UKSC 2020/0195

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

B E T W E E N :

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 MADURO BOARD

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INTRODUCTION

References to the Appendix, Chronology and Statement of Facts and Issues are given as Appendix, [page]; Chronology, [date]; and SoFI, para. References to the judgments below take the forms J#x and CA#x.

1. The Bolivarian Republic of Venezuela ("**Venezuela**") is, or at the very least must for present purposes be taken to be, controlled by a government led by President Nicolás Maduro.[1]

2. Under the Venezuelan Constitution the President is Head of State ("**HoS**") and Head of Government ("**HoG**")[2] and is entrusted to "*direct the international relations*" of Venezuela.[3] HMG continues to recognise and have official dealings with the Venezuelan Ambassador to the United Kingdom who was first appointed by President Maduro in November 2014,[4] and HMG has throughout been in full reciprocal diplomatic relations with President Maduro's government through Her Majesty's Ambassador Mr Soper in the British Embassy in Caracas.[5] And, as the Court of Appeal held at CA#35, "[c]*onversely, HMG has declined to grant diplomatic status to Mr Guaidó's representative here, Ms Vanessa Neumann, or to establish diplomatic relations with Mr Guaidó*".

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[1] This hearing arises from preliminary issues formulated by the Guaidó Board. Facts asserted by the Maduro Board must for present purposes be assumed in their favour. As the Court of appeal noted below (CA#33), "*The Guaidó Board accepts that in practice Mr Maduro's government does exercise at least a degree of effective control in Venezuela, although the extent of such control is disputed* […]". The Maduro Board says that that control is in fact complete.

[2] Art 226 of the Constitution provides: "*The President of the Republic is the Head of State and of the National Executive, in which latter capacity he directs the action of the government.*" (Appendix, 815).

[3] Art 236(4) of the Constitution provides that the "*attributions and duties of the President of the Republic [include] [t]o direct the international relations of the Republic* […]" (Appendix, 817).

[4] The Court of Appeal stated at CA#34: "*It is not disputed that HMG has continued to maintain diplomatic relations with Mr Maduro's representatives by continuing to receive at the Court of St James the ambassador appointed by Mr Maduro and by continuing to maintain an embassy in Venezuela with an ambassador accredited to Mr Maduro. The Venezuelan ambassador to the United Kingdom is Mrs Maneiro, who was appointed in November 2014 and presented her credentials to Her Majesty the Queen, and who has continued in post (and in occupation of the Venezuelan Embassy) to the present date.*"

[5] The Court of Appeal stated at CA#34: "*The United Kingdom ambassador to Venezuela is Mr Andrew Soper, who was appointed in October 2017 and has remained in post notwithstanding the recognition of Mr Guaidó as constitutional interim President.*" At Appendix 801-804, 985-986, 989-994, 1277-1290 are various diplomatic notes issued by the British Embassy to the Maduro's Ministry of Foreign Affairs since 4 February 2019.

3. Mr Guaidó claims to have become President of Venezuela, *not* because he was elected as Venezuelan President, *nor* because he effectively exercises the powers of the President, but by a chain of assertions that starts with a contention that the 2018 Presidential elections were flawed. He contends that Mr Maduro is therefore to be treated as "unavailable to serve", and so Mr Guaidó, as President of the National Assembly (as he then was) temporarily takes his place. This, it is said by Mr Guaidó, is the effect of Art 233 of the Venezuelan Constitution.[6] One might be forgiven for thinking that Article 233 appears to be focussed on physical inability to serve rather than contentious election results, and the Venezuelan constitutional court, the Constitutional Chamber of the Supreme Tribunal of Justice ("**STJ**"), has rejected Mr Guaidó's interpretation of Article 233.[7] Nevertheless Mr Guaidó persists in his claim. As the Guaidó Board told the CA, their case is that "*the person here being displaced is Mr Maduro by the machinery of the Venezuelan Constitution, rather than via armed conquest or civil war*".[8]

4. Having asserted this claim to be President, Mr Guaidó then purported to appoint the "Guaidó Board"[9] of the Central Bank of Venezuela ("**BCV**") by exercising powers

[6] Art 233 (Appendix 816-817): "*The President of the Republic shall become permanently unavailable to serve by reason of any of the following events: death; resignation; removal from office by decision of the Supreme Tribunal of Justice; permanent physical or mental disability certified by a medical board designated by the Supreme Tribunal of Justice with the approval of the National Assembly; abandonment of his position, duly declared by the National Assembly; and recall by popular vote.*

When an elected President becomes permanently unavailable to serve prior to his inauguration, a new election by universal suffrage and direct ballot shall be held within 30 consecutive days. Pending election and inauguration of the new President, the President of the National Assembly shall take charge of the Presidency of the Republic.

When the President of the Republic becomes permanently unavailable to serve during the first four years of this constitutional term of office, a new election by universal suffrage and direct ballot shall be held within 30 consecutive days. Pending election and inauguration of the new President, the Executive Vice-President shall take charge of the Presidency of the Republic.

In the cases describes above, the new President shall complete the current constitutional term of office.

If the President becomes permanently unavailable to serve during the last two years of his constitutional term of office, the Executive Vice-President shall take over the Presidency of the Republic until such term is completed."

[7] CA#32.

[8] See paragraph 25 of the Guaidó Board's skeleton argument in the Court of Appeal (Appendix, 646-647).

[9] The terms "Maduro Board" and "Guaidó Board" are adopted at the direction of the Court and were used by the CA as terms of convenience: CA at #3. The Maduro Board is the Board of the Central Bank of Venezuela (BCV) which operates from the BCV's headquarters in Caracas and directs its day to day business and functions as the

supposedly granted to him by the "Transition Statute",[10] purportedly passed by the Venezuelan National Assembly. Mr Maduro's government did not recognise the National Assembly nor the laws it had purported to pass, and the STJ has ruled that the Transition Statute is of no effect.[11]

5. The Guaidó Board does not claim any power to control BCV assets in Venezuela, nor does it take any responsibility for any liabilities of the BCV whether in Venezuela or elsewhere. It claims merely to have control over the assets of the BCV which are outside Venezuela.[12]

6. In order to succeed in its claims, the Guaidó Board will therefore need to establish not only the status of Mr Guaidó but also the effectiveness of his purported appointments to the Board of the BCV.

7. The **First Issue in the Appeal** turns on the meaning of, or more precisely the right approach to the meaning of, words used by the FCDO (then the FCO) in Mr Shorter's letter of 19 March 2020 (the "**Shorter letter**").[13] That letter was a response, of sorts, to a series of questions which the Judge invited the FCDO to answer, and the Shorter

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nation's central bank and which claims authority to direct the BCV in relation to all of its assets and rights. Indeed the Guaidó Board accepts – as recorded by the CA at #3 – that the Maduro Board has sole authority to direct the BCV in relation to its assets within Venezuela. The Guaidó Board means a purported ad hoc board of the BCV in respect of which there is a dispute as to whether it has authority to give instructions on behalf of the BCV in relation only to its foreign assets and rights. It claims no other authority.

[10] The Transition Statute (Appendix, 836) itself acknowledges that there is a *de facto* government: "*Nicolás Maduro Moros continues to usurp the Presidency* […]*, and a* de facto *government has been set up in the country*" (Appendix, 837).

[11] Judgment No. 06 of 8 February 2019.

[12] CA at #3 "*It* [the Guaidó Board] *does not claim any right to control of the BCV's assets in Venezuela, but it does claim to be authorised to give instructions on behalf of the BCV in relation to the assets of the BCV in this jurisdiction*."

In an ICSID Arbitration against the State of Venezuela, the ICSID Tribunal rejected a request by Mr Falcón to represent Venezuela, finding (inter alia) that his appointment was not "*backed by Venezuela's effective government*" (Mobil and others v Venezuela (ICSID Case No. ARB/07/27), Decision on the Respondent's Representation (1 March 2021).

[13] Letter from the FCO to Robin Knowles J at Appendix 905-906.

letter referred back to, and repeated the precise formulation used in, the formal statement by the Foreign Secretary of 4 February 2019.[14]

8. That February 2019 statement itself arose from a threat made by the UK and its then EU partners on 26 January 2019: they said that unless Mr Maduro called fresh elections within eight days they would recognise Mr Guaidó as interim President.[15] The threat included a statement that in HMG's view "it is clear that Nicolás Maduro is not the legitimate leader of Venezuela" but did not in any way suggest that Mr Maduro was not in fact exercising the powers of President.

9. President Maduro did not call a fresh election, so the UK and EU made good on their threat to make a statement of recognition.

10. So, the background is the use by HMG of the threat of making a statement of recognition as a device to try to influence a foreign state's internal affairs. It is, at root, the statement of "recognition" made on 4 February 2019, and repeated in the Shorter letter of 19 March 2020, which is the focus of this case.

11. The wording used in February 2019 was:[16]

> *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.*

12. The wording "now recognises" reflects the fact that Mr Maduro had not acceded to the EU nations' demand to hold new elections within the eight days which they chose

[14] "In this respect we refer you to the statements 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 …" (at Appendix 832-833).

[15] Appendix 825-826.

[16] Appendix 832-833.

to permit, and, that period having elapsed, the UK (and its EU partners) therefore "now" made its recognition statement.

13. It is important to note that:

(1) the February 2019 statement was not accompanied by any express statement of derecognition of President Maduro, and no such statement has been made since;

(2) the February 2019 statement was not accompanied by any change in diplomatic relations between the UK and Venezuela, and that position has continued to date.

14. The second paragraph of the statement expresses HMG's views on the internal politics of Venezuela. The third paragraph expresses uncomplimentary opinions on the behaviour of Mr Maduro's "regime", but does not suggest that his control has ended. Only the first sentence says anything about Mr Guaidó, and the real focus is on what that sentence should be taken to mean.

15. The Maduro Board's position is that the meaning of HMG's words is clear. They are a formal recognition of Mr Guaidó as being the person HMG considers *entitled to exercise* the powers of interim President of Venezuela, but they do not go further than that. At the very least, says the Maduro Board, they leave open the possibility of a continuing express or implied recognition of Mr Maduro as President. Accordingly, the Court of Appeal was correct on Issue 1.

16. The Maduro Board goes further, and says that (a) the absence of any statement of derecognition of President Maduro and/or (b) the continued maintenance of diplomatic relations and consular dealings with persons appointed by President Maduro, show clearly and unambiguously that HMG continues to recognise President Maduro as *in fact exercising* the powers of President of Venezuela. Further or alternatively the Maduro Board says that even if the Courts here were to decide that there were an absence of any relevant express or implied de facto recognition of President Maduro, the Court would then need to *decide* who in fact exercises the

powers of President.[17] But these further points regrettably have to await remission of the case to first instance, because of the (unsatisfactory) way in which the preliminary issues were drawn (as noted by the CA at #61-64).

17. So the Maduro Board's position is:

(1) it is accepted that there has been an express recognition by HMG of Mr Guaidó as de jure President, qua HoS (but not HoG);

(2) there has been no further express or implied recognition of Mr Guaidó in any capacity;

(3) Mr Maduro's position as de facto President (both qua HoS and qua HoG) continues to be recognised by HMG because there has been no statement of derecognition and continuing recognition is to be implied from (inter alia) ongoing reciprocal diplomatic relations; and

(4) Alternatively, if there is no continuing express or implied recognition of Mr Maduro by HMG, the Courts here will have to decide who is in fact the President of Venezuela (both qua HoS and HoG).

18. HMG continues to hold an unfavourable view of President Maduro's government. There were EU sanctions in place from 2017 and on Brexit withdrawal day, 31 December 2020, the UK imposed its own sanctions the express purpose of which was "to encourage the Government of Venezuela" – and that can only mean the Maduro government - to (inter alia) "respect democratic principles … and participate in negotiations with its political opponents in good faith to bring about a peaceful solution to the political crisis in Venezuela".[18] Those sanctions remain in place, with the same purpose.

[17] See Republic of Somalia v Woodhouse Drake & Carey [1993] QB 54 ("**Somalia v Drake**").

[18] The Venezuela (Sanctions) (EU Exit) Regulations 2019, SI 2019 135, at Appendix 1147 (see Article 4 at Appendix 1150).

19. The National Assembly had a 5-year term which expired on 5 January 2021. On 6 December 2020 there were National Assembly elections but Mr Guaidó did not stand for re-election. On any view, therefore, Mr Guaidó ceased to be President of the National Assembly on 5 January 2021. As noted above, Mr Guido's claim to be interim President of Venezuela depends on his position as President of the National Assembly. HMG's position is that the 6 December 2020 National Assembly election were neither free nor fair and the UK does not recognise the result.[19] HMG's position now therefore seems to be a sort of "double" de jure position: that although Mr Guaidó is no longer in fact President of the National Assembly, he ought to be; and because he ought to be President of the National Assembly he ought to be interim President of Venezuela.[20]

20. The appeal (and this Case) divides into two parts: in Part 1 are Issues 1 and 2, which do not engage the Act of State Doctrine, and in Part 2 are all the other issues, which do.

Part 1 of the Appeal

21. The **First Issue in the Appeal** is about what forms of recognition statement are available to HMG, how recognition statements should be approached by the Courts, and how the Shorter letter, with its reference back to the Hunt statement, falls to be construed.

22. The **Second Issue in the Appeal** asks whether the CA was wrong in law to conclude that a de facto recognition of Mr Maduro as President (if and when established) would require the Court to treat Mr Guaidó's acts as nullities. This point was not argued by the Guaidó Board in the Court of Appeal or at first instance and does not, so it seems to the Maduro Board, arise from the Preliminary Issues. Hitherto the Guaidó Board have been keen to restrict the issues to those which arise from the

[19] see the FCDO statement at Appendix, 1022.

[20] this may be contrasted with the position of the EU position which appears to be that Mr Guaidó is no longer recognised as interim President of Venezuela in any sense: see the EU Council statement of 25/1/2021 at Appendix, 1254

Preliminary Issues which they sought to have decided. Nevertheless we deal with it in Section 2 of this Case. Like the first issue this is a question about recognition, but this time about the *consequences* of recognition.

Part 2 of the Appeal

23. The **Third Issue in the Appeal** touches on the interplay between recognition issues and the "Justiciability Issue". The Justiciability Issue, defined by the preliminary issues, is the question of whether it is open to the Courts here to consider the validity and/or constitutionality under Venezuelan Law of the various statutes and decrees and appointments on which the Guaidó Board's claims depend. The Court of Appeal held, rightly in the Maduro Board's submission, that that question could not be fully answered unless and until it is decided in these proceedings whether judgments of the STJ determining those issues should be recognised by the Courts here. The ambitious position of the Guaidó Board is that, even if Mr Guaidó's acts are without any legal foundation whatsoever under Venezuelan law, the Courts here must give effect to them. The striking consequence of the Guaidó Board's position is that the Courts here, although they have power to review the actions of the UK government, must give effect even to the acts of a foreign sovereign (if indeed Mr Guaidó is *in fact* sovereign as a matter of English law) that have been declared unlawful by the foreign judiciary.

24. The Maduro Board's position is that it is unnecessary and highly undesirable for the Supreme Court to embark on the various points about non-justiciability raised by the preliminary issues because (a) there has been no determination of any underlying facts (b) these issues have not been determined by the Court of Appeal. That is why the Maduro Board sought permission to cross appeal on the jurisdiction points only on a contingent basis.

25. But in case this Court nevertheless seeks to address some or all of the issues of non-justiciability, Part 2 of this Case sets out the Maduro Board's response on Issue 3 and its own case on the cross appeals on the Act of State Issues.

PART 1 - RECOGNITION

ISSUE 1 (GROUND OF APPEAL 1)

26. We respond in this section to Appeal Ground 1 (Issue 1):

"Was the Court of Appeal wrong in law 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?"

27. We identify the following issues:

(1) What is meant by the Government of a State?

(2) What is meant by Recognition?

(3) Can Recognition be Implied as well as Express?

(4) Can there (still) be de facto and de jure Recognition, and if so what does that mean?

(5) How are the Courts here to approach the task of construing statements of Recognition?

(6) What might be the expected pattern of Recognition statements were an incumbent and established government or President to reject a valid constitutional claim by a challenger who wielded no effective power?

(7) Conclusion

(1) What is meant by the Government of a State?

28. First, it is useful to distinguish the concept of *Statehood* from *Government* as a matter of international law. A sovereign government is one of the criteria for recognised *Statehood* in international law.[21] A Government is the *"formative*

[21] Oppenheim lists: (1) people; (2) territory; (3) government; and (4) that that government is a sovereign government (Sir Roberts Jennings and Sir Arthur Watts, *Oppenheim's International Law (Vol 1: Peace)* (OUP 2008) ("**Oppenheim**") at pp.120-123. Article I of Montevideo Convention on the Rights and Duties of States (1933) 165 LNTS 19 lists: (1) a permanent population; (2) a defined territory; (3) government; and (4) the capacity to enter into relations with other States. The late ICJ Judge James Crawford explained that a sovereign

element, the organizational machinery which enables the State to enter into international relations and thus exercise its rights and fulfil its duties".[22] States, as legal persons, act *through* their Governments and most if not all aspects of international relations depend on acceptance of a government's right to act and speak for the state.[23]

29. In public international law the test for whether a government exists is the test of secure de facto control of all or most of the State's territory (i.e. that it is, in fact, sovereign).[24]

30. The reason why effective control is so important here to the concept of a sovereign government is explained by the late ICJ Judge James Crawford (writing extra-judicially) in *The Creation of States in International Law* who states at pp. 55-56:

> "*The requirement that a putative State have an effective government might be regarded as central to its claim to statehood. 'Government' or 'effective government' is evidently a basis for the other central criterion of independence. Moreover, international law defines 'territory' not by adopting private law analogies of real property but by reference to the extent of governmental power exercised, or capable of being exercised, with respect to some territory and population. Territorial sovereignty is not ownership of but governing power with respect to territory. There is thus a good case for regarding government as the most important single criterion of statehood, since all the others depend upon it. This is true equally for external as internal affairs. Governmental authority is the basis for normal inter-State relations; what is an act of a State is defined primarily by reference to its organs of government, legislative, executive or judicial*." (Emphasis added.)

government is an "effective government": writing extra-judicially in *The Creation of States in International Law* (2007 OUP 2nd ed) ("**Creation of States**") he states (pp.33-34): "[o]*ne of the prerequisites for statehood is the existence of an effective government; and the main — for most purposes the only — organ by which the State acts in international relations is its central government.*"

[22] James Crawford, *Brownlie's Principles of Public International Law* (9th ed OUP 2019) ("**Brownlie**") at p.141: "The legal entity in international law is the state; the government is in normal circumstances the representative of the state, entitled to act on its behalf".

[23] Oppenheim pp.150-154 at §45. But the temporary absence/suspension of a government (for example during a civil war) does not necessarily affect the existence of the State (Brownlie, p.117; Oppenheim p.122).

[24] Brownlie, p.142. Oppenheim puts its thus: "The exercise of power, with apparent acquiescence of the population, is considered to be sufficient proof of effectiveness." The Guaidó Board seem (see SoFI para 37) to contend for a test of whether the government enjoys the habitual obedience of the bulk of the population with a reasonable expectancy of permanence. Those formulations seem all to be more or less equivalent. None of them import a requirement of legitimacy, whatever that might mean.

31. It is important to note that in international law how a (sovereign) government came to be in place is entirely irrelevant: there is no requirement that governments be democratically elected, nor that they be lawful in terms of the State's domestic legislation. Whether a putative government, "G", is the government of a given State is answered solely by asking factual questions. Legitimacy is irrelevant (and perhaps meaningless, given that international law does not impose upon States one or other form of government).[25]

(2) What is meant by Recognition?

32. Recognition is usually treated as being recognition either of *States*, or of *governments*[26]**.**

33. There is no issue in these proceedings about the recognition of Venezuela as a State: Venezuela is universally recognised as a State.[27] Rather, this case is about recognition of individuals as either HoS and/or HoG.

34. Under the Venezuelan Constitution the President is HoS and HoG, so there should be no difference. By Article 226 of the Constitution the President of Venezuela is the HoS and of the National Executive, in which latter capacity he directs the actions of the government.[28]

35. The Guaidó Board no longer put their case in terms of recognition of Mr Guaidó as HoG, but only as HoS. The Guaidó Board has abandoned its originally pleaded case that HMG has recognised Mr Guaidó as HoG of Venezuela.[29] In so doing it has

[25] Western Sahara Advisory Opinion [1975] ICJ Rep. 12, pp.43-44: "*No rule of international law, in the view of the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today*". See also Creation of States p.59: "*international law lays down no specific requirements as to the nature and extent of this control* [by a government, as one of the criteria for Statehood]*, except that it include some degree of maintenance of law and order and the establishment of basic institutions*."

[26] see e.g. Brownlie Chapter 6 "Recognition of States and Governments".

[27] Note that it is in relation to the recognition of States that there has been longstanding debate between the declaratory and constitutive theories of statehood: these issues are not engaged on this appeal.

[28] Appendix 815.

[29] The Guaidó Board's Amended Pleading is at Appendix 298-314**.** See in particular paragraphs 8(1); 19; 20. The Guaidó Board's position in its skeleton argument for the preliminary issues at first instance was that HMG unequivocally recognised Mr Guaidó as both HoG and HoS: see paragraph 63 and 64 of the skeleton (Appendix

changed its case on the meaning of what it nevertheless contends to have been an entirely unambiguous statement of recognition.

36. As noted above, international law sets a standard which must be met by a putative government before it can properly be treated in international law as being a sovereign government. The precise formulation does not matter for present purposes but broadly it is the standard of secure de facto control of all or most of the state's territory.[30]

37. This appeal does not *directly* engage this issue, because this case focuses on the meaning and effect of a statement of recognition as a matter of domestic law, rather than the question of whether in fact Mr Guaidó meets the international law criteria for a HoG or HoS (which, the Maduro Board says, he plainly does not).

38. But the point is nevertheless relevant. The Venezuelan constitutional position is that the President of Venezuela is (by virtue of being President) the HoG. So: suppose that an issue arises as to whether person X is *in fact* the President and HoG of Venezuela in the international law sense. If person X does not in fact control or head up the government, they could not properly be characterised as *in fact* being either HoS or HoG for international law purposes. And then suppose that HMG made a statement, and the issue was whether that statement recognised X as being, as a matter of fact, the President and HoG of Venezuela. If there were any doubt about the meaning of the statement, the fact that, applying international law X was *not* President or HoG,

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495-496). Indeed the focus of the Guaidó position was that Mr Guaidó's acts "*must be regarded as that acts of the duly constituted executive authority of Venezuela*" (Guaidó Board Trial Skeleton at #70 – Appendix, 500). But at the first instance hearing, the Guaidó board abandoned its position on recognition of Mr Guaidó as HoG and abandoned its position that recognition of a President must be as both HoS and of HoG. What had previously been said by the Guaidó Board to be an unequivocal recognition by HMG of Mr Guaidó as HoG and HoS was now said to be a different unequivocal recognition of Mr Guaidó, now only as President *qua* HoS and *not* as President *qua* HoG (See, for example, the transcript of the hearing before Teare J on day 1 at p.129 (lines 13-20) and p.134 (lines 6-10).

[30] Footnote 24 above. Oppenheim p150 §45: "As with recognition of new states, so also with recognition of governments the decision is not one determined solely by political considerations on the part of the recognising state. A government which is in fact in control of the country and which enjoys the habitual obedience of the bulk of the population with a reasonable expectancy of permanence, can be said to represent the state in question and as such to be deserving of recognition. The preponderant practice of states, in particular that of the United Kingdom, in the recognition of governments has been based on the principle of effectiveness thus conceived."

would be a factor tending to suggest that that was not what the statement meant. That is so because HMG should at a minimum be credited with a strong working presumption that it acts in accordance with international law.[31] This is one reason why it is dangerous to try to construe what HMG has said without any enquiry or decision as to the state of affairs on the ground in Venezuela (and hence why the narrowly-drawn preliminary issues were a bad idea).

39. On the more fundamental question of what exactly, in the context of governments, is meant by "recognition", the opening chapter of Talmon's Recognition of Governments in International Law[32] posits two distinct meanings:

(1) Indication of willingness to enter into official relations; and

(2) Manifestation of an opinion on legal status.

40. As we will see shortly these two different meanings find reflection in one approach (the CA's approach) to the meaning of a de jure/de facto distinction.

41. Oppenheim (2008) notes that recognition is accorded to a particular body in a particular capacity.[33]

[31] The 1950 statement to Parliament by then the Foreign Secretary (cited at CA #78) explicitly stated that "HMG consider that recognition should be accorded when the conditions specified by international law are, in fact fulfilled and that recognition should not be given when those conditions are not fulfilled." The Parliamentary Under-Secretary of State for Foreign Affairs stated, to similar effect in 1953: "*if Her Majesty's Government had not been satisfied that the Government of Egypt were in sufficient control of the country to justify the step taken, de facto recognition would not have been extended*". (HL Debs. vol. 183, col. 1418, 28 Oct. 1953.) The 1980 policy statement said that HMG "recognises States in accordance with common international doctrine".

See also R (Gulf Centre for Human Rights) v The Prime Minister & anor [2018] EWCA Civ 1855 at #23 on abiding by international law generally. Although HMG has recently stressed that it maintains sovereign power to act in breach of its treaty obligations (see e.g. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916702/UKIM_Legal_Statement.pdf], we have been unable to find any express statement by HMG that it would ever consider it to be appropriate to exercise the prerogative of recognition in a way inconsistent with international law, for instance by recognising as a de facto government a body which did not meet the international law definition of a government.

[32] Stefan Talmon, Recognition of Governments in International Law: With Particular Reference to Governments in Exile (1997 OUP) ("**Talmon**").

[33] Oppenheim, p.127.

42. Recognition is therefore a unilateral act, by which the party recognising communicates to the world its position in terms of recognising *some particular capacity* or attribute of a state, or a government, or (more rarely) an individual.

(3) Can Recognition be Implied as well as Express?

43. The Guaidó Board makes two centrally important submissions in its Case at #47: both, we submit, are wrong. The first is that the difference between the concepts of de jure and de facto recognition has no useful role to play: we address this below. The second is that there is now a "binary choice" so that either there has been an express statement of recognition or non-recognition; *or* there must be a Somalia v Drake enquiry. Similarly at #74 the Guaidó Board explicitly contends that "in a domestic judicial context there is no scope for any concept of implied recognition."

44. The Guaidó Board's analysis therefore seeks to squeeze out the middle ground: for instance an express de jure recognition (a) combined with a different de facto recognition (whether express or implied), or (b) combined with no de facto recognition at all. If it were right it would seriously constrain the range and meaning of recognition statements available to HMG, and would remove entirely the idea of implied recognition. Such a development of the law would be both unprincipled and undesirable.

45. It is unprincipled because the exercise by HMG of its power to recognise foreign States, Governments, HoSs and HoGs all fall within the scope of HMG's prerogative power to conduct foreign relations, including HMG's maintenance and conduct of diplomatic relations. HMG's freedom of manoeuvre should not be artificially constrained by the Courts and especially given the constitutional allocation of powers in this area.[34]

[34] *Mahmoud v Breish* [2020] EWCA Civ 637 ("**Breish**") *per* Popplewell LJ at #57: "*It is the consequences of the constitutional separation of powers which dictates that it is the sole prerogative of the executive to determine what foreign states and governments to recognise.*"

46. The proposed new approach is also undesirable because it would impermissibly constrain HMG's freedom to craft careful (and perhaps sometimes deliberately ambiguous) statements in a diplomatic or foreign policy context.

47. We turn then to the question of whether there can still be implied recognition.

48. Express recognition simply means an express statement using the word "recognise".

49. In 1980 the British government announced that it would no longer expressly recognise new governments. As explained by the CA at #69 that policy was driven by a fear that there was widespread misunderstanding that recognition implied approval. British Governments wished to be spared the embarrassment of expressly recognising a new regime of which they – and perhaps the electorate – disapproved.

50. Accordingly since 1980 recognition has frequently, and deliberately, been left to be implied.

51. As Oppenheim at §50 puts it, cited with approval by the CA at #71,

> "50. **Implied recognition**. Recognition can be either express or implied. Express recognition takes place by a notification or declaration clearly announcing the intention of recognition, such as a note addressed to the state or government which has requested recognition. Implied recognition takes place through acts which, although not referring expressly to recognition, leave no doubt as to the intention to grant it. Implied recognition has taken on greater significance with the adoption by several states, including the United Kingdom, of a policy of no longer expressly recognising a new government, but instead leaving the answer to the question whether it qualifies to be treated as a government to be inferred from the nature of their dealings with it, and in particular whether these dealings are on a normal government-to-government basis."

52. As explained by the CA,[35] a common and well-established form of implied recognition is by the establishment or maintenance of diplomatic relations (at #72):

> "One way in which recognition may be implied is the establishment or maintenance of diplomatic relations with the ruler or government of the foreign state. For example, Oppenheim at paragraph 50 refers to "the formal initiation of diplomatic relations" as one of the "legitimate occasions for implying recognition of states or governments.""

[35] And see also, Sir Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) ("**Lauterpacht**"), Chapter XX [111]; B R Bot, *Non-recognition and Treaty Relations* (AW Sijthoff 1968) pp.102-103; Frowein, "Recognition" in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2010); Sir Ivor Roberts, *Satow's Diplomatic Practice* (7th ed OUP 2016), pp.74-75; 76.

53. That is why Mr Guaidó was so keen to have his diplomatic representative accredited to the Court of St James, and why it is so significant that she was not. It is with Mr Maduro's government and representatives (and only with Mr Maduro's government and representatives) that HMG retains normal, day-to-day diplomatic relations.

54. The Guaidó Board at #72(1) quote Lauterpacht but omit any reference to his §111 (pp.381-383) which clearly supports the idea of implied recognition by diplomatic relations.

55. So the CA was correct (emphasis added):

> "*82. … Thus, however paradoxical it may sound, when the terms are used in this sense, it is possible for HMG to recognise two Presidents of a state, one being recognised de jure and the other de facto.*
>
> *83. Mr Andrew Fulton for the Guaidó Board accepted this. He agreed that it was possible for HMG to state that one person was recognised de jure and the other was recognised de facto, but submitted that this could only be done if both statements were made expressly and concurrently. I do not accept this.* ***There is no reason, if the facts warrant such a conclusion, why HMG should not expressly recognise one person de jure while at the same time recognising another de facto as a matter of necessary implication from conduct.***"

(4) Can there (still) be de facto and de jure Recognition of a government or President (or Recognition as a de jure or de facto government or President), and if so what does that mean?

56. The next distinction which the Guaidó Board Case at #47 seeks to sweep away is the distinction (however labelled) between de facto and de jure.

57. The question of de jure vs de facto recognition is bedevilled by inconsistencies in terminology.[36]

58. The Maduro Board adopts the meaning of these expressions used by the CA. This is in accordance with the majority of the English cases on recognition; but it is not consistent with all of the academic and textbook commentary. Note that in terms of terminology there is no "right answer" here: the terminology point is about shorthand labels for the type of meaning that a statement of recognition might carry.

[36] See e.g. Talmon, pp.77-94

The important question is not the *label*, but the *meaning* (see CA #106). As the Guaidó Board themselves rightly point out, HMG's statements about Venezuela (very sensibly) uses neither "de facto" nor "de jure".

59. So the shorthand terminology we will use (and we will give it here in the context of President) is that

(1) de jure: a recognition by State A of P as the de jure President of State V, means that State A recognises that P is as a matter of the law of State V entitled to be the President of V, *whether or not P in fact is exercising (or can effectively exercise) the powers of the President of State V*;

(2) de facto: a recognition by State A of P as the de facto President of State V, means that A recognises that P is as a matter of fact exercising the powers of the President of State V, *whether or not P is entitled under the law of State V to be the President of V*

60. Or, as put in Luther v Sagor[37] and Breish, and by the CA at #77:

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

61. Note that, *used in this way*, "de facto" and "de jure" apply as modifiers of the thing that is recognised (the President or the Government), they do not modify the nature of the recognition as such. Talmon expresses this as the difference between "A de jure/ de facto recognition" and "Recognition of or as a de jure/de facto government".[38]

62. Note too – and obviously – that in neither case does the act of recognition of P (whether express or implied) in fact change the actual position of P in any way. A's recognition de jure is in truth only a statement of A's opinion on the lawfulness of

[37] Luther v Sagor [1921] 3 KB 532 ("**Luther v Sagor**")

[38] Talmon, p.60.

P's position: it cannot in any sense *determine* that lawfulness for the purposes of State V domestically. Nor does a statement of recognition de facto in truth alter the position on the ground – which is what it is. This is obvious since it would be possible for two foreign powers to make different recognition statements about P, for instance one recognising P as de jure President and the other recognising P as de facto President.

63. The point about a recognition statement is simply that in the State where the recognition is made it binds the Courts to the same view as has been expressed by the executive. Therefore, in either case, by the application of the One Voice Principle, the English Courts must proceed as if what has been recognised by HMG is in fact the case.[39]

64. There are obvious reasons why HMG might sometimes want to make, or might not want to make, or might specifically want not to make, one, or the other, of these kinds of statement of recognition. It might want to make a statement of recognition de jure in order to show political support for P, especially if doing so also showed solidarity with the position taken by other states with whom HMG was, or wanted to be, on good terms. It might be keen to avoid making an express statement of recognition, de facto, of an unpopular President of whom it disapproves, because of the fear that such recognition is construed as approval. HMG might therefore prefer to leave its recognition de facto to be implied, for instance from continued diplomatic relations. Effective diplomacy is often as much about what is not said as about what is said. If the Courts were to shoehorn HMG into a restricted range of recognition statements it would be removing from the FCDO perfectly proper tools of diplomacy.[40]

[39] The Maduro Board contended before the CA that a mere de jure recognition, being in substance only an expression of opinion on a question of foreign law, could not bind the Courts here; but the CA rejected that submission (at #106) and this Court has refused permission to appeal. It is perhaps a curious position that HMG's position on questions of foreign constitutional law, which it has neither the power nor the skills reliably to decide, should be able to bind the domestic Courts even in the face of an express contrary ruling from a recognised and properly functioning foreign Constitutional Court that has properly decided the point in a manner which is definitive for the internal purposes of the foreign State.

[40] See e.g.: (i) the three carefully worded statements not amounting to recognition recorded in Luther v Sagor at pp.534-5, issued prior to recognition of the Soviet Government as the de facto Government of Russia; (ii) the masterly non-committal in the statement dated 5 October 1949 recorded in Civil Air Transport Incorporated v

65. There can be no doubt that HMG has in recent years been keen to use statements that use the word "recognise" as a way of expressing approval and/or influencing events. Colin Warbrick's review of HMG's use of statements of recognition in relation to Libya[41] notes two stages in the "recognition" of the NTC in Libya:

(1) In June 2011 HMG said that:

> "it is clear that Gaddafi no longer has legitimacy and so he should heed the calls of the Libyan people and the international community to leave immediately. We recognise the National Transition Council [NTC] as the legitimate representative of the Libyan people and welcome their efforts to include all Libyans and to prepare for a political transition in which Libyans can decide on their own future." (emphasis added)

Warbrick comments that "The use of 'recognition' here is dubious for something less than a government, 'accept' or 'acknowledge' would have been better."

(2) But then in July 2011 HMG went much further and said that it:

> "expressly recognises and will deal with the NTC as the sole governmental authority in Libya. This decision reflects the NTC's increasing legitimacy, competence and success in reaching out to Libyans across the country".

And it explained that "in line with this decision" the Qadhafi diplomats must leave the UK and the NTC had been invited to appoint a new Libyan diplomatic envoy to take over the Libyan embassy.

66. Warbrick concludes as follows:

> "It is ironic that the policy of British Governments over the years that recognition decisions were to reflect the actual situation in foreign states and not indicate approval for the character of any authority, a policy imperative which played its part in refashioning the means by which the policy was pursued after 1980, has been so casually but instrumentally abandoned. We must wait to see whether the incident of Libya and the NTC turns out to be an anomalous revival of an abandoned option or whether the attractiveness of the peremptory character of the recognition decision will appeal to future British Governments with the precise object of

Central Air Transport Corporation [1953] AC 70 PC at p.88-89, issued before the recognition (either de facto or de jure) of the Communist Government of China; (iii) the statements recorded in Somalia v Drake at pp64-65; (iv) the statement not amounting to recognition recorded in Bouhadi v Breish [2016] EWHC 602 (Comm) (Blair J) at #24.

[41] Colin Warbrick, "British Policy and the National Transitional Council of Libya" (2012) 61(1) ICLQ 247.

> influencing events in other States. If it does become an active tool of foreign policy, rather than a reactive one, Parliament might want to consider whether or not it should have a say on how the policy works."

67. For present purposes three points can be drawn from the Libyan story:

(1) first, HMG is well able to fashion statements supportive of challenger governments which do not go so far as to constitute formal recognition of the challenger as being in fact the government (or President) with which they will deal;

(2) second, when HMG wants to make an express statement of recognition it can, if it wants to, do so with absolutely no ambiguity whatsoever; and

(3) third, HMG itself pointed to the significance of its diplomatic dealings in the context of recognition.

68. And a fourth point might then be inferred about the *Venezuelan* statements. It may well be the case that when HMG made its 4 February 2019 statement, it hoped that its support for Guaidó's position would help achieve a position in which Guaidó subsequently became an effective HoS or HoG. Perhaps it foresaw a chance – perhaps even a likelihood – that it would in the future be making a statement of express recognition of Guaidó as the sole head of a de facto Venezuelan government.

69. Statements of "recognition" can be, and should be capable of being, subtle and nuanced. The Guaidó Board's submission (P2A application at #9[42], and now reflected in its Case at #47-56), that the concepts of de jure and de facto recognition are "obsolete" should be rejected.[43] It is no part of the role of this court to remove constituent elements of HMG's foreign policy toolkit.

(5) How are the Courts to approach the task of construing a statement of Recognition?

70. The CA dealt with this at J#107-111 and we adopt and repeat all of what is said there. In summary:

[42] Appendix, 1320.

[43] Avoiding the *terminology* of de jure and de facto is a quite distinct point.

(1) it is for the Court to determine what a statement of recognition means (#107);

(2) if the words used are clear and unambiguous on their face and admit of only one meaning, that is the meaning which they are to bear (#110);

(3) otherwise:

(a) the Court may (but is not obliged to) seek further clarification and/or

(b) the Court should construe the statement against the relevant background including the conduct of HMG.

71. So, if the words of a statement from HMG admit of only one meaning, that is the meaning that must be ascribed to them. But even to determine *whether* words have an unambiguous meaning requires them to be considered in their context. "Fire!" shouted on a shooting range is unambiguously an imperative. "Fire!" shouted in a smoky theatre is unambiguously a warning.[44]

(6) What sequence of Recognition statements might be expected in a case where there is claim by someone who does not wield effective power, that they are in fact the legitimate President?

72. Although the circumstances in which governments and their Presidents change are infinitely various, and although there are dangers in trying to over-categorise, we suggest that the recognition cases can usefully be analysed by reference to a series of categories.

[44] Or, as put by Leggatt J (as he then was) in Zhoushan Jinhaiwan Shipyard Co Ltd v Golden Exquisite Inc [2014] EWHC 4050 (Comm), [2015] 1 Lloyd's Rep. 283 at #25: "*The meaning of all language depends on its context. To paraphrase a philosopher of language, a sentence is never not in a context. Contracting parties are never not in a situation. A contract is never not read in the light of some purpose. Interpretive assumptions are always in force. A sentence that seems to need no interpretation is already the product of one.*"

Category A: de facto displacement cases.

73. In these cases, an established HoS or HoG is challenged and eventually ousted, in terms of actual authority and control, by internal insurgency, or civil war, or external invasion.

74. In such a scenario one would expect that the first recognition given would be recognition as a de facto government, and that recognition as a de jure government would follow only later.

75. In this category fall the Russian and Spanish revolution cases (Luther v Sagor; Banco de Bilbao, for example).

76. In them, there is de facto recognition first, followed only later by de jure recognition.

Category B: constitutional displacement cases.

77. These cases are in a sense the opposite of Category A. Here the challenger asserts against the actual incumbent government or HoS a legal right to be HoG or HoS, which the incumbent rejects (either with or without the concurrence of the domestic court that is the arbiter of such constitutional claims). In such cases you might expect that the first recognition given to the challenger would be a recognition of the legal validity of the Constitutional claim: in our parlance, a de jure recognition. Only if actual power followed after the legal claim was asserted would you expect there to be a recognition of the challenger as de facto HoG or HoS. The instant case is the only case in this factual category.

Category C: client State cases

78. These cases – Carl Zeiss[45] and others are in a category of their own (and have caused some conceptual difficulties).

[45] Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2) [1967] 1 AC 853,

Category D: Sovereign Immunity

79. These are the cases which focus on sovereign immunity of individual HoSs which peter out after the State Immunity Act 1978. These cases include Duff Development Co v Kelantan [1924] AC 797 (HL). The last hurrah is R (Sultan of Pahang) [2011] EWCA Civ 616 and these cases are of no interest for present purposes.

Where this Case Falls

80. Consider, then, a case like the present which falls into Category B – a case in which the contention is that the challenger president or challenger government claims against the incumbent a legal right to be HoG or HoS, but that right is not accepted by the incumbent, so that the challenger does not wield effective power.

81. If, at that stage, there were to be a recognition statement by a foreign state, one would expect it to be, and to be only, a statement of recognition as de jure president.

82. In the reported cases there are no Category B scenarios, which is why, as the Guaidó Board point out, there are no earlier reported cases in which HMG has made a statement of recognition of a President (or government) as de jure President (or government) not accompanied by a statement of recognition as a de facto President or Government. In the Russian and Spanish revolution cases power was effectively seized *before* there was any claim to legitimacy under the existing legal order.

83. That is why there should be no surprise at all that the statement of recognition in this case, in which, as the Guaidó Board see it "*the person here being displaced is Mr Maduro by the machinery of the Venezuelan Constitution, rather than via armed conquest or civil war*"[46] was a statement of recognition of de jure status, unaccompanied by any statement of recognition of de facto status.

(7) Application of these Principles

84. It is important to remember how extreme the Guaidó Board's contentions on the first point are. At the moment the only issue is whether the Shorter letter *leaves*

[46] See paragraph 25 of the Guaidó Board's skeleton argument for the Court of Appeal (Appendix, 646).

open the possibility that there is a continuing implied recognition of Mr Maduro as President. It does. It also leaves open the possibility that there is merely a de jure recognition of Mr Guaidó but because there is no implied recognition of Mr Maduro the Courts will have to decide on a Somalia v Drake enquiry who is in fact the de facto President.

85. Ultimately the point is a short one. The Shorter letter is a fine example of studied ambiguity. The judge invited the Secretary of State to provide a Certificate answering two questions. No certificate as such was provided, and neither of the Court's questions were answered by Mr Shorter. The letter simply refers back to Mr Hunt's statement which was made in the context of a pan-EU threat to Mr Maduro. The language used in that foreign policy context of January and February 2019 has been repeated in the response to the Court's questions. The question is what that language means. If HMG had really meant that Mr Guaidó *in fact* exercised the powers of President in Venezuela it is entirely unclear why HMG would have needed to make any threat, or any statement, in the first place – because Mr Guaidó could then (ex hypothesi) have achieved fresh elections. Far and away the best reading is that HMG was using the recognition statement publicly to express its view that Mr Guaidó was entitled, under the Venezuelan constitution, to be President pending fresh elections, and that HMG was doing so in the hope that it could influence President Maduro. There is nothing in the language used in the Shorter letter that can constrain the Court to find that HMG was expressing the, manifestly false, view that Mr Guaidó in practice and in fact exercising the powers of President of Venezuela.

86. Events since the 19 March 2020 Shorter letter confirm that HMG's position is limited to a recognition of the de jure status of Mr Guaidó.

87. Here:

(1) it is difficult for the Guaidó Board to say that the words can only have one meaning when they themselves have changed their mind about the

meaning which they say the words bear (from recognition of Mr Guaidó as HoG and HoS to recognition of Mr Guaidó as HoS: see above at 34); and

(2) HMG has chosen its words carefully (which is why it continues to repeat exactly the same formulation) and has studiously avoided any statement that (for instance) it recognises Mr Guaidó as President for all purposes, or no longer recognises Mr Maduro for any purpose.

88. It is abundantly plain from the words used (and if it is not then it is clear from the words used and the factual background, including in particular the fact that the words have their origin in the making good of HMG's threat to "recognise") that there is no express recognition of Mr Guaidó as de facto President, and that clearly leaves open at least the possibility that HMG continues to recognise President Maduro as de facto President.

ISSUE 2 (GROUND OF APPEAL 2)

89. Here we address the Guaidó Board's second ground of appeal:

"The Court of Appeal was wrong in law 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"

90. It is important to note that ultimately this case might at least in theory be resolved by the Court finding:

(1) that there has been a recognition of Mr Guaidó as de jure President ***and*** as de facto President (in which case this Issue 2 will not arise);

(2) that there is a recognition of Mr Guaidó as de jure President but also a recognition of Mr Maduro as de facto President; or

(3) that there is a recognition of Mr Guaidó as de jure President and no recognition or derecognition of Mr Maduro, but (following a Somalia v Drake inquiry) it is decided that Mr Maduro *is* the de facto President.

91. The way in which the Guaidó Board formulates this ground of appeal wrongly ignores possibility (3), and the bald assertion at #89 of the Guaidó Board's case is wrong.

92. Everything that the Maduro Board says about this ground applies equally on scenario (2) and (3): if Mr Maduro is to be treated as de facto President it cannot matter whether he is to be so treated because of a One Voice binding recognition, or because (in the absence of any recognition) he actually is the de facto President.

93. Issue 2 is a new point raised for the first time in this Court.

94. The Guaidó Board's position is bold. Suppose it were correct, so that, simply by virtue of the de jure recognition the Courts here were bound to regard Mr Guaidó's acts as valid. What then of contradictory or inconsistent acts of Mr Maduro? Are they *also* to be treated as valid? That would self-evidently be unworkable. So the Guaidó Board's position must be that the Courts here must treat as <u>invalid</u> the acts in Venezuela of the person who has been recognised as being (or is in fact) the de facto President of Venezuela. But that would strip de facto recognition of all meaning and effect. It would also be inconsistent with the One Voice Principle; for the Courts would then be saying that, *despite* the de facto recognition afforded by HMG the Courts were free to ignore the acts of the de facto President. The Guaidó Board's submission is therefore incoherent and unworkable.

95. The Court of Appeal was correct at CA#85-90: de facto recognition "trumps" de jure recognition subject, perhaps, to one irrelevant, and in any event questionable exception concerning property of a de jure sovereign held in this jurisdiction, which if it is an exception at all ought to be limited to personal property of the sovereign.[47]

[47] As to that: the exception is established only at the level of the first instance decision of Bennett J in <u>Haile Selassie v Cable & Wireless (No 2)</u> [1939] 1 Ch 182. The reasoning for the decision is cryptic in the extreme (p.194):

> "I ask myself why should the fact that the Italian army has conquered Ethiopia and that the Italian Government now rules Ethiopia divest the plaintiff of his right to sue.
>
> The only reason can be, I suppose, that the money is not the plaintiff's own money, and that it is a sum which he is under some obligation to spend for the benefit of the people of Ethiopia—an obligation which he cannot now fulfil.
>
> There is a clear answer to this suggestion. I think it undesirable that I should state it."

96. The rule is that the acts of a recognised de facto government or ruler are to be treated as valid, and acts within that territory by a rival government or ruler, even one recognised de jure, must be treated as a nullity (CA#88).

97. The rule is well-established. It reflects the international law position (that what matters is who governs, not whether they govern legitimately). It also reflects the pragmatic policy that it is the acts of the government or ruler which in fact governs or rules (or which is recognised as doing so) to which effect will be given. Any other approach would mean that acts which are in fact effective in the territory of the foreign State have to be treated by the courts here as ineffective, which would plainly lead to unworkable conflicts and uncertainties. By way of example:

(1) if there were a sale of goods contract between a UK company and a Venezuelan State owned oil company, the UK company *can* only deal with the de facto powers in Venezuela, and needs to know that that will be treated as effective elsewhere;

(2) what, on the Guaidó Board's case, is the status of Ambassador Soper in Venezuela? And what is the status of Mrs Maniero – and of Venezuelan Embassy property – in London?

(3) The borders to Venezuela are controlled by the Maduro Government. HMG has to seek authorisation for its diplomatic staff—through whom it conducts its foreign relations—to leave and enter the country.[48] There is no point in asking Mr Guaidó.

(4) What if the State oil company PDVSA were involved in arbitration in London? Mr Guaidó's representatives could not sensibly run the arbitration because, since they in fact have no control over PDVSA, they would be unable to provide disclosure or to obtain the cooperation of witnesses, or even to know what PDVSA's position actually was.

The CA did not decide the point which by then was academic.

[48] Maduro Board's Amended Statement of Case paragraphs 16.2 – Appendix, 326; Particulars under Paragraph 13A and in particular paragraphs 25(a)-(h) – Appendix, 357-359.

98. The case law consistently favours actual (de facto) sovereignty over de jure (theoretical) sovereignty in relation to acts taking effect within the territory concerned.

99. In Luther v Sagor:

> "The Government of this country having to use the language just quoted, recognized the Soviet government as the Government really in possession of the powers of sovereignty in Russia, the acts of that government must be treated by the Courts of this Country with all the respect due to the acts of a duly recognized foreign sovereign state" @ 543 per Bankes LJ
>
> "But it is impossible to recognize a government and yet claim to exercise jurisdiction over its person or property against its will" @ 556 per Scrutton LJ

100. In Bank of Ethiopia v National Bank of Egypt ("**Bank of Ethiopia**") [1937] 1 Ch 513:

> "In the middle of December, ... HMG ... recognized the Italian government as being in fact (de facto) the government of the area then under Italian control.
>
> The effect of that communication is that I am bound to treat the acts of the government which was so recognized as acts which cannot be impugned on the ground that it was not the rightful but a usurping government." (Clauson J at 519)

101. At CA level in Banco de Bilbao v Sancha [1938] 2 KB 176 ("**Banco de Bilbao**"):

> "The only question open to argument arises from the fact that HMG recognize the Spanish Republican Government with its seat in Valencia or Barcelona as the de jure Government of the whole of Spain, but at the same time recognize the insurgent Government of General Franco as the Government de facto of the area in which Bilbao is situate. So far at all events as this Court is concerned this question seems to be settled by the principles laid down in decisions of this Court in *Luther v. Sagor*, and *White, Child & Beney, Ld. v. Eagle Star & British Dominions Insurance Co., Ld.*, which may be conveniently summarized; following in substance the language used in a Court of first instance, in the case of *Bank of Ethiopia v. National Bank of Egypt*, as follows - namely, that this Court is bound to treat the acts of the government which His Majesty's Government recognize as the de facto government of the area in question as acts which cannot be impugned as the acts of an usurping government, and conversely the Court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognized by His Majesty's Government as the de jure government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty's Courts.

(the judgment of the Court - Greer, MacKinnon and Clauson LJJ - delivered by Clauson LJ, at p195-196).

102. Banco de Bilbao is cited with approval in Gdynia Ameryka Linie v Boguslawski [1953] AC 11:

> "There are two cases which I think support the view that retroactivity of recognition should be confined to spheres of de facto control. In the case of *Banco de Bilbao v. Sancha* General Franco's de facto control over Bilbao was held to oust the sovereignty of the Republican Government although at the material time the Republican Government was recognized by the British Government as the de jure government of the whole of Spain. Similarly, in the present case, even after the recognition of the new government as the de jure government of Poland, that government would not have had sovereign powers over Polish nationals in England if the old government had been still recognized as de facto in control of Polish nationals in England. …" (Lord Oaksey at p39)

103. Most recently the Court of Appeal confirmed the position in Breish at #43 per Popplewell LJ:

> "… 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."

104. What then of the arguments raised in the Guaidó Board's case? They are summarised at #91 and said to rest on "three simple propositions".

105. The second proposition is:

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

That is question-begging: Mr Guaidó has purported to appoint, but whether he has succeeded depends on the answer to Issue 2.

106. The third of those propositions is:

> "(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 there."

107. This does not bear scrutiny. Its meaning is wholly obscure. In what sense does Mr Guaidó have "practical power"? Whichever person's acts the court here *decides* to give effect to might be said to have "practical power". But putting the issue this way again just begs the question.

108. Accordingly, two out of the three proposed "simple propositions" are question begging and take the analysis no further.

109. The Guaidó Board seek at #94/95 to distinguish Banco de Bilbao and Bank of Ethiopia because there "the de jure monarch and de jure government had been driven out of the relevant territory". That is right and reflects the fact that they were Category A cases rather than Category B cases. But the underlying rationale is unaffected. The reasons why de facto sovereignty trumps de jure sovereignty in the relevant territory remains the remains the same: de facto sovereignty is actual, and de jure sovereignty is only theoretical.

110. Then the Guaidó Board seek at #97 to argue that Banco de Bilbao and Bank of Ethiopia should be overruled. They say Lauterpacht was "unenthusiastic" about them, but he was not, in any relevant sense: "... there are weighty reasons of convenience and common sense which render acceptable the true principle of *Luther v Sagor* as followed in *Banco de Bilbao v Rey* – the principle, that is to say, that recognition de facto carries with it the acknowledgment of the validity of the acts of the recognized authority within its territory."[49] And F.A. Mann's criticisms were directed to the treatment of States and their corporate entities where there is de facto control of part only of the territory in question. That may or may not be a valid criticism, but it is irrelevant to the present case.[50]

111. At paragraphs 98-100 the Guaidó Board note, entirely correctly, that HMG has in recent years used statements of recognition "*as an instrument of foreign policy to promote democracy and human rights*". But that itself provides the answer to the

[49] Lauterpacht at p.285.

[50] "The same can be said of the Guaidó Board's comment (at #97) that Banco de Bilbao and Bank of Ethiopia *"were viewed unenthusiastically"* by Lord McNair and Sir Arthur Watts. McNair and Watts' objections, however, seem to have been directed at the perceived divergence between HMG's recognition statements and the facts on the ground - see McNair and Watts *The Legal Effects of War* (CUP, 1966) at (i) p398: "*even in December 1936 the Italian Government did not control the whole of Ethiopia, and it is common knowledge that this state of affairs continued for some time later*" - that may be correct, but Clauson J in Bank of Ethiopia still had to deal with a certificate stating that the Italians were the *de facto* Government. Likewise (ii) at p402 McNair and Watts are critical of HMG's certificate recognising the *de facto* control by the Spanish Nationalist Government of part only of Spain. Nevertheless, HMG had certified this to be the case and the court in Banco de Bilbao had to take it into account."

bald and bold assertion at #100 that "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." As to that:

(1) There is no need to attribute such an "intention" to HMG precisely because the wording of the 4 February 2019 statements is perfectly explicable once it is accepted that HMG has taken to using statements of recognition as, in and of themselves, an instrument of foreign policy to promote democracy and human rights.

(2) In any event, what HMG might or might not have intended, or hoped, the legal effect of its statement to be is surely entirely irrelevant.

112. As to the Guaidó Board's reliance on British Arab Commercial Bank v NTC of Libya [2011] EWHC 2274, the case is irrelevant because the facts are so different. There, there was an express derecognition of the Qadhafi regime: not only had HMG terminated diplomatic relations with the Qadhafi regime (see at #10), but there was a formal Certificate which stated:

> "(1) Her Majesty's Government recognise the NTC as the Government of Libya. (2) Her Majesty's Government do not recognise any other Government in Libya. In particular they no longer recognise the former Qaddafi regime as the Government of any part of Libya".

113. To conclude: there is no warrant for changing the law as the Guaidó Board suggests. The reason why a recognised *de facto* sovereign's acts are given effect to is because such a sovereign's acts are effective.

PART 2 – FOREIGN ACT OF STATE

Introduction

114. Part of what is sometimes described as the Foreign Act of State ("**AoS**") doctrine is a rule of non-justiciability, described as the Third Rule by Lord Neuberger in Belhaj[51] and dealt with in Buttes Gas,[52] its basis being the absence of manageable standards. We leave this rule to one side: it is not engaged in this case, and is probably limited to political questions involving relations between two foreign states. We confine the consideration of AoS to the First and Second Rules identified (in different formulations) by Lord Neuberger and Lord Mance in Belhaj and described by Lord Sumption in Belhaj as "municipal" AoS doctrine.

115. If there is an AoS rule, it is a preclusionary rule which prevents the Courts from questioning the validity of a foreign AoS. Note that the rule is couched in terms of Acts of *State* rather than (say) Acts of Sovereigns, or Presidents, or Heads of Government.

Key Facts

116. The key facts to remember when approaching AoS are:

(1) The BCV is a Venezuelan legal entity. The issue here is who is appointed to its Board and who has authority to represent the Venezuelan BCV in its dealings with others in relation to its assets abroad.

(2) The BCV as it operates in Venezuela is (uncontroversially) a central bank required to carry out the usual tasks of a central bank[53] including the management of monetary policy and credit as well as management of its reserves generally. The loss of c.€2bn or so of assets in UK will have a significant effect on Venezuela and has (at least in the view of the Maduro

[51] Belhaj v Straw [2017] UKSC 3; [2017] AC 964 ("**Belhaj**").

[52] Buttes Gas & Oil Co v Hammer (No 3) [1982] AC 888 ("**Buttes Gas**").

[53] See Zaiwalla 3 §45-46 (Appendix, 807-808) and Ortega 1, §24-37 (Appendix, 721-726).

Board) already adversely affected the country's attempts to obtain Covid vaccines.

(3) The purported Guaidó Board appointments are (on the Guaidó Board case) appointments in respect, only, of overseas assets (CA #3). There is no symmetry with the appointments of the Maduro Board, which are for all purposes (including the management of assets and liabilities wherever situated) (Ortega 1 §14-37 (Appendix, 716-726)) and are agreed to be effective with respect to the management of assets and liabilities of the BCV in Venezuela (CA#3). The Guaidó Board has never claimed to run the Central Bank for any domestic purpose, printing banknotes, managing the money supply etc.).[54] The Maduro Board's position in Venezuela, as the Board of an independent Central Bank, is unchallenged, save in relation to the assertion that Mr Guaidó has revoked the appointment of the President of the Maduro Board (President Ortega).

(4) The lack of symmetry is particularly stark when it comes to accountability. The Maduro Board is legally and financially accountable in Venezuela.[55] It is not clear to whom the Guaidó Board says it is accountable.

(5) The power of appointment which Mr Guaidó purported to exercise was not a power he has qua President, but a power specifically granted to him by the Transition Statute (CA#24-28).

117. The following further facts must be assumed:

[54] Mr. Guaidó has purported to declare the appointment of the current *President* of the BCV void. Otherwise, the Guaidó Board appears to accept the validity of the Maduro Board appointments, the Guaidó Board case appears to be that the authority of the BCV Board is ousted in respect of assets overseas by the purported appointment of the Guaidó Board.

[55] Ortega 1 §13 (Appendix, 716); Zaiwalla 2 §93 (Appendix, 768).

(1) the various relevant decisions of the STJ were not only made (as is common ground) but, are binding and correct as a matter of Venezuelan law as it is in fact applied and enforced in Venezuela;[56]

(2) the relevant STJ decisions do not depend on who is President;[57]

(3) the Maduro Board's assertions as to Venezuelan law are all sound (whether or not yet supported by STJ decisions); and

(4) until January 2021, the legislative body in Venezuela was the National Constituent Assembly, not (whilst it remained in contempt of court) the old National Assembly.

118. Finally, this Court must assume that Mr Maduro in fact in practice exercises the powers of President qua HoG (because HMG's recognition is limited to a recognition qua HoS). Whether or not this Court should also assume that Mr Maduro in fact (de facto) exercises the powers of President qua HoS will depend on whether the AoS issues arises because the Guaidó Board wins on Issue 1, or only on Issue 2 (see below at #124).

How the AoS points rise

119. It is important to see how the AoS arguments fit in to the wider issues.

[56] There are a series of STJ decisions. It is common ground that, as a matter of Venezuelan law, the STJ has exclusive power to declare the nullity of laws and acts (Appendix, 232). The Maduro Board accepts that if and insofar as any of those decisions depends on Mr Guaidó not being President, the One Voice Doctrine requires the Courts here to treat the decision as, to that extent, inoperative. But the parties are not agreed as to which decisions depend on that fact. The Guaidó Board suggests the final two decision of the STJ fall into this category. The Maduro Board does not accept that any of the relevant STJ judgments are founded, or exclusively founded, on such a premise.

[57] The reasons include (a) the inability of the National Assembly to pass any legislation whilst it remains in contempt (SOFI §13); (b) the failure of the Transition Statute to be published in the Official Gazette of Venezuela ("**Official Gazette**") (Maduro Board Statement of Case §52 – Appendix, 341-342); (c) the irreconcilability of the Transition Statute with the BCV Decree, a decree "with Rank, Value and Force of Law" (Maduro Board Statement of Case §53 – Appendix, 342); and (d) the unconstitutionality of the Transition Statute on various grounds.

120. The Maduro Board says that (1) there is no Transition Statute;[58] (2) there are other constitutional reasons why the appointments of the Special Attorney-General ("**SAG**") and the Guaidó Board are invalid;[59] (3) the BCV is not a decentralized entity anyway; and therefore (4) for all these reasons Mr Guaidó's purported appointments are ineffective as a matter of Venezuelan law.

121. The Guaidó Board responds: (1) the appointments (to the Board, and of the SAG) are executive acts of state within the AoS doctrine; (2) they engage the Second Rule in Belhaj; so (3) the Maduro Board cannot challenge them (and that is so even though the STJ has declared them to be ineffective); and finally (4) even if the Maduro Board *can* challenge the executive acts, it still cannot challenge the Transition Statute because of the First Rule in Belhaj.

122. The Maduro Board contends in reply:

(1) The AoS doctrine is unclear, unprincipled and unnecessary and if it has any role in English law it should be strictly confined to circumstances in which it has already been applied. The expansive formulation favoured by the minority in Belhaj should be rejected.

(2) The purported Guaidó appointments are not acts of state for the purposes of the AoS doctrine - not because they are the wrong sort of *act*, but because they are not properly characterised as being Acts *of State* (this point overlaps with point (3)).

(3) If there is a Second Rule, it does not apply in this case because the relevant acts have been ruled unlawful by the STJ and/or because they are unlawful.

These first 3 submissions are directed to Issue 3 and Issue 6

[58] For a series of reasons: the body which purported to pass it was no longer the legislative body of Venezuela; and even if it were the formal constitutional requirements for Venezuelan legislation have not been met; and the STJ has declared it contrary to the Constitution of Venezuela.

[59] The STJ has declared their appointments null and void; the National Assembly is unable to approve their appointments; Article 15 of the Transition Statute could not apply to the BCV anyway; the formalities for publication of their appointments have not been met; and the appointments are unconstitutional (**Maduro Board Statement of Case §11**).

(4) If there is a Second Rule (and it can apply even to a domestically unlawful act), it does not apply here because the relevant acts, although they take effect in Venezuela, affect assets in the United Kingdom. The Second Rule is limited to acts the direct consequence of which is felt only in the foreign state. This is Issue 7.

(5) If there is a Second Rule, it does not apply because the relevant acts are appointments to a Board, and the Second Rule applies only to executive acts affecting property. This is Issue 8.

(6) If and insofar as it becomes necessary to consider the First Rule and the validity of the Transition Statute, the AoS doctrine cannot rule out an enquiry into whether the Transition Statute is a legislative Act within the meaning of the doctrine. This is Issue 4

(7) The AoS doctrine cannot preclude consideration of whether or not the BCV is not a "decentralized entity" to which the Transition Applies (the Maduro Board says that the BCV is not a "decentralized entity", a term which has a specific meaning in the legislation of Venezuela and which cannot apply to a Central Bank). This is Issue 5.

123. We address these points in turn below. But we deal first with two logically prior points, first, the scenarios on which the AoS Issues arise and secondly the question of whether it is sensible and appropriate to resolve any of the AoS issues at this stage in these proceedings.

<u>The scenarios on which AoS needs to be addressed</u>

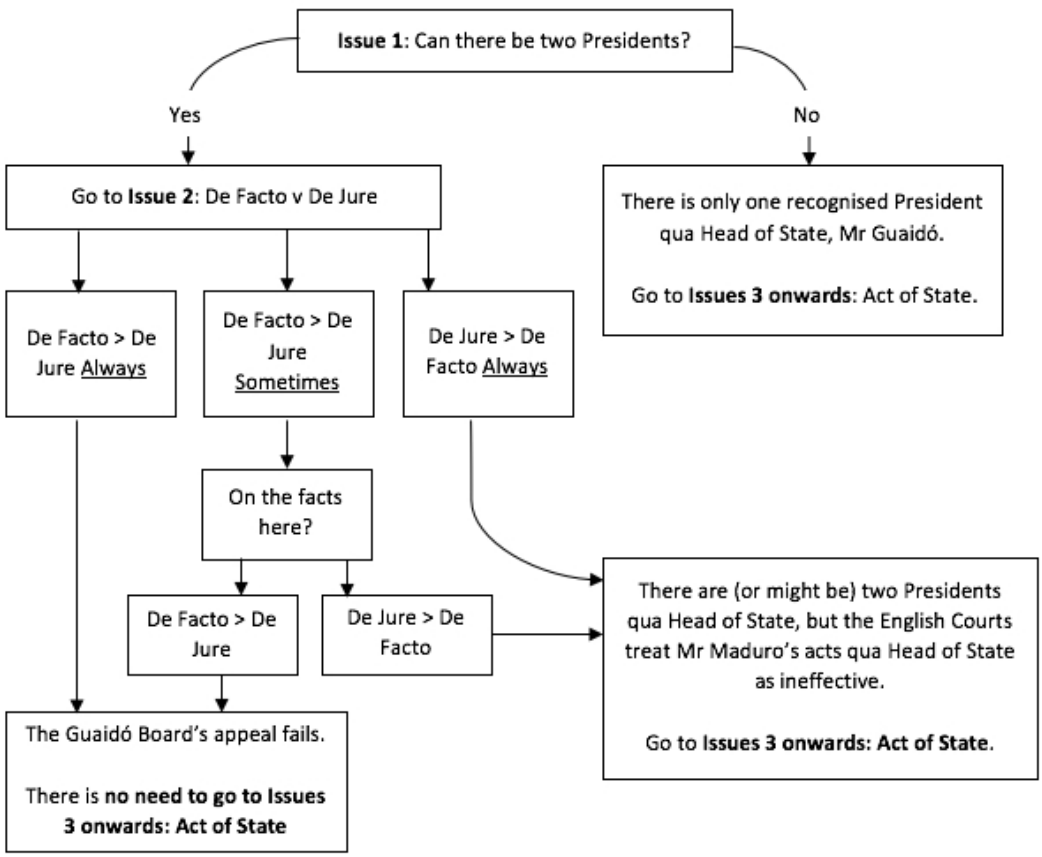
124. On the preliminary issues and in this Appeal, AoS issues might arise in two scenarios[60].

[60] The Guaidó Board's Case at #102 posits success for the Guaidó Board "on Issues 1 and/or 2" without considering the different assumptions which would flow.

(1) The first is if the Guaidó Board wins on Issue 1, so that it is impossible that Mr Maduro is to be treated (by our Courts) as President qua HoS. In this world, in the eyes of the English Court there is only one President (qua HoS) and it is Mr Guaidó (even though that is not the view taken by the Venezuelan Courts).

(2) The second is if the Maduro Board wins on Issue 1 but the Guaidó Board wins on Issue 2. In this world there are (or at least might be) two Presidents qua HoS (even though, again, that is not the view taken by the Venezuelan Courts), in addition to Mr Maduro being President qua HoG, but for some reason the English Courts treat Mr Guaidó's acts as effective and Mr Maduro's as ineffective (again, contrary to the views of the Venezuelan Courts).

125. These slightly difficult mental gymnastics are a consequence of the unwise decision to try to extract the preliminary issues for determination. A flow diagram makes it easier:



The (Un)desirability of Determining the AoS Issues on this Appeal

126. None of the AoS issues should be decided now, as a preliminary issue. They have only been determined in these proceedings at first instance. The Court of Appeal addressed only one issue (the domestic lawfulness point) and that was expressly obiter.

127. There are two strong reasons for declining to opine on these issues.

128. First, it is uncontroversial that even the existence of a Foreign AoS Doctrine is far from straightforward: we address this below. What is needed are decisions on actual facts, not further conditional or obiter disquisitions directed to a range of possible factual outcomes. Lord Mance writing extra-judicially has said that Belhaj shows that any claim to invoke the doctrine of non-justiciability or judicial abstention "requires close attention to the particular facts".[61] That is obviously not possible when, as here, the relevant facts have not been determined. Lord Lloyd Jones writing extra-judicially has said that working out the precise scope of the principles of AoS and non-justiciability is a process "particularly suitable for incremental development and clarification by judicial decision."[62] These issues have not been decided by the Court of Appeal.

129. Fascinating though these issues are, we suggest that further obiter comment from the Supreme Court on the Foreign AoS Doctrine, in the absence of any findings of fact, is unnecessary and unlikely to advance matters.

130. Further, unless and until it necessary to do so, it is not prudent for this Court to decide that it would or should decline to give effect to rulings of the Courts of a friendly foreign State with whom the UK is in full reciprocal diplomatic relations: yet that is a necessary ingredient of the Guaidó Board's position.

[61] Lord Mance, "Justiciability" (2018) 67(4) ICLQ 739 at 750.

[62] Lord Lloyd-Jones, "Forty Years On: state Immunity and the State Immunity Act 1978" (2019) 68(2) ICLQ 247 at 268.

131. We now turn to our submissions on the assumption this Court does wish to engage on the AoS Issues.

(1) The AoS Doctrine is unclear, unprincipled and unnecessary and if it has any role in English Law it should be strictly confined to circumstances in which it has already been applied. The expansive formulation favoured by the minority in Belhaj should be rejected

132. Belhaj attempted a rationalisation of the AoS doctrine, and the result of that attempt was to demonstrate that there is no clear or coherent doctrine. The AoS doctrine described in Belhaj is an aggregation of at least two distinct and unrelated concepts. The first concept concerns, or is at least very closely connected to, general principles of choice of law. This covers Lord Neuberger's first and second rules in Belhaj (the "**First Rule**" and the "**Second Rule**"); it also covers Lord Mance's first and second rules and Lord Sumption's "*municipal law act of state*". The second concept is non-justiciability, derived in its modern form from Lord Wilberforce's speech in Buttes Gas.

133. As noted above, we say nothing about Buttes Gas type non-justiciability, which has nothing to do with this appeal. Similarly, as for Lord Neuberger's Fourth Rule in Belhaj (which if it exists precludes investigations into foreign State acts, if such investigations embarrass the United Kingdom government), it has nothing to do with this appeal. No comment is made on it, save to say that there seems to be no basis to conclude that there is such a rule, in the light of such observations as "*A possible fourth rule*" (Belhaj #124); "*the supposed fourth rule*" (Belhaj #131); "*There is little authority to support the notion that the fourth rule is part of the law of this country*" (Belhaj #132); "*If the fourth rule exists, which I doubt (see para 150 below), it would require exceptional circumstances before it could be invoked*" (Belhaj #132).

134. So we turn to the scope of Lord Neuberger's First and Second Rules in Belhaj.

Lord Neuberger's First Rule and Second Rule

135. The following summaries are taken from Popplewell J's descriptions of the First and Second Rules in Reliance Industries Limited v The Union of India [2018] EWHC 822 (Comm):

First Rule

> "…the English court will recognise, and will not question, the validity or effect of the foreign state's legislative acts: see the first rule articulated by Lord Neuberger in *Belhaj v Straw* at [121], [125], [135], with whose judgment Baroness Hale, Lord Clarke and Lord Wilson all expressly agreed; per Lord Mance at [11(iii)(a)] and [38]; and per Lord Sumption at [228]-[233]."

Second Rule

> "…the English court will not question the effect of the foreign state's *executive acts* in relation to property situate within its territory, and will not adjudicate upon whether such acts are lawful. That was Lord Neuberger's second rule articulated at [122] and considered at [136]-[143]…….Lord Mance's judgment addresses the principle and its judicial support at [11(iii)(b)] and [38] and assumes without deciding that the principle exists and applies to property cases. Lord Sumption's analysis treats the principle as established, being an aspect of what he labels "municipal act of state": see [228]-[230]."

First Rule: Analysis

136. Lord Neuberger identified the First Rule (Belhaj #135):

> "The first rule appears to me to be well established and supported by a number of cases, at least in relation to property" – Belhaj [125]) and further stated, emphatically: "There is no doubt but the first rule exists and is good law in relation to property (whether immovable, movable, or intellectual) situated within the territory of that state concerned…the first rule only applies to acts which take effect within the territory of the state concerned".

137. There was, nevertheless, some perceptible diffidence about the First Rule:

(1) "[T]*here is a strong argument for saying that the first rule is not part of the Doctrine at all, or at least is a free-standing aspect of the Doctrine effectively franked by international law*" (Lord Neuberger, Belhaj #120);

(2) "*I agree with Lord Mance JSC that the first rule is a general principle of private international law*" (Lord Neuberger, Belhaj #150). This statement is followed by a reference to the characterisation of the rule by Upjohn J In re Claim by Helbert Wagg & Co Ltd [1956] Ch 323, a case principally concerned with conflict of law issues concerning the proper law of a contract, the situs of debts and the enforceability or otherwise of confiscatory legislation.

138. Indeed, the First Rule has been extensively described as a choice of law rule:

(1) In Buttes Gas, the First Rule was described thus:

> "A second version of "act of state" consists of those cases which are concerned with the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation – often, but not invariably, arising in cases of confiscation of property. Mr Littman gave us a valuable analysis of such cases as *Carr v Fracis Times & Co* [1902] AC 176; *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532 and *Princess Paley Olga v Weisz* [1929] 1 KB 718, suggesting that these are cases within the area of the conflict of laws, concerned essentially with the choice of the proper law to be applied."

(2) Lord Neuberger (Belhaj #159), said the First Rule "*is either based on, or at least is close to, the choice of law, or proper law, principle which applies in private law conflict cases*".

(3) Lord Mance, writing extra-judicially[63], has said that cases where the United Kingdom courts recognize foreign confiscatory or expropriatory decrees:

> "…are not cases of non-justiciability and they are better not described as cases of Act of State. They reflect the ordinary private conflicts of law rule, that title to movables is normally determined by the law where the relevant movables are at the relevant time, the lex situs: see *Luther v Sagor* [1921] 3 KB 532; *Princess Paley Olga v Weisz* [1929] 1 KB 718; and *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368".

(4) Lord Sumption, who in Belhaj had the most expansive description of Foreign AoS, nevertheless conceded at #229 that in cases of legislative acts expropriating property (ie First Rule cases, although Lord Sumption does not use that term):

> "title will have passed under the lex situs and the expropriation will be recognised in England on ordinary choice of law grounds unless, exceptionally, its recognition would be contrary to public policy. In this context, it is difficult to see that anything is added by calling the expropriation an act of state."

139. In an article in the *Virginia Journal of International Law* (1982)[64], David Lloyd Jones (as he then was) conducted a thorough review and analysis of the pre-Buttes Gas cases and concluded:

[63] See above, footnote 60 at p.749.

[64] David Lloyd Jones "*Act of Foreign State in English Law: The Ghost Goes East*" (1982) 22 VA. J. Int'l L. 433, p.444.

> "An alternative explanation of all the relevant *pre-Buttes Gas* cases is the principle that English courts should give effect to the acts of foreign sovereigns *as law* when they become part of the domestic law of the foreign sovereign and when that law governs the issue before the court according to English rules of conflict of laws."

140. In short, there is no substantial difference (or indeed any difference save for terminology) between the application of the First Rule and the application of English law choice of law rules generally: ie Dicey Rule 128 (nature and situs of property), Dicey Rule 129 (situs), Dicey Rule 132 (immovables), and Dicey Rule 133 (movables).

141. In the circumstances, it is difficult to see what the First Rule "brings to the table", apart from the ability to deploy some expansive language that "*the English court will recognise, and will not question, the validity or effect of the foreign state's legislative acts*" (emphasis added). However, the "*and will not question*" wording in reality adds nothing to the "*will recognise*" wording – the party relying on foreign legislation still has to prove in the ordinary way what the legislation is and what it means; and there is no prohibition on the English Court construing the constitution of a foreign State to see whether what is alleged to be a legislation is constitutional or not (in cases where the issue comes in incidentally in proceedings where the English Court plainly has jurisdiction[65]) (see Al-Jedda v Secretary of State for Defence [2011] QB 773 at #189-191).

142. In A/S Tallinna v Tallinna Shipping [1946] Lloyds Law Rep 99 at 114 (not cited in Belhaj) the CA did not feel constrained from considering constitutional validity and accepted (albeit obiter) that "*a decree of the Presidium of the Provisional Supreme Court of the Estonian Soviet Socialist Republic of October 8 1940* […] *was unconstitutional under the New Estonian Constitution*".

143. As F.A. Mann wrote:

[65] The test for whether an issue "comes in incidentally" is, or should be, the same test as the "domestic foothold" test (R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs [2009] EWHC 1910 (Admin), Cranston J at #54). The test includes "does the issue arise in the context of ensuring a fair trial in the courts of England and Wales" (Al-Haq #54); an alternative formulation of the same test is whether "a private law liability was asserted which depended on such a matter" (Shergill v Khaira [2015] AC 359 at #43). The test is plainly satisfied in the instant case, notwithstanding the carving out the preliminary issues, because the stakeholder applications and the underlying claims must be determined.

> "the doctrine seems to be primarily applicable to the validity of the act of state under its own law. Why such validity should not be capable of investigation to the extent to which it is subject to examination according the lex auctoris is […] obscure"[66].

That was in 1986, but the question remains good, and the answer remains obscure.

Second Rule: Analysis

144. The Second Rule is even more controversial. This rule says that the English court will not adjudicate upon whether a foreign state's executive acts within its territory are lawful.

145. Lord Neuberger's consideration of the Second Rule in Belhaj began with the statement that: "The second rule also has significant judicial support, but again only in relation to property" (see Belhaj at #127).

146. Lord Neuberger then moved on to the contradiction inherent in the Second Rule #136-137:

> "…In so far as the executive act of a state confiscating or transferring property, or controlling or confiscating property rights, within its territory is lawful, or (which may amount to the same thing) not unlawful, according to the law of that territory, I accept that the rule is valid and well-established.
>
> 137. However, in so far as the executive act is unlawful according to the law of the territory concerned, I am not convinced, at least in terms of principle, why it should not be treated as unlawful by a court in the United Kingdom. Indeed, if it were not so treated, there would appear something of a conflict with the first rule…"

147. The conflict with the First Rule and the inherent contradiction can be seen from the following simple example: an executive act expropriating property is declared unlawful by subsequent legislation in the State concerned, which revests title to the expropriated owner. The Second Rule says that the English Court cannot question the lawfulness of the executive act in question; the First Rule says the English Court cannot question the subsequent legislation.

148. Lord Neuberger continued (Belhaj #137-138):

[66] F A Mann, *Foreign Affairs in English Courts* (OUP 1986), Chapter 9 at p.177

> "…None the less, I accept that there are dicta which can be fairly said to support the existence of the rule even where the act is unlawful by the laws of the state concerned (see para 127 above).
>
> 138. However, I am not persuaded that there is any judicial decision in this jurisdiction whose ratio is based on the proposition that the second rule applies to a case where the state's executive act was unlawful by the laws of the state concerned."

149. At #142, Lord Neuberger highlighted the very paradox which the English courts are confronted with in the instant case:

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

150. And at #143:

> "The question whether the second rule exists in relation to executive acts which interfere with property or property rights within the jurisdiction of the state concerned, and which are unlawful by the laws of that state, is not a point which needs to be decided on the present appeal. Property rights do not come into this appeal, and no doubt for that very reason, the point was not debated very fully before us. Accordingly, it seems to me that it is right to keep the point open."

151. The central difficulty with the Second Rule is the alleged preclusionary effect, preventing adjudication upon whether a foreign state's executive acts within its territory are lawful. Without this preclusion, the Second Rule is no more than a choice of law rule (like the First Rule).

152. As Lord Sumption appreciated at Belhaj #246-247, once the possibility is admitted of questioning the lawfulness of a foreign governmental act, the Second Rule becomes meaningless. At Belhaj #246, Lord Sumption considered the decision of the High Court of Australia in Moti v The Queen (2011) 245 CLR 456 and observed that:

> "the court adopted the view of Dr F A Mann, a long-standing critic of the act of state doctrine, that there was no bar to adjudication of the lawfulness of a foreign governmental act if it was necessary to the resolution of an issue within the jurisdiction and competence of the forum".

153. Lord Sumption criticized Moti and said:

(1) "*in my view this was too wide and certainly wider than anything that was required for the decision of the case*" (at #246); and (significantly)

(2) "*The proposition which the High Court of Australia accepted from Dr Mann is tantamount to the abolition of the foreign act of state doctrine*" (at #247).

154. It is "*tantamount to the abolition of the foreign act of state doctrine*" (or at least the abolition of the Second Rule), because once the preclusionary prohibition on questioning lawfulness has gone, all that remains is a choice of law question – "*if the law of the* locus *is applied as it would be by the local courts, what consequences follow?*"

155. The High Court of Australia in Moti was clearly aware of this, stating at #52:

> "The dictum of Fuller CJ was stated in absolute and universal terms. It is a dictum often associated with the expression "act of State". But both the dictum, and the phrase "act of State", must not be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than is achieved by applying a single, all-embracing formula. Thus, as has now been pointed out in successive editions of *Dicey and Morris*, the result to which the dictum of Fuller CJ would point is often a result dictated by the application of ordinary rules governing the choice of law. So, for example, there could be no recovery by an action brought in this country in tort for the governmental seizure of property in a foreign country if the law of the place where the alleged tort was committed permitted that seizure. Whether the acts of which complaint was made in such a case were tortious would be determined by reference to the law of the place where the alleged tort was committed. And other circumstances in which the dictum might be thought to be engaged will more appropriately require the application of well-established rules about foreign states immunity."

156. It is notable, in this context, that the Supreme Court of Canada has recently held, by a majority, that the AoS Doctrine is not part of Canadian law either (Nevsun Resources Ltd v Araya, 2020 SCC 5). The reasoning of the majority, given by Abella J, is instructive – see in particular:

(1) At #42:

> "As the conflicting judgments in *Belhaj* highlight, the attempt to house several unique concepts under the roof of the act of state doctrine in English jurisprudence has led to considerable confusion.

(2) At #44:

> "The Canadian common law has grown from the same roots. As in England, the foundational cases concerning foreign act of state are *Blad* and *Duke of Brunswick*. But since then, whereas English jurisprudence continually reaffirmed and reconstructed the foreign act of state doctrine, Canadian law has developed its own approach to addressing the twin principles underlying the doctrine articulated in *Buttes Gas*: conflict of laws and judicial restraint. Both principles have developed separately in Canadian

> jurisprudence rather than as elements of an all-encompassing "act of state doctrine". As such, in Canada, the principles underlying the act of state doctrine have been completely subsumed within this jurisprudence."

(3) At #45:

> "Our courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference, but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law."

(4) At #47:

> "Our courts also exercise judicial restraint when considering foreign law questions. This restraint means that courts will refrain from making findings which purport to be legally binding on foreign states. But our courts are free to inquire into foreign law questions when doing so is necessary or incidental to the resolution of domestic legal controversies properly before the court."

The application of the Second Rule leads to anomalies and injustice

157. CA#151 recognised the anomaly inherent in the Second Rule:

> "As Lewison LJ suggested in argument, it is useful to test the position by considering how the English court would view the converse situation. Suppose an executive act of the United Kingdom government had been held by the Supreme Court to be unlawful, and therefore null and void (as indeed happened in the second Miller case: the prorogation of Parliament was "unlawful, null and of no effect"). For a foreign court, applying an act of state doctrine equivalent to our own, to hold that the act in question had nevertheless to be treated as valid and effective without enquiry would be absurd. Mr Fulton did not shrink from saying that this would be the position but, to my mind, that demonstrates the unreality of his submission on this point."

158. It has already been noted above that (as Lord Neuberger identified in Belhaj at #136 and #137), there is an inherent contradiction between the First Rule and the Second Rule.

159. The logic of the Second Rule leads inexorably to a "first come, first served" approach, where the first party in a dispute who can point to a sovereign executive act in their favour wins the day, on the (flawed) basis that the Second Rule precludes looking at any other relevant aspect of the local law which might point up that the act was illegal, or had been over-ruled, or had been reversed.[67]

[67] For an example of this, see Reliance Industries Ltd v The Union of India [2018] EWHC 822 (Comm); [2018] 1 Lloyd's Rep 562 ("**Reliance v India**"), analysed below.

There is no case in this jurisdiction where the Second Rule has been applied in its most extreme formulation

160. There is no case in this jurisdiction where the Second Rule has been applied in its most extreme formulation (Belhaj #138) – ie: there is no case where an unlawful executive act of a foreign State has been given effect by the English court, on the basis that the English courts were precluded from questioning the lawfulness of the foreign executive act.

161. It is sometimes said (including by the Guaidó Board in this case) that the Second Rule is an alternative ratio in Princess Paley Olga v Weisz [1929] 1 KB 718. Lord Neuberger was right to regard those parts of the Court of Appeal's judgments in Princess Paley Olga, which endorse the Second Rule, as obiter (Belhaj #138) and not a true alternative ratio.

162. Indeed it may be that the third ground in Princess Paley is better read as a ruling about the retrospective effect of recognition, rather than as addressing the question of whether domestic unlawfulness could be a defence: see per Scrutton LJ at 723 and 725. It does not appear to have been argued that there was in fact some internal domestic unlawfulness not cured by the subsequent adoption of the expropriation by the recognized government.

Bernstein v Van Heyghen Freres SA

163. The Second Rule **was** applied in its extreme formulation by the United States Court of Appeals for the Second Circuit in a notorious case called Bernstein v Van Heyghen Freres SA, 163 F.2d 246 (2d Cir. 1947). This concerned the confiscation, by Nazi officials, of shares in a German shipping line owned by a Jewish businessman. The confiscation took place at a time (1937) when such acts were unlawful even by the laws of the Nazi regime in Germany.

164. The majority in Bernstein held that the AoS Doctrine meant that a US Court could not question an illegal (under German law) seizure of Jewish property, on the basis that:

> "*However, even though we assume that a German court would have held the transfer unlawful at the time it was made, that would be irrelevant. We have repeatedly declared, for over a*

period of at least thirty years, that a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such".[68]

165. The evident injustice of Bernstein is a warning that applying the Second Rule in its most extreme formulation is unlikely to be the right thing to do. It might be said that an English court in the same position would have applied a public policy exception to get the right result, but that is to miss the point – it is simply not the business of the United Kingdom's legal system to enforce domestically illegal foreign executive acts (and the public policy exception by definition does not apply to all illegal foreign executive acts).

English cases since Belhaj

166. In this jurisdiction, Belhaj has been considered in 6 reported cases.

(1) Chugai Pharmaceutical Co Ltd v UCB Pharma SA [2017] EWHC 1216 (Pat); [2017] Bus LR 1455 (Henry Carr J). This was a patent dispute involving (see #61-68) an unsuccessful attempt to argue that a claim of infringement of a foreign patent was non-justiciable on AoS grounds when validity was in issue. Lucasfilm [2011] UKSC 39 was applied.

(2) Reliance v India [2018] EWHC 822 (Comm); [2018] 1 Lloyd's Rep 562 (Popplewell J, as then). This case concerned challenges to an arbitration award under ss67, 68 & 69 of the Arbitration Act 1996. Challenge 6 #95-115, under ss67 & 68, involved AoS. In broad overview, this is a case of expropriation of property by a Government under the laws applicable within its territory. However, it is interesting in that it points up the conflict between the First and Second Rules in Belhaj:

(a) The buyers under oil and gas supply contracts were nominees of the Government of India.

[68] The surprising result of the Bernstein case and the striking out of a further claim by Mr Bernstein eventually led in 1949 to a letter from the US Department of State, clarifying that the policy of the Executive was that there should be no restraint on the jurisdiction of US courts to adjudicate on the validity of the acts of Nazi officials – see Bernstein v NV Nederlandsche-Amerikaansche Stoomvaart-Maatschappij 210 F.2d 375 (2d Cir.1954).

(b) The buyers withheld part of the price payable to the sellers, because they had been directed to do so by the Indian Ministry of Petroleum and Natural Gas (because certain sums due to the Indian Government has not been paid).

(c) The Government of India's case was that the withholdings were lawful #97; the sellers argued to the contrary; the Arbitral Tribunal considered it did not have jurisdiction to decide the issue, which did not arise out of the Production Sharing Contracts containing the arbitration agreements #97.

(d) There appears to have been no dispute that the "Office Memorandum" ("**OM**") said to authorise the withholdings was a valid legislative act (#101(j)(i)) (although the Claimant/sellers concession to this effect later seems to have been qualified - #103). There was however an issue as to the applicability of notices issued pursuant to the OM; and whether the OM and notices could deprive the sellers of their contractual rights to payment.

(e) Popplewell J applied the First Rule (at #106) so that the validity of the OM could not be challenged, but he accepted that the construction and applicability of the OM could be challenged (at #107), relying on Yukos.

(f) However, Popplewell J then went on to apply the Second Rule (at #108), to the effect that, although the construction and applicability of the OM could have been challenged, the notices giving effect to the construction for which the Indian Government contended could not be challenged, because the notices themselves were executive acts in relation to property within the Indian Government's own territory.

(g) There was no finding that the expropriatory notices were unlawful, but even so the result seems arbitrary and unsatisfactory. If the

expropriations had taken effect in reliance on the OM, it appears that Popplewell J would have held they *could* have been challenged (by challenging the construction and applicability of the OM). But because there was an intervening step of giving notice of the expropriations, that right was lost (and the true effect of the OM treated as irrelevant, notwithstanding the First Rule).

(3) The Law Debenture Trust Corpn plc v Ukraine [2018] EWCA Civ 2026; [2019] QB 1121. The issue was whether Ukraine had a defence to an action for repayment of transferable eurobond notes, the defence being that the notes had been procured by Russia by duress (see #151-181 and in particular #168-174). The Claimant said that Ukraine's duress defence was non-justiciable because it would be wrong for a domestic court to become involved in scrutinising foreign acts of state concerning matters of high policy of other nations. Applying Belhaj, the Court of Appeal considered that prima facie the Third Rule applied #173, but was disapplied by the public policy exception #174.

(4) High Commissioner for Pakistan in the United Kingdom v Prince Muffakham Jah [2019] EWHC 2551 (Ch); [2020] Ch 251 (Marcus Smith J). The issue was whether an interpleader claim to a fund deposited with the High Commissioner of Pakistan was justiciable (see #292-314 and in particular #309-312). Pakistan asserted non-justiciability under the Third Rule #295; discussion and analysis of the third rule at #306-312; held third rule did not apply on the facts #313.

(5) Dynasty Co for Oil and Gas Trading Ltd v Kurdistan Regional Government of Iraq [2021] EWHC 952 (Comm) (Butcher J). Jurisdiction challenge to claim for damages for alleged conspiracy and intimidation connected with alleged breaches by Kurdistan of oil production sharing contracts. Claim said to be non-justiciable by reason of AoS #59, specifically First Rule. Held that the First Rule did not apply, because #62 "*The validity of the Iraqi Constitution is not questioned by either party, and the court is not being called upon to*

say otherwise. That being the case, there is no prohibition on the court's construing that Constitution". The Second Rule was raised, but not considered at #136-137 because it was "premature"; the Second Rule was "controversial" and "*it would be better for such matters to be decided in a case in which they were important to the result*".

(6) Skatteforvaltningen v Solo Capital Partners LLP [2021] EWHC 974 (Comm) (Andrew Baker J). Indirect claim for unpaid tax by Danish Tax Authority. Third Rule #184 and Second Rule #204 referred to in the appendix recording the parties' arguments, but Belhaj does not appear in the reasoning in the main part of the judgment, which is all about Dicey Rule 3.

Point (1) on AoS: Conclusions

167. All the authorities which support the First Rule (foreign legislative acts) have an alternative explanation. There is no substantial or material difference between the First Rule and ordinary choice of law rules. The First Rule does not preclude inquiry into the construction, applicability or constitutionality of foreign legislation.

168. The Second Rule (foreign executive acts) conflicts or potentially conflicts with the First Rule. The Second Rule has never been applied in England and Wales in its most extreme formulation (i.e. giving effect to foreign executive acts which have been found to be unlawful); to do so would tend to lead to absurdity and injustice. Even If the Second Rule exists, its scope should not be expanded beyond its current formulation in which it is limited to property situate within the foreign state.

169. The Third Rule concerns non-justiciability in the Buttes Gas sense only and there is no Fourth Rule.

170. It follows that, even within its present limits, the AoS doctrine lacks any coherent justification. This analysis provides the groundwork for the next two submissions which are probably at root alternative ways of capturing what is essentially the same point.

(2) The purported Guaidó appointments are not AoSs for the purposes of the AoS doctrine - not because they are the wrong sort of act, but because they are not properly characterised as being Acts *of State*

171. Another weakness of the supposed doctrine is that there is no clear definition in the case law of what constitutes an AoS in the first place. Not every governmental action and not every ministerial activity is an AoS.[69]

172. Not all acts of the HoS qualify. The acts must be acts "jure imperii" and not commercial acts. But this point goes to which acts (of a State) qualify: they focus on the nature of the act, and assume that any act of the right nature *by* the HoS or the HoG, or by the legislature, will qualify as an act *of* State.

173. The point in our case is not the quality of the act, but rather the position of the actor – in this case the HoS – and whether *his* acts necessarily qualify as acts *of the State of Venezuela*, for the purposes of the doctrine.

174. A putative AoS might in principle be a legislative or executive act or judicial act.

175. English case law at CA level holds that judicial acts do *not* engage the AoS doctrine (see Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2) [2014] QB 458). This may, fundamentally, be because English judges are conditioned by our particular constitutional settlement in which there is absolute Parliamentary Supremacy.

176. But this immediately creates a tension in the doctrine because in many foreign constitutional arrangements judicial acts *can* override legislative acts, and in many states including in the UK judicial decisions *can* override executive acts of the HoG. It is difficult, perhaps impossible, to have a coherent doctrine in which one particular type of act, a judicial act, can *never* itself be an AoS and yet the same type of judicial

[69] Lucasfilm Ltd v Ainsworth [2012] 1 AC 208, at #85. At #86 Lord Walker and Lord Collins went on to point out that "…in England the foreign act of state doctrine has not been applied to any acts other than foreign legislation or governmental acts of officials such as requisition…" and (in the context of intellectual property rights) Act of State was not involved "simply because the action calls into question the decision of a foreign official". The act of state doctrine is not an impediment to an action for infringement of foreign intellectual property rights, even if the validity of a grant is in issue (Chugai Pharmaceutical Co Ltd v UCB Pharma SA [2017] EWHC 1216 (Pat) at #68, after considering Belhaj).

act can (at least internally) prevent something else, which would, if not so prevented, be an unchallengeable AoS, from being an effective act at all.

177. In other words what is or is not an AoS will inevitably require consideration of the various arms of the State in question and how they interrelate in that particular State's constitutional settlement. It cannot be assumed that all States operate as does the UK.

178. Consider the following:

(1) Is a US legislative act which has in fact been struck down as unconstitutional by the US Supreme Court an AoS for the purposes of the doctrine? Surely not. But if so, why not? And what if the challenge were pending?

(2) Suppose that in foreign State "S" the HoG has purported to prorogue the legislative assembly but the Courts of S have ruled the prorogation unlawful.[70] Is the prorogation (although ineffective in State S) to be regarded by the English courts as an AoS of State S? Surely not. But why not, unless it is on the basis that the prorogation is no longer an AoS because of the judicial act (even though that judicial act is not itself an AoS)

(3) Suppose that in foreign State S the executive serves Notice of Withdrawal from some of S's treaty obligations, but the Courts of S rule that the Notice of Withdrawal is unlawful (because only the legislative body can decide to do that).[71] Is the Notice of Withdrawal an AoS of State S? Surely not.

179. Similar difficulties arise if a State is, on the ground, subject to two competing claims to control, so that the constitutional checks and balances between rival "agents of the state" are not working as expected. On the assumed facts here, that is what is happening in Venezuela: there is a HoS who is not HoG, although the Venezuelan

[70] which is what happened in Miller 2 (R (on the application of Miller) v Prime Minister [2019] UKSC 41; [2020] AC 373).

[71] which is what might have happened in Miller 1 (R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2018] AC 61.

constitutional settlement demands that the same person is HoS and HoG. So the Venezuelan State in its judicial arm and governmental arms does not recognise the person whom the UK treats as its HoS.

180. The point was identified by Lord Mance in Belhaj at #65 (G-H):

> "In states subject to the rule of law, a state's sovereignty may be manifest through its legislative, executive or judicial branches acting within their respective spheres. Any excess of executive power will or may be expected to be corrected by the judicial arm. A rule of recognition which treats any executive act by the government of a foreign state as valid, irrespective of its legality under the law of the foreign state (and, logically, it would seem, irrespective of whether the seizure was being challenged before the domestic courts of the state in question), could mean ignoring, rather than giving effect to, the way in which the state's sovereignty is expressed…"

181. That observation is especially pertinent in this case, where everything Mr Guaidó has purported to do has been declared unlawful by the domestic courts.

182. The Guaidó Board's case at #102 says that their success on Grounds 1 and/or 2 "means that interim President Guaidó's appointments of public officials ***are the acts of the Venezuelan State***" (emphasis added). That does not follow even if the Guaidó Board wins on Issues 1 and 2. *Even if* HMG had recognised Mr Guaidó as both de facto and de jure constitutional interim president qua HoS, it would *not* follow that his acts in that capacity, however outrageously in contravention of Venezuelan law, were to be regarded as acts of the Venezuelan State. Similarly at #151 they suggest that "it is sufficient to engage the act of [state] doctrine merely to plead and rely upon a sovereign act", but again that is too simplistic. Proving that there is an AoS, properly so-called, is an essential first step to invoking the AoS doctrine[72].

183. On this analysis – that Mr Guaidó's acts are not properly characterised as being acts of the State of Venezuela, there is no AoS preclusion in play here *even on Lord Sumption's formulation* of the AoS doctrine: for his formulation of the principle was (at #288) that "English Courts will not adjudicate on the lawfulness or validity of a state's sovereign acts under its own law". That begs the question of whether a

[72] Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2) [2014] QB 458 at #110.

domestically unlawful, or unconstitutional, act by a foreign sovereign or President is a ***State*** sovereign act in the first place.

184. None of the above conflicts in any way with the possible rationale/s of the AoS doctrine:

(1) If the rationale of the doctrine is respect for the autonomy of the foreign state, that respect is not undermined if the English court applies the foreign law as declared by courts of the country concerned.

(2) If the rationale of the AoS doctrine were the competence of the English court, that is unproblematic if the foreign court has ruled, or will rule, on the matter.

(3) If the rationale was the promotion of certainty, one could hardly imagine a more disruptive event than the English court coming to the diametrically opposite conclusion to the foreign constitutional court.

(4) In circumstances in which there is already, or will be, a decision of the foreign court on the matter before the English court, an application of the 'AoS' doctrine to contradict or bypass the decision of the foreign court does not appear to be consistent with either the "comity" or "obligation" relationships between this court and the courts of a foreign country: Dicey and Morris Conflict of Laws Vol 1, para 14-007.

(5) Great weight should be placed on the decisions of a foreign court as to what foreign law is; and evidence of the opinion of the highest court in the country concerned is the best evidence on the question. See Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] A.C. 853 at 920-921 and at 923.

(6) The Guaidó Board say that the STJ is politically motivated, and its decisions should be disregarded. But at this stage this is mere assertion, and in any event decisions of foreign courts are to be respected because, "*even if political considerations were apparent it would remain true that what the*

courts have decided is in fact that law which is being enforced in the foreign country..." (per Lord Reed in the Carl Zeiss case at 924).

185. The application of the AoS doctrine contended for by the Guaidó Board is that the relevant supposed legislation and subsequent acts of Mr Guaidó are to be treated as valid and effective, when the domestic constitutional court has held diametrically the opposite, even without there having being established any valid criticism of the decisions of the domestic Courts.

186. This is a startling result. It places Mr Guaidó above the law – any law. If correct Mr Guaidó is not (in the eyes of our courts) subject to the Courts of Venezuela, nor will our Courts enquire into the lawfulness of his actions. The effect would be that he is elevated above all law. The One Voice doctrine would have been transmuted into a doctrine which allows recognition by HMG to place a foreign "sovereign" above all law. It is not a terribly progressive approach and it would, we suggest, be surprising were it to be adopted as a part of English law for the first time now.

187. It is of course exactly the type of result that Lord Mance identified as being unacceptable in Belhaj at #76 and #102.

(3) If there is a Second Rule, it does not apply because the relevant acts have been ruled unlawful by the STJ and/or because they are unlawful

188. An alternative way to reach the same conclusion is to treat the appointments as Acts of State but to decline to extend the AoS rule to cases in which the alleged foreign AoS has been ruled unlawful or unconstitutional, or is in fact unlawful or unconstitutional.

189. The determination of the question whether the Guaidó appointments are lawful (in Venezuelan law terms) will require the English court to consider the Constitution of the Bolivarian Republic of Venezuela; judgments of the STJ; and the independence or otherwise of the STJ. There are judicial and manageable standards by which all these matters can be determined, and no reasons of comity for declining to resolve them:

(1) The English Courts regularly consider the effect of foreign judgments and the interpretation of foreign constitutions. Far from there being no "judicial and manageable standards" for this, it can reasonably be described as commonplace.

(2) To the extent that the Guaidó Board challenge the independence of the STJ, the English courts are entirely capable of (and are not precluded from) determining this type of issue (see Yukos at #152-154). There are clear guidelines as to how the English courts should approach such allegations and see Buck v Attorney-General [1965] Ch 745 at p.770 and Al-Jedda v Secretary of State for Defence [2011] QB 773 at #74-75 & #189-191.

190. In the present case, the issue as to the validity of the Transition Statute arises incidentally, in the same way as the validity of a foreign law might come into question in an action on a contract to be performed abroad. This Court has jurisdiction in the DB case because the arbitration's seat is here, and in the BoE case the custody agreement provides for English law and jurisdiction. The object of the DB case is to determine who has authority to speak on behalf of the BCV for the US$120 million sum paid/payable by DB and to give instructions in the arbitration. The object of the BoE action is to obtain access to the gold and determine who has authority give instructions for its release.

191. The lawfulness of the Transition Statute and the subsequent executive acts have to be decided in order to determine who controls the arbitration and the gold, but determining the lawfulness of the legislative and executive acts is not the purpose or object of either claim.

192. In the minority in Belhaj, Lord Sumption appears to adopt a test of whether the main issue in the case cannot be determined without deciding the issue of unlawfulness. Lord Sumption's proposed version is too stringent. In Diplock L.J.'s example in Buck of an issue of unlawfulness arising on a question of performance of a contract, it would very often be necessary to decide whether the foreign law was unlawful or not in order to decide the contractual issue (so this would satisfy Lord Sumption's

test) but that decision would not be the "object of the action" – the object would be to obtain relief on the contract. Buck was a case of attempted direct head-on attack by a litigant on the validity of the Sierra Leone Constitution: that was the object of the proceedings.

(4) If there is a Second Rule (and it can apply even to a domestically unlawful act), it does not apply here because the relevant acts, although they take effect in Venezuela, affect assets in the United Kingdom. The Second Rule is limited to acts the direct consequence of which is felt only in the foreign state

193. This is Issue 7 in the appeal. Issue 8 in the appeal is about the subject matter limitation of the AoS doctrine. When the AoS doctrine is stated the two limitations are often wrapped up together and some caution is required in treating them separately.

194. There can be no rational basis for applying a different set of territorial or subject matter limitations to the First Rule as opposed to the Second Rule and we proceed on the basis that the limitations - whatever they are – must be the same.

195. The issue here is what is the precise nature of the **territoriality** limitation applicable to the AoS doctrine. That requires understanding the rationale for the limitation, and considering how it has been applied in the pre-Belhaj cases.

196. The Guaidó board say (Guaidó Board case at #158) that the territorial limitation of the AoS doctrine is "common ground" and cite Belhaj #121-122 where the formulation used by Lord Neuberger is (merging the two putative rules):

> "the courts .. will recognise and will not question the effect of a foreign state's legislation, or the effect of an act of a foreign state's executive, which takes place or takes effect within the territory of that state".

197. It is unlikely that the Supreme Court intended that formulation to be read as though it were a statute, and in any event the Supreme Court did not uphold these rules in unqualified terms. The territoriality limitation was dealt with at Belhaj #163-165.

198. The nub of the point here is whether the AoS preclusion applies even where the intended consequence – indeed the very purpose of – the impugned act is its affect in the United Kingdom (or at any rate outside Venezuela). There can be no doubt

that is the case here: the expressed motivation for the Guaidó Board appointments are to ensure the "protection… of State assets abroad[73]".

199. There is no good principled reason for doing so and none is identified by the Guaidó Board.

200. The distinction between where the act is and where it affects things was caught by F A Mann in 1986:[74]

> "… It is clear in English law that the doctrine of the act of State is limited to action taken by a foreign State within its own territory or, perhaps one should say, in respect of property situate in its territory."

201. The learned Judge appears (J#71) to have sought to apply Lord Neuberger's formulation, that AoS applies to "acts which take effect in the territory of the state concerned" and he held (at J#72 in relation to the Transition Statute and at J#80 and #81 in relation to executive acts) that that test was satisfied. He was wrong to do so. The only relevant *impact* of the acts in issue are extraterritorial: that applies whether one considers the legislative or executive acts.

202. The Judge held that the Transition Statute "takes effect in Venezuela" on the basis that the appointments made under it are in Venezuela, and to the Board of a Venezuelan institution. The Judge was correct in that, if the Transition Statute is to take effect anywhere, it must do so in Venezuela (and this is why the Venezuelan Courts have been right to deal with lawfulness of those appointments). But that is not the correct characterisation for the purposes of the territorial limitation to the AoS preclusionary rule. The mere fact that a power is exercisable in one location, and that it must come into force in Venezuela to be effective at all, does not mean that that it does not affect property in England. Suppose that the statute had conferred powers on Mr Guaidó to make an appointment (in Venezuela) to replace the branch manager of a Venezuelan bank that had a London branch: the power would be exercisable in Venezuela, but the Courts here would be unlikely to treat

[73] Article 15(b) of the putative Transition Statute Appendix, 844.

[74] F A Mann, Foreign Affairs in English Courts (OUP 1986), Chapter 9 at p.179

the exercise of power as nonjusticiable, and indeed did not do so in Banco de Bilbao v Sancha [1938] 2 K.B. 176.

203. The distinction between this case and, say, Luther v Sagor and Princess Paley Olga's case is that the Russian Decrees were concerned at the time they were made with property then in Russia; the relevant provisions of the Transition Statute are about property outside Venezuela.

204. The error is perhaps even clearer in relation to the acts of appointment. The ad hoc board does not meet in Venezuela, the SAG is not in Venezuela, and their only power is in relation to assets outside Venezuela. In terms of *consequences* it is about as extraterritorial as it could be. It is not (contrary to J#81) in substance concerned with a matter of *internal* governance of the BCV: it is concerned and concerned only with who could represent the BCV in its external dealings outside Venezuela, and in particular in Threadneedle Street.

205. At #159 of its Case, the Guaidó Board relies on Williams & Humbert v W&H Trade Marks (Jersey) Ltd [1986] AC 368. There, the Spanish government, the recognised government in administrative control of Spain, made decrees expropriating all the (Spanish) shares of Rumasa group Spanish companies in Spain, and hence took control over those companies. The decrees were challenged in the Spanish Constitutional Court but the challenge failed (see at page 377). The Spanish companies had English subsidiaries. Since the Spanish government now controlled the Rumasa companies in Spain, their English subsidiaries were now indirectly controlled by the Spanish government. It was held that, although English law would not enforce foreign laws that purported to have extraterritorial effect, nevertheless all that the Spanish government had done was to take control over the Spanish companies and the Spanish Government's title in the Spanish shares had been perfected in Spain, and so this was a case of a (lawful) Spanish decree operating only in relation to property in the foreign territory.

206. The present case is different. Mr Guaidó has not purported to expropriate to himself the share capital of the Central Bank and seek to take control of it by that means

(supposing that were possible, and even leaving aside any issues as to unlawfulness). Rather, what Mr Guaidó has sought to do is to seek to displace the current management's control over the foreign assets held by the Central Bank.

207. In paragraph 162 of its Case, the Guaidó Board contends that Mr Guaidó's declaration in his Decree 8 that President Ortega's appointment (but not any of the appointments of the other members of the Maduro Board) is void should be unquestionably accepted by the English courts. Leaving aside the fact that the STJ has held that Decree 8 is null, void and unconstitutional,[75] this contention fails because it does not of itself give the Guaidó Board control over the BCV's assets situated in England. In any event Decree 8 has not purported to remove the balance of the Maduro Board members.

(5) If there is a Second Rule, it does not apply because the relevant acts are appointments to a board, and the Second Rule applies only to executive acts affecting property

208. The underlying issue in this case is which individuals are able effectively to give instructions to the Bank of England about the BCV's gold which is stored in London, about money in the hands of London Receivers and about a LCIA arbitration in London. It is a question of actual authority to act for/represent the Central Bank.

209. The Second Rule in Belhaj has so far only been applied to executive acts purporting to apply to property in the State concerned. Here the executive acts relate to a quite different subject matter: agency of directors; in particular, their agency or direction in relation to property held outside Venezuela. In #126 of its case, the Guaidó Board accepts that this is not a property case, but says that a case of change of control or representation should fall within the same principles applicable to cases of property in foreign controlled territory.

210. The question of whether directors have been validly appointed to a foreign entity is a question for the law of the country of that entity's incorporation: Dicey and Morris Vol 2, para 30-028.

[75] STJ Ruling 0247 (see chronology 25 July 2019).

211. It is very difficult to see why there should be a preclusionary rule that prevents the English Courts assessing which of two conflicting appointments, each said to determine the issue of who can give instructions in relation to BCV gold, monies or arbitration rights in London, or to see how this can be an issue into which the Courts here cannot properly enquire.

212. The Guaidó Board (Guaidó case at #120-122) cannot find an example of AoS preclusion being applied to an act of sovereign appointment since 1848. As for the two cases which they say are examples:

(1) Dobree v Napier (1836) 2 Bing NC 781: the issue was not whether there was an AoS preclusion preventing challenge to the *Portuguese* lawfulness of appointment of Napier by the Queen of Portugal; rather the question was whether domestic (i.e. British) unlawfulness of the appointment was relevant at all: the Court (rightly) held that it was not.

(2) Duke of Brunswick (1848) 2 HL Cas 1: the claim was against a former sovereign for acts done in that capacity. It was certainly a case of sovereign immunity. Whether or not it was also a case of non-justiciability has divided commentators, but at any rate Lord Campbell, who had been one of the judges, treated it as a sovereign immunity case Wadsworth v Queen of Spain [1851] 17 QB 171 at 207.

213. More telling than these two elderly cases are the much more recent cases where acts of appointment by foreign "sovereigns" *have* been disputed, and neither the Court nor the parties have treated the challenge as being precluded by the AoS doctrine. See for instance Banco de Bilbao and Bank of Egypt.

214. Most recently, in Mohamed v Breish [2019] EWHC 1765 (Comm) and [2020] EWHC 696, the question was which of several candidates was the person entitled to be Chairman of, and represent, the Libyan Investment Authority, which was conducting litigation in London. Andrew Baker J. received evidence of Libyan law and examined a challenge to the validity of the executive appointment of the main candidate under

Libyan administrative law – see [2020] EWHC 696 at #23-26 and #46-72. This course was upheld in the Court of Appeal at [2020] EWCA Civ 637, #26 and #40-41.

215. There was no suggestion made that the AoS doctrine precluded these issues being raised or being resolved.

216. In #125 of its Case, the Guaidó Board contends that an AoS objection could have been raised in Breish, but suggest that on pragmatic grounds the points were not taken. That overlooks the point that if AoS did apply, the Court should have taken the point. Much the better explanation is that such points were recognised to be unavailable because any Second Rule of AoS is limited to property.

(6) If and insofar as it becomes necessary to consider the First Rule and the validity of the Transition Statute, the AoS doctrine cannot rule out an enquiry into whether the Transition Statute is a legislative act within the meaning of the AoS doctrine.

217. This is Issue 4. Before the AoS doctrine can bite, there must, obviously, be an act of state. The Transition Statute can only be an AoS if it is a legislative act. If Mr Blogs of Caracas goes to his study and writes out a document which he entitles "Statute", it is not an AoS. To get off the starting blocks it must be an act of the relevant legislative body, and, one would have thought, it must satisfy whatever preconditions the Venezuelan Constitution requires of a statute.

218. Similarly one would not expect a foreign Court (in one of the few countries with an AoS doctrine) to treat an English statute as an Act of Parliament which had not passed through both houses or received Royal Assent.

219. This is a different point to that above (at **(2)**). That point there is that there is no act *of state* because one considers the State as a collective whole (i.e. all three organs of the state) when determining an AoS. This point is even more fundamental – it is an *existential* question: if the putative AoS does not fulfil the basic domestic qualifications to be legislation/an executive act/a judicial decision within the domestic state, how can it ever hope to treated as an AoS?

220. Here the Judge at first instance said that the AoS Doctrine precluded any consideration of these issues (J#64). That is, with respect, plainly wrong because the

reasoning is circular and assumes the premise. The underlying question is "does the AoS doctrine preclude consideration of whether the Transition Statute is lawful and effective?" It can only possibly do so if the Transition Statute is in fact a relevant AoS (here: a piece of legislation). Until that question is answered one cannot know whether the AoS doctrine applies, so the question cannot be answered by saying "the AoS doctrine does not permit this question to be asked."

221. If the transition statue is not a legislative act, the AoS doctrine simply is not engaged at all.

222. The Maduro Board has two arguments which it says it ought to be permitted to run.

223. The first is the simple one that the National Assembly could not any longer pass legislation. As to that:

(1) That is what the STJ has decided (SoFI §13).

(2) The CA did not deal with this point.

(3) The judge at first instance dealt with this at J#58-64 but erred at J#61 by mischaracterising the issue here as being one about the *validity* of the legislation. It is not. It is a point about whether it *is* legislation at all. Having quoted the passage from Rix LJ in Rosneft (#62) the judge ought to have held that the challenge here is an existential challenge.

(4) The Judge held at J#64 that there must be "credible evidence" that the Transition Statute is the act of the Venezuelan legislature. There is no basis for such a test. The question is whether the Transition Statute <u>is</u> an act of the Venezuelan legislature. In any event, the evidence recounted at J#64 does not assist in answering the question whether the National Assembly can make legislation: all its shows is that (not surprisingly) the view of Mr Guaidó and the officers of the National Assembly is that it can. That takes matters no further.

224. The second point is the Maduro Board's argument that the Transition Statute cannot be effective legislation because it has not been published in the Official Gazette as required by Art 215 of the Venezuelan Constitution (see #58). As to that

(1) The Official Gazette is under government (i.e. President Maduro as undisputed HoG's) control, and the purported Transition Statute has not been published in the Official Gazette. The Transition Statute itself acknowledges this, stating that because the Maduro government is 'de facto' in power, the Transition Statute is not being published in the Official Gazette: see Transition Statute Art 38. The STJ has ruled that because the Transition Statute has not been published in the Official Gazette, it is null and void and of no effect.

(2) The first instance reasoning at J#64 does not address this point, or, if it does, it cannot meet it. A signature by the Interim President cannot substitute for publication in the Official Gazette.

(3) The point is not a dry or technical one. Constitutional checks and balances are created by formalities in relation to the promulgation of legislation. In this country Parliament can pass laws but they are not effective until they receive Royal Assent. In Venezuela there is a different mechanism, but it is no less important.

(4) Similar points arise in relation to the executive acts relied on, which can only be Acts of State at all if the act under which they are made is a real act. And they too can only take effect if they are published in the Official Gazette. At J#76 and #88 the Judge precludes challenges to them, and repeats the point he made at J#64. The Judge appears to hold that as long as they are signed by Mr Guaidó at the Legislative Palace, they are effective. He has not considered what is required, under Venezuelan law, for such acts to be effective.

225. These arguments are for later. For now, the simple point is that, in order to engage the AoS doctrine, there obviously must be an AoS. Passing the Transition Statute was

not, on any view, something done *by Mr Guaidó*. Insofar as it was passed at all, it was passed by the National Assembly. If, as the STJ has held, the National Assembly had no power to pass legislation whilst it was in contempt, there can be no AoS, and it is irrelevant to that issue that Mr Guaidó is, or is on this hypothesis recognised as, Constitutional Interim President. This point about the National Assembly's status may or may not ultimately turn out to be right, but it certainly cannot be precluded from consideration by the AoS doctrine. To do so would be to argue in a circle: "this Court cannot decide whether or not the Transition Statue is an AoS, because it is an AoS".

(7) The Decentralised Entity Points

226. This is Issue 5. The Maduro Board seeks to argue contend that the BCV is not a decentralized entity, and a fortiori it is also not a "decentralized entity abroad" so that the enabling power in Article 15 of the Transition Statute does not extend to permit appointments in relation to the BCV. The learned Judge held at #65 that this point arises only in relation to the second rule, on validity of executive acts, and then dealt with at #89.

227. Insofar as this is a question of construction, it clearly arises on the wording of the Transition Statute. If the point turns out to be right, it means that there is no power to make any sort of appointment in relation to the BCV, which in turn means there is no subsequent executive AoS (another existential point). The correct analysis is that this is a point available to the Maduro Board on the construction to the Transition Statute, and there is no basis for precluding its consideration on AoS Grounds. Courts have frequently considered the construction of foreign statutes, even in cases of State expropriations.[76]

228. There is another point of construction as to whether the Transition Statute prevails over the BCV Law and its different and special provision for the appointment or removal of the President and Board of the BCV, and their terms of office. The

[76] Al-Jeddah v Secretary of State for Defence [2011] QB 773 at #74 and #189-191; see Lord Mance in Belhaj at #73(iii).

Transition Statute is not worded to repeal the BCV Law. On the judge's view that even questions of construction cannot be raised, the court is faced with two inconsistent acts, with no solution for resolution.

229. Whether the Maduro Board can argue these points must depend on the scope of the AoS Doctrine and the outcome of the other Issues, so no distinct point is raised by it.

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