Neutral Citation Number: **[2022] EWHC 2040 (Comm)**

Case No: CL-2019-000303; CL-2020-000304

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
IN THE MATTER OF SECTION 44 OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF SECTION 37 OF THE SENIOR COURTS ACT 1981

Rolls Building
Fetter Lane
London,
EC4A 1NL

29 July 2022

Before :

MRS JUSTICE COCKERILL

- -

Between :

DEUTSCHE BANK AG (LONDON BRANCH) **Claimant**

- and -

CENTRAL BANK OF VENEZUELA **Defendant**

-and-

RECEIVERS

Receivers

And between:

BANCO CENTRAL DE VENEZUELA

Claimant

-and-

THE GOVERNOR & COMPANY OF THE BANK OF ENGLAND

Defendant

-and-

(1) THE "MADURO BOARD"

(2) THE "GUAIDÓ BOARD"

Stakeholder Claimants

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Andrew Fulton QC and Mark Tushingham (instructed by **Arnold & Porter Kaye Scholer (UK) LLP**) for the **GUAIDÓ BOARD**
Richard Lissack QC, Vaughan Lowe QC, Brian Dye, Jonathan Miller and Daniel Edmonds (instructed by **Zaiwalla & Co**) for the **MADURO BOARD**

Hearing dates: 13, 14, 15, 18 July 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the judge in Court 17 today and by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 29 July 2022 at 09:30am.

Mrs Justice Cockerill:

INTRODUCTION

1. The essence of this case concerns control of approximately half of the Republic of Venezuela's substantial gold reserves, worth about US$1.95 billion, which are held by the Bank of England and the sum of approximately US$120 million held by receivers appointed by the Court.

2. However the route to that essential question is somewhat convoluted and I deal in this judgment with one step in a long and complex legal chain. That step may (subject to appeals) be the final step, or it may not. The parties to this dispute hold very different views on this topic – as on most others.

3. The question as to the ownership and right to control the gold and the sum held by the receivers arises because:

    i) In the first claim, by an arbitration claim form dated 14 May 2019, the claimant ("Deutsche Bank") sought, pursuant to section 44 of the Arbitration Act 1996, the appointment of receivers to hold and manage the proceeds of a gold swap contract concluded between it and the Central Bank of Venezuela ("BCV") in 2015—2017. The court appointed the receivers and the claimant transferred the proceeds of the gold swap contract to them.

    ii) In the second claim, by a claim form dated 14 May 2020, the claimant ("the BCV"), upon the instructions of the Maduro Board, issued proceedings against the defendants ("The Bank of England"), claiming that the Bank of England was in breach of its obligation to accept instructions from the Maduro Board with regard to payment of gold reserves held for the BCV. In response, the Bank of England filed a stakeholder application under CPR Part 86 and sought an order for the Court to determine upon whose instructions (as between the Guaidó Board and the Maduro Board) the Bank of England was authorised to act.

4. There are two contenders for the role of Head of State of the Bolivarian Republic of Venezuela, Mr Maduro and Mr Guaidó.. They would not in the ordinary course of events control the gold or the sum held by the receivers directly, because the deposit was originally made by the Central Bank of Venezuela (BCV). Each of Mr Maduro and Mr Guaidó have appointed Boards, which they say have the right to make those decisions. Correspondingly each Board claims to be entitled to represent the BCV in relation to the assets of the BCV in this jurisdiction.

5. And so began a dispute which has already been to the Supreme Court: [2021] UKSC 57 [2022] 2 WLR 167. The starting point for this judgment is that by its decision the Supreme Court has established that:

    i) Courts in this jurisdiction are bound by the "one voice principle" to accept statements of the executive which establish that Mr Guaidó is recognised by Her Majesty's Government as the constitutional interim President of

Venezuela and that Mr Maduro is not recognised by HMG as President of Venezuela for any purpose; and

ii) There exist rules of domestic law in relation to Foreign Acts of State ("FAOS") such that, subject to important limitations and exceptions, courts in this jurisdiction:

a) will recognise and will not question the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state ("Rule 1"); and

b) 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 ("Rule 2").

6. It follows that, pursuant to Rule 2, the English courts will not question the lawfulness or validity of certain executive acts of Mr Guaidó performed or taking effect within the territory of Venezuela - essentially because they are sovereign acts of the Venezuelan state. In practical terms for the dispute this means that the courts will generally question the validity of Mr Guaidó's purported appointments of individuals to the positions of:

i) a "Special Attorney"(also referred to as the "Special Attorney General"); and

ii) the ad-hoc administrative board of the BCV (the "Guaidó Board").

(together "the Executive Acts").

7. The Maduro Board says that the general rule does not apply however, because there is a further and fundamental limitation to FAOS Rule 2 ("the Limitation"). It raises the question: What happens if Venezuela's Supreme Tribunal of Justice ("the STJ") has given judgments which deny the validity of those appointments? That question matters because in general terms this Court will give recognition or effect to such judgments in accordance with domestic rules of private international law and the public policy of England & Wales.

8. The Maduro Board contends that Mr Guaidó's acts of appointment are null and void under Venezuelan law, and notes that they have been held as null and void by the Venezuelan courts. The Maduro Board has identified 10 STJ Judgments to which it says recognition should be given. Those decisions are listed in Part 1 of the Maduro Board's RASOC (the "Part 1 Judgments"). As Lord Lloyd-Jones has put it at [156]:

> "Mr Guaidó, recognised by HMG as the President of Venezuela, has made appointments to the board of the BCV which the STJ, as a part of the judicial branch of government, has declared to be unlawful and of no effect. As a result, this court is confronted with conflicting positions adopted by the executive and the judiciary of Venezuela."

9. If the Maduro Board is right and the Part 1 Judgments fall to be recognised, the declarations sought by the Guaidó Board would not be granted, and instead a finding made that the Maduro Board BCV President and Directors alone have the requisite authority to represent and act on behalf of the BCV.

10. If the Maduro Board is wrong about this, there are disputes as to whether it does or does not follow that I should grant the declarations which the Guaidó Board seeks. In particular, the Maduro Board also contends that even if the appointment of a Special Attorney were valid, that appointment did not confer authority on the Special Attorney to represent the BCV, which is a sui generis autonomous entity under the Constitution and not a decentralised entity. The judgments sought to be recognised include decisions by the STJ as to the nature of the BCV.

11. I should note near the outset of this judgment (and it will be apparent throughout) that although the underlying parties are plainly on extremely hostile terms, the trial has been prepared and conducted with exceptional levels of co-operation and courtesy between the legal teams. The co-operation has enabled this very expedited trial of very complex issues to be heard effectively - and has much lightened the burden which falls on me.

12. The judgment is arranged as follows:

THE FACTS

13. The parties helpfully prepared for me a very detailed and almost entirely agreed factual narrative, for which I am extremely grateful. I am particularly indebted to junior counsel (Mr Edmonds, Mr Miller and Mr Tushingham) on whom the bulk of this work devolved. This section is taken entirely from that narrative. The key judgments whose recognition is in issue are highlighted in bold in the narrative.

Backdrop

14. In 1999, Hugo Chávez was elected President of Venezuela. Until his death in 2013, President Chávez led a "Bolivarian Revolution" which involved an "*overhaul of all the institutions of Venezuelan society*".

15. In August 1999, a National Constituent Assembly was established and tasked to draft a new Constitution in Venezuela. The new Constitution came into force in December 1999 following a popular referendum, in accordance with the provisions of the 1961 Constitution (then in force). The Constitution was amended in 2006.

16. Pursuant to the Constitution, the Public Power is distributed vertically between Municipal, State and National Public Power. The National Public Power is divided horizontally between five separate branches, namely: (i) Legislative Power; (ii) Executive Power; (iii) Judicial Power; (iv) Citizen Power; and (v) Electoral Power.

<u>Legislative Power</u>

17. National Legislative Power is exercisable by the National Assembly ("NA"). The NA consists of deputies (i.e. legislators) who are elected for five year terms. Article 200 of the Constitution provides:

> "Deputies of the National Assembly shall enjoy immunity in the exercise of their functions from the time of their installation until the end of their term or resignation. Only the Supreme Tribunal of Justice shall have competence over any crimes [that] may be charged as committed by members of the National Assembly, and only the Supreme Tribunal of Justice, subject to authorization in advance from the National Assembly, shall have the power to order their arrest and prosecution. In the case of a flagrant offence committed by a

> legislator, the competent authority shall place such legislator under house arrest and immediately notify the Supreme Tribunal of Justice of such event."

18. A two-thirds majority of the NA deputies can exercise various special powers under the Constitution, including:

    i) the censure and removal of the Vice President and Cabinet Ministers;

    ii) the removal of STJ Judges in accordance with Article 265 of the Constitution if they are guilty of serious misconduct which has been established by the Citizen Power;

    iii) the appointment of members of the National Electoral Council (the "CNE"); and

    iv) calling for the creation of a National Constituent Assembly for the purpose of transforming the State, creating a new juridical order and drawing up a new Constitution. (The initiative for calling a National Constituent Assembly may also emanate inter alia from the President of the Republic sitting with the Cabinet of Ministers: Article 348 of the Constitution.)

19. The first legislative session of the NA begins each year on 5 January and ends on 15 August. The second legislative session begins on 15 September and ends on 15 December. In the period between 15 December and 5 January, a Delegated Committee (consisting of the President, the Vice-President and the Presidents of the Standing Committee) has the power to call the NA into extraordinary session, "*when the importance of any matter so demands*".

Executive Power

20. National Executive Power is exercised by the President, the Vice President, the Cabinet Ministers and other officials. The President of the Republic is the Head of State and of the National Executive, in which latter capacity he directs the action of the government. The Presidential term is of six years. The elected candidate takes office as President on 10 January of the first year of his constitutional term. Article 231 of the Constitution sets out circumstances in which the President may be sworn in by the STJ.

Judicial Power

21. Judicial Power consists of the STJ, such other courts as may be determined by law and various other State organs (including the Office of Public Prosecutions).

22. The STJ is Venezuela's highest court. It has a role as the highest and ultimate guarantor of the country's Constitution (Articles 266, 334-336 of the Constitution, Article 25 of the Organic Law of the Supreme Tribunal of Justice ("LOTSJ") and Articles 7-8 of the Organic Law of Contentious Administration). It is a founding member and participant in the Ibero-American Judicial Summit, which was founded in the 1990s. Its magistrates regularly participate in international events and meetings.

23. The STJ sits in six separate Chambers, namely:

    i) The Constitutional Chamber ("CC-STJ");

    ii) The Political/Administrative Chamber ("PAC-STJ");

    iii) The Electoral Chamber ("EC-STJ");

    iv) The Civil Cassation Chamber;

    v) The Criminal Cassation Chamber; and

    vi) The Social Cassation Chamber.

24. There are 32 Magistrates (i.e. Judges) of the STJ (and of a number of "alternatives" who stand in for the Magistrates when the latter are not available) divided between the six Chambers of the STJ. The three main Chambers of the STJ that the Court heard about in this trial are: (i) the CC-STJ which deals with Constitutional matters and which, in rank, is the foremost of the Chambers; (ii) the EC-STJ which deals, inter alia, with electoral cases and disputes, and (iii) the PAC-STJ, whose competences are set out in Article 26 of the LOTSJ. The six Chambers of the STJ meet regularly to coordinate, to allocate or re-allocate cases, or to deal with specific matters allocated to the STJ in Plenary. When the Chambers meet together, this meeting is called the Plenary Chamber ("PC-STJ").

25. The CC-STJ is able to make *erga omnes* decisions. One issue live before me is the extent to which such a decision is equivalent to an *in rem* decision.

26. Magistrates are appointed, and removed, by the NA under Articles 263-265 of the Constitution. Unless they retire earlier, Magistrates are appointed for terms of 12 years. Article 265 of the Constitution provides:

> "Justices of the Supreme Tribunal of Justice may be removed by the National Assembly by a qualified two-thirds majority of the members, after granting the interested party a hearing; in cases involving serious misconduct already characterized as such by the Citizen Power, on such terms as may be established by law."

The Organic Law Of The STJ (LOTSJ)

27. The powers, organisation and functions of the STJ are governed (inter alia) by the LOTSJ which was passed by the NA in May 2004 and amended by the NA in October 2010. Pursuant to the LOTSJ:

    i) Each Chamber of the STJ is composed of 5 Judges, save for the CC-STJ which is composed of 7 Judges. The competences of each STJ Chamber are set out inter alia in Articles 25-35.

    ii) STJ Judges must be appointed and sworn in by the NA for a single term of 12 years in accordance with the procedure set out in Articles 37-40 and Articles 64-74.

28. The PC-STJ is composed of all 32 Judges. The competences of the PC-STJ are set out inter alia in Article 24 and Article 36(1)-(14).

29. The STJ has an Executive Committee that is comprised of the President, the First and Second Vice Presidents and three directors. The Judges who sit on the Executive Committee also serve as Judges in the various STJ Chambers. Under Article 323 of the Constitution, the President of the STJ is one of the ex officio members of the National Defence Council.

The Composition Of The STJ

30. Between February 2015 and February 2017:

    i) The President of the STJ (and the President of the CC-STJ) was Judge Gladys María Gutiérrez Alvarado ("Judge Gutiérrez"); and

    ii) The First Vice President of the STJ (and the President of the Criminal Cassation Chamber) was Judge Maikel José Moreno Pérez ("Judge Moreno").

31. Between February 2017 and April 2022:

    i) The President of the STJ (and the President of the Criminal Cassation Chamber) was Judge Moreno; and

    ii) The Second Vice President of the STJ (and the President of the CC-STJ) was Juan José Mendoza Jover ("Judge Mendoza").

32. From April 2022 to the present date:

    i) The President of the STJ (and the President of the CC-STJ) has been Judge Gutiérrez; and

    ii) The First Vice President of the STJ (and the President of the Social Cassation Chamber) has been Edgar Gavidia Rodríguez.

2013 -2016

33. In 2013, President Chávez died and a Presidential election was called. In April 2013, Mr Maduro was elected President of Venezuela.

Retirement And Appointment Of New STJ Judges In 2015

34. In October 2015, the PC-STJ (then headed by Judge Gutiérrez) approved the retirement of 13 STJ Judges, including Judge Carmen Elvigia Porras de Roa ("Judge Porras") and Judge Francisco Carrasquero López. The latter gave evidence for the Maduro Board at trial.

35. Whereas the NA had between 2000 and 2015 been controlled by deputies belonging to the ruling socialist parties led by Mr Chávez and Mr Maduro, a coalition of opposition parties claimed to have won a two-thirds majority of the

seats in the NA election in December 2015 (i.e. 112 out of 167 seats). A dispute arose as to the validity of the election of the four deputies for the State of Amazonas (one pro-government deputy and three opposition deputies).

36. On 8 December 2015, Mr Diosdado Cabello (the outgoing President of the NA and Vice President of the PSUV party) said that the NA would appoint new STJ Judges before the newly elected NA deputies took office on 5 January 2016. This was to fill the vacancies left open by the retirement of the 13 STJ Judges referred to above.

37. On 22 December 2015, by Judgment CC/1758/22.12.2015, the STJ ruled (upon a petition filed by Mr Cabello) that (i) the NA was not constitutionally prevented from convening an extraordinary session after the expiry of the second legislative session on 15 December 2015 and (ii) the matters that could be dealt with during an extraordinary session held during the recess period included those matters declared "urgen[t]" by a majority of the members of the NA.

38. Thereafter, the outgoing NA convened an extraordinary session and deemed the appointment of STJ Judges an urgent matter. On 23 December 2015, during this extraordinary session, the NA appointed 13 new STJ Judges and 21 new alternate STJ Judges, including Calixto Antonio Ortega Ríos ("Judge Ortega") and Christian Tyrone Zerpa ("Judge Zerpa"), said to be by a simple majority vote of PSUV deputies (after three plenary sessions held on 22-23 December 2015 had failed to obtain a two-thirds majority vote of all NA deputies).

39. Of the 13 new STJ judges and 21 alternates who were appointed:

    i) Three judges (and four alternates) were appointed to the CC-STJ;

    ii) Two judges (and four alternates) were appointed to the PAC-STJ.

    iii) Two judges (and four alternates) were appointed to the EC-STJ; and

    iv) The remaining judges (and alternates) were appointed to other Chambers.

40. Following the appointment of the 13 new STJ Judges, the STJ comprised (in total) 32 Judges across all six Chambers (including 20 judges who were appointed prior to 2015).

The Special Commission and the 2016 Judgments

41. On 7 January 2016 the NA (which was now controlled by the opposition coalition) approved the appointment of a Special Commission to examine the appointment of the STJ Judges by the NA on 23 December 2015 (the "Special Commission").

42. On 1 March 2016, by Judgment CC/9/01.03.2016, the CC-STJ ruled that the NA lacked any power to create the Special Commission and declared the nullity of any act by which the NA intended to review the process by which the STJ Judges were appointed. A note appears at the bottom of Judgment CC/9/01.03.2016 which states that the three Judges of the CC-STJ who were appointed in

December 2015 "*did not sign this judgment, who did not attend[] for justified reasons*".

43. The Special Commission subsequently issued a Final Report which alleged (inter alia) that there were irregularities and violations of the Constitution and the LOTSJ in connection with the selection and appointment of the STJ Judges on 23 December 2015. The Special Commission recommended that the NA should revoke the NA's decision on 23 December 2015 to appoint the STJ Judges.

44. On 14 July 2016, the NA voted to approve the Special Commission's Final Report.

45. In a 31 March 2016 **CC 259/31.03.16** ruling on the constitutionality of a law purporting to amend the system of appointments and removal to the board of the BCV, the STJ determined that the "*the BCV is not part of the Central Administration or the Functionally Decentralized Administration*".

46. On 19 July 2016, by Judgment CC/614/19.07.2016—and following an application to the STJ made by deputies of the NA who belonged to PSUV—the CC-STJ ruled that (i) the Special Commission was unconstitutional and null, (ii) the NA's decision to approve the Special Commission's report was unconstitutional and null, and (iii) the NA's act on 23 December 2015 in approving the appointment of the STJ Judges was valid and those Judges would remain for their corresponding constitutional period. A note appears at the bottom of Judgment CC/614/19.07.2016 which states that the three judges of the CC-STJ who were appointed in December 2015 "*do not sign this judgment for justified reasons*".

47. On 20 July 2016 by judgment **CC/618/20.07.16**, considering whether a loan entered into by the BCV with the Latin American Reserve Fund was a public interest contract subject to the authorisation of the National Assembly, the STJ ruled on a demand for constitutional interpretation in order to determine "*the content and scope of the same in the Constitutional System that informs the actions of the BCV*."

48. On 9 August 2016, the NA passed a law to reform an earlier decree of President Maduro relating to the exploration and exploitation of gold reserves in Venezuela (the "Gold Reform Law"). On 19 August 2016, Mr Maduro filed a petition requesting the CC-STJ to make a declaration as to the constitutionality of the Gold Reform Law.

49. On 2 September 2016, by Judgment CC/808/02.09.2016 ("Judgment 808"), the STJ: (i) declared that the NA's decision to pass the Gold Reform Law was made in "frank contempt" of its earlier judgments; and (ii) further declared that all acts of the NA (including laws that are sanctioned) were "manifestly unconstitutional" and "*absolutely null and lacking of validity and legal effectiveness*" for so long as the NA was acting in contempt of the earlier judgments of the STJ.

50. Such decisions continued to occur in response to particular enactments. So for example on 5 January 2017 the NA approved an act electing a Secretary and Assistant Secretary, the first stage in starting a session. A popular action was

brought in which the claimant was Hèctor Rodriguez Castro, a National Assembly deputy, and he was opposed by attorneys for the board of directors of the National Assembly, who appeared, at the hearing. By a judgment CC/2/11.01.2017, marked File 17-00001, the STJ declared the nullity of that act.

The STJ and the 2017 Budget

51. Article 187(6) of the Constitution provides that it is the function of the NA *"[t]o discuss and approve the national budget and any bill relating to the taxation system and to public [debt]*".

52. Article 313 of the Constitution provides (inter alia):

> "The economic and financial management of the State shall be governed by budget approved annually by law. The National Executive shall submit the draft Budget Act to the National Assembly, at the time prescribed by the organic act. If the Executive Power fails for any reason to submit the budget bill within the time limit established by law, or the bill is rejected, the budget for the current fiscal year shall remain in effect. […]".

53. Article 319 of the Constitution provides that "*[t]he budget of operating expenses of the [BCV] shall require discussion and approval by the National Assembly […]".*

54. Article 75 of the BCV Law provides:

> "The draft of the operational income and expenses budget of the Central Bank of Venezuela shall be sent for its discussion and approval to the National Assembly during the first fortnight of October of the immediate preceding fiscal year to which the draft of budget refers."

55. In each year between 1999 and until 2016, the NA had approved a Budget Law under Article 187(6) of the Constitution, which the National Executive had submitted to the NA in draft for approval under Article 313 of the Constitution.

56. On 3 October 2016, Mr Maduro filed a petition requesting the STJ to clarify Judgment CC/810/21.09.2016 by which the STJ had declared the constitutionality of Mr Maduro's (emergency) Decree No. 2.452 dated 13 September 2016. In his request for clarification, Mr Maduro stated (inter alia):

> "[…] I request to the Honourable Constitutional Chamber of the Supreme Court of Justice, its interpretation on the feasibility that based on the Decree of State of Exception and Economic Emergency No. 2,452, published in the Extraordinary Gazette No. 6.256 dated 13 September 2016, the Budget of the Republic may be decreed, as well as exceptional regulations for the allocation of budgetary resources, the maximum limits of authorizations to spend, the

> distribution of expenditures and financing operations, which shall govern the financial year 2017."

57. On 11 October 2016, by Judgment CC/814/11.10.2016, the STJ ruled that: (i) since the NA remained in contempt it had no power to approve the 2017 annual budget; (ii) Mr Maduro must present the budget before the STJ in the form of a decree having the rank and force of law to be in force in 2017, subject to law and to the constitutional control of the STJ in accordance with Art 336.3-336.4 of the Constitution (iii) the STJ would itself "*exercise control of that act of the National Executive Power, in accordance with the provision of the [Constitution], all of which shall guarantee the constitutional principles governing budgetary matters*". The judgment was a reasoned judgment in which the STJ reasoned that the Constitution provided for a budget to be approved by the NA, but the NA was unable to act. The STJ considered that the present situation of the NA being unable to approve the budget due to its own wrong was not expressly dealt with in the Constitution.

Venezuela's Universal Periodic Review In 2016

58. Every five years, the human rights situation of all 193 UN Member States is reviewed by the UN Human Rights Council as part of a Universal Periodic Review ("UPR"). The result of each UPR is reflected in a Final Report issued by a Working Group established by the UN Human Rights Council which lists recommendations the State under review will have to implement before the next review.

59. On 27 December 2016, the Working Group on the UPR of Venezuela adopted its Final Report (A/HRC/34/6) (the "2016 UPR Final Report").

60. In the conclusions and/or recommendations section of the 2016 UPR Final Report, there are 14 references to the independence of the judiciary (out of 274 recommendations). These recommendations, which are recommendations issued by other States and were to be examined by Venezuela, included the following:

> "133.154 Work to ensure the independence of the judiciary and to continue with the efforts to fight crime using a preventive approach and a human rights perspective (Mexico);
>
> 133.155 Take appropriate measures to secure the independence of the judiciary, including by amending the regulatory framework providing for such independence (Namibia);
>
> 133.156 Take steps to ensure the independence and impartiality of judges and prosecutors, under all circumstances and in all cases, including by remedying the provisional status of the majority of judges and prosecutors (Netherlands);
>
> 133.157 Restore the rule of law and the independence and impartiality of the judicial system (Germany);

> 133.158 Redouble its efforts to guarantee the autonomy, independence and impartiality of the judiciary (Republic of Korea);
>
> 133.159 Take steps to ensure the full independence and impartiality of the judiciary (Spain);
>
> 133.160 Take the necessary measures to respect the separation and independence of powers, including of the National Electoral Council, Parliament and the judiciary, in particular of the Supreme Court of Justice (Switzerland);
>
> 133.161 Fully respect representative democracy, the separation of powers, legal rights, due process, universal human rights and the role of civil society groups and regional bodies (Australia);
>
> 133.162 Take urgent action to ensure the full independence, autonomy and impartiality of the judicial system and the electoral authority, especially with regard to the Supreme Court of Justice and the National Electoral Council (Brazil);
>
> 133.163 Restore the independence and impartiality of the judiciary by appointing impartial, qualified judges and magistrates in accordance with its legal and constitutional requirements (Canada);
>
> 133.164 Ensure the independence of the branches of government, in particular the electoral and judicial branches, ensure due process and avoid arbitrary arrests (Costa Rica);
>
> 133.165 Ensure the independence of the judiciary and enact a comprehensive review of legislation and practice aimed at guaranteeing the right to a fair trial for everyone, including opposition leaders and those critical of the Government (Czechia);
>
> 133.166 Ensure the independence and impartiality of the judiciary and police authorities and allow all parties to exercise their rights before the judiciary (France);
>
> 133.167 See that the legitimate independence of public powers is respected in accordance with its international commitments (Holy See);"

61. Putting the above in context, the UN has 193 delegations. 14 made comments in relation to Venezuela's courts. The UK was not one of the 14.

62. By a report dated 13 March 2017, submitted by Venezuela to the UN Human Rights Council in response to the 2016 UPR Final Report, Venezuela accepted Recommendation Nos. 133.154–133.156, 133.158–133.159, 133.164, 133.166, 133.167. The stated reason for their acceptance by Venezuela was "*because their*

implementation is under way". Venezuela rejected the others on the basis they were untrue.

STJ Judgments 155-158 In March And April 2017

Judgment 155

63. On 21 March 2017, the NA passed a "*Resolution on the Reactivation of the Process of Application of the OAS Interamerican Charter, as a mechanism for the peaceful resolution of conflicts in order to restore constitutional order*".

64. In case CC/155/27.03.17, the STJ received evidence that the NA had, when passing the above Resolution, sat "in camera" and come to an agreement/resolution to procure some form of intervention on the part of the Organisation of American States, and the application of the OAS Charter to Venezuela. On the NA's website there was an indication that the purpose of the resolution was that the Charter would become a "*law which is over and above the Constitution*" and "*prevail over it*".

65. On 27 March 2017, by Judgment CC/155/27.03.2017, and in response to the NA's Resolution dated 21 March 2017 and a petition filed on 22 March 2017 by a deputy of the NA who belonged to PSUV (Héctor Rodríguez Castro), the STJ (inter alia):

    i) stated that "*in accordance with Article 200 of the Constitution, parliamentary immunity protects only those acts performed by deputies in the exercise of their constitutional powers (which is not compatible with the current situation of the National Assembly of being in contempt) […]*";

    ii) declared the NA's Resolution dated 21 March 2017 as invalid and unconstitutional;

    iii) ordered Mr Maduro (inter alia) "*[…] to take such civil, economic, military, criminal, administrative, political, legal and social measures as he considers appropriate and necessary to avoid a state of unrest […]*"; and

    iv) ordered Mr Maduro (inter alia) to "*[…] review as an exceptional measure the substantive and adjective legislation […]*" (including the Organic Law on Organized Crime and the Financing of Terrorism, Law on Corruption, Penal Code, Criminal Procedure Code and the Military Justice Code) "*[…] since it is possible that offences of a military nature may be being committed […]*".

66. Furthermore, by Judgment CC/155/27.03.2017, the STJ:

    i) held as follows:

> "[…] the directly injured party in this action is the people of the Bolivarian Republic of Venezuela, who have the reasonable expectation and legitimate confidence in their democratically-elected authorities as a system of government, that the higher values enshrined in the Constitution and the

> constitutional guarantees are effectively guaranteed, preventing any action which seeks foreign interference of any kind; because it is a serious offence to the supreme law of the Venezuelan State, which must be fully complied with by all the bodies of the branches of government, and this Court in exercise of its constitutional jurisdiction is required to prevent the occurrence of an[d] avoid unlawful and unconstitutional acts which threaten independence and national sovereignty and bring about the rupture of the order and constitutional thread which underlie the Democratic and Social State of Law and Justice, which the people of Venezuela have brought about by means of universal suffrage".

ii) held as follows:

> "…the facts described, as well as the decisions of this Court with which the National Assembly has openly failed to comply (among others, judgments Nos 3 of 14 January 2016; 615 of 19 July 2016 and 810 of 21 September 2016) show that there is indeed a clear intention to adopt a position which is patently contrary to the Constitution, its principles and higher values, and in permanent contempt of the judgments handed down by the Electoral Court and by this Constitutional Court, to the point where breach of them is no longer an attitude of omission but, rather, in an act of manifest aggression against the people as direct representative[s] of national sovereignty, there is a conduct which seriously disregards the higher values of our legislation, such as peace, independence, sovereignty, and territorial integrity, which constitute acts of 'Treason', as stated by the applicant";

iii) stated as follows:

> "In this context, in light of the unprecedented actions affecting peace and national sovereignty and in view of the repeated conduct contrary to international legal order carried out by the current Secretary General of the Organization of American States (OAS), to the detriment of the general principles of international law and of the Charter of the Organization of American States itself (A-41), relating to self-determination, independence and sovereignty of peoples, inter alia (see judgments of this Court No 1939 of 18 December 2008, 1652 of 20 November 2013 and 3342 of 19 December 2002), the President of Venezuela is ordered, in accordance with the provisions of Article 236.4, in harmony with the provisions of Articles 337 et seq. id. (see judgment No 113 of 20 March 2017), inter alia, to enact such international measures as he considers appropriate and necessary to safeguard the constitutional order…"

Judgment 156

67. On 28 March 2017, Venezuela's State-owned oil and gas company ("PDVSA") filed a petition requesting the STJ to interpret Article 33 of the Organic Law on Hydrocarbons, which provided:

> "The establishment of semi-public companies and the conditions governing the conduct of primary activities shall require the prior approval of the Venezuelan [National] Assembly, for which purpose the National Executive Branch, by means of the Ministry of Energy and Oil, shall inform it of all the circumstances relevant to the aforementioned constitution and conditions, including the special advantages envisaged in favor of the Republic. […]"

68. On 29 March 2017, by Judgment CC/156/29.03.2017 and in response to PDVSA's petition, the STJ (inter alia):

    i) held as follows:

    > "there is no impediment for the National Executive Branch to establish semi-public companies in the spirit established in Article 33 of the Organic Law on Hydrocarbons, for which purpose the National Executive Branch […] shall inform this Chamber of all the circumstances relevant to the aforementioned constitution and conditions, including the special advantages envisaged in favor of the Republic";

    ii) reiterated Judgment CC/155/27.03.2017;

    iii) held as follows (at paragraph 4.4):

    > "It is noted that as long as the situation of contempt and invalidity of the proceedings of the Venezuelan [National] Assembly continues, this Constitutional Chamber will ensure that the parliamentary powers are exercised directly by this Chamber or by the body available to this Chamber, to ensure the Rule of Law."

69. The Judgments at [63]-[68] above are referred to as "Judgments 155-156".

70. On 31 March 2017 statements regarding Judgments 155-156 were issued by:

    i) the-then President of the NA (Mr Julio Borges);

    ii) the-then Prosecutor General of Venezuela (Ms Luisa Ortega Díaz);

    iii) the Foreign and Commonwealth Office ("FCO");

    iv) the Governments of Argentina, Brazil, Chile, Colombia, Paraguay and Uruguay; and

    v) the Inter-American Commission on Human Rights ("IACHR").

71. Within Venezuela, there were said to be "[t]housands of protests" against STJ Judgments 155 and 156.

National Defence Council Meeting on 31 March 2017

72. On 31 March 2017, Mr Maduro chaired a meeting of the National Defence Council at the Miraflores Palace. Under Article 323 of the Constitution, the National Defence Council is "*the highest consultative organ for planning and advising the Public Power as to matters relating to the overall defence of the Nation, its sovereignty and the integrity of its geographical space*". Under Article 323, the National Defence Council is presided over by the President of the Republic and also includes: (i) the Vice President of the Republic; (ii) the President of the National Assembly; and (iii) the President of the STJ.

73. At 12:20am on 1 April 2017, Mr Maduro delivered a live address (via national radio and television) from the Miraflores Palace during which he stated (inter alia) that:

    i) the National Defence Council had had a "*fruitful deliberation session*" to discuss the controversy arising from Judgments 155-156;

    ii) the meeting was attended by (among others) the President of the STJ (Judge Moreno) and a "special guest" namely the President of the CC-STJ (Judge Mendoza); and

    iii) the National Defence Council had "*reached an important agreement to solve this controversy*" namely "*with the reading of this communiqué and the publication of the respective clarification and corrections of Rulings 155 and 156, this controversy has been overcome […]*".

74. Mr Maduro then asked the Vice President of the Republic (Mr Tareck Zaidan El Aissami Maddah) to read a pre-prepared communiqué whereby the National Defence Council presided over by Mr Maduro (inter alia) "*exhort[ed] the Supreme Court of Justice to review decisions 155 and 156 in order to maintain constitutional stability and the balance of powers through the resources contemplated in the Venezuelan legal system*". After reading this communiqué, Mr Maduro declared a "*constitutional victory, thanks to high magistrates of the Republic, high authorities of the Republic […]*".

75. Later on 1 April 2017, Judge Moreno convened a press conference with Mr Maduro's Vice President (Mr El Aissami) and other STJ Judges, including Judge Mendoza. At this press conference, Judge Moreno said:

> "[…] we attended this Defense Council, the meeting, and we were there, at Miraflores Palace, until about one, just after one, in the morning working in the, of course to talk about the national and international attacks against the decisions of this highest Court. As I said at some point, I believe that what we have demonstrated at this moment is that we are an autonomous power, democratically and constitutionally constituted. The differences between any decision of the

> highest Court and any representative of the public power, are settled among us, among Venezuelans […]".

Judgments 157-158

76. Later on 1 April 2017, the CC-STJ issued Judgments CC/157/01.04.2017 and CC/158/01.04.2017 ("Judgments 157-158") which: (i) reversed / clarified aspects of Judgment Nos. 155-156/2017; and (ii) acknowledged that the request made by Mr Maduro for the STJ to meet with the National Defence Council "*to deal with the controversy arising between authorities of the Venezuelan State, is presented to us as an unprecedented situation for constitutional jurisdiction*".

77. Under STJ Judgment 157 (which was declared to be "*a supplementary part of Judgment No 155*"):

    i) references to parliamentary immunity in Judgment No 155 (see [92(1)] above) were amended and "revoked"; and

    ii) the measures which the STJ had ordered Mr Maduro to take in Judgment No 155 were also "revoked".

78. STJ Judgment 158 "clarif[ied]" that its conclusion in Judgment 156 at paragraph 4.4 (i.e. that the NA's powers would be exercised by the CC-STJ) was a precautionary, not final, decision.

79. On 3 April 2017, the Permanent Council of the Organisation of American States ("OAS")—which comprises a Permanent Representative of each of the 35 OAS Member States in the Americas who have ratified the OAS Charter —issued a Resolution relating to Judgments 155-156 and 157-158. It included this passage:

> "The decisions of the Supreme Court of Venezuela [in Judgments 155-156] to suspend the powers of the National Assembly and to arrogate them to itself are inconsistent with democratic practice and constitute an alteration of the constitutional order of the Bolivarian Republic of Venezuela".

Events Relating To The NA's Appointment Of STJ Judges In 2017

80. In July 2017, the NA announced the creation of a judicial appointment commission to select 33 new STJ Judges and alternate Judges to replace STJ Judges who had been appointed by the outgoing NA on 23 December 2015.

81. On 20 July 2017, by Judgment CC/545/20.07.2017, the STJ declared the nullity and unconstitutionality of the process for the appointment of new STJ Judges that was currently being conducted by the NA. The NA nevertheless purported to swear in 33 new judges (and some alternate judges) to the STJ.

82. On 21 July 2017, following his appointment by the commission, Mr Angel Zerpa was sworn in before the NA as one of the 33 judges. Mr Zerpa has alleged that almost immediately afterwards he was pursued by SEBIN officers in civilian clothing and shots were fired. Mr Zerpa also says that he was detained for a month at El Helicoide prison.

83. At around this time, Mr Maduro was reported as announcing in a live televised address that each of the 33 STJ Judges who had been appointed by the NA would be sent to jail and that their assets would be frozen. Mr Maduro was also reported as saying in the same broadcast that:

    i) "*[t]hese people who were appointed […], usurpers who are out there. They are all going to go to jail, one by one, one after the other. They are all going to go to jail and they are all going to freeze their assets, accounts and everything, and no one is going to defend them*"; and

    ii) he was ready to have dialogue with the opposition and "*reach a peace agreement, national coexistence and a cycle of dialogue and conversations based on the interests of Venezuela, unique and exclusively*".

2018 Presidential Election And HMG's Recognition Of Interim President Guaidó

84. On 20 May 2018, a Presidential election took place in Venezuela for the 2019-2025 Presidential term. Mr Maduro claimed to win this election. The UK government has said that it considered that this election was deeply flawed. Other States expressed similar views.

85. On 13 June 2018, by Judgment EC/53/13.06.2018, the STJ dismissed a contentious electoral claim brought by a rival Presidential candidate (Henri Falcón) who had sought precautionary measures suspending the implementation of the result of the election based on allegations of voting irregularities by the Maduro regime.

86. Articles 180-181 of LOTSJ provide as follows:

> "Article 180. In the corresponding brief, the precise identification of the parties shall be indicated and it shall have a circumstantiated narration of the facts that gave rise to the infraction being alleged and of the irregularities committed by the alleged wrongdoer.
>
> Article 181. Non-compliance of the requirements above-indicated will render the claim inadmissible, unless it is a matter of insubstantial omissions that do not impede the understanding of the claims submitted."

87. The STJ drew attention to these provisions in Judgment EC/53/13.06.2018. The STJ ruled that Mr Falcón's claim did not comply with Articles 180-181 of LOTSJ, and it was declared inadmissible by the STJ.

88. On 19 June 2018, Mr Maduro appointed Mr Ortega as President of the BCV. On 26 June 2018, the NA passed a Resolution declaring Mr Ortega's appointment to be unconstitutional. The STJ in turn declared the NA's Resolution unconstitutional.

89. On 8 January 2019, by Judgment CC/1/08.01.2019, the STJ ruled that because the NA was in contempt, Mr Maduro could not be sworn in as President before

the NA (as required, in the absence of supervening reason, by Article 231 of the Constitution). The STJ therefore summoned Mr Maduro to appear before the STJ (the alternative under Article 231) on 10 January 2019 "*in order to be sworn in as Constitutional President of the Bolivarian Republic of Venezuela for the presidential period 2019-2025*".

90. On 10 January 2019, Mr Maduro was sworn in before the STJ for a second term as the President of Venezuela. Article 231 of the Constitution provides that:

> "The candidate elected shall take office as President of the Republic on January 10 of the first year of his constitutional term, by taking an oath before the National Assembly. If for any supervening reason, the person elected President of the Republic cannot be sworn in before the National Assembly, he shall take the oath of office before the Supreme Tribunal of Justice."

91. On 15 January 2019, the NA and the President of the NA, Mr Guaidó, announced, relying upon Article 233 of the Constitution, that Mr Maduro had usurped the office of President and that Mr Guaidó was the Interim President of Venezuela by virtue of his position as President of the NA.

92. Article 233 of the Constitution provides as follows:

> "The President of the Republic shall become permanently unavailable to serve by reason of any of the following events: death; resignation; removal from office by decision of the Supreme Tribunal of Justice; permanent physical or mental disability certified by a medical board designated by the Supreme Tribunal of Justice with the approval of the National Assembly; abandonment of his position, duly declared by the National Assembly; and recall by popular vote.
>
> When an elected President becomes permanently unavailable to serve prior to his inauguration, a new election by universal suffrage and direct ballot shall be held within 30 consecutive days. Pending election and inauguration of the new President, the President of the National Assembly shall take charge of the Presidency of the Republic.
>
> In the cases describes above, the new President shall complete the current constitutional term of office.
>
> If the President becomes permanently unavailable to serve during the last two years of his constitutional term of office, the Executive Vice-President shall take over the Presidency of the Republic until such term is completed."

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

94. On 4 February 2019, the then Foreign Secretary, the Rt Hon Jeremy Hunt MP, issued the following statement:

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

95. This was followed by an exchange of letters between Tom Tugendhat MP, Chair of the House of Commons Select Committee on Foreign Affairs and Sir Alan Duncan MP, Minister of State for Europe and the Americas, which has been made public. By that exchange Mr Tugendhat asked for an explanation of the legal basis for this act of recognition. On 25 February 2019, Sir Alan explained that the decision to recognise Mr Guaidó was a "*case specific exception to our continuing policy of recognising States not Governments*" and was based on two points. First, in the opinion of the British government, Mr Guaidó and the NA were acting consistently with the Venezuelan Constitution when they declared the Presidency vacant following the May 2018 elections which the British government had said were "deeply flawed". Second, the circumstances in Venezuela were "exceptional": 3.6 million people had fled the country and the regime, which was in the opinion of the British government "*holding onto power though electoral malpractice and harsh repression of dissent*", had been referred to the International Criminal Court by six countries for its abuse of human rights.

The Transition Statute, the Executive Acts and the 2019 Judgments

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

97. Article 15 of the Transition Statute provides:

> "The National Assembly may adopt any decisions necessary to defend the rights of the Venezuelan State before the international community, to safeguard assets, property and interests of the State abroad, and promote the protection and defense of human rights of the Venezuelan people, all in

> accordance with Treaties, Conventions, and International Agreements in force.
>
> In exercising the powers derived from article 14 of this Statute, and within the framework of article 333 of the Constitution, the Interim President of the Bolivarian Republic of Venezuela shall exercise the following powers, subject to authorization and control by the National Assembly under the principles of transparency and accountability.
>
> a. Appoint ad hoc Administrative Boards to assume the direction and administration of public institutes, autonomous institutes, State foundations, State associations and State civil societies, State companies, including companies established abroad, and any other decentralized entity, for the purpose of appointing administrators and, in general, adopting the measures necessary to control and protect their assets. The decisions adopted by the Interim President of the Republic shall be executed immediately, with full legal effect.
>
> b. While an Attorney General is validly appointed in accordance with article 249 of the Constitution, and within the framework of articles 15 and 50 of the Organic Law of the Attorney General of the Republic, the Interim President of the Republic may appoint a special attorney general to defend and represent the rights and interests of the Republic, State companies and other decentralized entities of the Public Administration abroad. The special attorney general shall have the power to designate judicial representatives, including before international arbitration proceedings, and shall exercise the powers set forth in article 48, paragraphs 7, 8, 9 and 13, of the Organic Law of the Attorney General of the Republic, subject to the limitations derived from article 84 of that Law and this Statute. Such representation shall be especially oriented toward ensuring the protection, control, and recovery of State assets abroad, as well as executing any action required to safeguard the rights and interests of the State. The attorney general thus appointed shall have the power to execute any action and exercise all of the rights that the Attorney General would have, with regard to the assets described herein. For such purposes, such special attorney general shall meet the same conditions that the Law requires to occupy the position of Attorney General of the Republic."

98. On 5 February 2019, Mr Guaidó, as Interim President, appointed Mr José Ignacio Hernández as Special Attorney General to represent decentralised entities abroad. The decree said that it was "*issued at the Legislative Federal Palace in Caracas.*" The appointment contains a reference to it being made under the Transition Statute.

99. On 8 February 2019, the STJ issued Judgment **CC/6/08.02.19**, which considered and declared the nullity of the Transition Statute (issued in February 2019). The STJ issued this Judgment ex officio, without notification of the proceedings to any parties and without (written or oral) adversarial argument from anybody.

100. The decision is based on two conclusions, either of which was sufficient to render the Transition Statute null and void:

    i) First, the CC-STJ concluded that the Transition Statute was null and void because the STJ had already ruled that all acts issued by the National Assembly would be null and void for so long as it was constituted in contempt of the prior rulings of the STJ.

    ii) Secondly, the Transition Status had violated the Constitution of Venezuela.

101. On 11 April 2019, the STJ issued Judgment **CC/74/11.04.2019** relating to the appointment of Mr Hernández. This proceeding in the STJ was initiated by a request filed by a representative of PDVSA seeking unspecified protective measures (injunctions) against the persons who were appointed as members of the Ad-Hoc Board of Directors of PDVSA. Prior to issuing this Judgment, the STJ did not notify Interim President Guaidó, representatives of the NA or Mr Hernández, nor did it hear (written or oral) adversarial argument from them.

102. On 18 July 2019, Mr Guaidó, as Interim President, appointed an Ad Hoc board of the BCV (i.e. the Guaidó Board) by "Decree No. 8". The decree was expressed to be "*issued at the Federal Legislative Palace in Caracas*". The decree includes reference to its being issued pursuant to Article 15 of the Transition Statute.

103. Article 1 of Decree No. 8 provides:

> "The ad-hoc Administrative Board of the Central Bank of Venezuela shall be composed of the citizens Ricardo Villasmil, Nelson Lugo, Manuel Rodríguez and Guaicoima Cuius."

104. Article 2 of Decree No. 8 provides:

> "The ad-hoc Administrative Board shall have the powers granted to the Board of Directors of the Central Bank of Venezuela and its President, pursuant Articles 8, 9, 10, 15, and 21 of the Law of the Central Bank of Venezuela, for the sole purpose of executing the mandate described in the following articles.

105. Article 10(3) of the Law of the Central Bank of Venezuela provides that the President of the BCV shall have the power:

> "To exercise the legal representation of the Bank, except for judicial matters where the representation is exercised by the legal representative(s) as well as by the judicial attorneys appointed by the Board […]".

106. Article 3 of Decree No. 8 provides:

> "The ad-hoc Administrative Board shall represent the Central Bank of Venezuela before financial institutions domiciled abroad, as well as international organizations, in connection with all the agreements that such institution has entered into or may enter into for the management of international reserves, including gold, all for the purpose of managing international reserves owned by the Republic, in accordance with Article 127 of the Law of the Central Bank of Venezuela.
>
> Additionally, the ad-hoc Administrative Board shall represent the Central Bank of Venezuela for the purpose of using and disposing of the resources deposited in the bank accounts under its name in foreign institutions, within the limits derived from Article 36 of the [Transition Statute]."

107. Article 5 of Decree No. 8 provides:

> "The legal representation of the Central Bank of Venezuela rests with the President of the ad-hoc Administrative Board, while its judicial and extra-judicial representation rests with the Special Attorney General."

108. Article 7 of Decree No. 8 provides:

> "The acts that resulted in the appointment of the person who currently occupies the Presidency of the Central Bank [i.e. Mr Ortega] are declared void and null. Therefore, the ad-hoc Administrative Board shall be the only legitimate authority of the Central Bank of Venezuela recognized to exercise the legal representation of such institution, for the management and disposal of international reserves within the terms of this Decree."

109. On 25 July 2019, the STJ issued Judgment **CC/247/25.07.2019** relating to the appointment of the Guaidó Board. The STJ issued this judgment ex officio and without notification of the proceedings to interim President Guaidó or the Guaidó Board (or anybody else) and without (written or oral) adversarial argument from interim President Guaidó or the Guaidó Board (or anybody else).

110. The Judgment declares:

i) the nullity of the National Assembly's rejection of the appointment of the Chairman of the BCV and appointment of the ad hoc Board of Directors of the BCV; and

ii) that the BCV authorities appointed by reference to the two National Assembly "agreements" referred to within the Judgment are null and void.

111. This judgment was given on the basis that the appointment of an ad-hoc board was illegitimate in circumstances where: (i) the Transition Statute had already

been declared null and void; and (ii) the National Assembly remained in breach of the Supreme Tribunal of Justice's judgments.

112. On 13 August 2019, Mr Guaidó, as Interim President, passed "Decree No. 10" appointing an additional member to the Guaidó Board and naming Dr Ricardo Villasmil as President of the Guaidó Board. The decree includes reference to its being issued pursuant to Art 15 of the Transition Statute.

2020- Mr Guaidó's re-election and the 2020 Judgments

113. On 5 January 2020, Mr Guaidó was re-elected as President of the NA.

114. On 29 January 2020, the STJ issued Judgment **CC/3/29.01.2020** relating to the appointment by Mr Guaidó of an ad-hoc board of the Venezuelan State-owned television company ("Telesur"). The STJ did not notify interim President Guaidó or the appointees of the ad-hoc board of Telesur, and the STJ did not hear any adversarial argument (whether written or oral) from them.

115. The Judgment states that the office and appointment of a "Special Attorney" was an absolute nullity of no legal effect, because it openly usurped the powers entrusted to the Attorney General of Venezuela, Mr Reinaldo Muñoz who had been validly appointed in accordance with the Constitution.

116. On 22 April 2020, the STJ issued Judgment **CC/59/22.04.2020** relating to the appointment of the Attorney General and the Special Attorney General. This proceeding in the STJ was initiated by a citizen who sought the interpretation of Articles 247-249 of the Constitution. The STJ did not notify President Guaidó, representatives of the NA or Mr Hernández and did not hear any adversarial argument (whether written or oral) from them. The STJ had already found the position of the Special Attorney General to be a nullity in Judgment **CC/003/29.01.20** and **CC/74/11.04.19**. By this judgment the STJ resolved a request for constitutional interpretation, ratifying the earlier Judgments, and declaring the legitimacy of the acting Attorney General Muñoz, and the illegitimacy of the appointment of Special Attorney Hernández by the Guaidó Board.

117. On 19 May 2020, the NA passed a Resolution, a preamble of which stated that the BCV was a "decentralised entity" and that the BCV's assets abroad may only be administered by the Guaidó Board.

118. On 26 May 2020, the STJ issued Judgment **CC/67/26.05.2020** relating to the appointment of the Maduro Board and the acts of the Guaidó Board. The STJ issued this Judgment ex officio, without notification of the proceedings to interim President Guaidó or the Guaidó Board (or anybody else) and without (written or oral) adversarial argument from them. By this judgment, the STJ declared the appointment of the Board of Directors of the BCV (viz. the Maduro Board) to be valid and the appointment of the ad hoc Board of the BCV (viz. the Guaidó Board) to be null and void, as were its acts.

119. On 28 May 2020, Mr Hernández resigned as Special Attorney General.

120. On 23 June 2020, Mr Guaidó, as Interim President, appointed Mr Enrique José Sánchez Falcón as Special Attorney General of Venezuela pursuant to "Decree No. 21". The decree includes reference to its being issued pursuant to Art 15 of the Transition Statute.

121. On 24 August 2020, Dr Villasmil resigned as President of the Guaidó Board.

122. On 28 August 2020, Mr Guaidó, as Interim President, passed "Decree No. 24" appointing Mr Manuel Rodríguez Armesto as interim President of the Guaidó Board. The decree includes reference to its being issued pursuant to Art 15 of the Transition Statute.

123. On 26 December 2020, the NA passed certain amendments to the Transition Statute, described as a Partial Reform of it, including (the Maduro Board says purportedly) to extend the term of the outgoing National Assembly after 5 January 2021, to make provision for a Delegate Committee, and to make different provision for appointments than had been previously made in Article 15 of the Transition Statute.

124. On 30 December 2020, the STJ issued Judgment **CC/274/30.12.2020** relating to the NA's decision on 26 December 2020. By this judgment, reacting to an attempt in December 2020 by the National Assembly to introduce changes to the Transition Statute, the STJ declared by reference to past judgments that an alleged amendment to a null statute was also void.

THE TRIAL

125. As I have already noted the trial of the issues has taken place over four days. Both parties called factual and expert witnesses.

126. The Maduro Board has served evidence from 3 factual witnesses:

    i) Dr Carrasquero Lopez, a magistrate of the STJ from 2005 to 2015 and a former Vice President of the CC-STJonstitutional Chamber of the STJ ("CCSTJ"). He gave evidence as to his experience as an STJ judge. It was to the effect that he did not recognise the impartiality issues raised by the Guaidó Board. He was a measured and generally impressive witness.

    ii) Dr Enrique Parody Gallardo, a former judge and the current secretary for the PC-STJ. As someone on the administrative side of the STJ, he gave evidence as to the STJ's independence from government in matters of finance and budgeting, staffing and governance, he outlined from his knowledge the process by which judgments are prepared and delivered and explained that cases are allocated at random to individual judges. His evidence was clear, but I did not ultimately find its ambit of particular use to me.

    iii) Mr Calixto José Ortega Sanchez, the Maduro Board's president - or from their perspective: the president of the Central Bank of Venezuela. His statement was not challenged and so he was not called. His evidence was

really directed to bringing to my attention the fact that it is the Maduro Board which operates on the ground. His evidence covered functions of the BCV, its complexity, day-to-day operations and financial dealings; the current functioning of the BCV, emphasising governance issues, recognition of his authority and full functional control; his dealings with central banks and international institutions. He also gave evidence as to his knowledge of the members of the Guaidó Board and explained that in reality the Guaidó Board has no control over the BCV.

127. The Guaidó Board served evidence from 3 factual witnesses:

i) Prof Enrique José Sánchez Falcón, current Special Attorney;

ii) Dr Ricardo Alfonso Villasmil, former president of the Guaidó Board; and

iii) Mr Manuel Rodriguez Armesto, current president of the Guaidó Board.

Though it was doubtless appropriate that I should hear from them directly and they gave their evidence clearly and frankly, its contents were not of much assistance in relation to the issues before me.

128. The main witness evidence was the expert evidence. The parties served expert evidence on: (i) the status of the STJ judgments; and (ii) the requirements of due process as a matter of Venezuelan law, with:

i) the Maduro Board serving evidence from Mr Julio Cesar Arias Rodriguez set out in his third report dated 3 May 2022 ("Arias 3").

ii) the Guaidó Board serving evidence from Prof Brewer-Carías set out within his third report dated 1 May 2022 ("Brewer-Carías 3"); and

129. I will deal with the details of the evidence below and shall explain why I have preferred the evidence of one witness over another at the point where the issues arise. It is however fair to say – and Mr Lissack QC realistically did not shy away from this fact – that Prof Brewer-Carías was the expert with by far the greater expertise and authority: "*a man of enormous distinction and seniority in his field*" who was in fact one of the main drafters of the Venezuelan Constitution. He has, since being indicted in absentia in 2005 following his giving of an advice in relation to events which followed the announcement of the resignation of President Chavez lived outside of Venezuela. Prof. Brewer-Carías is accordingly of a more senior generation – he pointed out that Mr Guaidó was too young for him to have known him prior to his own exile. Mr Arias is much younger, an active lawyer working in Venezuela and Mr Lissack delicately submitted that I should regard him as consequently a bit more in touch.

130. I agree that both experts tried to help the court – that could be seen in the extent to which they managed to find common ground. I should also record that it is quite apparent to me that both experts put in a very great deal of work to digest and make comprehensible the expert issues, providing a Joint Expert Memorandum of exemplary clarity and utility.

THE ISSUES

131. The issues which arise are:

i) **Issue 1**: Whether the Part 1 Judgments are judgments of a type which limit the effect of Rule 2 following the Supreme Court Judgment or are otherwise of relevance, and more specifically whether the court:

a) is as a matter of principle limited in these circumstances to considering or giving effect to STJ judgments that explicitly identify and declare prior Executive Acts to be nullities (so-called "quashing decisions"); and if so, whether the Part 1 Judgments (or a proportion of them) are "quashing decisions"; or

b) may in principle have regard to, and give effect to, STJ judgments which for the purposes of considering the Limitation to Rule 2 by their reasoning and effect demonstrate and/or implicitly declare the Executive Acts to be invalid and nullities, such that all the Part 1 Judgments are relevant; or

c) may in any event recognise Part 1 Judgments that assist the court in its analysis as to the consequence of the Executive Acts even if valid.

ii) **Issue 2**: In the event that the Part 1 Judgments (or a proportion of them) cross any "quashing" threshold, whether they are eligible for recognition pursuant to English rules of private international law, that is to say whether they are of a type which is capable of being recognised as judgments *in rem* i.e. made with "international jurisdiction".

iii) In the event that the answers above are affirmative such that the Part 1 Judgments (or a proportion of them) fall to be recognised, whether recognition of the Part 1 Judgments is nevertheless precluded by any of the following defences raised by the Guaidó Board:

a) by the operation of the "one voice doctrine" (**Issue 3**); and/or

b) by principles of natural justice and/or the guarantee to a fair trial (**Issue 4**); and/or

c) as a matter of public policy in circumstances where it is alleged that recognition would interfere with HMG's foreign policy (**Issue 5**).

132. It is common ground that the Maduro Board bear the burden of proof on Issues 1 and 2, with the Guaidó Board bearing the burden of proof on the defences encapsulated in Issues 3-5 inclusive.

THE PART 1 JUDGMENTS

133. At the heart of this debate lie the Part 1 Judgments. They are summarised (drawing on a table, provided by the Maduro Board and principally the work of Mr Edmonds, identifying the reason why they are relied upon) as follows:

(The non-shaded cases denote those which the experts considered, which largely overlap with those which the parties agreed were capable of being "quashing decisions")

No	Part 1 Judgment	Summary of finding & proposition it is said to support
1	**CC/1.115/16.11.10**	Summary: Judgment in the context of a requirement that the PDVSA sell its FX to the BCV. By this judgment, the STJ provided a constitutional interpretation of the BCV, its nature, and functions following: (i) an appeal for annulment; and (ii) an "unnamed precautionary measure". *Per* the STJ: "*The constituent's option to give constitutional rank to the Central Bank is the necessary result of the functions attributed to central banks and of the historical experience worldwide in this regard, where efficiency in the achievement of the objectives is inversely proportional to the possibility of the Executive Power of unilaterally imposing its economic policies.*" Proposition: This reasoning supports the finding that the BCV is not a decentralized entity.
2	**CC/259/31.03.16**	Summary: By this judgment, ruling on the constitutionality of a law purporting to amend the system of appointments and removal to the board of the BCV, the STJ determined that the "*the BCV is not part of the Central Administration or the Functionally Decentralized Administration*". Proposition: This reasoning supports *inter alia* the finding that the BCV is not a decentralized entity.
3	**CC/618/20.07.16**	Summary: By this judgment, considering whether a loan entered into by the BCV with the Latin American Reserve Fund was a public interest contract subject to the authorisation of the National Assembly, the STJ ruled on a demand for constitutional interpretation in order to determine "*the content and scope of the same in the Constitutional System that informs the actions of the BCV*." Proposition: This reasoning supports *inter alia* the finding that the BCV is not a decentralized entity.
4	**CC/6/08.02.19**	Summary: By this judgment, the STJ considered and declared the nullity of the Transition Statute (issued in February 2019). The decision is based on

		two conclusions, either of which was sufficient to render the Transition Statute null and void: (1) First, the Constitutional Chamber concluded that the Transition Statute was null and void because the STJ had already ruled that all acts issued by the National Assembly would be null and void for so long as it was constituted in contempt of the prior rulings of the STJ. (2) Secondly, the Transition Statute had violated the Constitution of Venezuela. Proposition: This reasoning in turns supports *inter alia* the finding that the Transition Statute is null and void.
5	**CC/74/11.04.19**	Summary: Following a challenge brought by the PDVSA, the STJ declared the nullity of the appointment of the alleged Special Attorney Hernández and issued injunctive measures against those individuals who claimed to represent PDVSA, re-confirming that any action by the National Assembly in contempt and by anybody or individual contrary to what was decided in it, would be null and void of all legal validity and effectiveness, without prejudice to any liability that may arise. This was for three reasons: (1) the National Assembly was engaged in usurpation of authority, due to its failure to observe the rulings of the STJ as previously found in numerous rulings. (2) The appointment of a "special attorney" usurped the powers entrusted under the Constitution to the Attorney General (*viz*. the Vice Attorney General, who performs that role in the absence of the Attorney General pursuant to the Organic Law of the Attorney General's office). (3) The appointment of an *ad-hoc* board was illegitimate in circumstances where: (i) the Transition Statute had already been declared null and void; and (ii) the National Assembly remained in breach of the STJ's judgments.

		Proposition: This judgment directly supports the finding that the Special Attorney does not exist and decrees to the contrary are null and void and impliedly/necessarily supports the proposition that the Guaidó Board is null and void.
6	**CC/247/25.07.19**	Summary: Judgment declaring: (1) the nullity of the National Assembly's rejection of the appointment of the Chairman of the BCV and appointment of the *ad hoc* Board of Directors of the BCV; and (2) that the BCV authorities appointed by reference to the two National Assembly "agreements" referred to within the Judgment are null and void. This judgment was given in circumstances where the appointment of an ad-hoc board was illegitimate in circumstances where: (i) the Transition Statute had already been declared null and void; and (ii) the National Assembly remained in breach of the Supreme Tribunal of Justice's judgments. Proposition: This judgment supports the finding that: (i) the Guaidó Board does not exist and decrees to the contrary are null and void.
7	**CC/3/29.01.20**	Summary: Judgment reiterating that the office and appointment of a "Special Attorney" was an absolute nullity of no legal effect, because it openly usurped the powers entrusted to the Attorney General of Venezuela, Mr Reinaldo Muñoz who had been validly appointed in accordance with the Constitution. Proposition: This judgment supports the finding that the Special Attorney and *ad hoc* Board do not exist and decrees to the contrary are null and void.
8	**CC/059/22.04.20**	Summary: By this judgment the STJ resolved a request for constitutional interpretation, ratifying Judgment 74 referred to above, and declaring the legitimacy of the acting Attorney General Muñoz, and the illegitimacy of the appointment of Special Attorney Hernández by the Guaidó Board. Proposition: This judgment supports the following propositions: (i) the Special Attorney does not exist and decrees to the contrary are null and void; and

		(ii) the finding that the Transition Statute is null and void.
9	**CC/67/26.05.20**	Summary: By this judgment, the STJ declared the appointment of the Board of Directors of the BCV (*viz.* the Maduro Board) to be valid and the appointment of the *ad hoc* Board of the BCV (*viz.* the Guaidó Board) to be null and void, as were its acts. Proposition: Within this Judgment the STJ: (i) confirmed that *"the BCV "has a unique legal nature and is not a decentralized entity of the Public Administration"*; and (ii) supports the finding that the Guaidó Board does not exist and decrees to the contrary are null and void.
10	**CC/274/30.12.20**	Summary: By this judgment, reacting to an attempt in December 2020 by the National Assembly to introduce changes to the Transition Statute, the STJ declared by reference to past judgments that an alleged amendment to a null statute was also void. Proposition: This reasoning supports: (i) *inter alia* the finding that the Transition Statute is null and void; and (ii) the Special Attorney and *ad hoc* Board do not exist and decrees to the contrary are null and void.

134. A point which should be noted is that a number of these judgments bear a notation which places them on "File 17". The significance of that notation was in issue. However the background to it is that Case 2 of 2017 was the first case in file 17. As outlined above at 50 above, the claimant was Hèctor Rodriguez Castro, a National Assembly deputy, and he was opposed by attorneys for the board of directors of the National Assembly, who appeared, albeit unsuccessfully, at the hearing. The STJ declared in that case that this was a matter of mere right, a matter of mere law, requiring no evidence. That decision was followed in other cases (among them some of the Part 1 Judgments) which bear the File 17 notation. It was said for the Maduro Board that this decision effectively provided a gateway which enabled the CC-STJ to initiate follow on proceedings ex officio under Article 334 of the Constitution.

ISSUE 1: "QUASHING DECISIONS"

135. For the first question it is necessary to go back to the judgment of the Supreme Court. In the Supreme Court the Guaidó Board was (in effect) arguing that HMG's recognition of interim President Guaidó and his appointments (i.e. the Executive Acts) were the end of the road. The Supreme Court rejected that analysis saying at [155]:

> "…within most modern states sovereign power is shared among the legislative, executive and judicial branches of government and it cannot be assumed that the conduct of the executive is the sole manifestation of sovereign power or that it should necessarily prevail over the position taken by the legislature or the judiciary. As a result, in seeking to respect the sovereignty of a foreign state, it will not always be appropriate for courts in this jurisdiction to focus exclusively on acts of the executive."

136. The division is then set out at [169] of the judgment thus:

> "The act of state principle under consideration would therefore prohibit courts in this jurisdiction from questioning or adjudicating upon the lawfulness or the validity of certain executive acts of a foreign state on the ground that to do so would constitute an objectionable interference with the internal affairs of that state. This rationale can have no application, however, where courts in this jurisdiction merely give effect to a judicial decision whereby the courts of the foreign state concerned, acting within their proper constitutional sphere, have previously declared the executive acts to be unlawful and nullities."

137. The first point is the ambit of the relevant judgments – whether any of them fall within the area designated by this passage of the Supreme Court's judgment. Five of the judgments: 1-3, 7 and 10 were submitted by the Guaidó Board not to do so. As the summaries above indicate, those judgments go principally to the question of whether the BCV is to be regarded as a "decentralized entity" and with judgments 7 and 10 also said to support the proposition that the Special Attorney and/or Guaidó Board do not exist and decrees to the contrary are null and void.

138. The initial entry point for this argument was that the Guaidó Board had previously pursued a case that the Transition Statute provided a Venezuelan law basis for the Executive Acts relied upon (separate from Mr Guaidó's recognition). Because the Supreme Court has unequivocally upheld the Guaidó Board's case that it has no need to rely on the Transition Statute - it can rely solely upon Interim President Guaidó's Executive Acts, unless quashed - the Guaidó Board has not before me advanced any such case.

139. Mr Lissack for the Maduro Board accepted that on one level he does not need these judgments; it is enough for him if the other five judgments considered by both experts are recognised. However he maintains his case here, in part because of the implications for the arguments at a later stage of the analysis – including if one comes to declarations.

140. The submission was that in circumstances where sovereign power is shared among the legislative, executive and judicial branches of government, it cannot be assumed that the conduct of the executive should prevail over the position taken by the judiciary. There is, it is submitted, no evident principled basis for limiting the court's recognition and consideration of the judiciary's decisions –

themselves manifestations of sovereign power – to explicit declarations of nullity, as opposed to decisions that: (i) impliedly; or (ii) unquestionably by their reasoning render an executive act a nullity so as engage the Limitation to the Act of State. This approach is said to be supported by the judgment of the Supreme Court, in particular:

i) The reference at [155] that domestic law would be of relevance in the event of a clash between the executive and legislative branches of a state;

ii) The reference at [170] to the need to consider reasoning;

iii) Paragraph [169] approving and quoting from the judgment of Lord Justice Males in the Court of Appeal as follows:

> "There is, however, no want of comity in holding that the act of state doctrine does not require the English court to treat as valid and effective as a sovereign act of executive power that which the foreign court has held to be unlawful and therefore null and void, while recognition of a separation of power should operate both ways. To recognise a decision of the foreign court, acting within its own sphere of responsibility under the constitution of the foreign state, is in accordance with the principles of comity and the separation of powers."

141. On this basis it was submitted that, despite the Guaidó Board's own lack of reliance on the Transition Statute, the statute, and the decisions which proceed by reference to it, become relevant.

142. The point was put with great skill by Mr Lissack for the Maduro Board. But it falters against the history of the case. In the Supreme Court the battle lines were drawn thus:

i) The Maduro Board contended that the foreign act of state doctrine had no application at all to executive acts which were unlawful under their own law; hence it was always necessary for an English Court to look at what the foreign courts had decided;

ii) The Guaidó Board argued that since it was irrelevant whether a sovereign act was lawful or unlawful, anything a foreign court had to say about lawfulness was logically irrelevant also – subject only to the proviso (not engaged on these facts) that a foreign judgment might nevertheless be deployed in support of an argument that it would be contrary to public policy to give effect to the foreign executive act.

143. The Supreme Court did not adopt either course. Instead it held that the ability to deploy a foreign judgment striking down the executive act ought not to be confined to a public policy inquiry and that there was an exception to the foreign act of state doctrine for executive acts which had been quashed. The question was asked in those terms by Lord Lloyd-Jones at [163]:

> "The question for consideration here is, to my mind, a more fundamental one. It is necessary to ask whether Rule 2 has

> any application to a situation in which an executive act of a foreign state has been quashed by the judiciary of that state. In order to answer this question, it is necessary to have regard to the rationale of that rule."

144. The "implicit quashing" argument is therefore an attempt to reprise an argument which has been considered – and rejected - by the Supreme Court. The debate about where the line between the executive and the judiciary should be drawn is one which the Supreme Court has considered,and reached its own clear conclusion. That is set out at [169]:

> "The act of state principle … can have no application, however, where courts in this jurisdiction merely give effect to a judicial decision whereby the courts of the foreign state concerned, acting within their proper constitutional sphere, have previously declared the executive acts to be unlawful and nullities."

145. It follows that, the Supreme Court having (in effect) already held that the Guaidó Board can rely on Executive Acts insofar as any STJ judgment quashes the Transition Statute but not the Executive Act of appointment made in purported reliance on the Statute, it is not open to the Maduro Board to contend that the Executive Act in question has been impliedly quashed by a decision in relation to the Transition Statute. There is nothing in the Males LJ formulation which can undermine this reasoning. Indeed, that dictum is itself expressed in terms of "*a sovereign act of executive power which the foreign court has held to be unlawful and therefore null and void."* That focuses on direct consideration of executive acts.

146. Nor is there anything which gives ground for concern in the other paragraphs of the Supreme Court judgment to which the Maduro Board made reference. All of these are effectively dealing with the Transition Statute argument under FAOS Rule 1, which it later concluded was not necessary for the Guaidó Board, and which the Guaidó Board has now dropped.

147. Accordingly I conclude that the judgments for which implicit quashing status was sought do not come within the ambit of the exception.

148. It was, however, ultimately common ground that 5 of the Part 1 Judgments explicitly declare null and invalid the Executive Acts on their face. Thus:

    i) In respect of those Executive Acts relating to the purported appointments to the position of Special Attorney:

        a) In Judgment 5 (CC/74/11.04.19), the STJ: (i) confirmed the act of appointment of a Special Attorney was to a position that "*does not exist in the Venezuelan legal system*"; (ii) confirmed the designation of a Special Attorney was "*null and completely nullified and lacking per se legal effects*"; (iii) confirmed that "*any action …. of any entity or individual against what is decided here, will be void and without any legal validity and effects*;" and (iv) declared the "*COMPLETE*

NULLITY AND LACK OF LEGAL EFFECTS of the appointment [of Mr Hernández] as [Special Attorney]."

b) In Judgment 7 (CC/3/29.01.20), the STJ again declared that the office of the Special Attorney and the appointment of a Special Attorney was an absolute nullity and of no legal effect because it openly usurped the powers entrusted to the Attorney General of Venezuela, Mr. Reinaldo Muñoz, who had been validly appointed in accordance with the constitution of the Bolivarian Republic of Venezuela ("the Constitution").

c) In Judgment 8 (CC/059/22.04.20), the STJ declared the nullity of the appointment of Mr Hernández as Special Attorney, confirming the position of Special Attorney to be "non-existent and illusory", and that "*it is hereby ratified that any action that a citizen who intends to usurp the powers currently held by [Attorney General Reinaldo Muñoz] in his legitimate condition as Attorney General of the Republic, is null and void*."

ii) In respect of the Executive Acts appointing an "*Ad-hoc Board of the BCV*" (viz. the Guaidó Board), the STJ has confirmed:

a) In Judgment 6 (CC/247/25.07.19) that inter alia: (i) "*designations of authorities of the BCV … are NULL AND COMPLETELY NULLIFIED*"; and (ii) ratified "*that any action … of any entity or individual contrary to what Judgment 247 had decided would be void and devoid of any legal validity and effectiveness.*"

b) In Judgment 9 (CC/67/26.05.20) that: (i) "*this Chamber warns that any action carried out by the non-valid [Guaidó Board] unconstitutionally designated by the agreement dated May 19, 2020, for the purpose of taking possession of any asset that represents the reserves from the Bolivian Republic of Venezuela that are deposited or in custody of any banking or financial institution abroad, they are absolutely null and void of legal effects*"; and (ii) ratified Expert Part 1 Judgment No.4 CC/6/08.02.19 where it stated "*that any action of … any organ or individual contrary to what has been decided here will be null and lacking all legal validity and efficacy.*"

149. In relation to those judgments there is an element of agreement. The experts have agreed that these judgments declare:

i) "*the nullity of all acts of the National Assembly and Mr Guaidó*";

ii) "*the nullity of the agreement rejecting the appointment of the President of the BCV and the nullity of the appointment of the ad hoc Board of Directors of the BCV*";

iii) "*the validity of the Board of Directors … of the BCV [i.e. the Maduro Board], and nullity and invalidity of the ad hoc Board [Junta] of the BCV[i.e. the Guaidó Board*], *as well as nullity the acts of the latter board.*"

150. I conclude on Issue 1: The court is as a matter of principle limited in these circumstances to considering or giving effect to STJ judgments that explicitly identify and declare prior Executive Acts to be nullities (or a sufficient specific, forward-looking ruling) (so-called "quashing decisions"). Consequently only the five judgments identified in paragraphs 148-149 above ("the Judgments") are judgments of a type which limit the effect of FAOS Rule 2 following the Supreme Court Judgment or are otherwise of relevance.

ISSUE 2: RECOGNITION

151. One therefore proceeds to the second issue, the question of whether these five judgments are capable of recognition. This is not as complex as it might have been; there is no issue as to whether the Judgments are final and conclusive, or about the STJ's subject matter jurisdiction or about the binding effect of the Judgments within Venezuela. There are however serious issues between the parties.

152. In the normal course of events judgments which are sought to be recognised are *in personam* judgments and are placed within the context of cause of action or issue estoppel. It is accepted by the Maduro Board that the judgments upon which it relies do not fit easily into this paradigm, essentially because the relevant persons were not parties to, or indeed notified of, the cases. The requirements of cause of action/issue estoppel applicable to *in personam* judgments therefore could not be satisfied.

153. The Maduro Board submits however that this is not the end of the argument. It is common ground that the Judgments are ones which go to status. It contends that they are of a nature which should be treated as a species of, or on a par with, judgments *in rem*. It is common ground that at least four of the Judgments (6, 74, 247 and 67) (i.e. Judgments 4,5,6 and 9 in the table above) were produced via the concentrated method of constitutional review, and that rulings in this form have what is known as *erga omnes* effects; these are said to be similar to those produced by *in rem* rulings in English law. They are not however said to be *in rem* and the Guaidó Board submits (and this is not really in issue) that they fall outside the ambit of the categories of judgments which this court categorises as *in rem* judgments.

154. I pause here to note that of the five Judgments, Judgment 8 (CC/059/22.04.20) is contentious: it is a ruling issued following a demand for constitutional interpretation. It is Prof Brewer-Carías' position is that this decision only has *inter partes* effects applying as a judgment *in personam*. Mr Arias accepts the point as to how the ruling came into being: that this judgment was not produced pursuant to a concentrated method of review but as a result of a demand for constitutional interpretation. Nevertheless, Mr Arias opines that this judgment has *in rem* effects by operation of Article 335 of the Constitution and Articles 4 and 32 of the LOTSJ.

155. Because of the four judgments which are common ground, the question of the status of Judgment 8 is not a dispute which I need to resolve. If I had to do so I would prefer Prof Brewer-Carías' analysis. Mr Arias' approach would seem to

extend the *erga omnes* effect implicitly to every judicial review decision, which seems highly implausible. I prefer Prof. Brewer-Carías' view that such a decision "*only applies to the parties to those proceedings ... [and] declares the unconstitutionality of a provision of a law or statute as it applies in that specific case without annulling the provision itself*". This was a point where Prof Brewer-Carías' greater experience and more in depth knowledge of the relevant provisions was important.

156. Turning back to the main issue, the Maduro Board accepts that what is being sought is to some extent an expansion of the realm in which the concept of recognition would operate. However it points out that the circumstances of this case are unique – this court is being asked to recognise (or not) judgments of the apex court of a foreign sovereign state determining the status of executive acts of state. The nature and extent of the expansion is a topic to which I will return below. In addressing the argument the Maduro Board concentrated on the contention that it would be right for the particular judgments to be recognised, and I shall start with that approach to the question.

157. I will deal first, by way of introduction, with the Guaidó Board submission that the Maduro Board's argument would fly in the face of the leading authority in this area.

158. The case of *Carl Zeiss Stiftung v Rayner & Keeler (No.2)* [1967] 1 AC 854 is of course the leading authority in the area of issue estoppel in the context of foreign judgments. It is treated as a case dealing with *in personam* judgments. However when the facts are examined an interesting factual parallel is discernible.

159. In that case the Carl-Zeiss-Stiftung, a charitable foundation, had been incorporated in 1896 under articles of constitution at Jena, which was in the district of East Germany that was then the Grand Duchy of Saxe-Weimar. The foundation was administered by a "special board" and the two businesses which it owned—one an optical works (founded in 1846 by Carl Zeiss) and the other a glass works—were run each by a separate board of management. Its constitution provided that if political changes were made, the rights and duties of the foundation were to be made over to the "highest administrative authorities in Thüringia". Time passed. In 1945 when Thüringia was occupied by American forces, a new provisional government of Thüringia was set up and its Minister of Education became the special board. In July 1945, by agreement between the allied powers, East Germany, including Thüringia, was taken over by the Russians. In 1949 the U.S.S.R. set up the German Democratic Republic to govern that part of Germany. In 1952 the German Democratic Republic abolished the state of Thüringia and the Council of Gera assumed the position corresponding to the Minister and acted as the special board.

160. The action in England was a passing-off action for an injunction to restrain the respondent from using the word "Zeiss" and from selling optical or glass instruments under that name unless the goods were those of the appellant. It was issued in the name of Carl-Zeiss-Stiftung as plaintiff on instructions given on authority derived from the Council of Gera. Thus the authority of the English solicitors to issue the writ in depended on the authority of the council to act as the special board of Carl-Zeiss-Stiftung, the appellant. The Federal High Court in

West Germany had meanwhile held, in other litigation, that the Council of Gera had no authority to represent the foundation. The House of Lords (Lord Wilberforce dissenting) held that there was no identity of parties or privity of interest for the purposes of issue estoppel, since the English solicitors for the appellant were not parties to those proceedings and there was no privity as regards the English solicitors: Lord Reid at 911E-F; Lord Hodson at 928C-929B; Lord Upjohn at 942; Lord Guest at 937C-F.

161. Mr Fulton QC submitted that if the Maduro Board's argument in this case were correct, the result in *Carl Zeiss*, which was also about the power of a quasi-governmental authority to give instructions, should have been different. While I agree with him that the approach there gives pause for thought, on this part of the argument I would agree with Mr Lissack that the nature of the argument there specifically related to something more obviously akin to an *in personam* judgment. There had been a determination between the parties. The concept of an *in rem* or *erga omnes* status was not live. The case, and its similarities, does however point to the need for a clear understanding of why a question of status should not be so treated.

162. Turning then to the question of the application of the *in rem* rule to these judgments I am not persuaded that the expansion for which the Maduro Board contends is appropriate. Indeed I consider that, as the Guaidó Board contended, the argument appears to be contrary to principle.

163. There are essentially two reasons for this conclusion. The first is that Maduro Board's arguments rely on analogising judgments *in rem*, and judgments *erga omnes*. As Mr Lissack put it in closing "*It's hard to think how in practice there could actually be a working difference in effect between the principle of erga omnes, ..., and in rem, a difference of Latin, but other than that very, very much the same effective principle*."

164. That broad brush approach is not in my assessment an appropriate way forward. A judgment *in rem* is a very particular thing. Dicey formulates it in this way at [14-109]:

> "A judgment in rem is a judgment whereunder either (1) possession or property in a thing is adjudged to a person, or (2) the sale of a thing is decreed in satisfaction of a claim against the thing itself. The term is used also to describe (3) an adjudication as to status such as a decree of nullity or dissolution of marriage, and (4) a judgment ordering property to be sold by way of administration in bankruptcy or on death…"

165. That such a judgment stands in a unique position is emphasised by the rules in relation to recognition of *in rem* judgments. As Dicey points out at [14-109]

> "But unless the foreign judgment claims to operate in rem, it cannot be recognised in England as a judgment in rem. By contrast, if the judgment might be construed as a judgment in rem, but in which quality it would not qualify for recognition,

> yet also contains orders which require a person to pay money or otherwise perform acts, it may be recognised or enforced to that extent as a judgment which binds the parties in personam if it satisfies the requirements of Rule 43."

166. While I am not entirely convinced that the judgment cited for the first proposition in this passage - *Air Foyle v Center Capital* [2003] 2 Lloyd's Rep 753 - says exactly what the learned editors of Dicey say that it does, the case does in my judgment indicate that this court will be unlikely to accede to a submission that *in rem* equivalence should be granted to judgments of a court, even couched in *erga omnes* terms, when the pronouncing court would not accord it *in rem* status.

167. *Air Foyle* concerned a Russian registered Antonov aircraft sold pursuant to a Dutch Court auction. There was a competing claim to ownership, the defendants asserting that they had bought the aircraft direct from its owner between the date the Netherlands court ordered the sale, and the date of the auction. Proceedings were brought in both Russia and the Netherlands regarding ownership. At the time of sale it was in the Netherlands; at the time of trial it was at Manston in Kent. It was thus that a set of exam questions on cause of action and issue estoppel landed on the plate of Gross J [38]. For present purposes it is not necessary to consider most of them. However the following points are pertinent:

    i) Expert evidence established that "*unlike English law Dutch law has no concept of in rem proceedings"* [19(3)];

    ii) The Dutch sale order was "*binding on the world (erga omnes) … the title passed under the auction likewise had effect erga omnes*." [19(4)];

    iii) It was submitted that the claimants needed to but could not point to a judgment *in rem* to defeat an estoppel created by a Russian Court judgment [31];

    iv) The Claimants argued that the Dutch judicial sale was "*indistinguishable or at least closely akin to an Admiralty Court sale pendente lite in this country and therefore was to be accorded in rem status.*" [44].

168. The Judge said this at [45]:

> "For my part, if viewed simply as a matter of English law and … I find it difficult to discern a distinction, at any rate a distinction with a difference, between the judicial sale in Holland and a sale in this country pendente lite which would attract in rem status; for completeness, I see much force in the argument that this case, viewed purely as a matter of English law, comes on the *in rem* side of the dividing line suggested by Spencer Bower, Res Judicata, 3rd ed., at par. 261 …. The difficulty in Mr. Eder' s way, however, lies in the fact that Dutch law has (as already noted) no concept of in rem proceedings, although, by a different process of reasoning, the experts on Dutch law concluded that AF acquired title to the aircraft *erga omnes*. In these circumstances, albeit with some

> reluctance, I do not think it would be right to treat the June 7 order of the Dutch Court as enjoying in rem status in proceedings in this country when, for conceptual reasons of Dutch law, it could not be accorded that status in Holland."

169. This case is not dissimilar to *Air Foyle* in that it is accepted that Venezuelan law has no *in rem* judgment concept. The Maduro Board's submission was that Mr Arias's evidence that there was an equivalence should be accepted. However Mr Arias's assertion of *in rem* effects seems not to address the question but rather to assume the point based on a general resemblance, rather than any detailed consideration of the potential differences of the concept.

170. As a matter of principle and on the authorities I consider that it is not right that it is the same thing – *erga omnes* literally means "towards all" or "towards everyone" and thus it is a term *prima facie* directed at generally owed obligations. While the concepts may sometimes elide, *Air Foyle* demonstrates that it is clear that they do not necessarily do so - and also that the Court will be unwilling to accord *in rem* status to a judgment which however expressed is not of its nature *in rem*.

171. The Maduro Board submitted that I should conclude that the cases could be distinguished on their facts, in particular in the light of the international dissemination involved in these judgments. As to this, it was submitted that I should infer that the judgments were intended to have worldwide effect because of the wide international dissemination of this judgment and the disclosure through the Ministry of People's Power for Foreign Relations to the different embassies and diplomatic representations accredited to the Bolivarian Republic of Venezuela. It was also submitted that if necessary I should conclude that *Air Foyle* was wrongly decided.

172. I do not however consider that the factual distinctions between the cases (which are evident) are material to the reasoning. Plainly Gross J was dealing with a very similar question to the one with which I grapple in the sense of an *erga omnes* judgment emanating from a jurisdiction with no in rem concept. Equally plainly he was viscerally inclined towards the argument which the Maduro Board now makes. However he felt constrained as a matter of principle to the decision he reached.

173. Nor am I at all attracted by the submission that the decision of Gross J was wrong. No real reasoning was given to support this proposition. Further the reasoning of Gross J evinces a cautious approach which is echoed in the recent judgment of Flaux CHC in *Ward v Savill* [2021] EWCA Civ 1378 at [73]-[74]

> "It is precisely because a judgment in rem is conclusive against the world, that the circumstances in which Parliament grants jurisdiction to make such judgments are rare. As Hickinbottom J said in *R(PM) v Hertfordshire CC* at [42]: '*Given the overriding nature of judgments in rem, the circumstances in which a court or tribunal is given such a power or jurisdiction are understandably rare, and usually granted in the clearest of terms.*' … the same concern as

> Hickinbottom J identified, to avoid procedural injustice through a party being bound by a judgment without an opportunity to be heard, should dictate a similarly cautious approach to the question whether, as a matter of common law or in equity, a judgment takes effect *in rem*."

174. That caution can also be seen in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 at [129] where Lord Collins indicated that any change in the settled common law rules as to recognition or enforcement of foreign judgments "*is a matter for the legislature, not for judicial innovation*". I entirely accept the Maduro Board's submission that this case has to be treated with a degree of caution given that this was a decision in a totally different context and with potentially substantial ramifications. However even the limited dissent of Lord Clarke gives the Maduro Board no real help since the extension which he would have allowed was in a very different context and far more limited in extent than the extension which the Maduro Board proposes.

175. Nor do I consider that international dissemination can change anything. A judgment has the status it has. A court or an executive cannot change its status by wide circulation; nor can it do so by desire.

176. I might have been persuadable on this point had it been the case that the evidence established either that the judgments were of their nature the exact equivalent substantively and procedurally to the cases which are recognised as *in rem* or that they were only a very small deviation away. However the evidence is to the opposite effect. It is conceded that there is no exact equivalence. On the evidence one important feature of an *in rem* judgment is missing: the evidence of Prof. Brewer-Carias was clear in cross examination that the *erga omnes* principle was territorial in its effect:

> "my comment on the similarity is because they have *erga omnes* general effect. These are matters of general effect, but decisions in Venezuela, as it were in general, are territorial [in] ambit. We are much modest [and do not make] decisions for all the world."

177. A further distinction might be said to be that in general the judgments recognised as *in rem* are ones where interested parties are represented; which is not the case here.

178. I therefore conclude that the *erga omnes* nature of the decision cannot give it *in rem* equivalence so as to bring it within the existing rules or to permit me to regard it as a purely nominal expansion.

179. This takes me to the second difficulty with the Maduro Board's submissions. It is that its submission that it was advocating a minor and incremental expansion has been demonstrated in argument to be rather a long way from being the case.

180. The essence of the submission as made was to juxtapose two passages with the judgments sought to be recognised and to say: in the light of these passages, these judgments should be recognised.

181. The two passages were:

i) Dicey at [14-082], which says "*The rules of common law ... as to jurisdiction are not necessarily exclusive. Like any other common law rules, they are no doubt capable of judicious expansion to meet the changing needs of society.*"

ii) Lord Mance in *Pattni v Ali* [2006] UKPC 51 [2007] AC 85 at [21]:

> "a judgment in rem in the sense of rule 40 is thus a judgment by a court where the relevant property is situate, adjudicating on its title or disposition as against the whole world (and not merely as between parties or their privies in the litigation before it). The distinction is shortly and accurately put in Stroud's Judicial Dictionary, 7th ed (2006), p 2029, cited (in an earlier edition) by Deemster Kerruish:
>
> "A judgment in personam binds only the parties to the proceedings, as distinguished from one in rem which fixes the status of the matter in litigation once for all, and concludes all persons …"
>
> Jowitt's Dictionary of English Law, 2nd ed (1977), pp 1025–1026, contains fuller definitions to the same effect:
>
> "A judgment in rem is an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, it precludes all persons from saying that the status of the thing or person adjudicated upon was not such as declared by the adjudication. Thus the court having in certain cases a right to condemn goods, its judgment is conclusive against all the world that the goods so condemned were liable to seizure. So a declaration of legitimacy is in effect a judgment in rem. A judgment of divorce pronounced by a foreign court is in certain cases recognised by English courts, and is then a judgment in rem … Judgments in personam are those which bind only those who are parties or privies to them; as in an ordinary action of contract or tort, where a judgment given against A cannot be binding on B unless he or someone under whom he claims was party to it."
>
> Cheshire & North, Private International Law, 13th ed (1999), pp 423–234, Phipson on Evidence, 16th ed (2005), para 44–10, and Spencer Bower, Turner & Handley, Res Judicata, 3rd ed (1996), paras 234–235, are to like effect. The last work suggests, at para 234, that '*it would have been clearer if decisions in rem and in personam had been named decisions inter omnes and inter partes'*."

182. The Maduro Board looks to the latter for a broader statement of what is an *in rem* judgment and to the former as support for the willingness to embark on the expansion which it seeks. On the *Pattni* point, I do not consider that Lord Mance was here endeavouring to redraw the ambit of the rule as stated in Dicey. This passage must be taken in the context of the case, where it is not ratio, but features as part of the explanation leading up to a consideration of the different effect of determinations concerning property rights where the court was considering whether a particular determination as to property rights was a determination in rem or *in personam*. It occurred against a backdrop where the jurisdictions involved were entirely common law jurisdictions, familiar with the concept of in rem judgments.

183. One cannot therefore use this passage to push to one side the categories of case where in rem status has been recognised. Once that point is made, the position of the Maduro Board becomes impossible, because one must then discern the nature of the extension sought. I pushed Mr Lissack in argument to set out the extent to which his case required a rewriting of either Dicey Rule 47, or the passage I have quoted above. While doubtless more notice would have enabled greater precision to be brought to bear on the task, the amendment proposed was this:

> "A court of a foreign country has jurisdiction to give a judgment in rem capable of enforcement or recognition in England if the subject-matter of the proceedings wherein that judgment was given ~~was~~ comprises immovable or movable property which was at the time of the proceedings situate in that country, or personal status where the conditions set out in Rule 43 above are met, or the status of acts were situated in the jurisdiction of the foreign court at the time of the proceedings ...."

184. It can readily be seen that this cannot easily be described as an insignificant or incremental expansion; as was tacitly conceded in reply where the point made was "*that may cast the floodgates open a little. To what extent it will or won't is not the answer to whether it is right*". I cannot accept that submission. The original argument, based on limited incremental expansion, placed the case as high as it could go on the authorities. The Court might (just) see its way to a limited incremental expansion. Anything wider is not appropriate or justified by the cases.

185. It is true that the common law has not been completely closed to development on this point and that the Guaidó Board's submission that there is no room at all for judicial innovation may be placing the submission too high; but the authorities at least endorse a very cautious approach, as noted already. Those reasons for caution are only increased if one considers the impact of such additions on other areas which can perfectly well be catered for within *in personam* jurisdiction.

186. Further the previous common law treatment does not support any wider application of common law rules. The careful accretion of the types of cases which are accorded *in rem* status by these courts rather reinforces the need for caution. For example the development reflected in Dicey [14-109 at (3) was one in relation to the recognition of foreign divorce proceedings which has since been

encapsulated in legislation. Its use outside this specific area was roundly rejected in *Rubin* at [110].

187. While matrimonial cases are not the only place where decisions as to status are considered to operate *in rem* – as noted by Briggs Civil Jurisdiction and Judgments (7th ed. 2021) at p 794 and Phipson on Evidence (20th ed, 2021) at [43-14] what one sees are precise, defined, limited jurisdictions, in all of which a need has been demonstrated for the particular expansion. That is some considerable distance from what the Maduro Board would propose here.

188. I would therefore in any event reject the Maduro Board's submissions. However I would also consider that further ground for caution is given by the fact that what is sought here has two particular features:

    i) Here the court is operating within the paradigm of an established foreign Act of State to which an exception is sought to be established.

    ii) What is sought to be recognised are judgments where parties affected were not notified of or able to make representations at the hearing.

189. It follows that I conclude that there is no basis for the recognition of the Judgments upon which the Maduro Board relies. The Guaidó Board therefore succeeds. There will need to be argument about whether the declarations sought now follow.

190. In the light of these conclusions the defences to recognition become academic, and I will deal with them fairly briefly.

ISSUE 3: ONE VOICE

191. The backdrop to this issue is the "one voice" doctrine, summarised by the Supreme Court thus at [170]:

> "the public policy of the forum will necessarily include 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."

192. The essence of the disagreement between the parties here can be summarised as follows.

    i) The Maduro Board submits that the proper approach to be taken is that, so long as the non-recognition of Mr Guaidó as President is not a necessary part of the reasoning supporting a conclusion within a Part 1 Judgment, that conclusion should stand;

    ii) The Guaidó Board submits that a judgment will necessarily conflict with HMG's recognition if it does not explicitly or implicitly take as its starting point that the President (or government) is the same as that recognised by HMG.

193. It is fair to say that these arguments follow from slightly nuanced characterisations of the issue in the judgment of the Supreme Court. So the Maduro Board points to this passage at [170]:

> "As a result, if and to the extent that the reasoning of the STJ leading to its decisions that acts of Mr Guaidó are unlawful and nullities depends on the view that he is not the President of Venezuela, those judicial decisions cannot be recognised or given effect by courts in this jurisdiction because to do so would conflict with the view of the United Kingdom executive…"

194. The Guaidó Board in turn relies on Lord Lloyd-Jones in the Supreme Court Judgment at [177]:

> "no recognition or effect could be given to a judgment of the STJ if and to the extent that to do so would conflict with the recognition by HMG of Mr Guaidó as the interim President of Venezuela."

195. On this issue I am in no doubt that the approach of the Guaidó Board is correct. This conclusion can be reached either from a review of the authorities, or from independent reasoning in the light of the nature of the "one voice" doctrine.

196. So far as concerns the Supreme Court's decision, I am not even persuaded that the dichotomy which the Maduro Board argues for exists – as was noted in argument the introduction at [177] of "*it must be emphasised once again*" actually indicates that Lord Lloyd-Jones intended the two formulations to be read as one. I would therefore read the test set out in the two passages as requiring this court to look at the decisions holistically, taking into account both reasoning and effect. I do not regard it as one which is focussed on a dissection of the reasoning. Certainly the formulation which the Maduro Board now advocates moves the dial onwards from what Lord Lloyd-Jones said; he may have referred to reasoning, but in the context of it "*depending on the view*". That is a much less exclusive test than "*non-recognition … is a necessary part of the reasoning.*". To the extent that there is a distinction, the passage at [177] of the Supreme Court's judgment should in my view be regarded as the source for any test. The passage at [170] introduces the concept and the argument. The passage at [177] is the one which sets out the scope of the issue before me.

197. Further the Supreme Court's analysis does not stand alone. In *Mahmoud v Breish* [2020] EWCA Civ 637 [2020] 1 CLC 858 the Court was grappling with competing claims to the chairmanship of the Libyan Investment Authority. At [41] Popplewell LJ put the test thus: *"where the alleged unlawfulness does not take as its starting point that the government is the government, it inevitably conflicts with the recognition given to the government by HMG and engages the one voice principle"*. The fact that in that case the arguments were plainly incompatible has no effect on the test.

198. The approach also follows as a matter of principle. This is not an area where the courts should be looking to confine the ambit of recognition or to create lawyerly quibbles as to ambit. The doctrine is a reflection not just of the ambit of the

executive's functions (see the judgment of the Supreme Court [64], [69]), but more fundamentally that of the sovereign's voice. In *Breish* the court reproduced [32] of the judgment of Andrew Baker J at first instance, which puts the point vividly:

> "It is a fundamental principle of English law and an aspect of the unwritten constitutional bedrock of the United Kingdom that it is the prerogative of the sovereign, acting through her government as the executive branch of the state, to decide whom to recognise as a fellow sovereign state and whom to recognise and treat as the executive government of such a state. The courts, as the judicial branch of the state, must accept, adopt and follow any such recognition as the state must speak with 'one voice' in such matters. Where, therefore, a court, considering a case in which it is relevant to ask who is the government of a foreign state, is informed by the Foreign and Commonwealth Office ('the FCO') in unequivocal terms that HMG recognises some particular persons or body as such, that information must be acted on by the court as a fact of state. Such an unequivocal notification from the FCO is, in substance, the voice of the sovereign as to a matter upon which she has an absolute right to direct the answer."

199. In one sense this quote encapsulates why the right answer has to be the "starting point" analysis. There is nothing in the arguments raised by the Maduro Board on these authorities which impacts on that.

200. Further once the analysis is played out into the facts one can also see why the "starting point" analysis must be the right answer. As the Guaidó Board explained in their written skeleton, the contrary position would lead to huge difficulties in disentangling elements of the foreign court's reasoning and also to consequences which would appear incompatible with the position on recognition – and which would effectively undercut a number of the authorities:

> "For example, once HMG had recognised the revolutionary Soviet government of Russia, an English Court would not then have recognised a decision of a Tsarist judge who purported to nullify the Soviet confiscations of private property. Similarly, had there been a judgment in 1939 from a court in Barcelona that the actions of General Franco's government in Bilbao were invalid then it would have been ignored in this jurisdiction, because HMG had by then chosen to recognise the Franco government's sovereign power over the Basque region. By the same token, nobody would have suggested that an English Court should recognise a judgment of an Iraqi judge sitting in Kuwait following Saddam Hussein's unlawful invasion and occupation in 1990."

201. This passage evokes the well known cases of *Luther v Sagor* [1921] 3 KB 532, *Banco de Bilbao v Sancha* [1938] 2 KB 176, and *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883.

202. The approach urged by the Maduro Board of deconstruction of the foreign court's judgment also sits uneasily with the cautions expressed in the context of recognition as regards the limited understanding which a court in jurisdiction A may have of the approach of courts of jurisdiction B (for example see Lord Reid at p 918 in *Carl Zeiss:* "*..there appear to me to be at least three reasons for being cautious in any particular case. In the first place, we are not familiar with modes of procedure in many foreign countries, and it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or obiter."*)

203. In a sense that decides the question. It was not suggested by the Maduro Board that if I concurred with the "starting point" analysis there was still any scope for the judgments not being out of step with the "one voice" doctrine. And given the terms of at least some of them and of the agreement of the experts (referenced above) as to what they declare that is unsurprising. The Maduro Board's submissions rather focussed on the question of whether, if its test was right, the reasoning was severable.

204. However there is to some extent a cross-over between the two points because it might be said that absence of severability tends to correlate with the position of Mr Guaidó being the starting point. In closing the Maduro Board urged me to look carefully at the judgments, and provided me with a table summarising the reasoning in each decision and (in essence) highlighting (i) the limited extent to which Mr Guaidó actually features (eg. "*The judgment expressly mentions Mr Guaidó only twice as usurping functions of the Presidency*.") and (ii) other reasoning which it is said does not depend upon the status of Mr Guaidó (eg. "*NA cannot assume the governmental functions which are presidentialist in nature…the transition statute is a grotesque violation of the principle of separation of powers which not only a) disregards that Maduro as President and the Government but b) assumes for the NA powers that do not correspond to the NA under the constitution…*").

205. To the extent that this does matter I would again concur with the arguments advanced for the Guaidó Board that the position of Mr Guaidó is inextricably linked to the reasoning of the cases. There may be cases where an executive act could be challenged without impugning the position of the actor – for example if the law of Venezuela required not simply a declaration of an executive act, but also public promulgation in a particular way, and the challenge was based on that promulgation having been completely omitted). But in this case the issue is about the Executive Acts as acts of Mr Guaidó. To some extent it may be said (as the passage above illustrates) that the reasoning comes from a Maduro-centred place as opposed to focussing on the acts – it takes as a given the legitimacy of Mr Maduro's presidency; but that is an approach which as a logical correlate assumes the illegitimacy of Mr Guaidó's position. That proposition is interwoven throughout the judgments; it is part of the warp and the weft of the argument.

206. The main way that the analysis can produce a result which had a reason other than Mr Guaidó's position is by focussing on the position of the National Assembly. This was where Mr Arias's analysis focussed.

> "since such acts of the National Assembly in contempt are null, non-existent and ineffective, so are all the presumed executive acts that may follow the null acts of the Assembly: all, without exception, that are a consequence, direct or indirect, of those; that is to say, those which may be issued, derived from the supposed legislative acts of the National Assembly in contempt, namely (decrees, resolutions, agreement, statutes, etc.). Thus, it is considered that they are void of absolute nullity and lack legal effects, are ineffective and non-existent, by virtue of the state of contempt incurred by the National Assembly"

207. This was the way that the point was put to Prof. Brewer-Carías:

> "All the rulings derive from the conclusion of the Constitutional Chamber, preceded by the Electoral Chamber, that the actions of the National Assembly are null, as you put it, and their view as regards Mr Guaidó, two separate causes."

208. The problem with this is that these are not two truly separate causes, in the sense that the same point actually underpins both of these.

209. Similarly while it is common ground that the Judgments "*declare the acts of Mr Guaidó null, repudiate his status as president of Venezuela, and declare he had usurped that position, without prejudice to other grounds contained in the ruling*" the words "without prejudice" do not connote a separate and distinct analysis, but cover the difference in view between the experts as to whether there is a separate and distinct analysis.

210. On this, the views of Prof Brewer-Carías are to be preferred. The fact that the acts of the National Assembly predate those of Mr Guaidó as Interim President do not make his acts qua Interim President any less the starting point for the STJ conclusion that they are ineffective. The Post-2019 Judgments (i.e. Judgments 4-10 in the table above) do not have a basis entirely separate from any issue as to whom carries the title of the incumbent President of Venezuela. The argument as to the National Assembly is not a separate basis for striking down the Executive Acts, which are acts of Mr Guaidó; what it is, is a step on the way to Mr Guaidó's position. The position of Mr Guaidó and the position of the legislature which put him in that position is incapable of being distinguished or disentwined. They are both part of a single common theme.

211. The STJ sees Mr Guaidó's acts as invalid because it sees him not as Interim President but as a private citizen; and it sees him as a private citizen because it does not recognise the acts of the National Assembly which he would say gave him that power. It is not (as the Maduro Board submitted) that HMG recognises Mr Guaidó as Interim President and not as leader of the National Assembly; Mr Guaidó's claim to recognition comes not from anything innate to him, but via the National Assembly. Therefore by impugning the National Assembly's actions, the STJ impugns Mr Guaidó's appointment which forms the basis of his recognition. And again the judgments are richly littered with statements which either state that Mr Maduro is President, or which assume that he is so (and that

his appointments are valid). I therefore accept the submission that this is not a "blue pencil" exercise. This is a case where the nature of the arguments are such that they are binary, and the different manifestations of that binary view are inseparable the one from the other.

212. I would add that the fundamental nature of the disagreement as to the incumbent President is illustrated by the fact that the cases have proceeded in the CC-STJ, denouncing the conduct of a private citizen, perceived to be engaged in a subversive criminal enterprise, rather than in the Political Administrative Chamber "PAC-STJ" as would have been the case if it was purporting to quash the acts of a Venezuelan President.

213. My conclusion as to the enmeshed nature of the arguments, and the lack of separability is also to some extent supported by the argument on natural justice advanced by the Maduro Board by reference to File 17: if it were right that the various judgments were (whether properly or not) annexed to Case 2 of 2017 as "*ex officio pure matter of law reconsideration of issues within the file 17 itself*" it would seem to follow from that that someone within the STJ itself considered that the issues in the cases were completely enmeshed with each other.

214. I am not entirely sure of the correctness of the submission for the Guaidó Board that *"as a matter of principle, a foreign court whose judgments are sought to be recognised must be on the same side as the person(s) expressly recognised by HMG. If, therefore, the foreign court holds a different view to HMG about the identity of, as the case may be, the President or government then such a court will by definition be on the 'wrong' side of the dispute*". As the preceding passages have explained I agree that this is correct in this case in relation to these issues. It may well also be that in this particular context (validity of executive acts) the percentage of decisions from the wrong starting point is likely to be strikingly high. But I would not think it conceptually impossible for a recognition question to arise for which the starting point of assuming Maduro incumbency is logically and legally irrelevant.

215. Finally I should deal with the argument raised by the Maduro Board that the starting point analysis is out of step with numerous other contexts, where partial invalidity and the separation of parts of a court or tribunal's reasoning is endorsed by the Court. Those contexts include where a judgment consists of a penal judgment and an award of civil damages, enforcement of foreign judgments under the Protection of Trading Interest Act 1980, under the Lugano Convention and in the context of the enforcement of arbitral awards. It was submitted that coherence and consistency should direct a result which harmonises with these other contexts.

216. On this point, while the note of caution is obviously a sound point to consider, I do not conclude that it affects the reasoning. In all of those contexts the issues are far removed from the kind of existential debate which is in issue here. Often (for example the PTIA or penal vs civil damages contexts) there are two distinct heads of damages arising from two different analyses. Severance there is simple.

217. I would therefore express my conclusions on this issue thus:

i) The correct approach to the Guaidó Board's defence is that it bears the burden of establishing that the judgments in question take as their starting point a view as to the respective roles of Mr Maduro and Mr Guaidó which from the perspective of HMG is incorrect.

ii) It is common ground that the Judgments "*declare the acts of Mr Guaidó null, repudiate his status as president of Venezuela, and declare he had usurped that position, without prejudice to other grounds contained in the ruling*".

iii) Thus, although they do other things as well, the logic of the answer in each case is dictated by the view that Mr Guaidó is not President. They therefore proceed from the wrong starting point.

iv) The use of the words "without prejudice" in the Joint Report does not connote a separate and distinct analysis.

v) The fact that the acts of the National Assembly predate those of Mr Guaidó as Interim President do not make his acts qua Interim President any less the starting point for the STJ conclusion that they are ineffective.

218. Accordingly if, contrary to my previous conclusion the Judgments would prima facie fall to be recognised the court should not recognise them because to do so would be in conflict with the "one voice" doctrine.

ISSUE 4A: NATURAL JUSTICE

219. On the first sub-issue the case advanced is that the proceedings in the STJ which led to those Judgments involved the clearest possible breaches of natural and substantial justice and a denial of a fair trial under Article 6 of the ECHR, in that:

i) none of the Guaidó interests (i.e. interim President Guaidó, the members of the Guaidó Board and the successive Special Attorneys) were either formally served with or otherwise given prior notice of the STJ proceedings which culminated in the Judgments;

ii) the Guaidó interests therefore knew nothing about the proceedings until after the Judgments were issued and were given no opportunity to be heard, despite the fact that their rights and obligations were directly affected;

iii) the Guaidó interests were not represented and there was no argument before the STJ in support or defence of their positions; and

iv) the breaches were compounded by the STJ's explicit encouragement to other State organs to take action against the Guaidó interests with a view to potential criminal liability.

220. The Guaidó Board submits that there are obvious problems, both as a matter of English Law and by reference to Article 6.

221. So far as the facts are concerned it is worth pausing here to note that there was effectively no contest. It is the case that there was no prior service or notice of the proceedings, and that the Guaidó Board, the Special Attorney General and Mr Guaidó had no opportunity to be heard before a final judgment was pronounced in any of the Judgments. It is also the case that it is common ground that the decisions in question had a very significant impact on the rights of the Guaidó Board (insofar as the Guaidó Board had any rights - which was contested by the Maduro Board).

222. Although the Maduro Board urged caution and contended that I should only find a breach if the denial of natural justice was "flagrant" by reference to *USA v Montgomery (No.2)* [2004] 1 WLR 2241, on the facts there was really very little indeed which could be urged, and the very light touches upon the subject in written and oral submissions were telling.

223. It is of course the case that caution is necessary. Both sides relied on Cheshire, North and Fawcett (15th ed) at p 577 dealing with absent defendants:

> "The English courts are reluctant to criticise the procedural rules of foreign countries on [due notice] and will not measure their fairness by reference to the English equivalents but, if the mode of citation has been manifestly insufficient as judged by any civilised standard, they will not hesitate to stigmatise the judgment as repugnant to natural justice and for that reason to treat it as a nullity."

224. Mr Lissack reminded me that in proceedings involving a decision affecting a large number of individuals, notably those conducted before constitutional courts following a challenge to legislation, it is not always required or even possible that every individual concerned is heard before the court. He directed my attention to the decision of the European Court of Human Rights (First Section) in App No. 33244/02 *Gavella v Croatia*:

> "However, the Court has already held that in proceedings involving a decision affecting large number of individuals, notably those conducted before constitutional courts following a challenge to legislation, it is not always required or even possible that every individual concerned is heard before the court (see Roshka v. Russia (dec.), no. 63343/00, 6 November 2003, and Wendenburg and Others v. Germany (dec.), cited above). The Court sees no reason to reach a different conclusion in the present case."

225. This is quite true. But there is a significant difference between "not everybody" (endorsed by *Gavella*) and "absolutely nobody". Further here, since what was challenged were executive acts rather than generally applicable legislation, the pool of those affected was actually not anywhere approaching the unmanageable levels apparently contemplated in *Gavella*.

226. Nor is there an escape route via an argument as to available recourse – a point on which the Maduro Board touched by reference to the submission that the question as to whether the existence of an available remedy in a judgment-granting country

prevents a breach of substantial justice was left open by the Court of Appeal in *Adams v Cape Industries plc* [1990] Ch 433 at 568-569. Mr Arias suggested that there was nothing preventing persons representing the National Assembly from participating in cases brought before the STJ without being parties to them joining in *motu proprio*,or requesting an extension or clarification of the ruling.

227. The reality is that there was no route for Mr Guaidó, or the Guaidó Board or the Special Attorney General, to challenge these judgments. As Prof Brewer-Carías explained, a summons or notification was not made in accordance with article 135 of the Organic Law of the STJ to allow the authorities that issued the annulled acts to participate in the proceedings and defend their actions, and to allow all other interested parties to appear.

228. Indeed Mr Arias, in the context of defending the failure to notify, was clear that the court would not have had any regard to their submissions because the court would not have regarded them as having any relevant status. While a somewhat bizarre (bordering on "Through the Looking Glass") argument in that context, it did provide telling evidence against any argument that other remedies existed. That was reflected in the granular legal evidence on Article 252 of the Code of Civil Procedure and the cases on it, which show clearly that there is a possibility for parties to seek correction or clarification of a judgment – but that does not extend to non-parties. The other provisions on which Mr Arias relied (Articles 51 and 26 of the Constitution) seemed to have no relevance to the point. As for the joinder motu proprio Mr Arias did not explain how this could be done if the relevant persons were not notified of the hearing.

229. There might be some hesitation on the grounds of comity to pursue this line of reasoning if it were the case that Venezuelan Law took a rather different approach to the right to be heard; one would then have a basis for saying that that was evidence of another civilised standard which should therefore be recognised. In those circumstances what the English Court regards as fair might have to be nuanced or to give place to the considered alternative of another jurisdiction. However Prof. Brewer-Carías' evidence was clear – Article 49 of the Constitution provides an "inviolable" right to legal assistance and defence, including the right to be heard. This is then reflected in the procedural rights set out in for example Articles 135 to 151 of the LOTSJ and also in the process whereby if an oral hearing is dispensed with in cases where there is no need for a fact finding stage interested parties are still enabled to file written submissions ("*acto de informes*").

230. On this point too I found Mr Arias' evidence less cogent and persuasive. He did not really grapple with the fallback process where an oral hearing is dispensed with.

231. There might also be some basis for hesitation if the conclusion were that there was something in the nature of the decision, some aspect of its (*ex hypothesi* at this stage) *in rem* nature which would render the usual rules of natural justice inapplicable. But the Maduro Board could not put it so high. At best it was said that the nature of the Part 1 judgments, as judgments with *erga omnes* binding effects, going to the status of a central bank, was such that the importance of attendance and being heard is greatly reduced. That however does not go as far as the Maduro Board needs it to go, and in fact goes no further than the argument

by reference to *Gavella*. It may not be necessary for all to be heard; the importance of attendance may be reduced – but that does not mean that it is acceptable to decide such matters without any representation by or even notification to the main interested parties – or even one of them. And that brings us back to the point made by Mr Fulton in the context of *in rem*, namely that in general *in rem* judgments as we understand them are reached *inter partes*, with arguments from those affected.

232. Nor was I persuaded that the "File 17" process which appears to have been adopted, namely to annex most of the Judgments to the decision CC/2/11.01.2017 treating them as an ex officio pure matter of law reconsideration of the same issues, provided an answer. On their face the majority of the Judgments are cases of "concentrated judicial review". As a matter of Venezuelan law such an action must be commenced via a popular action, and cannot be commenced ex officio. That approach carries with it a structure which incorporates representation. The original commencement of the action in CC/2/11.01.17 by an individual cannot provide a sufficient framework or remedy however because on its face that action concerned entirely different acts than the ones struck down by the later decisions.

233. While the STJ can initiate proceedings of its own motion (with no originating party) via Article 336(6) of the Constitution, and via that route Article 25(6) of LOTSJ, to review ex officio via the concentrated constitutional review method emergency decrees (ie decrees by the President declaring a State of Emergency/Exception), that is a very specific case with an obvious reason for the power to have been conferred in order to prevent the abuse of those potentially far-reaching powers. It is not on its face a power which would seem likely to be applicable in this case. It was Prof Brewer-Carías' opinion that it was not applicable, and I accept that evidence, which was also broadly the evidence of Mr Arias. I also accept Prof Brewer-Carías' evidence that the other situations in which the STJ can act ex officio (review of decisions declaring inapplicability and review of annulled statutes) each have their roots in proceedings initiated by a party. I prefer his evidence on this point (which was clear and with a direct link to the statutes) to that of Mr Arias – it was not clear from Mr Arias' report by what means given the underlying provisions this apparently broader exercise of ex officio powers was "legally feasible", as he suggested.

234. Furthermore I incline to the view which Prof-Brewer-Carías also expressed that, since the approach of annexing resulted in an ex officio consideration rather than a requirement of a popular action (which should have occurred), that was probably done in error by the clerks of the Court. The only other alternative, to which Prof Brewer-Carías did not incline, was that it was an intentional process to defraud the judicial process:

> "I don't want to believe that this can be an intentional process of defrauding judicial procedures so I think it's an error..
>
> I don't think this is an intentional process, because if so it will be a decision to defraud the judicial proceeding."

235. While Mr Lissack urged me to disregard this evidence, stigmatising it as "not impressive" I found it the very reverse – and indeed it was evidence which tended

to contradict the suggestion that Prof Brewer-Carías might not be able to opine independently because of his sufferings at the hands of the Chávez regime. On the legal evidence it would appear that this treatment of these judgments was a real oddity. Prof Brewer-Carías did not leap to the conclusion that there had been a conspiracy. He preferred to see merely an administrative error. There is a logical reason for this – that the question is one of filing and therefore administrative.

236. Finally the Maduro Board was driven back onto the argument that recognition should not be denied on this ground because, even had the requirements of natural justice been complied with, the same result would have eventuated. This is of course an argument which can have some force in limited circumstances in public law; and I have here in mind section 84 of the Criminal Justice and Courts Act 2015/Sections 31(2A) and 31(3A)-(3F) of the Senior Courts Act 1981 which provides that the Court must refuse permission to apply for judicial review if it appears to the Court to be highly likely that the outcome for the claimant would not have been substantially different even if the conduct complained of had not occurred. However that is a rather exceptional (and indeed controversial) case[1], and demonstrably a derogation from the usual position. Even before considering authority it seems unlikely to be applicable in the context of recognition. However in addition there is recent and eminent authority which demonstrates that this is a bad point.

237. In *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455 the Supreme Court was considering an appeal brought on grounds of the judge's conduct, in particular his interventions during oral evidence, and held at [49]:

> "What order should flow from a conclusion that a trial was unfair? In logic the order has to be for a complete retrial. As Denning LJ said in the Jones case [1957] 2 QB 55, … at p 67, "No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it". Lord Reed PSC observed during the hearing that a judgment which results from an unfair trial is written in water. An appellate court cannot seize even on parts of it and erect legal conclusions upon them."

238. To similar effect is *R (Al-Hasan) v Secretary of State for the Home Department* [2005] UKHL, [2005] 1 WLR 688 (a judicial review case concerning prisoners' rights in the context of intimate searches) at [43] where Lord Brown said this:

> "On this question I entertain not the slightest doubt ... Indeed it seems to me clear both as a matter of principle and authority that once proceedings have been successfully impugned for want of independence and impartiality on the part of the tribunal, the decision itself must necessarily be regarded as tainted by unfairness and so cannot be permitted to stand.

[1] See, for example Crummey "Why Fair Procedures Always Make a Difference" 2020 MLR 83(6) 1221-1245 which stigmatises the rule as resting "on a conception of the value of fair procedures that is deeply problematic as a matter of political morality."

> There are decisions to this effect both ancient and modern of the highest authority."

239. Accordingly I conclude that if, (contrary to my previous conclusions) the STJ Judgments did fall to be recognised and did not offend against the one voice principle, the failings in natural justice in each case are serious clear breaches of natural and substantial justice and a denial of a fair trial under Article 6 of the ECHR (in respect of which the label "flagrant" is appropriate) and would render it inappropriate to recognise them.

THE OTHER ISSUES: IMPARTIALITY/INDEPENDENCE AND PUBLIC POLICY

240. I have therefore concluded that the Guaidó Board succeeds: that the STJ judgments are not capable of being recognised, and that if they were there are two good defences which would preclude their recognition. What remains are issues which are analytically very contingent. I will therefore deal with them only briefly.

Issue 5: Public Policy

241. It is common ground that a refusal to recognise a foreign judgment based on residual public policy considerations requires exceptional circumstances. Both parties directed my attention to the judgment of Lord Nicholls in *Kuwait Airways Corporation v Iraqi Airways Corporation (Nos. 4 & 5)* [2002] 2 AC 883 at 1078:

> "[16] …blind adherence to foreign law can never be required of an English court. Exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court. A result of this character would not be acceptable to an English court. In the conventional phraseology, such a result would be contrary to public policy. Then the court will decline to enforce or recognise the foreign decree to whatever extent is required in the circumstances…
>
> [18]… When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws. That would be neither sensible nor logical. Laws may be fundamentally unacceptable for reasons other than human rights violations."

242. The Guaidó Board say that this is such a case; the Maduro Board disputes it. It is fair to say that this was the point pursued with least enthusiasm by the Guaidó Board – it categorised it as "*a fallback position only*". This lack of enthusiasm is entirely correct.

243. I consider that if we had proceeded so far, this defence would have failed. As Mr Lissack noted in opening this point only arises if the court has already concluded that the conditions for recognition have been met, that recognition does not offend against "one voice" and that there are no issues of natural justice which preclude recognition.

244. Against that background, while I would be minded to conclude with the Guaidó Board that political policy does not extend to foreign policy, HMG's foreign policy has not been identified or proved with sufficient specificity to add anything to the doctrines already considered and certainly not to clear the high hurdle which the authorities establish.

Issue 4B: Impartiality and Independence

245. This leaves only the question of the impartiality and independence of the STJ. Although some way down the batting order, it was an issue which has dominated the parties' preparation for trial, with lengthy pleadings/submissions exchanged on both sides. Given the contingent nature of the issue and the parties' earnest desire for a swiftly delivered judgment I will give only brief reasons, which cannot begin to do justice to those submissions. I shall however endeavour to provide a framework answer which is comprehensible to the parties.

246. The starting point is the approach which I should take to this question. Although there was on paper a distinction between the parties as to this, the difference was more apparent than real. The question is one for the ordinary civil standard of proof; but it is (for obvious reasons) approached with considerable caution. Reference was made to the decision of the Privy Council in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 [2012] 1 WLR 1804 at [101]:

> "Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required. But, contrary to the appellants' submission, even in what they describe as endemic corruption cases (i.e. where the court system itself is criticised) there is no principle that the court may not rule….
>
> The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence…"

> … Cases in which justice in the foreign legal system has been found wanting have been rare".

247. The Guaidó Board seeks to establish the systemic partiality and lack of independence of the STJ. It acknowledged that this was an unusual course – that very few cases involve the investigation of allegations of systemic lack of independence of a foreign judiciary.

248. The Guaidó Board elected not to call Part 35 expert evidence because *"there are in circulation a number of recent, relevant and reputable third party reports"*. Its submission, which I broadly accept, is that a Part 35 expert could have done little more than collate and comment on this pre-existing material. Certainly my own sense has been that it would have been extremely difficult to find an expert with the requisite expertise who could cover the range of material authoritatively so as to assist the court. That was the sense which Foxton J also had at the CMC. The Guaidó Board noted that this approach, of relying on third party reports, has also been deployed elsewhere in the judicial system. So for example, in the Administrative Court in the context of *Brown v Rwanda* [2009] EWHC 770 (Admin) the basis for the court's consideration was a 2008 report by Human Rights Watch.

249. However that case and others make clear that where this course is adopted the Court must be alert to properly evaluate the quality and reliability of the evidence given – perhaps the more so because there is no scope for testing the material in cross-examination. Thus in *Brown* the Court commented:

> "We regard it as a formidable dossier, not least because of the disciplined and painstaking manner in which its authors contend with the acute and sensitive issues they set out to address…the Report's sources, whether in the form of interviews or documents are meticulously cross-referenced in footnotes"

250. Similar - but to rather different effect - is Butcher J in *Dynasty Co for Oil and Gas Trading Ltd v Kurdistan Regional Government of Iraq* [2021] EWHC 952 (Comm) [2022] QB 246 at [178, 181]:

> "[178]… there are reasons for circumspection in having regard to general statements as to a country's legal system, even coming from reputable organisations. Unless the court can see what underpins such statements, it is very difficult to place weight upon them. General statements are easily made, but may embody an opinion by the author with which others might not agree, based on evidence which others might not found convincing.…
>
> [181] Professor Gerges referred to, … a number of comments in publications about the judicial system in the KRI. With the exception of two matters, to which I will return, the -relatively short- comments applicable to the judicial system in the KRI are unspecific as to the basis of their statements … or can fairly be said to be "press or political comment".

251. Both Butcher J and (earlier) Andrew Smith J in *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm) [2012] 1 Lloyd's Rep 588 have acknowledged the practical difficulties in this context of presenting direct or primary evidence - but have also placed stress on the need for "*evidence that enables the court to examine their basis, and which is sufficiently detailed and focused to justify them.*"

252. I would add, in the light of the reliance on *Brown* and the points made about this approach by the Maduro Board, that while in some cases (of which this may well be one) such an approach may be the best or only feasible approach, the ready acceptance by the Court of such material should not be assumed on the basis of this authority. *Brown* is a case from 2009 – which is a fairly long time ago. The Administrative Court Guide has since then emerged, and reminded litigants of the need for expert evidence to comply with Part 35; and that caution has been endorsed in a number of cases: see for example *R(Cox) v Oil and Gas Authority* [2022] EWHC 75 (Admin) [46-52]. The result is that where such reports are utilised the Court is likely to interrogate the reports by reference to such points as the specificity of the evidence, the extent to which it reflects direct evidence and the extent to which the sources for that evidence can be ascertained and oriented within the spectrum of reliability/neutrality.

253. Here particular reliance was placed on:

    i) The Detailed Findings of the UN Fact-Finding Mission ("FFM") (established in 2019 by the UN Human Rights Council), especially in its 2020 report (in respect of potential crimes against humanity) and in its 2021 report (with a more specific focus upon the role of the Venezuelan justice system);

    ii) The methodology and overall conclusions of the various third-party reports;

    iii) The more granular detail of specific incidents and actions which support the above conclusions as to the lack of judicial independence;

    iv) The hearsay statements of individuals who can speak from direct experience about the politically motivated interference by the Maduro regime in the judicial process;

    v) The official position of HMG as reflected in its imposition of sanctions upon Judges Moreno and Mendoza and assorted public statements that the STJ is controlled by the Maduro regime;

    vi) The consistency between those views of HMG and the stance of the US, Canada and the entirety of the EU in imposing sanctions on STJ judges; and

    vii) The fact that the breaches of due process (which gave rise to the Judgments which the Maduro Board seek to recognise) were so flagrant that they can only have been deliberate, plus the intensely political nature of the dispute.

254. I pause here to note that his last point is one which needs to be treated with a degree of caution. If I take the view that the Judgments arose in the context of a

serious breach of natural justice it would follow that I conclude that the judgments should not be recognised for that reason. If it is necessary to consider independence/impartiality it is because that argument has not succeeded and the question of breaches of natural justice are unlikely to add anything.

255. Overall I have found it difficult to translate the case advanced by the Guaidó Board into the material I need for this case. That is not to say that such evidence is lacking, but I do concur with the Maduro Board that a considerable amount of the material advanced by the Guaidó Board is not material on which weight can properly be based - and it is hard to sift from that material the substantial evidence base needed.

256. There is much anonymous hearsay evidence. There is much evidence which appears to demonstrate that it comes from someone who is party pris. There is much evidence which bears little if any relation to the judgments of the STJ. I give here a few examples:

    i) Reliance on UN reports: the Guaidó Board implicitly asked me to accept the UN Fact Finding Reports as evidence of the truth of the allegations therein set out. I entirely accept that UN Reports feature towards the upper end of reliability, compared to the kinds of entity referred to by Butcher J. But that does not mean that their reports are infallible, devoid of generalisation or untainted by any form of subconscious or conscious bias. Further many of the pieces of evidence given are anonymised, so their status on the direct/hearsay spectrum cannot be ascertained. Further the methodology of the reports makes clear that they are not the result of on the ground investigation. There is also a good deal of repetition within the reports which creates an "echo chamber" effect.

    ii) Reliance on other reports: A number of these reports are ones which relate to particular agendas (such as human rights – for example IBAHRI's whose mission is to "*promote, protect and ensure the enforcement by the legal profession of international human rights law, within the framework of the State of Law.*") There is no direct relevance of such material. There is a danger that matters peripheral to that concern (e.g. judicial independence generally) are not evaluated in the same way as the central theme. Some of them (e.g. the Law Society submission) are based on research done by campaigning organisations and so the neutral label may not be perfectly reliable.

    iii) Much of the evidence relates to matters outside the STJ. I am not persuaded that evidence (even if direct) about corruption of or pressure on the magistrate level of the judiciary has any real impact on the evidence base as regards the independence/impartiality of judges of Venezuela's apex court.

257. With this in mind I asked the Guaidó Board to focus the submissions for closing on their best evidence. Accordingly they produced another lengthy (but helpful) document, to which the Maduro Board managed, despite time pressure, to respond. Again I should record my gratitude to the parties for this constructive

approach. I will cover the main headings in that document briefly, but in an order which relates to my own approach to the issues following reflection.

258. I start with this question: Do I have cogent evidence that the STJ in 2016, and/or 2019 and/or 2020 was corrupt or lacking in independence?

259. Looking at the material highlighted in that document and the wider evidence base I would not be minded to place much weight at all on the following factors:

i) The Afiuni effect: While by no means wishing to disrespect Judge Afiuni or make little of the sufferings she has undergone, this has no real linkage to the point in issue. Judge Afiuni was not an STJ judge. Her clash with the regime arose out of a case where (contrary to the prosecution case) she respected what we in this jurisdiction call custody time limits and released on bail a person who immediately fled the jurisdiction. Comments were made by a number of politicians which emphatically did not respect the independence of the judiciary (a feature not unknown in many jurisdictions). She was imprisoned for a lengthy period before being tried and is reported to have suffered abuse in prison. After being freed on bail she was convicted of corruption. There are hearsay reports and one direct report of an “Afiuni effect" - of judges being wary of finding against the Maduro regime and of being warned by reference to Ms Afiuni. The Maduro Board evidence did not concur in this evidence. I conclude that the evidence is too slight, and in essence non-existent at STJ level.

ii) Instructions from the Maduro Regime: there are a number of allegations of judges being directed to reach certain conclusions. Numbers are hard to establish, because the sources are mostly unnamed. There is a link to the STJ, limited to the Plenary Chamber in relation to requests to lift the immunity of high profile political actors. Again I conclude that the evidence is too slight and lacking in granularity, and at STJ level relates to a different sort of case in a different chamber.

iii) Removal of Immunity: as regards the STJ this essentially rests on some of the same evidence. As regards the NCA it has no relevance to the STJ.

iv) STJ support for rule by emergency decree: there is evidence of a severe economic crisis having occurred in Venezuela, and the form of rule adopted is apparently within constitutional limits. The appropriateness of the use of those powers is the question; and that appears to be a question of Venezuelan constitutional law which was not the subject of detailed evidence. In particular Prof Brewer-Carías was not asked to opine on any of the impartiality/independence issues. The reliance on the absence of NA approval is essentially bootstraps argument.

v) STJ support for the 2017 Budget: similar points apply.

vi) Interference in 2020 Elections: While I note that this was the subject of an FCDO statement, this appears to relate to Venezuelan electoral law. It was not the subject of detailed evidence and does not bear directly on the issue before me.

260. There are however a number of matters which do seem to me to provide evidence which gives grounds for concern. In particular:

i) Stacking of the STJ: there is clear evidence of an unusual number of retirements at a particular point and testimony from named actors as to the concerning coincidence of the appointments of replacements who were at least thought by the Maduro regime to be supporters (I have in mind here the testimony of the former STJ judge who said he was selected "*because they assumed I would be loyal to the government*". Further the FFM report indicates (though without evidence) that of the 32 STJ Judges, 29 were selected from "Chavist circles". There is direct evidence of at least one appointment being "encouraged" by Mr Maduro. There is direct evidence of one other politically engaged judge. Mr Carrasquero was not able to deny the suggestion that most new appointees were Chavist/Maduro supporters. Having said that: (i) The evidence which goes beyond this (to pressure to retire) is not robust. (ii) Nor is there evidence of causation – the numbers do not suggest the new judges created a majority. (iii) Judges are not immune from personal political preferences and it cannot be assumed that a political preference infects judicial reasoning.

ii) Amazonas Contempt: although this relates to a different chamber, the evidence is clearly traceable back to a named witness. It is clear and detailed. It was not effectively contradicted by the Maduro Board. While it occurs at a point where there were plainly fears of civil war, it provides evidence of the executive attempting to (and succeeding in) influencing the judicial process at STJ level.

iii) Judgments 155-158: These have been the focus of considerable international concern because of the fact that they disregard the separation of powers. Even the Maduro Board concedes that "*some of the STJ's precautionary measures may have overreached.*"

iv) Judge Moreno: While some of the evidence is anonymous and cannot be evaluated, there is a body of evidence, based in part on direct testimony, as well as a 2019 speech by Judge Moreno, which indicates that Judge Moreno (the President of the STJ at the time of the relevant decisions) was not neutral. The quality of the evidence appears to be supported by the imposition of sanctions by the UK on Judge Moreno – a very rare event.

v) The almost entire absence of judgments against the Maduro regime. The Maduro Board has only managed to locate 10 judgments in which the STJ has decided against the Maduro regime.

261. Further (and without relying on the absence of notice aspect of the Part 1 Judgments), I should touch on the File 17 point. As noted above, on its face it would appear that each of these judgments should have been commenced by a separate popular motion and that the decision to docket them as cases following on from CC/2/11.01.17 makes no sense as a matter of law. On one level the logic suggests this is evidence of the STJ acting without impartiality. However it was Prof Brewer-Carías' opinion that this treatment of the file would have been

something done by the STJ clerks and not by the judges themselves. I have on reflection accepted that evidence. I do not therefore count this among the concerns.

262. Does this material taken together amount to "cogent evidence" that on the balance of probabilities the STJ in 2016, and/or 2019 and/or 2020 was corrupt or lacking in independence? As regards 2016 (if relevant), I am satisfied that it does not. As regards 2019 and 2020 the case is very much nearer the line. There is obviously a considerable difficulty about assessing how much weight to give to each of the items which I identify above, and plainly different judges might well assess these differently. I am also not convinced that the means by which the case was advanced – substantially by way of pre-reading, with only time for a fairly fast run though the main points orally – was a suitable means of dealing with such a very serious issue. This approach was necessary in the context of an expedited hearing of fairly short length; but it did not enable me to get as full or deep an appreciation of the points as would have been the case if the argument had been advanced as the main argument, over a longer period, and with witness/expert evidence.

263. In the end it seems to me that each of these points, when considered with due caution bearing in mind the points which can be said to mitigate the concerns, provides a fairly small weight on the scales. I therefore conclude that - had the point been live - I would have held that the hurdle of cogent evidence was not met. Taken overall I cannot regard them as going beyond material giving grounds for concern.