IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2020/0195**

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

BETWEEN:

THE "GUAIDÓ BOARD" OF THE CENTRAL BANK OF VENEZUELA

Appellant/Cross-Respondent

-and-

THE "MADURO BOARD" OF THE CENTRAL BANK OF VENEZUELA

Respondent/Cross-Appellant

-and-

THE SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS

Intervener

CASE ON BEHALF OF THE FOREIGN SECRETARY

INTRODUCTION[1]

1. On 19 March 2020, the Foreign Office responded to an invitation of Robin Knowles J to provide a written certificate in the context of proceedings in the Commercial Court. In its letter ("**the Certificate**"),[2] the Foreign Office referred to the statement made by the then Foreign Secretary on 4 February 2019 that "*[t]he United Kingdom now recognises Juan Guaido as the constitutional interim President of Venezuela, until credible presidential elections can be held*".[3] The Foreign Office confirmed "*that this remains the position of Her Majesty's Government*" **[App/77/906]**.

[1] References to the High Court and Court of Appeal judgments are in the form HC Judgment, §* and CA Judgment, §*, respectively. References to the Appellant's written case are in the form Guaidó Case, §* and references to the Respondent's case are in the form Maduro Case, §*. References to the Appendix are in the form **[App/ Tab*/ p. *]**.

[2] The full text of the Certificate is at **[App/77/905-906]**. Robin Knowles J's letter to the Foreign Secretary is at **[App/76/904]**.

[3] The full text of the Foreign Secretary's 4 February 2019 statement, entitled "*UK recognises Juan Guaido as interim President of Venezuela*" is at **[App/53/832-833]**.

2. At first instance, Teare J accepted the Certificate as a clear and unambiguous recognition of Mr Guaidó as the constitutional interim President of Venezuela, to the necessary exclusion (and non-recognition) of Mr Maduro in that capacity.[4] On appeal, the Court of Appeal held that the Certificate was ambiguous. In particular, the Court of Appeal considered that it left open the possibility that HMG may implicitly recognise Mr Maduro as head of State *de facto*, and ordered that the matter be remitted to the Commercial Court for further questions to be put to the Foreign Office.[5]

3. In outline, the Foreign Secretary's position on recognition is as follows:

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

   (2) The Court of Appeal looked beyond the terms of the Certificate to matters of "*context*".[6] An interpretative approach that assesses HMG's broader conduct undermines the purpose and function of an executive certificate. The courts should not conduct their own enquiry into the facts in circumstances where HMG has made an express statement of recognition.

   (3) If, however, the Court were to consider that it is necessary and appropriate to assess HMG's broader bilateral relationship with Venezuela, HMG's conduct is consistent with its continued recognition of Mr Guaidó as interim President of Venezuela. The fact that it has been necessary for practical reasons for HMG to engage with elements of the Maduro regime in relation to certain essential functions does not undermine its position on recognition. To the contrary, HMG's

[4] HC Judgment, §§33 **[App/5/108]** and 42 **[App/5/110-111]**.

[5] CA Judgment, §§123-124 **[App/2/67-68]** and §§126-127 **[App/2/68-69]**.

[6] CA Judgment, §123 **[App/2/67-68]**.

refusal to engage directly with Mr Maduro underlines the UK's position that he is no longer recognised as the Venezuelan Head of State.

4. The Foreign Secretary also makes brief submissions on questions relating to the scope of the foreign act of State doctrine for the assistance of the Court, focusing on Grounds 6 to 8 of the Maduro Board's cross-appeal.

THE LEGAL FRAMEWORK ON RECOGNITION

Recognition and HMG's policy

5. Recognition is an act which communicates a State's acceptance of a particular fact or state of affairs in its relations with another State. Recognition of States and governments has a particular meaning and significance. The recognition of a State is the acknowledgement by an existing State that another entity has attained the status of statehood, with all the legal consequences that this entails. This is to be distinguished from the recognition of a government as "*established, lawful or 'legitimate', that is, as entitled to represent the state for all international purposes*": James Crawford, Brownlie's Principles of Public International Law (9th ed., 2019) ("**Brownlie's Principles**"), 135.[7] As the Lord Privy Seal explained, "*[r]ecognition enables Her Majesty's Government fully to conduct business with the Government in question. By it, Her Majesty's Government accept that the Government are entitled to represent the State concerned in its international relations and that their acts may be regarded as binding on it in international law*": Hansard, Commons, vol. 969, col. 153W (26 June 1979). Accordingly, the recognition of an individual as Head of State or as Head of Government signifies the recognising State's willingness to deal with that individual as representing the State concerned on the international plane.

6. Prior to 1980, HMG's long-standing practice was to make and announce decisions formally 'recognising' a new government following an unconstitutional regime change. It did so if specific criteria were met: see, e.g., Hansard, Commons, vol. 485, cols 2410-

[7] See further James Crawford, 'Introduction to the Paperback Edition' in Sir Hersch Lauterpacht, Recognition in International Law (1947, reprinted in 2013) ("**Lauterpacht**"), xxix ("*The former is a question of international* existence; *the latter, of international* representation").

2411 (21 March 1951). Following a review of that practice in 1979-1980, HMG adopted a policy that it would not accord recognition to governments in such cases. On 28 April 1980, the Foreign Secretary, Lord Carrington, explained the new policy in the following terms (Hansard, Lords, vol. 408, col. 1121-1122):

> "*Where an unconstitutional change of régime takes place in a recognised State, Governments of other States must necessarily consider what dealings, if any, they should have with the new régime, and whether and to what extent it qualifies to be treated as the Government of the State concerned. ... the policy of successive British Governments has been that we should make and announce a decision formally 'recognising' the new Government. This practice has sometimes been misunderstood, and, despite explanations to the contrary, our 'recognition' interpreted as implying approval. ... We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to Governments. Like them, we shall continue to decide the nature of our dealings with régimes which come to power unconstitutionally in the light of our assessment of whether they are able to exercise effective control of the territory of the State concerned, and seem likely to continue to do so.*"

7. On 23 May 1980, the Lord Privy Seal, Sir Ian Gilmour, set out how HMG's attitude towards a new regime may be clarified for the purposes of legal proceedings as follows (see Hansard, Commons, vol. 985, col. 385W):[8]

> "*In future cases where a new régime comes to power unconstitutionally our attitude on the question whether it qualifies to be treated as a Government will be left to be inferred from the nature of the dealings, if any, which we may have with it, and in particular on whether we are dealing with it on a normal Government to Government basis.*"

8. This policy does not prevent HMG from recognising a government or Head of State when it chooses to do so, whether in the circumstances of an unconstitutional regime change, or otherwise. Nor does it prevent HMG from informing the courts of the same: Kuwait Airways Corporation v Iraqi Airways (Nos 4 and 5) [2002] 2 AC 883 ("***Kuwait Airways***"), §§349-350. Since the 1980 policy was introduced, HMG has exceptionally made recognition statements – notably in relation to the National Transitional Council of Libya in 2011: see British Arab Commercial Bank plc v National Transitional Council

[8] See also Hansard, Lords, vol. 409, col. 1098W (23 May 1980), where the same statement was given to the House of Lords by the Foreign Secretary.

of the State of Libya [2011] EWHC 2274 (Comm). It has also continued to recognise States and to issue statements of non-recognition of governments.[9]

Executive certificates and the 'one voice' principle

9. The decision as to whether or not to recognise a Head of State or government (or a State) is a prerogative of the Sovereign. This prerogative extends to deciding not to engage with the recognition question at all, to the manner in which recognition is accorded, and to deciding positively not to recognise an entity or individual. There is thus a constitutional allocation of responsibility, with such decision-making on recognition being the province of HMG. That allocation is reflected in the practice and principled approach adopted by the courts to recognition.

10. The 'one voice' principle provides the rationale for that practice and those principles. It has long been accepted by the courts[10] and was set out in *The Arantzazu Mendi* [1939] AC 256, 264 thus:[11]

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

11. The key practice and principles are as follows.

12. **First**, in matters of recognition, the courts' long-standing practice is to seek information from a Secretary of State as to HMG's position: *Duff Development v Government of*

[9] See, e.g., Hansard, Commons, vol. 17, cols 279-280W (8 February 1982) (Taiwanese authorities) ("*Her Majesty's Government do not recognise Taiwan as a State nor the Nationalist authorities in Taiwan as a Government*"); Hansard, Commons, vol. 144, col. 838 (11 January 1989) (Tibetan authorities) (referring to "*a Tibetan Government in exile, which is recognised neither by Her Majesty's Government nor by any other Government*").

[10] See *Taylor v Barclay* (1828) 2 Sim 213, 221 ("*It appears to me that sound policy requires that the Courts of the King should act in unison with the Government of the King*"). See also *Jones v Garcia del Rio* (1823) Turner & Russell 297, 299.

[11] The 'one voice' principle remains relevant to cases in which (despite HMG's change in policy in 1980) a formal statement of recognition is nonetheless made: see e.g., *Kuwait Airways Corp v Iraqi Airways Co (No 5)* [1999] CLC 31, 67 (approved by the Court of Appeal in *Kuwait Airways*, §350).

Kelantan [1924] AC 797 ("***Duff Development***"), 805-806 (Viscount Cave) and 813 (Viscount Finlay).

13. **Secondly**, there is no uniform rule as to the manner in which the courts inform themselves as to HMG's position on a particular matter.[12] One such method is the executive certificate. Another is the Court, upon its own initiative, inviting HMG to appear and address the Court. It is open to the courts to receive HMG's views in the combined form of submissions to the Court and an executive certificate: e.g., *The Gagara* [1919] P 95.[13]

14. **Thirdly**, the 'one voice' principle is not a mere rule of evidence. Instead, "*it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance*": *Duff Development*, 813 (Viscount Finlay). Reflecting the constitutional allocation, it is solely for HMG to determine who or what government the UK chooses to recognise: see *Mohamed v Breish* [2020] EWCA Civ 637, §57. In matters of recognition, "*there is no source which can state with equal authority what is or is not recognised by the government*": Sir Francis Vallat, International Law and the Practitioner (1966), 54.

15. **Fourthly**, if a statement of recognition (or non-recognition) is provided (whether in the form of submissions, an executive certificate, or otherwise), the statement will be conclusive. No evidence is admissible to contradict HMG's statement of recognition:

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[12] See, e.g., Elizabeth Wilmshurst, 'Executive Certificates in Foreign Affairs: The United Kingdom' (1986) 35 ICLQ 157, 168-169: "*The courts have treated [letters] in the same way as formal certificates. What is in question is the view of the Crown, and the courts have apparently not been concerned with the form in which that view is expressed.*"

[13] In this case, the Court of Appeal found HMG's submissions to be of particular assistance ("… *I am of the opinion that the statements which were made by the law officers of the Crown are free from the objections that counsel suggested were to be found in the letters of the Foreign Office … Reading these deliberate statements of the Law Officers of the Crown, as expressing the attitude of the Government towards this Estonian National Council, I cannot but feel that if the Court claimed to exercise, and did exercise jurisdiction in respect of such a dispute as arises in this action … there would be a divergence of action as between the Courts of this country and the statements that have been made by the Government of the country as to the attitude which this country was prepared to take* ": see *The Gagara* [1919] P 95, 103-104. For a summary of HMG's participation in this case, see Clive Parry (ed), A British Digest of International Law (1965) ("**Parry**"), Part VII, 206-207. For a further example of HMG communicating its position by submissions, see *In re Amand (No.2)* [1942] 1 KB 445, 452.

Carl Zeiss Stiftung v Rayner & Keeler Ltd [1967] 1 AC 853 ("***Carl Zeiss***"), 901E (Lord Reid).

16. **Fifthly**, "*[i]t is not for the judiciary to criticise any obscurity in the expressions of the executive, nor to inquire into their origins or policy. They must take them as they stand*": *Gur Corporation v Trust Bank of Africa Ltd* [1987] 1 QB 599, 625 (Nourse LJ). Nor is it for the courts to second-guess HMG's exercise of the prerogative by reference to the constitutional position in the foreign State: *Mohamed v Breish* [2019] EWHC 306 (Comm), §37 (Andrew Baker J).

17. **Sixthly**, and accordingly, the first question that the Court must ask itself when presented with a recognition certificate (in whatever form) is "*whether it completely states the facts and whether there is any ambiguity in it*": *Carl Zeiss*, 956F (Lord Wilberforce). The analysis is to be conducted by reference to the certificate itself. The Court should have "*no temptation, in a matter of this kind, to speculate or to read into the certificate anything which is not there*": *id*, 957G. If a recognition certificate is provided, the analysis is not to be undertaken by reference to HMG's broader conduct. Otherwise, there is a risk that an "*undesirable conflict*" between HMG and the courts may arise: see *Duff Development*, 808 (Viscount Cave); see also Lord Carson's reference to "*chaos and confusion*" at 830.

18. It follows that the Court should not concern itself with facts or matters that may be inconsistent with the statement of recognition made by HMG, regardless of whether those facts or matters are extraneous to the statement or part of it. If HMG's conclusion on the question of recognition is plain, the Court need look no further. Accordingly:[14]

> "*… if, in a certificate of this sort, the conclusions are unqualified and unambiguous, it does not matter whether those conclusions are combined with, or even professedly based on, materials apparently inconsistent with them. … it is the*

[14] *R v Bottrill (ex parte Kuechenmeister)* [1947] KB 41, 56 (Asquith LJ) (concerning a certificate to the effect that His Majesty was at war with Germany). See also Dr F A Mann, Foreign Affairs in English Courts (1986), 48 ("*What alone should be relevant is the conclusion which Her Majesty's Government reaches and expresses in its certificate*") and 57 ("*The practice of obtaining the Executive's certificate and the rationale supporting it cannot be justified, unless the courts take every possible step to ensure that their interpretation of the certificate accords with the Executive's intentions.*")

conclusion which is operative, even if … it be a non sequitur from a preamble or premises which, in the certificate, precede it."

19. So, the exercise for the Court is not one of fact-finding. Nor is it an exploration of whether the statement of recognition provides an accurate reflection of the actual wielding of power or authority in the foreign State or of the constitutional position under local law. Recognition, in cases in which a statement of recognition is made, is exclusively for HMG. The only live question for the Court is what recognition HMG has afforded.

20. **Seventhly**, in cases in which there is no formal statement of recognition of a government or Head of State, the contrast is clear. In such a case, it will be for the courts to determine whether or not a government exists in the relevant State, rather than whether HMG has recognised that government. The nature of HMG's dealings with that entity will be one factor that the courts will consider: see *Republic of Somalia v Woodhouse Drake* [1993] QB 54 ("***Somalia v Woodhouse***"). An HMG statement setting out such dealings will be admissible but not conclusive. The basic position even here is that the courts should act with a "*high degree of circumspection*" in cases involving "*serious implications for the conduct of international relations*": *R v Secretary of State, ex parte Pirbhai* (1984) 107 ILR 461, 479 (Sir John Donaldson MR).

Implied recognition

21. As a matter of international law, recognition may be express or implied: Brownlie's Principles, 139; Lauterpacht, 369ff; Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law (9th ed, Vol I: Peace, 1992) ("**Oppenheim**"), §50. Implied recognition "*takes place through acts which, although not referring expressly to recognition, leave no doubt as to the intention to grant it*": Oppenheim, §50.

22. There are two essential points to bear in mind:

    (1) When assessing such acts, the intention of the State concerned is paramount: "*[r]ecognition is primarily and essentially a matter of intention. Intention cannot be replaced by questionable inferences from conduct"*: Lauterpacht, 371. For this

reason, if a State manifests an intention not to recognise the relevant entity or individual, "*there can be no question of implied recognition*": Lauterpacht, 406.

(2) The courts must take care not to equate informal dealings with a *de facto* authority as amounting to implied recognition: Lauterpacht, 329-330; Sir Robert Jennings (1967) 121 *Recueil des cours* 323, 359; see also Oppenheim, §50. HMG may be required to deal with an entity or individual for reasons of practical necessity. It does not follow that HMG intends to recognise, or does recognise, by so dealing.

23. The concept of implied recognition has little, if any, relevance following the introduction of the 1980 policy. As the courts have recognised, that policy was not intended to replace express recognition with implied recognition:

(1) "*It seems clear that the government did not intend in 1980 to replace clear statements of binding intention with coded language from which courts would then struggle invidiously to derive an inferred intention*": *Kuwait Airways Corp v Iraqi Airways Co (No 5)* [1999] CLC 31, 65 (Mance J).

(2) "*The impracticality of the 'inferred recognition' theory as a legal concept for forensic use is obvious and it cannot be thought that it was the intention of [HMG]*": *Somalia v Woodhouse*, 63E-F (Hobhouse J).

24. By leaving the question of whether a regime "*qualifies to be treated as a Government … to be inferred from the nature of [HMG's] dealings … with it*" (see §7 above), HMG intended that the courts' enquiry would avoid the question of 'recognition' entirely. Even in the exceptional cases in which HMG recognises a government outside the 1980 policy, it is difficult to imagine a circumstance in which HMG would evince an intention to recognise without an express statement of recognition.

***De facto* and *de jure* recognition**

25. When recognising governments, States have sometimes in the past employed the terms "*de facto*" and "*de jure*". The following points need to be borne in mind in considering

these terms and their use in past case-law.

26. **First**, in modern times, and certainly by the time of the 1980 policy, the terms *de jure* and *de facto* were no longer in wide usage.[15] HMG's more recent practice was to accord "*recognition*" only, without using these terms at all.[16]

27. **Secondly,** they are not immutable terms of art. One must ascertain the intention of the recognising State in deploying them, if it chooses to do so, with reference to the precise language used. James Crawford was right to observe that "*general propositions about the distinction are to be distrusted; everything depends on the intention of the government concerned and the general context of fact and law*": Brownlie's Principles, 143.[17]

28. **Thirdly**, when a distinction of this kind is sought to be drawn, and no doubt reflecting the rarity of doing so in modern practice, the relevant terms are expressly used by the recognising State. Where no such term is used in a formal announcement, the assumption is that "*recognition*" refers to full recognition. As Professor Talmon observes, "*[w]hen recognition* per se *is granted by formal announcement or declaration, it always seems to be '*de jure *recognition', i.e., full recognition, unless the recognizing*

[15] For example, Professor Brownlie described the concepts as "*very out of fashion*" and "*three decades out of date*" in the early 1980s: (1982) 53 BYIL 197, 207-208. Other scholars describe them as "*obsolete*": Frowein, 'Recognition' (2010) *Max Planck Encyclopedia of Public International Law*, §17. See also Peterson, Recognition of Governments: Legal Doctrine and State Practice, 1815-1995 (1997) ("**Peterson**"), 100: "*As the twentieth century wore on, governments either returned to treating recognition of governments as a binary distinction between recognized governments and unrecognized regimes or else sought to end the discussion by abandoning recognition of governments entirely*". See also Crawford (1993) 52 CLJ 4 at 6 (where he referred to "*the unsatisfactory and obscure distinction between* de facto *and* de jure *governments*", describing it as "*abolish[ed]*" by *Somalia v Woodhouse*).

[16] See, e.g., Hansard, Commons, vol. 968, col. 917 (18 June 1979) (Ghana) ("*Once we were satisfied that our criteria for recognition had been met, recognition was accorded to the new Administration*"); Hansard, Commons, vol. 954, col. 241W (19 July 1978) (Mauritania) ("*The Government have recognised the new Government in Mauritania and we shall be continuing our normal contacts*"); Hansard, Commons, vol. 892, col. 1395 (21 May 1975) (Vietnam) ("*Her Majesty's Government recognised the new Government of South Vietnam on 12th May*"); Hansard, Commons, vol. 863, col. 965 (7 November 1973) (Chile) ("*Her Majesty's Government recognised the new Government of Chile on 22nd September*"); Hansard, Commons, vol. 266, col. 715 (25 May 1965) (Vietnam) ("*Her Majesty's Government recognised the Government of Nguyen Ngoc Tho on November 8, 1963*"). See also, after the 1980 policy, HMG's recognition of the National Transition Council in Libya ("*the United Kingdom recognises and will deal with the National Transitional Council as the sole governmental authority in Libya*"): *British Arab Commercial Bank plc v National Transitional Council of the State of Libya* [2011] EWHC 2274 (Comm), §6.

[17] By way of illustration, Professor Talmon identifies at least 6 senses in which States and scholars have used the term '*de facto* government': Recognition of Governments in International Law (1998), 60.

State expressly declares that it recognizes the new regime only as a de facto *government*": (1992) 63 BYIL 231, 236.[18] This practice is illustrated by HMG's recognition of the Government of the Islamic Republic of Iran in 1979. In keeping with its modern practice, HMG accorded recognition without qualification ("*We have recognised the new Iranian Government of Dr. Bazargan*"): Hansard, Commons, vol. 962, col. 545W (14 February 1979). For the purposes of later civil proceedings, the Foreign Office was asked to confirm whether HMG had granted that government recognition, and if so, whether it was *de jure* or *de facto*. In its 1982 certificate, the Foreign Office confirmed that HMG "*had recognised the Government of the Islamic Republic of Iran de jure on 13 February 1979*".[19] It thereby equated the term recognition with *de jure* recognition.[20]

29. **Fourthly**, and again if a State chooses to use these concepts, it is to be recognised that they are "*conceptions of international law*" (see Madzimbamutu v Lardner-Burke [1969] 1 AC 645, 723) and they should be understood against that background, rather than limited to the recognising State's "*opinion on the lawfulness of [an individual's] position*".[21]

    (1) As a matter of international law, in general terms, *de jure* is full recognition, whereas *de facto* is lesser recognition: "*the former is the fullest kind of recognition while the latter is a lesser degree of recognition, taking account on a provisional basis of present realities*": Oppenheim, §46.[22]

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[18] This is also recognised by other scholars: see Orekhelashvili, Akehurst's Modern Introduction to International Law (8th ed, 2019), 107 ("*When recognition is granted by an express statement, it should be treated as* de jure *recognition, unless the recognizing state announces that it is granting only* de facto *recognition*"); Peterson, 86 ("*Governments choosing to start with '*de facto*' recognition have to convey that decision expressly because the legal scholars and governments using the distinction have agreed that recognition is '*de jure*' unless otherwise specified*").

[19] The text of the certificate filed in Bank Saderat Iran v Farshneshani (1981) B 2477 is published in 'UK Materials on International Law 1982' (1982) 53 BYIL 337, 355.

[20] By way of further illustration, see Haile Selassie v Cable and Wireless (No 2) [1939] Ch 182, 196 ("*… it was the intention of His Majesty's Government to recognize His Majesty the King of Italy as Emperor of Abyssinia, that is to say, that his position would be recognized de jure and no longer merely de facto*").

[21] Maduro Case, §62.

[22] See also Schtraks v Government of Israel [1964] AC 556, 587 ("*The difference between de facto and de jure recognition is, after all, essentially a difference between a provisional and a final decision*").

(2) This is reflected in early UK practice where *de facto* recognition preceded fuller, *de jure* recognition: e.g. Soviet Government (*de facto* 1921; *de jure* 1924); Spanish Nationalist Government (*de facto* 1937; *de jure* 1939); PRC Government (*de facto* 1949; *de jure* 1950).

(3) It is also consistent with Lord Wilberforce's statement in *Carl Zeiss*, 957-958, that "*De jure recognition in all cases but one is the fullest recognition which can be given … if nothing more is said, de jure recognition presupposes effective control in fact*".[23]

(4) Further, limiting *de jure* recognition to a statement on "*lawfulness*"[24] under the relevant foreign law is to focus on the wrong legal system. As Sir Hersch Lauterpacht has explained, "*When … a State or government is recognized as being* de facto *or* de jure*, the distinction refers not to any conformity with the internal law of the State but to the requirements of international law*": Lauterpacht, 336-337.[25]

30. **Fifthly**, there are not two competing definitions of *de jure* recognition, as the Court of Appeal appears to suggest. The so-called "*Luther v Sagor* sense" of the term (where a *de jure* government was understood as "*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*") is not an ordinary or correct use of this term and the Maduro Board is wrong to adopt it:[26]

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[23] See also the recent judgment of Lord Lloyd-Jones in *Regina v TRA* [2019] 3 WLR 1083, §58, where the "*government of the State*" was to be regarded as "*the de jure government*" and contrasted with an entity "*which is merely exercising de facto control or authority*". This case arose in the different context of the interpretation of section 134 of the Criminal Justice Act 1988 and Article 1 of UNCAT.

[24] Maduro Case, §62.

[25] See also Lauterpacht, p. 330 (the terms *de facto* and *de jure* are "*expressive not of any judgment upon the legitimacy of the recognized authority from the point of view of the constitutional law of the State concerned, but upon its claim to be considered as validly and effectively representing the State or territory in question in the field of international law*"): Chen, International Law of Recognition (1951), 277-278 ("**Chen**").

[26] Maduro Case, §§59(1) and 60.

(1) The definition has been rightly criticised as wrongly concentrating on the domestic constitutional legitimacy of the individual or entity, rather than the international law position: see Lauterpacht, 338; Chen, 271-272 (fn 5).

(2) On a proper analysis, its sphere of relevance is limited. The definition was originally developed to apply in the narrow situation where an incumbent is overthrown by a rebel group.[27]

(3) Several cases have adopted this alternative, lesser meaning of "*de jure recognition*": see *Bank of Ethiopia v National Bank of Egypt* [1937] 1 Ch 513 ("***Bank of Ethiopia***") and *Banco de Bilbao v Sancha* [1938] 2 KB 176 ("***Banco de Bilbao***"). However, that is the "*one exception*" to the general rule of full recognition, as Lord Wilberforce identified: *Carl Zeiss* at 957G. Its application is limited to the specific and unusual situation where HMG chooses to recognise rival governments.

31. HMG has no modern practice of dual recognition of rival governments of the kind at issue in the *Banco de Bilbao* and *Bank of Ethiopia* cases. Instead, there are isolated historic examples[28] of dual recognition. In those examples, *de jure* recognition is accorded to an incumbent, previously recognised government; whereas *de facto* recognition is accorded to a usurping government that has established effective control in a particular area: see *Madzimbamutu v Lardner-Burke* [1969] 1 AC 645, 723-724 ("*it happens not infrequently that the Government recognise a usurper as the de facto*

[27] The passage in *Luther v Sagor* is derived from Wheaton's Elements of International Law (5th ed., 1916), 36, which is in turn derived from Mountague Bernard's 19th century text, A Historical Account of the Neutrality of Great Britain during the American Civil War (1870), 108 (Chapter title "*International Effects of a Civil War*"; section title: "*Effect of a Revolt*"). As the section title suggests, the passage in which the definition appears discusses the specific situation of the transfer of power following a revolt. As the Guaidó Board notes, Bernard cites no authority for his narrow proposition, in any event: Guaidó Case, §48.

[28] In addition to the situations of concurrent recognition at issue in the *Banco de Bilbao* and *Bank of Ethiopia* cases, there are at least two other examples (*contra* Guaidó Case, §52). First, for a short period (from 1 October 1949 until 5/6 January 1950), HMG recognised the Nationalist Government as the *de jure* government of China, but also recognised the Central People's Government as the *de facto* government of those parts of China over which it exercised control: see the certificates of the Foreign Office at issue in the *Civil Air Transport Incorporated v Central Air Transport Corporation* [1953] AC 70, 86-89. Secondly, in 1916, the UK recognised King Constantine's Government as the only *de jure* government of Greece. However, it also recognised the provisional government of Mr Venizélos as "*the de facto authority in the districts where it is established*": see Hansard, Commons, vol. 87, col. 551 (14 November 1916).

government of a territory while continuing to recognise the ousted Sovereign as the de jure government"); see also Warbrick (1981) 30 ICLQ 568, 585.

GROUND 1: THE COURT OF APPEAL'S INTERPRETATION OF THE CERTIFICATE

32. It is submitted that the Certificate was a clear and unequivocal recognition of Mr Guaidó as President of Venezuela, and that this recognition necessarily entailed that Mr Maduro was not recognised as President.

33. The Foreign Secretary makes three core submissions: (i) the Certificate is unambiguous; (ii) there is therefore no need (and it would be impermissible) to look behind it to HMG's conduct in its dealings with Venezuela; and (iii) in any event, even if it is necessary to look beyond the terms of the Certificate to HMG's conduct more widely, that conduct is consistent with HMG's recognition of Mr Guaidó as constitutional interim President of Venezuela, to the necessary exclusion of Mr Maduro as President in any capacity.

(1) The Certificate is unambiguous

Initial points on interpretation

34. The Foreign Secretary makes five initial points on the interpretation of the Certificate.

35. **First**, the Certificate meant what it said. It was not qualified by reference to any function or purpose, or by reference to the extent of Mr Guaidó's ability in practice to wield power or authority in Venezuela. It sought to draw no distinction by reference to any Latin term or concept. Its clear meaning was that Mr Guaidó was recognised by HMG as the Head of State of Venezuela, for all purposes for which a Head of State can act. This is not a case where deliberately vague language is deployed requiring this Court to "*collect the true meaning for itself*": *Duff Development*, 824 (Lord Sumner), cited at CA Judgment, §107 **[App/2/64]**.

36. **Secondly**, the Certificate recognises Mr Guaidó. In doing so in the first sentence it makes no reference to Mr Maduro. It is clear that one President, and one President only, is recognised, as the title of the 4 February 2019 statement itself reiterates ("*UK*

recognises Juan Guaido as interim President of Venezuela") **[App/53/832]**. HMG did not purport to recognise Mr Maduro in a residual or other capacity. On the contrary, the plain meaning is that HMG chose not to do so and that Mr Maduro is not recognised.

37. **Thirdly**, the fact that HMG recognises Mr Guaidó in a particular capacity, i.e., "*as the constitutional interim President of Venezuela*", simply confirms the capacity HMG considers him to occupy – he is being recognised in the capacity of President of Venezuela, a position he holds by virtue of the Venezuela Constitution. It is not a coded reference to a lesser form of *de jure* recognition, or a comment as to Mr Guaidó's entitlement to exercise the powers of interim President as a matter of Venezuelan law, contrary to the Maduro Board's suggestion.[29]

38. **Fourthly**, the reference to the "*Maduro regime*" (i.e., "*The oppression of the illegitimate, kleptocratic Maduro regime must end*") plainly does not qualify the earlier recognition statement. It is separate from it. Its evident purpose is to provide a supporting policy justification for HMG's position on recognition. Nor is this language capable of constituting a veiled recognition of Mr Maduro: he is not even explicitly mentioned, let alone in a capacity as *de facto* President.

39. **Fifthly**, the Certificate sits in the legal context described above. That context provides further support for the clear recognition of Mr Guaidó. In particular:

    (1) In accordance with the practice referred to at §28 above, language of "*recognition*" is typically understood to refer to full recognition, not a lesser kind of *de jure* recognition, or *de facto* recognition. When the latter term is relevant, it is used expressly.

[29] See Maduro Case, §15, which characterises the 4 February 2019 statement as "*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*". This fails to recognise that recognition principally intends to communicate a State's willingness to deal with the individual or entity on the plane of international law as the legitimate representative of the relevant State: see §5 above. This is distinct from mere domestic legitimacy. As Chen observes: "*It is indeed true that a government* de jure *in the international sense normally carries with it the quality of constitutional legitimacy. But that is merely incidental*": Chen, 278.

(2) The *de facto*/ *de jure* distinction is in any event outdated and not reflective of HMG's practice, even prior to the 1980 policy change (see §26 above).

(3) The general principle is that one cannot recognise two governments at the same time: *Gdynia-Ameryka Linie v Boguslawski* [1953] AC 11, 45. HMG has previously accorded *de facto/ de jure* recognition in parallel only in narrow, exceptional circumstances and only expressly (see the *Banco de Bilbao* and *Bank of Ethiopia* cases, discussed at §71 below).

(4) The concept of implied recognition is only relevant in circumstances where there is no express recognition in the form of a "*notification or declaration clearly announcing the intention of recognition*": Oppenheim, §50. That is not this case.

40. In those circumstances, it is to be expected at the least that, if HMG were truly seeking to accord dual recognition in one certificate, it would have been expressly done.

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

The effect of the recognition

42. Four points are made. **First**, Mr Guaidó, and no other, was the individual recognised by HMG as having the authority to perform the functions of Head of State of Venezuela. That was the nature of the recognition described by HMG in the Certificate. HMG would recognise his acts as such; and, applying the 'one voice' principle, the courts will do so too.

43. **Secondly**, the Certificate did not have to, and did not, make any statement about the extent to which any exercise of Mr Guaidó's recognised constitutional authority could be or would be practically effective. To the extent that Mr Guaidó exercises that authority, HMG will recognise that as an exercise of authority by the Head of State of Venezuela.

44. **Thirdly**, the Certificate was not purporting to make a statement of fact about the ability of the recognised Head of State to govern Venezuela in all of the aspects that government involves. It did not imply, or need to imply, that Mr Guaidó had effective control on the ground in Venezuela, or that he was able to exercise the functions of government in fact. It is not a precondition to the recognition of a Head of State (or indeed a government) that he or she is in fact able to wield each and every aspect of government to the exclusion of any rival. The recognition is a recognition of competence to act as Head of State, representing Venezuela on the international plane: see the Lord Privy Seal's explanation of the purpose of recognition quoted at §5 above. It follows that where Mr Guaidó can and does act in that capacity, HMG will treat him as entitled to do so.

45. **Fourthly**, HMG evidently did not recognise Mr Maduro as having competence to perform the functions of the Head of State of Venezuela. Contrary to the Maduro Board's position,[30] it is impossible to interpret the Certificate as having, or leaving open, such recognition, particularly when one has regard to the questions the Foreign Secretary was posed ("*Who does Her Majesty's Government recognise as the Head of State of the Bolivarian Republic of Venezuela? Who does Her Majesty's Government recognise as the Head of Government of the Bolivarian Republic of Venezuela?*") **[App/76/904]**. Only one person has been recognised as the Head of State of Venezuela. Necessarily implicit in the Certificate is the non-recognition of Mr Maduro as the constitutional Head of State of Venezuela. He may be "in fact exercising" power across a more or less broad sphere as the Maduro Board claims,[31] but that is irrelevant. What matters is that HMG has stated its intention not to treat him as having any constitutional authority or competence to do so. In other words, HMG does not recognise him as the valid representative of the State of Venezuela on the international plane.

46. Accordingly, there is no role for the Court to "*decide who in fact exercises the powers of President*" under the *Somalia v Woodhouse* criteria.[32] The Court's role is instead,

[30] Maduro Case, §15 ("*At the very least, says the Maduro Board, [HMG's words] leave open the possibility of a continuing express or implied recognition of Mr Maduro as President*").

[31] Maduro Case, §16.

[32] Maduro Case, §16; see also §§17(4) and 90(3).

faithfully applying the 'one voice' principle, to uphold HMG's recognition of Mr Guaidó as the interim President of Venezuela, with all the legal consequences that follow.

The Court of Appeal's reasoning

47. The Court of Appeal's reasoning appears in essence to have been as follows:

(1) Previous cases had used the concepts of *de jure* and *de facto* recognition in different senses. In summary, in the context of governments, in the Oppenheim sense, *de jure* meant that the government had effective control over the territory/ government that was firmly established – or "*recognition de facto plus firm establishment of the necessary control"* (CA Judgment, §79 **[App/2/58]**). In the *Luther v Sagor* sense, *de jure* simply meant the government that ought to be in control, even though the *de facto* government was in fact in control (CA Judgment, §77 **[App/2/57]**).

(2) Mr Guaidó was not in fact the *de jure* Head of State in the Oppenheim sense. Therefore, the recognition in the Certificate must have been a recognition in the *Luther v Sagor* sense.

(3) As a result, the Certificate left open the possibility that HMG continued to recognise Mr Maduro as *de facto* Head of State. The possibility was enhanced by (in summary) the continued dealings between HMG and Mr Maduro/ his government.

(4) Accordingly, HMG should be asked further questions. Those questions are essentially whether HMG recognises: (i) Mr Guaidó as Head of State for all purposes and Mr Maduro for none; or (ii) Mr Guaidó as the person entitled to exercise all the powers, but also Mr Maduro as the person in fact exercising some or all of those powers.

48. It is submitted, **first**, that this reasoning is based on a false dichotomy. The Certificate did not have to choose between *de jure* and *de facto* recognition. It did not in fact do so, even if (in modern recognition practice) such a choice had been truly live. It simply recognised that Mr Guaidó was the Head of State.

49. **Secondly**, the Court of Appeal's approach would effectively turn the courts' respect of HMG's recognition of governments and heads of State through the 'one voice' principle into a question of fact, and thus cut across the constitutional fact that recognition is solely for HMG.

50. **Thirdly**, on the Court of Appeal's analysis, the key question of fact on which all appears to turn is who is in fact exercising powers. Indeed, the Court of Appeal appears to have treated an exercise of effective governmental control by Mr Guaidó as a precondition to his recognition. If another person is in fact exercising governmental powers (in whole or perhaps even just in part and irrespective of their legitimacy in HMG's eyes), then the position on the Court of Appeal's analysis appears to be that:

    (1) Any recognition, without more, of anyone else as Head of State could only be a *de jure* recognition, and would have to be interpreted as such.

    (2) The person in fact exercising (some or all) of the powers as Head of State would have to be recognised as the *de facto* Head of State.

    (3) The *de jure* Head of State could not properly be recognised as the *de facto* Head of State because that would be inaccurate on the facts (and the certificate could hardly be inaccurate, if this distinction must be drawn).

    (4) So, any recognition would have to be dual and split between *de facto* and *de jure.*

51. That has unfortunate consequences if the principle is that, where one person is recognised as *de jure* Head of State (or a government) and another is recognised as *de facto* Head of State (or a government), it is the *de facto* person/ government whose acts must be recognised with any acts by the *de jure* person/ government being nullities (see Ground 2 below). The courts would have in effect to decline to recognise the authority/ legitimacy of the person recognised by HMG; and to recognise as valid/ legitimate the acts of the very person not recognised by HMG (whose actions might indeed be decried as illegitimate). That is not the 'one voice', but the 'diametrically opposed voice', principle. It would also reverse the constitutional allocation of responsibility.

52. **Fourthly**, on the Court of Appeal's analysis, this set of consequences could only be avoided if HMG were in a position to state expressly and justifiably that the person recognised had control in the Oppenheim sense – i.e., having effective control over all functions with the requisite established stability. But recognition does not have to be straightjacketed in that way. Recognition is not simply a factual statement about who is running another country in practice. Nor does it have to be based on an overarching question about the nature and extent of the authority that can be wielded in practice by a Head of State; still less if that question requires that the Head of State can wield all powers. It is rather an expression by HMG that it recognises (in the context of a Head of State) a person as having the authority to act as such. The courts respect and give effect to this expression under the 'one voice' principle.

53. This conception of recognition allows for nuanced judgements to be made by HMG in the wide variety of situations that will confront it when considering the position in other countries. A person may be able to exercise some, but not all, of the powers that are traditionally wielded by a Head of State. There may well be practical limitations, geographic or otherwise, on his/ her ability to do so. However:

    (1) That is no reason not to recognise that person as Head of State.

    (2) That recognition having been accorded by HMG, those practical limitations provide no reason for the courts not to respect the recognition in relation to acts which that person has carried out as such.

    (3) The practical limitations do not, and should not, imply that the only candidate for effective recognition (i.e., recognition that will have legal consequences under domestic law in a case such as this) is the unconstitutional rival (in this case Mr Maduro).

54. **Fifthly**, the practicalities of power on the ground may well lead to the position in which, despite recognition of a person as the Head of State, HMG is confronted with a choice. If it considers that it is in HMG's interest to do so, it may have no option but to deal, in particular areas of government business, with the rival (or his/ her administration). It is not difficult to envisage examples, such as the operation of extradition arrangements to

return a person for trial on serious criminal charges in the UK or liaison at a security/ intelligence level. The principled and correct position is that it is for HMG to decide with which entities or individuals it will have dealings in the conduct of foreign relations: see *Secretary of State for the Home Department v CC* [2013] 1 WLR 2171 at §130 (Lloyd Jones LJ).

55. HMG's continued engagement in limited respects with the Maduro regime says nothing about the recognition of either Mr Guaidó or Mr Maduro. It is simply a reflection of the decision made by HMG that its interests would be served by continuing to engage in those spheres – a decision which necessarily entails dealing with whoever needs to be dealt with in those spheres.

56. It would be undesirable if the choice to do so had the effect of undermining the recognition that HMG wished to accord to the Head of State. Yet, that would tend to be the effect of the Court of Appeal's reasoning. The correct approach is that HMG is not precluded from recognising an individual because of facts on the ground, including dealing with the unconstitutional rival as judged appropriate or necessary. HMG can, if it wishes, choose to recognise the unconstitutional Head of State or not. His actual control over part or all of the levers of government does not lead to an entitlement to *de facto* recognition. Recognition is accorded and is to be respected by the courts in accordance with its terms. The consequences in law of HMG dealing, in whatever context, with the rival may potentially raise other issues, but that fact does not touch HMG's recognition.

(2) It is neither necessary nor appropriate to look beyond the terms of the Certificate

57. In circumstances where the Court is presented with an express statement of recognition, it is neither necessary nor appropriate to look beyond the Certificate to investigate HMG's conduct vis-à-vis the State, government or individual in question.

58. The Court of Appeal interpreted the Certificate by reference to matters of "*context*" and found ambiguity as a result: see CA Judgment §123 **[App/2/67-68]**. Those matters included:

> "*(1) the pre-existing recognition of Mr Maduro as President of Venezuela in the fullest sense, or perhaps more accurately, HMG's unequivocal dealings with him as head of state; (2) the acknowledgement in the statement that the Maduro regime continues to exercise substantial, albeit "illegitimate", control over the people of Venezuela; (3) the continued maintenance of diplomatic relations with the Maduro regime, including through an ambassador accredited to Mr Maduro as President of Venezuela; (4) the fact that HMG has declined to accord diplomatic status to Mr Guaidó's representative in London; and (5) the established existence of a distinction between recognition de jure (i e that a person is entitled to a particular status) and de facto (i e that he does in fact exercise the powers that go with that status).*"

59. It is submitted that this was the wrong approach. **First**, constitutionally, it is for HMG to decide what Head of State or government to recognise. The question is not whether it has made a correct choice, but rather whether it has made a choice. An interpretative approach that has regard to HMG's broader conduct undermines the very purpose of a certificate. The certificate is not just an expression of HMG's view on a question of fact which is ultimately for the Court. If HMG chooses to communicate its position on recognition expressly, it is not for the Court to investigate HMG's broader dealings to which HMG has not referred it. Here, the Certificate should have been interpreted on its face in order to see whether HMG had indeed recognised Mr Guaidó as Head of State.

60. **Secondly**, matters such as whether HMG continued to have dealings with parts of the Venezuelan regime which were under the control of Mr Maduro are irrelevant. They cannot and do not inform the question of whether HMG has recognised Mr Guaidó as Head of State and/or positively declined to recognise Mr Maduro. If it were otherwise, the principles of recognition, including the constitutional allocation of the judgements as to whether and if so whom to recognise as Head of State, would be undermined.

61. **Thirdly**, other cases or contexts not involving express recognition do not assist and cannot support an inquiry by reference to the broader factual context in the foreign State.

    (1) To the extent that the Court of Appeal's approach was based on the Court of Appeal's earlier judgment in *Mohamed v Breish*, that case was very different. The two Foreign Office letters in that case did not use the language of "*recognition*"; HMG's position on recognition was not expressly stated. It was not a case in

which HMG deliberately departed from the 1980 policy.[33] Instead, it was a case in which the court appeared to draw an inference of recognition from HMG's dealings with the relevant Libyan entities: see *Mohamed v Breish* [2019] EWHC 306 (Comm), §§40-41; see further [2020] EWCA Civ 637, §§31-39.

(2) Consideration of HMG's broader dealings is relevant in cases in which the court is required to determine for itself whether a government exists, as the 1980 policy envisages: see, e.g., *Somalia v Woodhouse*; *Kuwait Airways*. That is not this case.

(3) In any event (and even if relevant), HMG's conduct is consistent with its recognition of Mr Guaidó

62. Since 4 February 2019, HMG has reiterated its recognition of Mr Guaidó as interim President of Venezuela[34] and has refused to deal with the Maduro regime on a "*normal Government to Government basis*" (see §7 above). Instead, HMG has deliberately avoided treating the Maduro regime as the legitimate government of a recognised State, consistent with its policy of recognising Mr Guaidó as the interim Venezuelan Head of State.

63. In fact, it engages only with the Maduro regime to the extent necessary to continue the essential business of government. HMG's policy also reflects the reality that Mr Guaidó's recognition as head of State arises by reason of the Presidential vacancy under the Venezuelan Constitution, rather than his seizure of effective control of the territory of Venezuela. In particular:

(1) HMG has no dealings with Mr Maduro or his Ministers, with the exception of Mr Maduro's foreign minister, Mr Arreaza and his deputy (in order to maintain essential channels of communication).

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[33] To the extent that Popplewell LJ meant to suggest otherwise in the Court of Appeal's judgment at §33, that is incorrect and a further reason why this case should be confined to its facts.

[34] For example, see the Joint Declaration on Venezuela (on behalf of the UK and European countries) of 4 February 2019 **[App/54/834-835]**; FCO's statement of 20 December 2019 **[App/72/898]**; the FCO's statement of 6 January 2020 **[App/73/899]**; the FCO's statement of 21 January 2020 **[App/74/900]**; the statement of Ambassador James Roscoe of 20 May 2020 **[App/84/951-952]**; the FCO's statement of 17 June 2020 **[App/87/982]**; the message of the chargé d'affaires to Mr Guaidó of 2 July 2020 (transmitting the Her Majesty's message to the people of Venezuela) **[App/90/987]**; the FCDO's statement of 7 December 2020 **[App/100/1022]**; the Department of Trade and Industry's statement of 26 April 2021 **[App/114/1273]**.

(2) HMG continues to engage with the institutions of the Venezuelan State (e.g., the police) on routine official business (such as securing visas for staff at the British Embassy in Caracas).

(3) HMG engages with the Venezuelan Embassy in London on necessary routine business only, and at a junior official level.

(4) The British Embassy in Venezuela has remained operational so as to facilitate HMG's conduct of essential business. This has necessitated replacing diplomatic staff when their posting is at an end. For that reason, the Foreign Secretary decided in June 2021 to appoint Ms Rebecca Buckingham OBE as chargée d'affaires *ad interim* to replace the Ambassador, Mr Soper, who left his post in March 2021.[35]

64. The continued engagement with the Maduro regime in limited spheres says nothing about the recognition of either Mr Guaidó or Mr Maduro. It is simply a reflection of the decision made by HMG that its interests would be served by continuing to engage in those spheres – a decision which necessarily entails dealing with whoever needs to be dealt with for that purpose.

GROUND 2: THE CONSEQUENCES OF *DE FACTO* RECOGNITION

65. The Foreign Secretary's primary position is that this issue does not arise, given that HMG did not recognise Mr Maduro in any capacity. However, even if HMG had intended to recognise Mr Guaidó and Mr Maduro in parallel on the basis of the *de jure* and *de facto* split underlying the analysis of the Court of Appeal, it would not follow that the acts of the *de jure* head of State are to be treated as invalid or as nullities under English law. The Court of Appeal appeared to proceed on the basis that the acts of a *de facto* head of State trump those of a *de jure* head of State.

66. **First**, there is no reason in principle why that should be so. On this hypothesis, the *de facto* position would do no more than acknowledge that a person is illegitimately in

[35] In this capacity, Ms Buckingham will act provisionally as head of the mission. It is to be noted that, under Article 19 of the Vienna Convention on Diplomatic Relations ("**VCDR**"), there is no requirement to secure the *agrément* of the host State for the appointment of a chargé d'affaires *ad interim*, unlike for heads of mission proper: see Articles 4, 14 and 19 of the VCDR.

control of certain governmental functions. There is no moral or legal impetus behind a plea that the domestic courts should recognise actions taken under such authority as lawful and effective. By contrast, there is good reason for such an outcome if a person recognised as the constitutional head of State has in fact acted. This is all the more so applying the 'one voice' principle.

67. **Secondly**, *Luther v Sagor* involved recognition of a government. It involved recognition in terms that did use the *de facto/ de jure* distinction. The Court considered whether a decree issued by the Soviet Government in 1918 was to be treated as valid, in circumstances where it had been recognised by HMG as the *de facto* government. It considered that there could be no distinction between *de jure* and *de facto* government for such purposes:

> "*The Government of this country having ... 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*": [1921] 3 KB 532, 543 per Bankes LJ.

68. The Court of Appeal did not purport to lay down any general rule. The Court recognised that *de jure* and *de facto* recognition may be a relevant distinction in some cases, but not in the case before it (i.e., for "*the present purpose*": see 543 per Bankes LJ; see also 551 per Warrington LJ). As was later noted: "*the only point established by [Luther v Sagor] is that when the Government of this country has recognized that some foreign government is de facto governing some foreign territory, the law of England will regard the acts of the de facto government in that territory as valid and treat them with all the respect due to the acts of a duly recognized foreign sovereign state*": *Haile Selassie v Cable and Wireless (No. 2)* [1939] Ch 182, 189-190. In any event, the Court was not concerned with a situation of HMG's dual recognition of rival governments in the same territory, as noted above.

69. In two 1930s cases, *Bank of Ethiopia* and *Banco de Bilbao* (referenced at §30(3) above), the courts held that it followed from *Luther v Sagor* that they were bound to treat the acts of a rival *de jure* government claiming jurisdiction over the same area as a mere nullity.

70. Whether that consequence is sound in principle can no doubt be revisited in a case on all fours in which what is in issue is recognition of a government and the *de facto/ de jure* distinction is live on the facts. Even if sound, and even in such a context, the consequence does not follow in all cases. As already explained, the Court of Appeal in *Luther v Sagor* was not purporting to set down a general rule. To the extent that the *Bank of Ethiopia* and *Banco de Bilbao* cases purported to apply and state a general rule on the basis of *Luther v Sagor*, they were wrong to do so.

71. **Thirdly**, the *Bank of Ethiopia* and *Banco de Bilbao* cases can and should be confined to their specific facts. There are three key points of distinction:

(1) Both of those cases concerned insurgencies, i.e., "*usurping*", not "*rightful*" governments. In *Bank of Ethiopia*, the Court was concerned with Italy's annexation and belligerent occupation of Ethiopia (then Abyssinia) following its invasion of Ethiopia in 1935. In *Banco de Bilbao*, the Court was concerned with the occupation of the Basque region in Spain by General Franco's insurgent forces from 1937. In both cases, the *de facto* government was the new insurgent government (rather than the existing government, like Mr Maduro's regime).

(2) The rival '*de jure*' governments were not present in relevant territory, but were purporting to act from outside of it.

(a) In *Bank of Ethiopia*, the Emperor Haile Selassie had left Ethiopia and was seeking to exert control from abroad. For this reason, Clauson J described it as a "*case of a de facto government set up in an area from which the former government has departed, and in which there is no governmental authority except that of the de facto government*": [1937] 1 Ch 513, 521-522.

(b) In *Banco de Bilbao*, the Republican Government of Spain sought to pass legislation in respect of the bank at a time when the Government was no longer in control of the Basque region (albeit that it was still present in Spain): [1938] 2 KB 176, 182.

(3) In both cases, the parallel grants of *de jure* and *de facto* recognition appear to have been express (or, at the very least, made sufficiently clearly so that there was no question as to whether recognition was granted *de facto* and *de jure*).

(a) In *Bank of Ethiopia*, the Court referred to HMG's recognition of the "*fugitive Emperor as a de jure monarch*", alongside HMG's *de facto* recognition of the Italian government : [1937] 1 Ch 513, 521 and 522.

(b) In *Banco de Bilbao*, it appeared from the Foreign Office's letter that HMG recognised that General Franco's government exercised *de facto* administrative control, whereas HMG recognised the Republic Government as the *de jure* government over the whole of Spain, including the area over which General Franco exercised *de facto* administrative control: [1938] 2 KB 176, 181.

FOREIGN ACT OF STATE

72. The Foreign Secretary does not address each of the issues relating to Ground 3 of the Guaidó Board's appeal and Grounds 4 to 8 of the Maduro Board's cross-appeal. Instead, he confines his submissions to three points of law relating to the scope of the foreign act of State doctrine.

73. As a preliminary matter, the Foreign Secretary does not understand the existence of the foreign act of State doctrine to be an issue in this appeal.[36] Indeed, the second preliminary issue in this case presupposes its existence. To the extent that the Maduro Board now seeks to call into question whether the doctrine "*has any role in English Law*",[37] there is no proper basis on which to do so in this case or any other. The doctrine

[36] This is also the understanding of the Guaidó Board: see Guaidó Case, §107.

[37] See Maduro Case, heading above §132 ("*The AoS doctrine is unclear, unprincipled and unnecessary and if it has any role in English Law it should be confined to circumstances in which it has already been applied.*")

has long been recognised as forming part of English law and affirmed by this Court as recently as 2017 in Belhaj v Straw [2017] AC 864 ("***Belhaj***").[38]

74. The **first** issue is whether the foreign act of State doctrine operates so as to preclude consideration of whether an act of State is lawful under its own domestic law (Issue 6(a)). That question arises in the context of the application of Lord Neuberger's second rule concerning executive acts.[39]

75. This question was not decided by the Supreme Court in Belhaj. Lord Neuberger expressly "*kep[t] the point open*" (at §143). Several of the Justices expressed a view on the question, however. Lord Neuberger expressed doubts, particularly in the context of unlawfulness occasioned by legislative act (at §137). He accepted that there were at least *obiter dicta* that "*support the notion that the second rule can apply to executive acts which are unlawful by the laws of the state concerned*" (at §138). Lord Mance observed that treating an executive act as valid irrespective of its legality under the relevant foreign law "*could mean ignoring, rather than giving effect to, the way in which a state's sovereignty is expressed*" (at §65). On the other hand, Lord Sumption (with whom Lord Hughes agreed) found that: "*it is well established that municipal law act of state applies not just to legislative expropriations of property, but to expropriations by executive acts with no legal basis at all*" (at §230).

76. It is submitted that the view of Lord Sumption should be preferred. Like State immunity, the foreign act of State doctrine applies to all acts of foreign States in the exercise of their sovereign authority (i.e., *acta jure imperii*), subject to the application of the usual limitations on the doctrine (including the public policy exception).[40] Whether or not the act in question is unlawful under the law of the relevant State is irrelevant. What matters is that it is an act of State.[41] The legality of the act of State does not detract from its

[38] This is in contrast to the position in Canada. As the Supreme Court of Canada recognised, "*whereas English jurisprudence continually reaffirmed and reconstructed the foreign act of state doctrine, Canadian law has developed its own approach*": Nevsun Resources Ltd v Araya 2020 SCC 5, §44. For this reason, the Canadian Supreme Court's rejection of the doctrine in that case is of no assistance to the Maduro Board (compare Maduro Case, §156).

[39] See HC Judgment, §83 **[App/5/119]**; CA Judgment, §142 **[App/2/73]**.

[40] This reflects the position advanced by the Foreign Secretary in Belhaj: see [2017] AC 964, 1040B.

[41] The Maduro Board's position that it does not follow from HMG's recognition of Mr Guaidó as interim President that Mr Guaidó's acts are acts of the Venezuelan State is not understood (see Maduro Case, §182). As

characterisation as such. As Lord Sumption explained, "*[t]hese transactions are recognised in England not because they are valid by the relevant foreign law, but because they are acts of state which an English court cannot question*" (at §230). The consequence of HMG's recognition of a government or Head of State is that the courts must recognise their sovereign acts, even if they are contrary to law: see *Princess Paley Olga v Weisz* [1929] 1 KB 718, 723-725 (Scrutton LJ), 726-730 (Sankey LJ); also 736 (Russell LJ).

77. If the question of lawfulness is irrelevant, it follows that the findings of the Venezuelan courts have no bearing on the application of the doctrine. The acts of such courts are not acts of State and should not be treated as such: see *Belhaj*, §73(ii) (Lord Mance); *Yukos Capital v Rosneft (No 2)* [2014] QB 458 ("***Yukos***"), §§73-90 (Rix LJ).[42] Accordingly, the Court of Appeal was wrong in law to conclude that it could not resolve the foreign act of State issue without first determining whether the judgments of the Supreme Tribunal of Justice of Venezuela should be recognised by the English court.

78. The **second** issue concerns the narrow question of whether Teare J erred in characterising the relevant acts as being exclusively Venezuelan, it being common ground between the parties that a territorial limitation applies.[43]

79. The Foreign Secretary accepts that Lord Neuberger's first and second rules generally have a territorial limitation. They are expressed to apply to "*acts which take place or take effect within the territory of that state*": *Belhaj*, §§121-122; see also §§35-36 (Lord Mance); §135 (Lord Neuberger) and §229 (Lord Sumption); *Yukos*, §68. This is because "*as a general rule neither public nor private international law recognises the application of a state's municipal law beyond its own territory*": *Belhaj*, §229; see also

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set out at §5 above, the recognition of an individual as Head of State signifies the recognising State's willingness to deal with that individual as representing the State concerned on the international plane. It follows that HMG treats Mr Guaidó's acts carried out in a sovereign capacity as acts of the State. By operation of the 'one voice' principle, the English courts must do the same.

[42] For this reason, the conflict of foreign act of State rules envisioned by Lord Neuberger in *Belhaj* at §137 and reiterated in the Maduro Case at §147 does not arise.

[43] See Guaidó Case, §158; see Maduro Case, §§195-196.

§236 (Lord Sumption). The same considerations, however, do not apply in respect of the third rule: see *Belhaj*, §237; *Yukos*, §49; *Kuwait Airways*, §319.

80. The key issue is the scope of Lord Neuberger's territoriality limitation. The Maduro Board argues that it is capable of excluding a legislative act conferring a power that, when exercised, may apply in respect of property abroad (i.e., Article 15 of the Transition Statute).[44] This is to place greater emphasis on Lord Neuberger's words "*take effect*" than they can reasonably bear. In the context of the first rule, that language indicates that a legislative act has territorial – as opposed to extra-territorial – application. It does not exclude a legislative act conferring powers which, when exercised, may have repercussions in another jurisdiction (whether as a "*direct consequence*"[45] or otherwise). It is enough that the legislation was promulgated and effective in the foreign State's territory.[46]

81. The **third** issue is whether the foreign act of State doctrine extends beyond legislative and executive acts affecting property to include a case where the act is contended to affect the authority of a person. The Foreign Secretary submits that Teare J was right to find that there is no identifiable reason of principle to confine the foreign act of State doctrine to property cases only.[47] This was consistent with Lord Sumption's view in *Belhaj* at §230 that there was "*no rational ground*" for drawing this distinction. As Teare J observed,[48] it does not follow from the fact that previous cases were concerned with property that the doctrine should be limited to such cases. In any event, several cases frame the doctrine in far broader terms.[49]

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[44] See Maduro Court of Appeal Skeleton, §139 **[App/37/625]**; Maduro Case, §202.

[45] Maduro Case, §122(4) and heading above §193.

[46] The Maduro Board accepts that the Transition Statute was to take effect in Venezuela: see Maduro Case, §202.

[47] HC Judgment, §§66 **[App/5/116]** and 77 **[App/5/117-118]**.

[48] *Ibid.*

[49] See Guaidó Case, §163.