CASE COMMENT

‘Maduro Board’ of the Central Bank of Venezuela v ‘Guaidó Board’ of the Central Bank of Venezuela

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I. INTRODUCTION

The unanimous judgment of the United Kingdom Supreme Court (UKSC) of 20 December 2021 provides important clarification of two issues: first, the approach English courts should take to a statement of recognition of a foreign government or head of State issued by the British government (the so-called recognition issue); and second, the operation and application of the ‘foreign act of state’ doctrine under English law. These issues arose in proceedings to determine which of two rival entities is entitled to give instructions on behalf of the Central Bank of Venezuela (BCV) to financial institutions holding Venezuelan assets within England, and to represent the BCV in a London Court of International Arbitration (LCIA) arbitration.

This case comment briefly recalls the background to the proceeding and the judgments delivered by the High Court and Court of Appeal (Section II); summarizes the UKSC’s reasoning (Section IV); and comments on the relevance of the judgment for the Venezuelan presidential dispute and for the practice of recognition (Section V).

Where relevant, we refer to our earlier article in this journal, which analyzed the handling of the dispute over the Venezuelan presidency in ICSID proceedings to which Venezuela is party, and in that context also commented upon the decisions of the lower English courts in the BCV proceedings.

II. FACTUAL BACKGROUND TO THE ENGLISH COURT PROCEEDINGS

Our earlier article in this journal provided a detailed factual background to the proceedings in the English courts. In short, since early 2019 (until developments in

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late 2022), both Nicolás Maduro (winner of the May 2018 presidential election) and Juan Guaidó (as National Assembly-appointed ‘interim President’) laid claim to the presidency of the Bolivarian Republic of Venezuela. Each has attempted to exercise governmental functions to the exclusion of the other. Further complicating matters, on 25 July 2019 the highest constitutional court of Venezuela, the Supreme Tribunal of Venezuela (STJ), held that the appointment of the Guaidó board was unconstitutional and of no legal effect.

This situation has given rise to disputes before ICSID tribunals and committees as to whose representatives have the right to represent Venezuela in those proceedings (as analyzed in our earlier article). Before the English courts, the disputes concern both legal representation (in an LCIA arbitration), and control over Venezuela’s gold and other assets located in the UK.

The disputes before the English courts arose after Mr Maduro and Mr Guaidó each purported to appoint a board to represent the BCV, and each board gave conflicting instructions to English banks as to how to deal with those assets. Those banks sought a determination from the English courts to ascertain which of the contending claimants is entitled to give instructions to financial institutions within this jurisdiction on behalf of the BCV and to represent the BCV in the LCIA arbitration. Resolving that question has required the courts to determine, for the purposes of English law, which of Mr Maduro and Mr Guaidó is recognized as the President of Venezuela, and if Mr Guaidó, whether his appointments of a BCV Board and of a Special Attorney General are valid.

Pivotal in the English proceedings has been the courts’ interpretation of the British government’s statement of recognition of Mr Guaidó of 4 February 2019, which provided, in relevant part, that ‘The United Kingdom now recognises Juan Guaido as the constitutional interim President of Venezuela’. That statement was subsequently incorporated into and affirmed by a letter from the Foreign & Commonwealth Office (FCO, as it was at the time) dated 19 March 2020, responding to a request made by Knowles J in the Commercial Court proceedings in which the recognition issue first arose. The Supreme Court treated these documents together as an executive certificate.

The certificate raised two key questions: first, did it amount to formal recognition of Mr Guaidó as the President of Venezuela and/or his government as the government
of Venezuela, or a mere expression of political support? Second, if the former, was this recognition conclusive for the issue at hand, ie authority to instruct English financial institutions and to represent Venezuela in the LCIA proceeding?

III. THE JUDGMENTS OF THE LOWER COURTS

At first instance, Mr Justice Teare found that the government’s statement of 4 February 2019 recognized Mr Guaidó as constitutional interim President of Venezuela, to the exclusion of Mr Maduro. The statement was conclusive and binding on the English courts under English law pursuant to the ‘one voice’ principle (according to which the executive is responsible for deciding the entities with which it will deal on the international plane, and the judiciary must accept statements of the executive conveying such decisions as conclusive). In addition, Teare J found that Mr Maduro’s Board could not challenge the validity and/or constitutionality of Mr Guaidó’s BCV board appointments as a matter of Venezuelan law, since they were foreign acts of state and non-justiciable.

On appeal, the Court of Appeal confirmed that a formal statement of recognition by the government is conclusive ‘for what it says’, but that it was ‘for the court to determine what it means’. The Court held that it was ‘perfectly possible’ for the British government to recognize one ruler de facto (ie, the one in effective control) and another de jure (in the sense set out in Luther v Sagor; ie, the one with the legitimate claim). In the Court’s view, the FCO’s 19 March 2020 letter (referring to the government’s statement of 4 February 2019) meant that it recognizes Mr Guaidó as the de jure head of State of Venezuela, but left ‘open the possibility that [the government] continues to recognise Mr Maduro as President de facto’. It was the government’s de facto recognition—ie, the person the government recognized as having effective control—which was decisive in a claim for control over the foreign State’s assets held in the UK. If the government had continued to recognize Mr Maduro as the de facto President then Mr Guaidó’s appointments of the BCV board, on which the Guaidó Board’s claim to the gold and other assets was based, would be null and void. Given

9 Deutsche Bank (n 8) [33].
10 The locus classicus of the principle is in the judgment of Lord Atkin in The Government of the Republic of Spain v SS ‘Arantzazu Mendi’ [1939] AC 256, 264:

Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognise as a fellow sovereign in the family of states: and the relations of the foreign state with ours in the matter of state immunities must flow from that decision alone.’ In the course of reviewing the subsequent authorities at [69]–[79] of the Supreme Court’s judgment, Lord Lloyd-Jones concluded that ‘the most satisfactory explanation of the one voice principle’ lay ‘in the view that certain matters are facts of state in the sense that they are peculiarly within the cognisance of the executive which has the conduct of foreign relations

11 Deutsche Bank (n 8) [88], [93].
12 ‘Maduro Board’ v ‘Guaidó Board’ (Supreme Court) (n 1) [78].
13 Luther v Sagor [1921] 3 KB 532, 543 and 551. Luther v Sagor concerned a dispute over the property of a Russian national said to have been expropriated without compensation by the Soviet government in Russia and thereafter brought to England. The reference of the Court of Appeal in ‘Maduro Board’ v ‘Guaidó Board’ (Court of Appeal) (n 8) to the ‘Luther v Sagor’ meaning of recognition de jure is a reference to the observation of Warrington LJ in that case (at 551), that ‘a de jure government in international law means “one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them”; while a de facto government is one which is “really in possession of them, although the possession may be wrongful or precarious”’. Bankes LJ made similar observations at Luther v Sagor [1921] 3 KB 532, 543.
14 ‘Maduro Board’ v ‘Guaidó Board’ (Court of Appeal) (n 8) [82].
15 ibid [112], [122]–[124].
16 ibid [125].
the Court’s conclusions on the ‘recognition issue’, it held that it would be ‘premature’ to decide the ‘foreign act of state’ issue.\footnote{ibid [138].}

\section*{IV. THE UKSC’S APPROACH TO THE ‘RECOGNITION ISSUE’ AND ‘FOREIGN ACT OF STATE DOCTRINE’}

The UKSC took a starkly different approach to that of the Court of Appeal on the recognition issue. The UKSC held that it was ‘clear’ from the certificate that the British government recognized Mr Guaidó as President of Venezuela\footnote{‘Maduro Board’ v ‘Guaidó Board’ (Supreme Court) (n 1) [92].} — a conclusion that was no doubt heavily influenced, if not mandated, by the intervention of the Foreign, Commonwealth & Development Office (FCDO) in the proceeding itself. In the UKSC’s view, the Court of Appeal had erred in a number of respects in finding otherwise. Given the Supreme Court’s conclusion on the recognition issue, it proceeded to consider Mr Maduro’s challenge to the validity of Mr Guaidó’s appointments, and therefore to provide clarification on the ‘foreign act of state’ doctrine under English law. We address both elements of the UKSC’s judgment in this section.

\subsection*{A. The ‘Recognition Issue’—The Executive Certificate Is Conclusive and There Is No Room for ‘Implied Recognition’}

The Supreme Court concluded that the Court of Appeal’s approach to the recognition issue was erroneous in three principal respects. First, the Supreme Court held that the certificate was a ‘clear and unequivocal recognition of Mr Guaidó as President of Venezuela’. It ‘necessarily entailed that Mr Maduro was not recognised as President of Venezuela’.\footnote{ibid. See also [101]: ‘the certificate was an unambiguous and unqualified statement by the executive that it recognises Mr Guaidó as interim President of Venezuela’.} The Foreign Secretary’s intervention in the proceedings, after the Court of Appeal judgment, reinforced its conclusion. The Supreme Court treated his written and oral interventions as further executive statements confirming that the government recognizes Mr Guaidó.\footnote{The Supreme Court observed that there is ‘no requirement that an executive statement be in the form of a formal certificate’ (ibid [102]–[105]).}

Second, the UKSC held that the Court of Appeal should not have looked ‘beyond the terms of the certificate’ to matters such as the British government’s maintenance of diplomatic relations with the Maduro regime and the absence of accreditation of Mr Guaidó’s representative in London.\footnote{ibid [93].} Going beyond the executive certificate, in the Supreme Court’s view, is ‘capable of undermining the very purpose of a certificate and the constitutional allocation of functions which is reflected in the one voice principle’.\footnote{ibid.} In circumstances where the FCDO departs from its usual practice\footnote{That is, the policy set out in 1980 by Lord Carrington, Foreign and Commonwealth Secretary at the time (HL Deb 28 April 1980, vol 408, cols 1121–22 WA (Lord Carrington), <https://api.parliament.uk/historic-hansard/written-answers/1980/apr/28/recognition-of-governments-policy-and> accessed 10 August 2022). See further Rees-Evans and Carvoss (n 4) 584–85.} and issues an express statement of recognition, any ambiguity should be resolved by making a request to the FCDO for clarification.\footnote{‘Maduro Board’ v ‘Guaidó Board’ (Supreme Court) (n 1) [96].}
Third, the Supreme Court criticized the distinction applied by the Court of Appeal between ‘implied de facto recognition’ of Mr Maduro and recognition of Mr Guaidó as President de jure.²⁵ In its view, unlike on the international plane, ‘there is no scope’ for English courts to apply any notion of implied recognition.²⁶ Where the government makes no express statement as regards the recognition of a foreign government, the courts’ task is not to infer recognition from the government’s conduct, but simply to ‘identify who may be the government or head of state by making its own findings of fact [ie, as to whether an entity in fact carries out the functions of a government] as indicated in Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA’.²⁷ In addition, the Supreme Court found it doubtful that the distinction between de facto and de jure recognition, in any of its forms, continues to play any ‘useful role’ before the English courts.²⁸

B. ‘Foreign Act of State’ Doctrine—The Doctrine Applies Not Only to Seizures of Property But Also Executive Appointments

The Maduro Board argued that even if the English courts were to find that the British government recognizes Mr Guaidó as interim President, his appointments to the ad hoc BCV board and of a Special Attorney General must be treated as invalid and ineffective because they are unconstitutional under Venezuelan law and have been nullified by the STJ.

Given the Supreme Court’s conclusion on the recognition issue, interim President Guaidó’s appointments of public officials constituted sovereign acts of the Venezuelan State. The Supreme Court was therefore required to consider whether the Maduro Board’s challenge to Mr Guaidó’s appointments was precluded by the foreign act of state doctrine.

The Court reviewed a long line of authority supporting the existence of a rule under English law that English courts ‘will not adjudicate or sit in judgment on the lawfulness or validity under its own law of an executive act of a foreign state, performed within the territory of that state’.²⁹ Lord Lloyd-Jones observed that while there was some authority to support the view that this rule should be limited to sovereign acts seizing property, there was a ‘serious practical argument’ in favour of applying the rule to ‘the exercise of a power of appointment to the board of a public body functioning within the territory of the foreign state’.³⁰

However, the existence of judgments of the STJ, declaring invalid and of no effect Mr Guaidó’s board appointments, complicated matters. The Court had to consider whether those judgments changed its conclusion that Mr Guaidó’s appointments could not be challenged before the English courts.³¹ That is, ‘whether in such circumstances the foreign act of state doctrine […] requires courts in this jurisdiction

²⁵ ibid [97].
²⁶ ibid [98].
²⁷ ibid. See also [96] referring to Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA [1993] QB 54 (per Hobhouse J at 68); Rees-Evans and Carvosso (n 4) 585.
²⁸ ‘Maduro Board’ v ‘Guaidó Board’ (Supreme Court) (n 1) [99].
²⁹ ibid [135].
³⁰ ibid [139]–[141].
³¹ ibid [153]–[180].
to defer to acts of the executive of a foreign state, in priority to recognising the rulings of its judiciary.’

The Supreme Court remitted this issue to the Commercial Court for further consideration. However, it held that it was at least clear that English courts ‘will refuse to recognise or give effect to foreign judgments such as those of the STJ if to do so would conflict with domestic public policy’. Public policy, in the Court’s view, ‘necessarily include[s] the fundamental rule of UK constitutional law that the executive and the judiciary must speak with one voice on issues relating to the recognition of foreign states, governments and heads of state’. If, therefore, the STJ’s conclusions were based on a finding that Mr Guaidó is not the President of Venezuela, its decisions could not be given effect by courts in this jurisdiction because to do so would conflict with the British government’s position.

In its judgment of 29 July 2022, the Commercial Court determined that the STJ judgments could not be recognized, primarily on the basis that Mr Guaidó and his appointees had not been party to the STJ proceedings. Cockerill J also held that the STJ’s judgments, in treating Mr Maduro as the President, proceeded from a starting point which conflicted with the British government’s recognition of Mr Guaidó. Accordingly, the ‘one voice’ doctrine also required the English courts not to recognize the judgments.

V. COMMENTS

The UKSC judgment is a significant development both on the domestic and international planes. Most obviously, the judgment confirms that the British government recognizes Mr Guaidó as interim President of Venezuela for all purposes, even if Mr Guaidó is not in ‘effective control’ of Venezuelan territory. This aligns the UK with the position taken by several US courts, as described in our earlier article. On the other hand, it arguably represents a significant departure from recent UK practice. (At the time of writing, it remains to be seen whether the Venezuelan National
Assembly’s December 2022 decision to remove Mr Guaidó as interim President and to elect new leadership will prompt a change to the British government’s position.  

As a matter of English law, the government’s recognition of Mr Guaidó is ‘constitutive’, in that it ‘creates legal results within the domestic jurisdiction’,
including by binding the English courts.
In the light of the outcome of the remitted Commercial Court proceedings, such results arise with respect to the representation of Venezuela in the LCIA proceedings and control over Venezuelan assets in the UK. It could also have implications for investors seeking to enforce arbitral awards against Venezuela in the UK, where those awards arise out of proceedings in which Venezuela was not represented by representatives appointed by Mr Guaidó.

On the other hand, the judgment reinforces the stark disconnect between the political act of recognition—and its domestic effects—and the international law regarding recognition of governments. The judgment confirms that, unlike in international law, there is no room in English law to apply the concept of ‘implied recognition’. English courts are bound to give effect to an express statement of recognition where there is one, irrespective of whether the recognized entity is in ‘effective control’ of the territory concerned. This reasoning extends also to the effect to be given to foreign judgments, which is subject to the ‘overriding operation of the public policy of the forum which will necessarily include the effective application of the one voice principle’.

In contrast, ICSID tribunals and committees seized with disputes concerning Venezuela’s legal representation which have (explicitly) conducted an international
law analysis have endorsed the Tinoco view that ‘effective control’ of territory is the
controlling criterion. English courts could only conduct an analysis of who may be
the government or head of State of a foreign State by making their own findings of
fact, including as to ‘control’, where the executive has made no formal statement of
recognition. Further, and unlike the English courts, one ad hoc Committee found
that it could not deviate from what had been decided by the highest Venezuelan judicial body unless it were proven that there had been a change of government under international law.

The Court of Appeal’s approach—treating the executive as having left open the
possibility that it was impliedly recognizing the Maduro regime as the de facto
government—was perhaps more closely aligned with the prevailing approach of interna-
tional courts and tribunals. One can certainly understand the Court of Appeal’s
reluctance lightly to infer that the UK executive intended to depart from the effective control standard as regards the domestic legal results that would ensue from its statement. Indeed, the Tribunal in Venezuela Holdings relied on the Court of Appeal’s reasoning as to a dichotomy between de jure and de facto recognition in support of its view that international recognition of the Guaidó government could not affect the question of recognition before the Tribunal, because it showed that States may have recognized Guaidó ‘as an expression of political support, without prejudice to the powers of the Maduro government as the effective government of Venezuela’.

While the UKSC decision renders the Tribunal’s reliance on that reasoning inappo-
site, it reinforces the conclusion that the task of determining which of two rival entities
should be afforded governmental status under international law will not necessarily
be assisted by having regard to the recognition practice of States. Recognition, being a discretionary political act, may involve considerations entirely divorced from any assessment of effective control.

47 Rees-Evans and Carvosso (n 4) 580–83; Tinoco Arbitration (GB v Costa Rica) (1923) 1 RIAA 369, 381. The clearest examples may be found in the decisions of the ad hoc Committee in Valores Mundo

48 In the words of Hobhouse J in Republic of Somalia v Woodhouse Drake SA (n 27), ‘the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state’.

49 ‘Maduro Board’ v ‘Guaidó Board’ (Supreme Court) (n 1) [98], see also [96].

50 Valores Mundo (n 47) para 47. See also Venezuela Holdings (n 47) paras 55–57.

51 See n 45.

52 Venezuela Holdings (n 47) para 60.