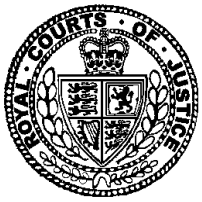

Neutral Citation Number: [2020] EWHC 1721 (Comm)

Case Nos: CL-2019-000303, CL-2020-000304

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2020

Before :

MR. JUSTICE TEARE

- -

Between :

DEUTSCHE BANK AG LONDON BRANCH

Claimant
(in the 2019 claim)

- and -

RECEIVERS APPOINTED BY THE COURT

Receivers
(in the 2019 claim)

CENTRAL BANK OF VENEZUELA

Claimant
(in the 2020 claim)
Defendant
(in the 2019 claim)

-and-

THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND

Defendant
(in the 2020 claim)

-and-

THE AD HOC ADMINISTRATIVE BOARD OF THE CENTRAL BANK OF VENEZUELA

-and-

THE BOARD OF THE CENTRAL BANK OF VENEZUELA

- -
- -

Nicholas Vineall QC, Brian Dye, Jonathan Miller and Mubarak Waseem (instructed by **Zaiwalla & Co.**) for the **Board of the Central Bank of Venezuela**
Andrew Fulton and Mark Tushingham (instructed by **Arnold & Porter**) for the **Ad Hoc Administrative Board of the Central Bank of Venezuela**
Deutsche Bank AG, London Branch (represented by solicitors **Allen & Overy LLP**), the **Receivers** (represented by solicitors **Quinn Emanuel Urquhart & Sullivan UK LLP**) and **The Governor and Company of the Bank of England** (represented by solicitors **Herbert Smith Freehills LLP**) did not instruct counsel for the hearing

Hearing dates: 22-25 June 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE TEARE

.....

"Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:00 AM on 02 July 2020. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the judge's Clerk"

Mr. Justice Teare :

1. This is the trial of two preliminary issues in two related matters. Each matter concerns the entitlement of persons or bodies to give instructions to financial institutions on behalf of the Central Bank of Venezuela ("BCV") with regard to foreign currency reserves. The Bank of England ("BoE") holds gold reserves of about US$1 billion for the BCV and Deutsche Bank ("DB") is obliged to pay the proceeds of a gold swap contract to the BCV in the sum of about US$120 million, currently held by court appointed receivers.

2. The two preliminary issues reflect the widely publicised dispute as to who is the President of Venezuela; Mr. Maduro or Mr. Guiado. Mr. Maduro claims to be the President of Venezuela on the grounds that he won the 2018 presidential election. Mr. Guaidó claims to be the Interim President of Venezuela on the grounds that the 2018 presidential election was flawed, that on that account there was no President and that, under the Venezuelan Constitution, the President of the National Assembly, Mr. Guaidó, was the Interim President of Venezuela, pending fresh presidential elections.

3. The court has been told that the resolution of the issues before the court is urgent because Mr. Maduro, or those speaking on his behalf, have said that he requires the reserves to fight the Covid 19 pandemic in Venezuela. They claim that the board of the BCV appointed by him is authorised to give instructions to the BoE and to DB. Mr. Guaidó, or those speaking on his behalf, claim that the *Ad Hoc* board of the BCV appointed by him and Special Attorney General Hernandez are authorised to give instructions on behalf of the BCV to the BoE and to DB, respectively.

4. BoE, DB and the receivers have therefore received conflicting instructions. They are neutral as between the Maduro Board and the Guaidó Board. They are what used to be called interpleaders but are now called stakeholders and will pay the reserves to whomsoever the court determines is entitled to give instructions on behalf of the BCV.

5. It is common ground that the Guaidó Board, which has given instructions to the BoE, and Special Attorney General Hernandez, who has given instructions to DB, were appointed by Mr. Guaidó. It is also common ground that Mr. Ortega, the President of the Maduro Board which has also given instructions to the BoE and DB, was appointed by Mr. Maduro.

6. The Guaidó Board claims that Mr. Guaidó was entitled to make the appointments in question by virtue of a statute known as the Transition Statute and the fact, as the Guaidó Board says it is, that he is the Interim President of Venezuela. The Maduro Board has challenged the right of Mr. Guaidó to make those appointments. That challenge has led to the two preliminary issues.

7. The Guaidó Board maintains that the authority of Mr. Guaidó to make such appointments is established, as a matter of English law, by the recognition by Her Majesty's Government ("HMG") of Mr. Guaidó as the constitutional interim President of Venezuela. Pursuant to the "one voice" doctrine the court must accept as conclusive an unequivocal statement by HMG recognising a foreign sovereign state or the leader or government of a foreign sovereign state. This is the first issue which has been described as the Recognition Issue. It has been expressed in these terms:

> "Does Her Majesty's Government (formally) recognise Juan Guaidó or Nicolás Maduro and, if so, in what capacity, on what basis and from when? In that regard:
>
> (i) Has Her Majesty's Government formally recognised Mr Guaidó as Interim President of Venezuela by virtue of the FCO's 19 March 2020 letter to the Court and/or the public statements made by Her Majesty's Government?
>
> (ii) If so, is that recognition as both Head of State and Head of Government? and
>
> (iii) Is any such recognition conclusive pursuant to the "one voice" doctrine for the purpose of determining the issues in these proceedings ?

8. The Guaidó Board further maintains that the act of state doctrine prevents the English court from entertaining any challenge to the validity under Venezuelan law of the legislative or executive acts by which the relevant appointments have been made. This is the second issue which has been described as the Justiciability Issue. It has been expressed in these terms:

> Can this Court consider the validity and/or constitutionality under Venezuelan law of (a) the Transition Statute; (b) Decrees No. 8 and 10 issued by Mr Guaidó; (c) the appointment of Mr Hernández as Special Attorney General; (d) the appointment of the Ad Hoc Administrative Board of BCV; and/or (e) the National Assembly's Resolution dated 19 May 2020, or must it regard those acts as being valid and effective without inquiry? In that regard:
>
> (i) Does the "one voice" doctrine preclude inquiry into the validity of such matters?
>
> (ii) Are such matters foreign acts of state and/or non-justiciable?
>
> (iii) Does the Court lack jurisdiction and/or should it decline as a matter of judicial abstention to determine such issues?

9. Both the Recognition and the Justiciability Issues are issues of English law. The "one voice" doctrine is an established principle of English law and the doctrine of foreign act of state is also well-established, though there is scope for debate as to its scope and its limitations.

Events before 4 February 2019

10. In April 2013 Mr. Maduro was elected President of Venezuela. In December 2015 there were elections for the National Assembly. In May 2018 the next Presidential election took place which Mr. Maduro claims to have won. On 19 June 2018 Mr. Maduro appointed Mr. Ortega as President of the BCV. On 26 June 2018 the National Assembly passed a resolution declaring that appointment to be unconstitutional. On 10 January

2019 Mr. Maduro swore himself in for a second term as the President of Venezuela. On 15 January 2019 the National Assembly and the President of the National Assembly, Mr. Guaidó, announced, relying upon article 233 of the Venezuelan Constitution, that Mr. Maduro had usurped the office of Presidency of Venezuela and that Mr. Guaidó was the Interim President of Venezuela.

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

HMG's statement of 4 February 2019

12. On 4 February 2019 the Foreign Secretary, Jeremy Hunt MP, issued the following statement:

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

13. In a letter from Sir Alan Duncan MP dated 25 February 2019 to Tom Tugendhat MP, Sir Alan, writing as Minister of State for Europe and the Americas, explained that the decision to recognise Mr. Guaidó was based on two points. First, Mr. Guaidó and the National Assembly were acting consistently with the constitution when they declared the Presidency "vacant" following the May 2018 elections which were "deeply flawed". Second, the circumstances in Venezuela were "exceptional". 3.6 million people had fled the country and the regime, which was "holding onto power though electoral malpractice and harsh repression of dissent", and had been referred to the International Criminal Court by six countries for its abuse of human rights.

Events after 4 February 2019

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

15. Article 4 of the Transition Statute provides that "the present Statute is a legal act in direct and immediate execution of article 333 of the Constitution of the Bolivarian Republic of Venezuela." Article 14 provides that in accordance with article 233 of the Constitution the President of the National Assembly (who was Mr. Guaidó) is "the legitimate Interim President of the Bolivarian Republic of Venezuela". Article 15 provides that the National Assembly may adopt decisions necessary, inter alia, to safeguard assets of the State abroad. Article 15a gave the Interim President power to appoint *Ad Hoc* boards to assume the direction of various public bodies including "any other decentralised entity" for the purpose, inter alia, of protecting their assets. Article 15b gave the Interim President power to appoint a Special Attorney General to defend the interests of decentralised entities abroad.

16. On 5 February 2019 Mr. Guaidó as Interim President appointed Mr. Hernandez as Special Attorney General. He purported to do so pursuant to articles 233, 236 and 333 of the Constitution and article 15b of the Transition Statute. The decree was "issued at the Legislative Federal Palace in Caracas."

17. On 18 July 2019 Mr. Guaidó as Interim President appointed an *Ad Hoc* board of the BCV. Article 3 of Mr. Guaidó's Decree No.8 issued on 18 July 2019 provided that the *Ad Hoc* board would represent the BCV abroad in connection with agreements relating to the management of international reserves, including gold. Article 7 provided that the acts that resulted in the appointment of the person who currently occupies the Presidency of the BCV (i.e. Mr Ortega) were declared null and void. The decree was "issued at the Federal Legislative Palace in Caracas."

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

19. On 19 May 2020 the National Assembly passed a resolution confirming that the BCV was a "decentralised entity" and that BCV's assets abroad may only be administered by the *Ad Hoc* board.

20. Meanwhile, on 13 May 2019 DB had issued an arbitration claim form in this court seeking the appointment of receivers to hold and manage the proceeds of a gold swap contract concluded between DB and the BCV in 2015-2017. The swap contract was governed by English law and provided for disputes to be resolved by arbitration in London. The arbitration claim was issued pursuant to section 44 of the Arbitration Act 1996 because of conflicting instructions received by DB with regard to the payment of the proceeds. The court appointed the receivers, following which DB transferred the proceeds of the gold swap contract to the receivers. In September and October 2019 the Guaidó Board and the Maduro Board served statements of case setting out, respectively, the entitlement of Mr. Hernandez and Mr. Ortega to give instructions on behalf of the BCV.

21. On 14 February 2020 Knowles J., after hearing argument in the arbitration application, wrote to the Foreign Secretary, Dominic Raab MP, and invited HMG, by the Foreign Secretary, to provide a written certificate on two questions:

> "(i) Who does HMG recognise as the Head of State of the Bolivarian Republic of Venezuela ?

(ii) Who does HMG recognise as the Head of Government of the Bolivarian Republic of Venezuela ?"

22. Knowles J. received a reply from Mr. Shorter, Director Americas at the FCO, dated 19 March 2020. Mr. Shorter referred to the two questions and to a policy statement issued by Lord Carrington in 1980. The statement made by Jeremy Hunt MP on 4 February 2019 was then quoted and Mr. Shorter confirmed that that remained the position of HMG.

23. On 30 March 2020 Knowles J. ordered that the Recognition and Justiciability Issues be determined as preliminary issues in September 2020. On 29 April 2020 Flaux LJ refused the Maduro Board permission to appeal from that decision.

24. On 14 May 2020 proceedings were issued in this court in the name of the BCV, upon the instructions of the Maduro Board, against the BoE claiming that the BoE was in breach of its obligation to accept instructions from the Maduro Board with regard to payment of the gold reserves. An application for an expedited hearing of the entire claim (on Covid 19 grounds) was made and the BoE (who, like DB had received conflicting instructions) issued a stakeholder application. The two applications were heard on 28 May 2020. The court decided to hear the preliminary issues in both the arbitration application issued by DB and the action against the BoE on 22 June 2020 and ordered a stay of the action against the BoE.

25. The preliminary issues were heard over four days between 22 and 25 June 2020. The hearing was "remote" because of the Covid 19 crisis. I am grateful to counsel, solicitors and the parties for enabling the hearing to take place and for providing me with both soft and hard copies of the documents, and also to my clerk for setting up and maintaining the remote hearing.

The Recognition Issue

26. The submission made by counsel for the Maduro Board was that until 4 February 2019 HMG recognised the "Maduro government". The statement by HMG made on 4 February 2019 was described as a Delphic utterance. Whatever it meant it did not come close, they submitted, to an unequivocal recognition of another government, nor to a de-recognition of the Maduro government. It was submitted that HMG by its actions, in particular, the maintenance (both before and after 4 February 2019) of full diplomatic relations with the Maduro government and none with any other government, unequivocally recognises the Maduro government and that pursuant to the "one voice" doctrine the court must follow that lead. This submission was made by way of seven propositions which were developed over 80 paragraphs and some 22 pages. Counsel submitted that HMG, by recognising Mr. Guaidó as constitutional interim President of Venezuela, made a political statement, that is, "a statement with important political consequences". It was put in this way: the statement demonstrated "HMG's view that President Maduro's present position is illegitimate, and records HMG's political support for the claim by Mr. Guaidó to be Interim President of Venezuela pending fresh Presidential elections."

27. The submission made by counsel for the Guaidó Board was simple. The statement made on 4 February 2019 by HMG was a "clear and unequivocal statement by HMG of its

recognition of Mr. Guaidó as the constitutional interim President of Venezuela with effect from 4 February 2019".

28. HMG may recognise governments, either *de facto* or *de jure*; see *Mohamed v Breish* [2020] EWCA Civ 637 at paragraphs 1 and 55 per Popplewell LJ. But HMG may also recognise individuals as heads of state; see *Breish* at paragraph 60 per Popplewell LJ, quoting Lord Sumner in *Duff v Government of Kelantan* [1924] AC 797 at p.824, and see also *Luther v Sagor* [1921] 3 KB 532 at p.556 per Scrutton LJ. and *Mighell v Sultan of Johore* [1894] 1 QB 149 at p.158 per Lord Esher MR.

29. HMG's practice in this regard was the subject of a policy statement by Lord Carrington as Foreign Secretary in 1980:

> "Following the undertaking of my right honourable friend the Lord Privy Seal in another place on 18th June last we have conducted a re-examination of British policy and practice concerning the recognition of Governments. This has included a comparison with the practice of our partners and allies. On the basis of this review we have decided that we shall no longer accord recognition to Governments. The British Government recognise States in accordance with common international doctrine.
>
> Where an unconstitutional change of régime takes place in a recognised State, Governments of other States must necessarily consider what dealings, if any, they should have with the new régime, and whether and to what extent it qualifies to be treated as the Government of the State concerned. Many of our partners and allies take the position that they do not recognise Governments and that therefore no question of recognition arises in such cases. By contrast, the policy of successive British Governments has been that we should make and announce a decision formally "recognising" the new Government.
>
> This practice has sometimes been misunderstood, and, despite explanations to the contrary, our "recognition" interpreted as implying approval. For example, in circumstances where there might be legitimate public concern about the violation of human rights by the new régime, or the manner in which it achieved power, it has not sufficed to say that an announcement of "recognition" is simply a neutral formality.
>
> We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to Governments. Like them, we shall continue to decide the nature of our dealings with régimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so."

30. In *Breish* Popplewell LJ commented upon this policy statement at paragraph 33:

> "There are limits to the significance of this policy statement in the current context. It is a truism that policy is a matter for each successive government; and what was there being expressed was a general policy in relation to routinely making declarations of recognition of governments. As Mance J observed in *Kuwait Airways Co v Iraqi Airways Co* [1999] 1 LRC 223 at p. 267, in a particular case HMG must remain free to take and to inform the court of a more categorical attitude regarding recognition or non-recognition of a foreign government. It does not follow from the general policy that there will be reluctance to do so in some individual cases. The given rationale for reluctance would not arise in a case in which HMG would not be concerned if such recognition were treated as approval of the new regime. It is clear from the evidence of the public support for Prime Minister al-Sarraj's GNA by HMG and the UN, some of which I refer to below, that this is such a case. Moreover the reluctance implicit in the general policy might give way where it is desirable to make a statement of recognition of the de facto status of a government for some particular objective. That also applies in the current context where the statements have been made in order to assist in resolving the deadlock in the LIA's ability to exercise effective control as Libya's sovereign wealth fund for the benefit of all the Libyan people, an objective which HMG and the UN have repeatedly endorsed in public statements, some of which I refer to below. Moreover it is not uncommon for the FCO to refer expressly to the 1980 policy in qualifying what is said in a statement, as it did for example in its statement in *Gur v Trust Bank*. The absence of such qualification in this case is a further indication that the 1980 policy is not a significant consideration."

31. Mr. Shorter, in his reply to Knowles J. on 19 March 2020 said:

> "The policy of non-recognition does not preclude HMG 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."

32. Thus the meaning of the 4 February 2019 statement by HMG must depend, not upon the 1980 policy statement, but upon the words of that statement understood in their factual context.

33. The words "The United Kingdom *now* recognises" indicate that as at the date of the statement (4 February 2019) something had changed. The factual context supports that understanding because on 4 February 2019 eight days had elapsed from 26 January 2019 on which date the UK and other members of the EU had given Mr. Maduro that period of eight days in which to call fresh elections. What had changed? Obviously what had changed was that Mr. Maduro had not called fresh elections. The person *now* recognised by the United Kingdom as the President of Venezuela was Mr. Guaidó. Until

4 February 2019 the person recognised as President must have been, I infer, Mr. Maduro. On and after that date it was, as HMG's statement says, Mr. Guaidó. The warning given on 26 January 2019 obviously had an international political purpose. It was intended to persuade Mr. Maduro to call fresh elections. The statement made on 4 February 2019 gave effect to the threat made on 26 January 2019. It was in that sense an internationally political statement but it was also a formal statement that HMG now recognised Mr. Guaidó as the interim President of Venezuela pending fresh elections. The word "recognises" denotes a formal statement of consequence. Counsel for the Guaidó Board submitted that it is a word which HMG would not use casually but would use deliberately. I agree. There was now, it was submitted, a recognition of the legal status of Mr. Guaidó as President as opposed to a mere expression of political support. I agree. Far from being Delphic the statement was clear and unequivocal in its meaning. There cannot be two Presidents of Venezuela and so it was necessarily implicit in the statement that HMG no longer recognised Mr. Maduro as the President of Venezuela.

34. The argument advanced by counsel for the Maduro Board (and most of the seven propositions) concerned the question whether HMG in its statement of 4 February 2019 had recognised a government. However, the statement of recognition made by HMG concerned not the government of Venezuela but the President of Venezuela. There was therefore force in the submission made by counsel for the Guaidó Board that the Maduro Board was "shooting at the wrong target".

35. The argument advanced on behalf of the Maduro Board failed to recognise the limited scope of the statement of recognition by HMG, namely, that it was limited to the recognition of the President of Venezuela. The government of Venezuela is not mentioned save in the last paragraph where the Foreign Secretary said that "the oppression of the illegitimate, kleptocratic Maduro regime must end". That was, it would appear, a comment expressing profound disapproval of the government led by Mr. Maduro. The statement of recognition was, however, confined (no doubt carefully) to the position of Mr. Guaidó as constitutional interim President of Venezuela. It was common ground between the parties that pursuant to article 226 of the Constitution the President is the Head of State and Head of the National Executive, in which latter capacity he directs the actions of the government. But the statement of recognition by HMG was limited to recognition of Mr. Guaidó as interim President.

36. The argument advanced on behalf of the Maduro Board assumed that the argument being advanced on behalf of the Guaidó Board was that the statement of 4 February 2019 recognised a new government. It was submitted that such an argument could not be right because HMG continued to have full diplomatic relations with Mr. Maduro's government which, it was said, supported by learned authorities in the field of public international law, is compelling evidence that HMG recognised Mr. Maduro's government as the government of Venezuela. The difficulty with this argument is that counsel for the Guaidó Board did not submit that there had been a recognition of another government. Their argument concerned, not the government of Venezuela, but the President of Venezuela, albeit that, as is common ground between the parties, the President, as Head of the National Executive, directs the action of the government. The reason counsel for the Guaidó Board concentrated on the President of Venezuela was not only the language used by HMG but also that the appointments which are challenged in the BoE and DB actions by the Maduro Board are appointments made by Mr. Guaidó as President of Venezuela. Thus, although there may have been no change

in the full and formal diplomatic relations between HMG and the government of Venezuela and although there may have been no change in the exercise of effective administrative control in Venezuela (as alleged by the Maduro Board but denied by the Guaidó Board) there has been, on the case of the Guaidó Board, a change in the person recognised by HMG as the President of Venezuela. It is unnecessary for the Guaidó Board to say there has been a change of government and they have not said that. Counsel for the Guaidó Board accepted that the question of "government" in Venezuela is "difficult" because some parts of the state of Venezuela support Mr. Maduro and, they submitted, some parts of it support Mr. Guaidó. In their pleadings and in their written skeleton argument counsel had referred to the President as "Head of Government" but this was based upon the proposition that the President was "entitled" to direct the action of the government. In oral submissions it was made clear that no case was advanced concerning the government of Venezuela.

37. The response of Mr. Shorter to Knowles J. on 19 March 2020 was that the position of HMG remained what it had stated on 4 February 2019. Counsel for the Maduro Board noted that HMG had not answered the two questions put to it by Knowles J. and that HMG had not provided a certificate. There was nothing in these points. HMG was not obliged to answer in terms the questions put to it. The reply was however of value because it confirmed that the position of HMG remained what it had stated on 4 February 2019. The letter was not in the form of a certificate but it did not have to be; see *Secretary of State for the Home Department v CC* [2013] 1 WLR 2171 at paragraph 117 per Lloyd-Jones LJ.

38. It was submitted that the statement by HMG should be construed so as to be consistent with its actions. In circumstances where, it was said, HMG continued to have diplomatic relations with the Maduro government the statement should be construed as a political statement, that is, one with political consequences, but of no consequence in terms of HMG's position on the recognition of the government of Venezuela. However, this approach to the meaning of the statement by HMG gives no effect either to the limited focus on the position of Mr. Guaidó as Interim President of Venezuela or to the use of the word "recognises".

39. It was also submitted that the statement made by HMG should be construed in a manner which was consistent with international law. It was suggested that a recognition of "a Guaidó Government" would contravene international law because it would be premature and, given the context of access to foreign reserves, would be an impermissible intervention in the affairs of Venezuela. I was not persuaded that this consideration justified a construction or interpretation of HMG's statement of 4 February 2019 other than that which I have given it above. First, HMG's recognition was not of "a Guaidó Government" but of Mr. Guaidó as constitutional interim President of Venezuela. Second, the meaning of HMG's statement of recognition is unequivocal. There is no ambiguity which needs to be resolved by reference to the norms of international law.

40. It was further submitted that the recognition was not of Mr. Guaidó as the President in a normal sense but as a "mere caretaker" pending further elections. The recognition was certainly of an interim President pending elections but there is no foundation for the suggestion that Mr. Guaidó was not being recognised as the President.

41. Finally, it was submitted that HMG's statement should be construed so as to avoid the court being bound by the "one voice" doctrine to proceed on a "manifestly artificial or false basis". But in circumstances where the National Assembly had declared Mr. Guaidó to be the Interim President of Venezuela there is nothing artificial or false in construing the statement as recognition of Mr. Guaidó as the constitutional interim President of Venezuela.

42. My answers to the Recognition Issue are therefore as follows:

> "Does Her Majesty's Government (formally) recognise Juan Guaidó or Nicolás Maduro and, if so, in what capacity, on what basis and from when?
>
> Answer: Yes. HMG does recognise Mr. Guaidó in the capacity of the constitutional interim President of Venezuela and, it must follow, does not recognise Mr. Maduro as the constitutional interim President of Venezuela. It has done so on the basis that such recognition is in accordance with the constitution of the Republic of Venezuela and has done so since 4 February 2019.
>
> In that regard:
>
> (i) Has Her Majesty's Government formally recognised Mr Guaidó as Interim President of Venezuela by virtue of the FCO's 19 March 2020 letter to the Court and/or the public statements made by Her Majesty's Government?
>
> Answer: Yes.
>
> (ii) If so, is that recognition as both Head of State and Head of Government?
>
> Answer: No. The recognition is as Head of State.
>
> (iii) Is any such recognition conclusive pursuant to the "one voice" doctrine for the purpose of determining the issues in these proceedings ?
>
> Answer: Yes.

43. Whilst not adopting any submission that the statement by HMG was an unequivocal recognition of Mr. Guaidó as the constitutional interim President of Venezuela, counsel for the Maduro Board were (unsurprisingly) alive to the possibility that the court may consider that such submission was correct. They submitted that such recognition was of Mr. Guaidó as *de jure* interim President of Venezuela and thus left in place HMG's prior recognition of Mr. Maduro as President which continued after 4 February 2019 as evidenced by the continued formal diplomatic relations between the two states.

44. However, this submission is inconsistent with the "one voice" doctrine which requires the courts of this country to accept a statement of recognition as conclusive because it is the prerogative of the Crown, acting though HMG, to make statements of recognition; see *Breish* at paragraphs 1 and 34 per Popplewell LJ. HMG having recognised Mr.

Guaidó as the President of Venezuela the courts and the executive must speak with one voice; see *The Arantzazu Mendi* [1939] AC 256 at p.264 per Lord Atkin. It is not open to the court to set aside the statement by HMG and look at other material in an attempt to identify what the position of HMG in fact is; see *Bouhadi v Breish* [2016] EWHC 602 (Comm) at paragraph 43 per Blair J. The court must not express a contrary view for any purpose; see *Breish* at paragraph 63 per Popplewell LJ.

45. Just as with governments, a person may be recognised by HMG as the *de jure* or *de facto* President (or any other head of state). When a person is so recognised the courts must accept him as President pursuant to the "one voice" doctrine.

46. In *Breish* Popplewell LJ said at paragraph 43:

> "(It) is well-established by authority that the one voice principle is engaged by recognition of foreign governments as de facto governments, and that such recognition says nothing about the de jure status or constitutional lawfulness of the government under local law. Such recognition of a de facto government is a recognition of its sovereignty. Accordingly what the one voice principle requires of the Court is that it should give effect to the sovereignty notwithstanding any constitutional unlawfulness of the government so recognised.

47. This principle will typically come into play when a revolutionary government overthrows the lawful and constitutional government and is later recognised by HMG as the *de facto* government. But where HMG unequivocally recognises a person as the *de jure* (or constitutional) President the court must give effect to that unequivocal recognition notwithstanding that another person was formerly the *de jure* or *de facto* President and claims still to be. The judiciary and the executive must speak with one voice. The courts cannot investigate the conduct of HMG (either before or after the recognition) to see whether its conduct suggests that it in fact had a different view from that stated unequivocally by HMG. I accept that in *Breish* the court did have regard to conduct of HMG (see paragraphs 34 and 38 of *Breish*) but the conduct of HMG in that case was entirely consistent with the FCO letters in that case. I do not accept that where HMG has unequivocally recognised a person as President it is constitutionally appropriate for the court to investigate the conduct of HMG with a view to contradicting that unequivocal recognition.

48. That being so I shall not attempt to rehearse the evidence relied upon in this regard by counsel for the Maduro Board which concerned an allegation that HMG had established full diplomatic relations with the government headed by Mr. Maduro prior to 4 February 2019 and has maintained such relations after 4 February 2019 and an allegation that HMG supported sanctions against the government headed by Mr. Maduro both before and after 4 February 2019.

49. Counsel for the Maduro Board submitted that if HMG's recognition of Mr. Guaidó was as *de jure* interim President the court did not have to follow that because HMG was merely expressing a legal opinion, and the court was not bound by such expressions of opinion. Reliance was placed on statements to that effect in *Carl Zeiss v Rayner & Keeler (No.2)* [1967] AC 853 at p. 949 per Lord Upjohn and in *Breish* at first instance by Andrew Baker J., see [2019] EWHC 1765 (Comm) at paragraph 24. However, whilst

some assessment of the Venezuelan legal position may have been made by HMG, the statement of recognition issued on 4 February 2019 was not an expression of a legal opinion but was a formal recognition by HMG of Mr. Guaidó as the constitutional interim President of Venezuela. The "one voice" doctrine requires the court not to contradict that unequivocal statement of recognition[1].

50. There was a dispute between the parties as to whether the Maduro Board were procedurally entitled to adduce evidence of the factual matters upon which they relied. It was submitted by counsel for the Guaidó Board that the preliminary issues ordered to be determined by the court did not include the issues of fact alleged by the Maduro Board, namely, that HMG continues to deal with the Government of which Mr. Maduro is head and that Mr. Maduro and the Government of which he is head continues to exercise effective administrative control in Venezuela. This submission was consistent with my recollection of the ruling I made and is supported by paragraph 18 of that ruling; see [2020] EWHC 1402 (Comm). The Guaidó Board had therefore not prepared evidence on such issues for this hearing. However, counsel for the Maduro Board submitted that the Recognition Issue, which had been amended by Knowles J. to include a reference to Mr. Maduro as well as to Mr. Guaidó, permitted factual evidence to be adduced on the question whether HMG had recognised Mr. Maduro as the President, Head of State and Head of Government. I do not recall being informed of that amendment and paragraph 17 of my ruling suggests that I had in mind the form of the preliminary issues as stated in the list of issues which referred only to Mr. Guaidó. Moreover, the subsidiary issues listed for determination of the Recognition Issues referred only to Mr. Guaidó. Counsel also relied upon the final sentence of paragraph 17 which acknowledged that factual evidence could be adduced by both parties, though that was limited to evidence as to other statements or conduct of HMG relevant to the question of whether there had been an unequivocal recognition of Mr Guaidó as President. The factual evidence which I had in mind which might be adduced was evidence of the context in which the statement of 4 February 2019 had been made. That would not include evidence of the diplomatic relations continued with the Venezuelan state after 4 February 2019. However, it is unnecessary to rule on this dispute in the light of the effect of the "one voice" doctrine. Should it hereafter become necessary to investigate what conclusion should be drawn from the matters relied upon by counsel for the Maduro Board it would be fair and just and consistent with the overriding objective for the Guaidó Board to have the opportunity to adduce evidence on such matters. Their counsel indicated, by reference to *Oppenheim's International Law* 8th.ed., paragraph 50, that there might be substantial arguments concerning implied recognition and in particular as to whether recognition can be implied from the retention of diplomatic relations. These matters, if they have to be decided, should only be decided after both parties have had the opportunity to adduce evidence. But on my understanding of the unequivocal meaning of HMG's statement of recognition and of the effect of the "one voice" doctrine they do not arise for decision.

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[1] After this judgment was provided to counsel in draft, counsel for the Maduro Board asked the court to state "explicitly" whether the recognition by HMG was de jure or de facto or both, because it was the position of the Maduro Board that it is possible for HMG to recognise one person as de jure Interim President (or as de jure President) whist continuing to recognise another person as de facto President. HMG's recognition was of Mr. Guaidó as constitutional interim President of Venezuela. That is consistent with a de jure recognition. However, whatever the basis for the recognition, HMG has unequivocally recognised Mr. Guaidó as President of Venezuela. It necessarily follows that HMG no longer recognises Mr. Maduro as President of Venezuela, as I said at the end of paragraph 33 of my judgment. There is no room for recognition of Mr. Guaidó as de jure President and of Mr. Maduro as de facto President.

The Justiciability Issue

51. The Maduro Board has raised several objections to the legality under Venezuelan law of the Transition Statute and of the appointments made by Mr. Guaidó. Those objections are summarised in the List of Issues and in Appendix II to the Skeleton Argument of counsel for the Guaidó Board. In that Appendix the objections number 13 in total. The Transition Statute and the appointments are said to be null and void, not promulgated or published in a manner which gives them legal effect and not applicable to the BCV (because it was not a "decentralised entity".) Some of the objections are based upon decisions of the Venezuelan Supreme Tribunal of Justice.

52. These objections are said by the Guaidó Board to be non-justiciable on two grounds. First, some of them are said to breach the "one voice" doctrine because they are premised upon Mr. Guaidó not being the interim President of Venezuela. Second, all of the objections are said to be non-justiciable by reason of the "act of state" doctrine.

53. So far as the "one-voice" doctrine is concerned this doctrine can only render a challenge non-justiciable if the challenge is premised upon Mr. Guaidó not being the interim President of Venezuela; see *Breish* at paragraphs 41 and 72(4) per Popplewell LJ and Males LJ. Counsel for the Guaidó Board accepted that this only applied to those challenges based upon decisions of the Venezuelan Supreme Tribunal of Justice because such decisions were based upon the premise that Mr. Guaidó was not interim President. Thus one of those decisions referred to

> "the citizen Juan Gerardo Antonio Guaidó Márquez who unconstitutionally tried to assume inclusive, the quality of "president of the national assembly and interim president of the republic". This situation has been declared by this Chamber in multiple sentences as a usurpation of functions, an assault on the rule of law and an act of force against the Constitution."

54. I accept that, to the extent that the decisions of the Supreme Tribunal of Justice are based upon that view of Mr. Guaidó, any challenge based upon such decisions (of which there appear to be only two) are not justiciable in this court. Counsel for the Maduro Board did not accept that any decisions were based upon that view. However, it is unnecessary to say anything more about this limb of the justiciability argument because the Guaidó Board say that all the challenges are not justiciable because they seek to challenge acts of the Venezuelan state.

55. The scope and limitations of "the act of state" doctrine were extensively considered by the Supreme Court in *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 but in a quite different context. There the issue was whether claims for damages arising out of unlawful abduction and other wrongs to the person were barred by the act of state doctrine. It was held that they were not. Counsel for the Maduro Board and the Guaidó Board were not agreed as to what conclusions of law could be drawn from the judgments in that case. However, there was, I think, agreement that, as contemplated by Lord Neuberger (who spoke for the majority of himself, Lord Wilson, Baroness Hale and Lord Clarke), there were three rules or aspects of the doctrine of foreign act of state pursuant to which the court will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states. They are stated at paragraphs 121-123 of Lord Neuberger's judgment.

> "121 The first rule is that the courts of this country will recognise, and will not question, the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.
>
> 122 The second rule is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state.
>
> 123 The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it. ……"

The first rule

56. The case of the Guaidó Board is that the Transition Statute is a legislative act of the state of Venezuela which this court will recognise and not question pursuant to the first rule.

57. The case of the Maduro Board is that the first rule does not apply for several reasons. These were summarised at the close of their counsel's submissions. I shall deal with each reason.

58. The first reason was that the Guaidó Board, in order to show that the Transition Statute was an act of state, had to show that it was a valid legislative act. For if it were not, then it could not be an act of state. The Transition Statute was said not to be a valid legislative act because it violated the constitution of Venezuela and had not been promulgated or published in a manner which gives it legal effect.

59. In *Belhaj* Lord Sumption (with whom Lord Hughes agreed) described the relevant principle in these terms at paragraph 228:

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

60. Lord Sumption was not one of the majority who agreed with Lord Neuberger but he agreed with the result of the case and gave his own reasons for doing so. There is no reason to doubt his description of the relevant principle. Thus Lord Neuberger described the principle at paragraph 118:

> "In summary terms, the Doctrine amounts to this, that the courts of the United Kingdom will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states, and it applies to claims which, while not made against the foreign state concerned, involve an allegation that a foreign state has acted unlawfully.……."

61. The submission of counsel for the Maduro Board, if correct, would nullify the effect of the act of state doctrine for it would enable the court to investigate and pass judgment upon the question whether a foreign legislature had, in accordance with its own law, passed a valid, effective and enforceable statute.

62. Lord Sumption endorsed and relied upon the statement of principle by Rix LJ in *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458 at paragraph 110 which is relevant in the present context:

> "What the *Kirkpatrick* case is ultimately about, however, is the distinction between referring to acts of state (or proving them if their occurrence is disputed) as an existential matter, and on the other hand asking the court to inquire into them for the purpose of adjudicating upon their legal effectiveness, including for these purposes their legal effectiveness as recognised in the country of the forum. It is the difference between citing a foreign statute (an act of state) for what it says (or even for what it is disputed as saying) on the one hand, something which of course happens all the time, and on the other hand challenging the effectiveness of that statute on the ground, for instance, that it was not properly enacted, or had been procured by corruption, or should not be recognised because it was unfair or expropriatory or discriminatory."

63. In the present case the Maduro Board wishes to advance a number of reasons for suggesting that the Transition Statute is null and void and of no effect. Lord Neuberger in *Belhaj* said at paragraph 135 that there is "no more fundamental competence [of a sovereign state] than the power to make laws." Yet the Maduro Board seeks to have this court adjudicate upon the validity of that exercise of sovereignty. In my judgment that is what the act of state doctrine prevents this court from doing.

64. I accept that there must be credible evidence before the court that the Transition Statute is the act of the Venezuelan legislature. In the present case there is evidence before the court that the statute was issued and signed by the officers of the National Assembly and that it bore the seal of the interim President of Venezuela. That evidence was not challenged. What was challenged was the assumption that the statute was valid and effective. But this court is not permitted to investigate that by the act of state doctrine.

65. The second reason suggested for saying that Lord Neuberger's first rule did not apply was that the court was entitled to entertain a dispute as to the construction of the Transition Statute. There can of course be circumstances where that is permissible but no dispute as to the construction of the statute arises in connection with Lord Neuberger's first rule. There was a question as to whether the BCV was "a decentralised entity" within the meaning of the statute but that, if it arises at all, arises in connection with Lord Neuberger's second rule.

66. The third reason suggested for saying that Lord Neuberger's first rule did not apply was that it applied only to property and perhaps to injury to the person (see paragraphs 125, 135 and 159 of his judgment in *Belhaj*). It is true that Lord Neuberger stated that the rule applied to property and might also apply to injury to the person. He said that because the cases showed that it applied to property and he considered there to be a

powerful argument that it applied also to injury to the person. But he was not considering the question whether the first rule or aspect of the doctrine applied to a statute which conferred power on the head of state to make certain appointments. In my judgment, when one has regard to the principles underlying the doctrine, there can be no reason for excluding such statutes from the scope of the doctrine.

67. Those principles were explained in *Attorney General v Buck* [1965] Ch. 745 by Diplock LJ at p.770:

> "As a member of the family of nations, the Government of the United Kingdom (of which this court forms part of the judicial branch) observes the rules of comity, videlicet, the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law. One of the commonest applications of this rule by the judicial branch of the United Kingdom Government is the well-known doctrine of sovereign immunity. A foreign state cannot be impleaded in the English courts without its consent: see *Duff Development Co. v. Kelantan Government*. As was made clear in *Rahimtoola v. Nizam of Hyderabad*, the application of the doctrine of sovereign immunity does not depend upon the persons between whom the issue is joined, but upon the subject-matter of the issue. For the English court to pronounce upon the validity of a law of a foreign sovereign state within its own territory, so that the validity of that law became the res of the res judicata in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rules of comity. In my view, this court has no jurisdiction so to do."

68. I return to Lord Sumption's statement of the relevant principle at paragraph 228:

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

69. If the courts will not adjudicate on the lawfulness or validity of a state's sovereign acts, because to do so would be to assert jurisdiction over the internal affairs of the state, there is, in my judgment, no principled reason for saying that the doctrine does not apply where the sovereign act is the act of the legislature conferring power upon the President to make certain appointments. I do not consider that the recognition by Lord Neuberger (and indeed by Lord Mance) that the previous cases were only concerned with property within the state in question should be regarded as requiring the conclusion that the principle does not apply to such an act of the legislature. The Supreme Court was not considering such an act.

70. The fourth reason suggested for saying that Lord Neuberger's first rule did not apply was that it does not apply in so far as it affects property or assets in the territory of another state.

71. All members of the Supreme Court in *Belhaj* agreed that there was a territorial limit on the extent of this doctrine. Thus Lord Sumption said at paragraph 229 that it was "confined to sovereign acts within the territory of the state concerned." Lord Neuberger said at paragraph 135 that the first rule only applied "to acts which take effect within the territory of the state concerned." (See also Lord Mance at paragraphs 35 and 36.)

72. The relevant part of the Transition Statute is that which empowers the Interim President to make certain appointments, article 15a and b. In my judgment that takes effect within the jurisdiction or territory of Venezuela. It confers powers upon the Interim President who is in Venezuela. It is true that the *Ad Hoc* board or Special Attorney General appointed by the Interim President may deal with assets abroad but the power to appoint conferred by the statute takes effect in Venezuela. There was no change in the ownership of the foreign reserves held by the BCV abroad. Counsel for the Maduro Board submitted that it was "artificial" to view the matter in this light because in reality this case is about gold bars in Threadneedle Street and sums due in a London arbitration. Of course this case is "about" those assets but the relevant part of the Transition Statute took effect in Venezuela because it conferred certain powers of appointment on the Interim President of that country. In my judgment there is nothing "artificial" about that. Thus the act of state doctrine applies and is not excluded by the territoriality requirement.

73. My conclusion is that Lord Neuberger's first rule or aspect of the act of state doctrine requires the court to refrain from enquiring into the validity of the Transition Statute. For that reason the challenges to the validity of the Transition Statute are not justiciable in this court.

The second rule

74. The case of the Guaidó Board is that the appointments of the Guaidó Board and of the Special Attorney General were executive acts of the state of Venezuela, in particular of the interim President of Venezuela, which this court will recognise and not question pursuant to Lord Neuberger's second rule.

75. The case of the Maduro Board was that the second rule did not apply for several reasons. These were summarised at the close of their counsel's submissions. I shall deal with each reason.

76. The first reason was that the authority of the interim President to make the appointments derived from the Transition Statute which for the reasons suggested by the Maduro Board was null and void and of no effect. There was therefore no relevant executive act of state. However, this argument is non-justiciable for the reasons already stated, namely, it involves a challenge to a legislative act of the state of Venezuela.

77. The second reason was that the second rule applies only to property within the jurisdiction of the state in question. This is the same point which was taken in relation to the first rule. It fails for the same reasons. If the courts will not adjudicate on the lawfulness or validity of a state's sovereign acts there is, in my judgment, no principled

reason for saying that the principle does not apply where the sovereign act is the act of the head of state in making certain appointments. I do not consider that the recognition by Lord Neuberger (and indeed by Lord Mance) that the previous cases were only concerned with property within the state in question should be regarded as requiring the conclusion that the principle does not apply to such an act of the head of a sovereign state. Indeed, it would be very surprising and unprincipled if, given the existence of the act of state of doctrine and the principles underlying it, it did not apply to executive actions of the head of state himself.

78. The third reason was that the executive actions of the interim President took effect out of the jurisdiction. Counsel for the Maduro Board submitted that the appointment of Mr. Hernandez as Special Attorney General took effect out of the jurisdiction because Mr. Hernandez was not within the jurisdiction but resided in Washington DC and his appointment was directed at international arbitration proceedings and the protection of the state's assets abroad (see article 15b of the Transition Statute).

79. When Lord Neuberger first stated the first and second rules in paragraphs 121 and 122 he stated that the court will recognise and will not question sovereign acts "which take place or take effect within the territory of that state". The use of the phrase "take place within" echoes the use of that phrase by Rix LJ in *Yukos Capital v Rosneft* at paragraph 68. The use of that phrase suggests that the mere fact that the effect of the sovereign may in some sense be felt abroad will not or may not be sufficient to exclude the doctrine if the sovereign act took place within the state in question.

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

81. When the Interim President appointed the *Ad Hoc* board of BCV and declared the appointment of the previous President of BCV as null and void pursuant to Decree No.8 he did so at the Federal Legislative Palace in Caracas. The decree concerned BCV which is a Venezuelan entity. Its board and President were changed. That took effect in Venezuela because BCV is a Venezuelan entity. Again, although the effect of that appointment could be said to be felt wherever the board members are (it was suggested in the United States) or in London, where gold was held for BCV by BoE, the reality is that the appointment, which concerned a Venezuelan entity, was made or took place in Venezuela and had its most obvious effect there by reason of the change in the board and President of BCV. In making the appointment the President was not seeking to

exercise power over the territory of another state. The ownership of the gold held by the BoE remained with the BCV. The President was concerned with an internal matter, the governance of Venezuela's central bank. In my judgment, to regard the appointment of the *Ad Hoc* board as extra-territorial and so beyond the scope of the act of state doctrine would be inconsistent with the principles underlying that doctrine.

82. I have noted with interest, but do not rely upon, the decision of the Court of Chancery in the state of Delaware in *Jiménez v Palacios* No. 2019-0490-KSJM (Del. Ch. Ct.) dated 12 August 2019 which concerned a very similar question in relation to the appointment by Mr. Guaidó of the board of the Venezuelan oil company PDVSA. It was argued that the effect of the appointment was extra-territorial because of its effect on Delaware corporations headquartered in Houston. The judge concluded at p.44:

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

83. The fourth reason relied upon for saying that the second rule did not apply was that the rule only applied in relation to valid acts of state.

84. This submission is not supported by a decision of the Supreme Court in *Belhaj*. The question whether the second rule applies to acts which are unlawful by the law of the territory concerned was expressly left open by Lord Neuberger; see paragraphs 137-143. What of the other judges? It was suggested that Lord Mance was of the opinion, with regard to the second rule, that the court was entitled to determine whether a foreign law was legal, for example under the local constitution; see paragraph 73(iii). By contrast Lord Sumption was of the opinion that the act of state doctrine applied to executive acts with no legal basis at all; see paragraph 230.

85. Thus I am, it seems, left with the task of deciding this issue which has been left open by the Supreme Court.

86. There are circumstances in which the lawfulness of a foreign executive act of state may be questioned, namely, where the issue arises incidentally rather than being the very subject matter of the action in the sense that the issue cannot be resolved without determining it; see *Attorney General v Buck* [1965] Ch. 745 at p.770 per Diplock LJ. This was recognised by Lord Neuberger in *Belhaj* at paragraph 140 and by Lord Sumption at paragraph 240. But in the present case the lawfulness of the executive acts of the Interim President does not arise incidentally but is raised directly and for decision.

87. I am very conscious that Lord Neuberger was not convinced that an executive act unlawful according to the territory concerned should not be declared unlawful by the courts of this country; see paragraph 137. However, he also recognised that there were dicta which could fairly be said to support the existence of the rule even where the act is unlawful by the laws of the state concerned; see paragraph 138. Moreover, I see, with respect, undoubted force in the opinion expressed by Lord Sumption at paragraph 230 that in those cases "these transactions are recognised in England not because they are valid by the relevant foreign law, but because they are acts of state which an English

court cannot question." So far as Lord Mance's opinion is concerned at paragraph 73(iii) I am not convinced that his opinion is to be understood in the wide sense suggested. Lord Mance relied upon *Attorney General v Buck* which only permitted challenges where they were incidental to the issue raised in the case, a principle also endorsed by the second case to which he referred *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758, [2011] QB 773 (at paragraphs 70-74 per Arden LJ and 185-189 per Elias LJ).

88. So far as a first instance judge is concerned (cf the approach of Popplewell J. in *Reliance Industries Ltd v The Union of India* [2018] EWHC 822 (Comm), [2018] 2 All ER (Comm) 1090 (at paragraphs 104-108) I consider that for the reasons expressed by Lord Sumption I am bound to hold that the court will not question the validity or effect of the appointments made by Mr. Guaidó as interim President of Venezuela even if they are unlawful or of no effect in Venezuelan law. In so far as there is a requirement for those appointments to be "apparently lawful" (as possibly suggested by Lord Neuberger at paragraph 138) they are apparently lawful, having been made at the Legislative Palace in Caracas pursuant to the Transition Statute.

89. I should mention, in the context of Lord Neuberger's second rule, the argument that the BCV was not a "decentralised entity" within the meaning of the Transition Statute. The "one voice" doctrine does not prevent this question being examined by the court but the act of state doctrine does. Mr. Guaidó purported to exercise the power granted to him under Article 15A of the Transition Statute to appoint an "Ad Hoc board" of the BCV on the grounds that the BCV was a decentralised entity within the meaning of the Transition Statute. That was an executive act of state and accordingly the court cannot adjudicate upon its validity.

90. I should also mention the reliance placed by counsel for the Maduro Board on my own decision in *JSC BTA Bank v Ablyazov (No.4)* [2011] EWHC 202 (Comm). In that case I considered the act of state doctrine before not only the decisions in *Belhaj* (2014-17) but also the decisions in *Yukos* (2011-2). My conclusions on the act of state doctrine were expressed at paragraph 55 in these terms:

> "Having reviewed the principal authorities relied upon by the parties my conclusions are:
>
> i) The act of state doctrine prevents the court from enquiring into the validity of a foreign sovereign act within the territory of the foreign state.
>
> ii) However, before applying that doctrine the court must consider the circumstances in which the court is being invited to enquire into the validity of the act of state for there are some circumstances, not inconsistent with the principle underlying the doctrine, in which the enquiry is permitted.
>
> iii) Those circumstances include:
>
> > a) Where the issue is whether a person who purports to act on behalf of a foreign sovereign has authority to do so; see *Dubai Bank Ltd. v Galadari*.

> b) Where the effect of a foreign law arises incidentally in an action upon a contract to be performed abroad or in an action alleging that a tort has been committed abroad; see *Buck v Attorney General* and *Al-Jedda v Secretary of State for Defence.*
>
> c) Where the foreign sovereign itself questions the validity of its own apparent act; see *Marubeni Hong Kong and South China Ltd. v The Government of Mongolia* and *Donegal International Ltd. v Zambia.*

91. Reliance was placed on sub-paragraph (iii)(a) and on the earlier paragraph 51 where I accepted the proposition that

> "……where a person claims to act on behalf of a foreign sovereign the court can enquire into whether that person does indeed have authority to act on behalf of the sovereign. However, if he does have the required authority and the court is asked to recognise the validity of his act within the territory of the sovereign, I do not consider that the court can enquire whether his actions were valid in accordance with the local law. To do so would be contrary to the authorities on which Mr. Smith relied.

92. It was not explained precisely how that proposition assisted the Maduro Board in this case. I do not consider that the proposition can assist their case. The Guaidó Board and the Special Attorney General derive their authority from the appointment made by Mr. Guaidó whom this court must accept is the interim President of Venezuela. The interim President of Venezuela purported to make those appointments pursuant to the Transition Statute and neither his appointments nor the validity of the Transition Statute can be adjudicated upon by this court.

93. I have now considered each of the reasons relied upon for saying that Lord Neuberger's second rule or aspect of the act of state doctrine is not applicable to Mr. Guaidó's appointments as Interim President of Venezuela and can answer the questions raised by the Justiciability Issue.

> Can this Court consider the validity and/or constitutionality under Venezuelan law of (a) the Transition Statute; (b) Decrees No. 8 and 10 issued by Mr Guaidó; (c) the appointment of Mr Hernández as Special Attorney General; (d) the appointment of the Ad Hoc Administrative Board of BCV; and/or (e) the National Assembly's Resolution dated 19 May 2020, or must it regard those acts as being valid and effective without inquiry?
>
> Answer: No. It must regard them as valid and effective without enquiry.
>
> In that regard:
>
> (i) Does the "one voice" doctrine preclude inquiry into the validity of such matters?

> Answer: Yes, but only in so far as the challenge is based upon decisions of the Supreme Tribunal of Justice which are themselves based upon Mr. Guaidó not being the constitutional interim President of Venezuela.
>
> (ii) Are such matters foreign acts of state and/or non-justiciable?
>
> Answer: Yes. They are foreign acts of state and non-justiciable.
>
> (iii) Does the Court lack jurisdiction and/or should it decline as a matter of judicial abstention to determine such issues?
>
> Answer: The court lacks jurisdiction because of subject matter immunity.

94. In the light of my decisions thus far it is unnecessary to decide whether, as submitted by counsel for the Guaidó Board, the challenges of the Maduro Board were also non-justiciable because of Lord Neuberger's third rule or aspect of the act of state doctrine.

95. I ask the parties to agree the form of an order giving effect to my decisions on the preliminary issues.