costs until after judgment and would propose the exchange of written submissions in this regard.