equivalent protection to EU law, denoting structural reform in the US is unlikely in the near future. A more likely outcome will be another "*Quick 'Harbour'*" or "*Shield*" accommodating the US institutional preferences. Such outsourcing of personal data protection in the face of unrestrained surveillance would set the stage for *Schrems III*.

Second, *Schrems II* will have significant implications for data transfers to third countries beyond US, including the post-Brexit UK, because SCCs are relied on by 88 per cent of EU companies transferring data outside the EU. While data transfers using SCC were upheld, *Schrems II* has put data controllers on notice – they must make assessments before exporting data to third countries and monitor those arrangements, suspending data flows if needed. The CJEU also made it clear that the DPAs must use their regulatory and investigative powers confidently, adopting corrective measures where data controllers fail to act or make agreements using SCCs which do not afford "essentially equivalent protection", and challenging European Commission adequacy decisions where DPAs doubt the adequacy of third-country safeguards.

Following the Snowden revelations in 2013, the CJEU has developed a powerful body of jurisprudence which rejects the transatlantic outsourcing of data protection without adequate safeguards. *Schrems II* reasserted the fundamental role of data protection in the EU legal order and transatlantic relations, and emphasised the need for EU to suspend, limit or even block data transfers to countries where fundamental rights are not protected. Full implications of *Schrems II* are yet to be seen but the effects will be felt for many years to come.

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WHO CONTROLS VENEZUELA'S GOLD? DE FACTO AND DE JURE RECOGNITION OF A FOREIGN HEAD OF STATE

"Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela [2020] EWCA Civ 1249 concerned which of two competing boards was entitled to give instructions to the Bank of England in respect of US $1.95 billion in gold reserves held on behalf of the Central Bank of Venezuela (BCV). The Maduro Board was appointed by Mr. Nicolás Maduro, who claims to be president of Venezuela on the basis of having won re-election in 2018. Mr. Juan Guaidó claims that the election was flawed and the office of the presidency vacant; and that, in such circumstances, Article 233 of Venezuela's Constitution provides that he, as the President of the National Assembly, is the interim president

https://doi.org/10.1017/S0008197321000167 Published online by Cambridge University Press

until fresh elections can be held. The opposition-controlled National Assembly enacted the Transition Statute on 5 February 2019, which authorised Guaidó to make appointments to an ad hoc board. However, the Supreme Tribunal of Justice of Venezuela (STJ), which is seen by some as supporting the Maduro Government, has held both the Transition Statute and the ad hoc Guaidó Board "unconstitutional, a nullity and of no legal effect" (at [27], [29]).

On 4 February 2019, the UK Foreign Secretary announced that "[t]he United Kingdom now recognises Juan Guaidó as the constitutional interim President of Venezuela, until credible presidential elections can be held .... The oppression of the illegitimate, kleptocratic Maduro regime must end ... The Venezuelan people deserve a better future" (at [21]). Teare J. of the High Court held that this statement constituted recognition of Guaidó as the constitutional interim president of Venezuela and implied non-recognition of Maduro; and that the act of state doctrine precluded the English courts from examining the legality of the appointments made by Guaidó under the statute. The Court of Appeal allowed the appeal, ruling that the Foreign Secretary's statement recognised Guaidó as president de jure, but the statement is not conclusive as to whether the Government also recognises Maduro as president de facto.

Males L.J., writing for the court, began by observing that recognition can be de jure or de facto but that these terms had been used in different ways by courts and commentators. The so-called *Luther v Sagor* approach defines a de jure government as one that ought to possess sovereignty and a de facto government as one that exercises territorial control in fact, even if unlawfully (*Luther v Sagor* [1921] 3 K.B. 432). On this view, it was possible to recognise one government as de facto and the other de jure. The second approach defines de jure recognition as the "fullest kind of recognition" and de facto recognition as a "a lesser degree of recognition", such as where a new government remains somewhat unstable (*Oppenheim's International Law*, 9th ed. (New York, 2008)). On this view, it is impossible to recognise a separate de jure and de facto government. Males L.J. preferred the *Luther v Sagor* interpretation, but emphasised that the UK Government need not (and probably should not) use these specific terms when recognising a foreign government; what matters is the intention of the Government and the relevant context.

In interpreting the Foreign Secretary's statement, Males L.J. highlighted several important factors – namely that the Foreign Secretary's statement acknowledged that Maduro exercised control over Venezuela but made no reference to Guaidó exercising such power; that Maduro had previously been recognised by the Government; and that the UK had continued diplomatic relations with the Maduro regime but had not entered into relations with Guaidó's representatives. Taking these factors into account, the statement was "ambiguous, or at any rate less than unequivocal" as to whether

the Government continued to recognise Maduro as the de facto president (at [123]). The case was therefore remitted to the Commercial Court so that further questions can be asked of the Foreign Office, or for the court to determine whether the Government impliedly recognised Maduro as the de facto president.

If it is found that the UK Government does recognise Maduro as the de facto president, then this prompts the question whether the acts of the de jure or the de facto ruler should be considered valid for the purposes of instructing the Bank of England. From *Bank of Ethiopia v National Bank of Egypt* [1937] 1 Ch. 513 and *Banco de Bilbao v Sancha* [1938] 2 K.B. 176, Males L.J. concluded that "English law is clear that the acts of a *de jure* ruler … have to be treated as a nullity; thus the appointments made by Mr Guaidó … would be null and void" (at [125]). However, it is not entirely clear that this should be the position in English law, given that the relevant property is located in England (Guaidó Board does not claim any right to control of the BCV's assets in Venezuela); the UK Government has explicitly recognised the de jure ruler as the one who ought to represent the state; and the de jure ruler is authorised to make the relevant appointments under, admittedly contested, national legislation. It may also be arguable that the fact that the property is located in England means that the de jure ruler *does* (or can) have some capacity to enforce rights associated with the property, even if the ruler does not exercise effective territorial control of the state concerned.

At the same time, given that international law requires governments to have effective territorial control, if the UK were to recognise that someone who does not exercise such control is entitled to control state assets abroad then it might be said that this amounts to unlawful intervention under international law. The Maduro Board made submissions to this effect, also arguing that the obligation of non-intervention is part of English law and inviting the court to consider that it constitutes a limit on the prerogative power of recognition. Although it was unnecessary to deal with this argument, Males L.J. had "no doubt" that it was "without substance" (at [132]). He noted that counsel had not provided precedent supporting the claim that recognition could amount to unlawful intervention, and that the editors of *Oppenheim* had explained that "[t]here are many acts which a state performs which touch the affairs of another state, for example granting or withholding recognition of its government … but these do not constitute intervention, because they are not forcible or dictatorial" (at [135]). However, the answer is not as clear cut as Males L.J. suggests. The question of whether and in what circumstances recognition can amount to unlawful intervention is an important point from the perspective of international law. Numerous commentators have argued that premature recognition of an opposition party – such as an insurrection or belligerent group – or of a government in exile may amount to unlawful intervention. In the

above-mentioned paragraph from *Oppenheim*, the editors noted that granting or withholding recognition of "[a state's] government" is not forcible or dictatorial (for the purposes of the rule of non-intervention), but the quotation does not deal directly with the situation in which two people claim to be president, and where there is disagreement internally as to who is the head of government. It is at least arguable that recognition of a government de facto when it does not in fact control the state's territory and when organs of the state have concluded to the contrary is an unlawful intervention in the internal affairs of that state.

Finally, although Males L.J. did not need to deal with the act of state issue (namely, that English courts should not consider the validity of the Transition Statute, which authorised Guaidó to make appointments to the ad hoc board), he made some comments on the argument, two of which are worth mentioning. First, if Guaidó is recognised as the only president of Venezuela, then it would be necessary to determine whether public policy precludes recognition of the STJ judgments declaring Guaidó's appointments and the Transition Statute null and void on the basis that the court itself is insufficiently independent and/or acted contrary to the rule of law. This would require evaluation of the independence of an apex court of another state, something that an English court would likely be slow to do. Second, although the Supreme Court in *Belhaj* left open whether the act of state doctrine applied to executive acts that were unlawful under the law of the foreign state, Males L.J. saw "no justification" for holding that the act of state doctrine requires the English court to treat executive acts "as valid and effective if they have already been held to be null and void under the law of the foreign state concerned" (at [147]). This conclusion is sound, but it means that much turns on whether it is contrary to English public policy to recognise and give effect to the decisions of the STJ on the status of the relevant executive acts.

Although this decision deals with a preliminary issue, it is nevertheless important. It has potentially significant implications for Venezuela, and for the UK's reputation as a place for foreign governments to deposit assets. In doctrinal terms, the Venezuelan situation illustrates the difficulties that arise when states support a new or emerging government while also maintaining diplomatic relations with the government that controls the territory concerned, including the possibility of unlawful intervention. When it comes to the recognition of governments, international law understandably focuses on territorial control and effectiveness, but in some circumstances, this may risk making political change within a state even more difficult to achieve.

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https://doi.org/10.1017/S0008197321000167 Published online by Cambridge University Press