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Caroline Bradley[1]

**Sovereigns in Domestic Courts, Part 2: Materials for Class on Monday April 15**

In this section of the materials I want to look at some unusual cases where sovereigns have found themselves litigating claims in domestic courts.

The first of these examples relates to claims to gold Venezuela had deposited with the Bank of England, in which the courts had to decide between two sets of claimants to be recognized as the representative of the Government of Venezuela. The second relates to Russia's attempt, through the trustee of its rights under a eurobond issued to it by Ukraine, which Ukraine argued had been procured by duress. Ukraine essentially invited the English courts to decide a dispute between two sovereigns. The third relates to the attempt by the Justice Department to enforce AML rules against Halkbank, a Turkish state-owned bank, and involves issues about how sovereign immunity applies in the context of criminal law.

These cases also function as something of a bridge between the sovereign debt material and issues relating to sanctions. Venezuela and Russia are currently both subject to economic sanctions measures, facts which are not directly relevant to the judgments, although the recognition decisions in the UK and in the US relate to the reasons for the economic sanctions against Venezuela. In the Russia/Ukraine dispute the UK Supreme Court notes that economic sanctions do not constitute duress under English law. In the Halkbank case, the indictment relates to conspiring to evade US sanctions against Iran.

## Venezuelan Gold

After an election in Venezuela in 2018, there were two competing claimants to be the legitimate government of Venezuela: Nicolás Maduro[2] and Juan Guaidó.[3] Other countries made different choices about which government to recognize: the US, the UK, Australia and Canada recognized Juan Guaidó as President, whereas Russia and China recognized Nicolás Maduro as President.[4] By early 2023 the situation had changed, as the Venezuelan National Assembly

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[2] Nicolás Maduro became President of Venezuela in 2013 after the death of Hugo Chávez.

[3] After the disputed election, the National Assembly announced that Mr Guaidó was the interim President of Venezuela until elections could be held, and then passed a Transition Statute, which was signed by Mr Guaidó, as President of the National Assembly, two vice-presidents, a secretary and an under-secretary of the National Assembly, and carried the seal of Mr Guaidó as President of Venezuela. The Supreme Tribunal of Justice of Venezuela then held this statute was unconstitutional and of no legal effect.

[4] *See*, *e.g.*, https://www.venezuelablog.org/interactive-map-degrees-of-diplomatic-recognition-of-guaido-and-maduro/ (information as of October 2020).

eliminated the interim government of Juan Guaidó.[5] The US now "recognizes the 2015 democratically elected Venezuelan National Assembly as the only legitimate branch of the Government of Venezuela,"[6] and the Maduro government is subject to US sanctions.[7] The UK government has taken a similar position.[8] Recently, Venezuela has renewed a claim on the Essequibo region of Guyana,[9] which complicates relations between the US and UK and Venezuela. The Maduro regime is working to ensure victory in upcoming elesctions while pursuing policies that have led to a vast migration of Venezuelans from the country, many of whom have come to the US.[10]

The idea of a legislative body also acting as the President of Venezuela has been described as "dubious."[11]

The Central Bank of Venezuela had put gold on deposit at the Bank of England,[12] and a dispute arose over who was entitled on behalf of the Central Bank to receive the gold. The Board of the Central Bank appointed by President Maduro issued a request to the Bank of England for

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[5] *See*, *e.g.*, Jose Ignacio Hernández, *The Final Blow: Uncertainty of the Venezuelan Transition from the Interim Presidency* (Feb. 13, 2023) at https://www.csis.org/analysis/final-blow-uncertainty-venezuelan-transition-interim-presidency.

[6] *See* https://www.state.gov/u-s-relations-with-venezuela/ .

[7] *See* https://ofac.treasury.gov/sanctions-programs-and-country-information/venezuela-related-sanctions; Executive Office of the President, Continuation of the National Emergency With Respect to Venezuela, 89 Fed. Reg. 16443 (Mar. 7, 2024).

[8] Foreign, Commonwealth & Development Office Minister for Americas and Caribbean, David Rutley, Written statement to Parliament: UK Government position on Venezuela (Jan. 12, 2023) ("We continue to consider the National Assembly elected in 2015 as the last democratically elected National Assembly in Venezuela, and take note of the Assembly's vote to extend its mandate for another year. It remains the UK government's position that the 2018 presidential election was not held in accordance with international democratic standards. The UK continues not to accept the legitimacy of the administration put in place by Nicolás Maduro.") *See also*, https://www.gov.uk/government/publications/financial-sanctions-venezuela#full-publication-update-history.

[9] *See*, *e.g.*, Americas Minister Visits Guyana to Demonstrate UK Support for its Territorial Integrity (Dec. 18, 2023) at https://www.gov.uk/government/news/americas-minister-visits-guyana-to-demonstrate-uk-support-for-its-territorial-integrity .

[10] *See*, *e.g.*, Ryan C. Berg & Alexandra Winkler, *This Could Be the Last Shot to Restore Democracy in Venezuela* (Apr. 4, 2024).

[11] Hernández, *supra* note 5.

[12] The Bank of England is the second largest keeper of gold in the world after the New York Federal Reserve Bank. *See* https://www.bankofengland.co.uk/explainers/how-much-gold-is-kept-in-the-bank-of-england.

return of the gold, but Juan Guaidó had also appointed an ad hoc Board to the bank which claimed the right to receive the funds.

In the litigation that followed the Bank of England's rejection of the request of the Maduro Board, the High Court originally held that, as the UK government recognised Guaidó as Venezuela's interim President the "one voice" doctrine required the courts to adopt the same approach.[13] But the English courts could not adjudicate the validity of a Venezuelan statute,[14] or of the Guaido appointment of the ad hoc Board of the Central Bank,[15] because of the act of state doctrine. The Court of Appeal[16] concluded that the extent of the UK Government's recognition was unclear, but the UK Supreme Court disagreed, following the one voice principle, in Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela.[17] Issues relating to the validity of the Venezuelan legislation were remanded to the High Court,[18] and appealed to the Court of Appeal,[19] which held that the English courts could not recognize the validity of the judgments of the STJ of Venezuela, which held that the appointment of the Guaidó Board was null and void, because to do so would conflict with the view of the UK government.

In **Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela**, the Supreme Court stated:

"91. The starting point is that it is for HMG to decide with which entities or individuals it will have dealings in the conduct of foreign relations. While its usual practice under the 1980 policy

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[13] Deutsche Bank AG London Branch v Receivers Appointed By the Court & Ors [2020] EWHC 1721 (Comm), [2020] WLR(D) 382, ¶ 45 (02 July 2020) at http://www.bailii.org/ew/cases/EWHC/Comm/2020/1721.html ("Just as with governments, a person may be recognised by HMG as the de jure or de facto President (or any other head of state). When a person is so recognised the courts must accept him as President pursuant to the "one voice" doctrine.") The litigation also involves issues relating to a gold swap agreement between the Venezuelan Central Bank and Deutsche Bank.

[14] *Id.* at ¶ 73.

[15] *Id.* at ¶ 92.

[16] "Maduro Board" of the Central Bank of Venezuela v "Guaido Board" of the Central Bank of Venezuela [2020] EWCA Civ 1249, [2020] WLR(D) 541 (05 October 2020) at http://www.bailii.org/ew/cases/EWCA/Civ/2020/1249.html.

[17] Maduro Board of the Central Bank of Venezuela v Guaido Board of the Central Bank of Venezuela [2021] UKSC 57 (20 December 2021) at http://www.bailii.org/uk/cases/UKSC/2021/57.html .

[18] Deutsche Bank AG (London Branch) v Central Bank Of Venezuela [2022] EWHC 2040 (Comm) (29 July 2022) (concluding there was no basis for recognition of the judgments on which the Maduro Board relied).

[19] Deutsche Bank AG (London Branch) v Central Bank of Venezuela & Ors [2023] EWCA Civ 742 (30 June 2023) at http://www.bailii.org/ew/cases/EWCA/Civ/2023/742.html \.

statement is not to recognise foreign governments or heads of state, it reserves the right to do so where it considers it appropriate to do so in all the circumstances. In the present case it took that exceptional course and the certificate drew attention to this fact. It is the duty of the receiving court to interpret and to give effect to such a certificate in accordance with the one voice principle. What matters here is the subjective intention of the executive as disclosed by the certificate...
92... the letter dated 14 February 2020 from Robin Knowles J to the Foreign Secretary expressly asked who is recognised by HMG as the head of state of Venezuela and who is recognised by HMG as head of government of Venezuela. The answer was unequivocal. It referred to and set out the Hunt statement: "The United Kingdom now recognises Juan Guaidó as the constitutional interim President of Venezuela, until credible presidential elections can be held."
It said nothing about the recognition of Mr Maduro. There was no need for it to do so. The certificate was a clear and unequivocal recognition of Mr Guaidó as President of Venezuela. This recognition necessarily entailed that Mr Maduro was not recognised as President of Venezuela...
93...The dealings which HMG may have had or may continue to have with different persons or entities within Venezuela are irrelevant to the question of recognition which turns on the intention of HMG as stated in the executive certificate...
96... If the FCDO has departed from its usual practice by issuing an express statement of recognition, any ambiguity in the statement should be resolved by a further request to the FCDO for clarification. In the absence of such an express statement of recognition by HMG, the issue of recognition does not arise and the courts are left to conduct an inquiry as to whether the entity in fact carries out the functions of a government in accordance with Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA..."

The Supreme Court referred the questions of the validity of the Venezuelan legislation back to the High Court, as stated above. The Supreme Court explained that doctrinal issues here relate to the English Act of State doctrine:

"155. Where it applies, the foreign act of state doctrine holds national courts incompetent to adjudicate upon the lawfulness or validity of the sovereign acts of a foreign state. However, 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. In Belhaj [2017] AC 964 both Lord Neuberger and Lord Mance touched on the difficulties which can arise in this regard if sovereignty is equated with executive activity. Thus, Lord Neuberger explained... that where an executive act is unlawful by the law of the state concerned, a failure by a court in the United Kingdom to treat it as unlawful... might conflict with [the rule] which requires courts in the United Kingdom to recognise and not question a foreign state's legislation and other laws which take effect within its territory. In a further passage ...he observed that if a confiscation was unlawful under the laws of the foreign state and its courts were so to hold, it was by no means obvious to him why it would be appropriate for the

confiscation to be treated as valid by the courts of another state to which the property had been transferred...
156. The present case is indeed unusual by comparison with other cases which raise issues of justiciability in that here both the executive and judicial branches within Venezuela have spoken. 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. The question arises, therefore, whether in such circumstances the foreign act of state doctrine... requires courts in this jurisdiction to defer to acts of the executive of a foreign state, in priority to recognising the rulings of its judiciary...
157. Although judicial rulings of a foreign state are manifestations of state sovereignty, it is now clear that they do not themselves attract the operation of any rule of foreign act of state applicable in this jurisdiction and, as a result, are not entitled to the deference which may be shown to legislative and executive acts of a foreign state....
159....courts in this jurisdiction are more willing to investigate whether a foreign court is acting in a way that meets the standards expected of a court and whether there has occurred or is likely to a occur a failure of substantial justice. For this reason, foreign judgments fall to be assessed under different rules from those applicable to legislative and executive acts and are simply less impervious to review...
160. Similarly, the US act of state doctrine does not apply to foreign court judgments (Timberland Lumber Co v Bank of America..,549 F 2d 597, 608 (9th Cir 1976); The American Law Institute, Restatement of the Law Fourth, the Foreign Relations Law of the United States (2018), para 441, pp 313-314). The commentators to the US Restatement note that, were the rule otherwise, courts in the United States would face a significant conflict between the doctrines governing the recognition and enforcement of foreign judgments, on the one hand, and the act of state doctrine on the other... [I]n Yukos [2014] QB 458... Rix LJ noted that in Altimo Holdings [2012] 1 WLR 1804... Lord Collins cited a number of US federal court decisions in which allegations of impropriety against foreign courts had been adjudicated in the context of forum non conveniens and enforcement of judgments.
161. There is therefore no rule requiring an unquestioning acceptance by courts in the United Kingdom of the validity or legality of a foreign judgment. Rather, the status of a foreign judgment is left to be determined in accordance with domestic rules on the recognition and enforcement of foreign judgments...
165. As we have seen, the authorities supporting the existence of [the act of state rule], proceed on the basis that courts in this jurisdiction should not sit in judgment or adjudicate upon the lawfulness or validity of a foreign state's sovereign acts within its own territory. On closer examination it appears that what is considered objectionable in such a course of conduct is the intrusion into the internal affairs of a foreign state which such an examination or passing of judgment would involve. While international law does not in general require states to apply rules of act of state such as those identified here, there can be little doubt that such rules, where they exist, are rooted in the concept of mutual respect for the sovereignty and independence of states and are intended to promote international comity...

169. 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. If a UK court were to give effect to such a foreign judgment, it would not itself be sitting in judgment on the executive act but giving effect to the view of it taken by the judicial branch of government within the foreign state... Furthermore, although judicial acts of that foreign state do not enjoy before UK courts the protection of any such rule of non-justiciability, it may in certain circumstances nevertheless be appropriate to recognise or give effect to them in accordance with domestic rules of private international law. If, for example, an executive act of the US President were to be declared unconstitutional by a judgment of the US Supreme Court, recognition of that judgment (if it were otherwise entitled to recognition before UK courts) would not involve any investigation into or adjudication upon the internal affairs of the United States so as to bring the act of state principle into operation."

The question of how to think about the judgments of the STJ was a complex one, but in the High Court (the Commercial Court) Mrs. Justice Cockerill, in **Deutsche Bank v Central Bank of Venezuela**,[20] found that the one voice principle required not giving effect to the judgments of the STJ:

"205. ... I would ... 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... 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

[20] https://www.bailii.org/ew/cases/EWHC/Comm/2022/2040.html. The Court of Appeal endorsed this reasoning.

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... 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. "

In **Jimenez v Palacios,**[21] addressing competing claims with respect to the appointment of the Boards of Directors of PDV Holding, Inc, Citgo Holding Inc. and Citgo Petroleum Corporation, the Delaware Court of Chancery (VC McCormick) applied the political question doctrine and the act of state doctrine:

"The political question doctrine requires courts to accept as binding the U.S. President's determination to recognize a foreign government. The act of state doctrine requires courts to assume the validity of an official act of a recognized foreign government performed within its own territory. Applying these doctrines, this decision accepts as binding the U.S. President's recognition of the Guaidó government and assumes the validity of the Guaidó government's appointments to the PDVSA board...

Given the exclusive nature of the Executive Branch's recognition authority, the Supreme Court of the United States has held that any decision by the Executive to recognize (or not recognize) a foreign government is a non-justiciable political question that federal and state courts must accept. The seminal Supreme Court decision on recognition of a foreign government, Oetjen v. Central Leather Co., addressed the seizure of animal hides in Mexico by General Francisco Villa, a representative of the revolutionary government of Venustiano Carranza. General Villa seized the hides to satisfy an assessment imposed by the revolutionary regime, and the hides were ultimately sold to the defendant. The plaintiff brought suit claiming that the defendant lacked good title to the hides because General Villa had obtained them unlawfully. During the pendency of the action in the lower courts, the United States recognized the Carranza government as both the de facto and de jure government of Mexico, which proved dispositive on appeal. The Supreme Court held:

Who is the sovereign, de jure or de facto, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.

Applying that principle, the Court held that the Carranza government "must be accepted as the legitimate government of Mexico" and gave that conclusion retroactive effect. The Court further invoked the act of state doctrine, a companion to the political question doctrine discussed more fully in the next section of this decision, to presume valid General Villa's actions in seizing the hides on behalf of the recognized Carranza government.

Oetjen is well-settled law. Multiple decisions of the Supreme Court and lower courts have applied its holding. Under Oetjen and its progeny, the applicable rule is clear: the Executive Branch's decision to recognize a foreign state "conclusively binds" all domestic courts, such that they must accept that decision.This decision calls for a straightforward application of that rule...

Underhill and intervening cases had articulated the act of state doctrine as an expression of comity and international law.The Court in Sabbatino rejected that theory, recasting the doctrine as arising from "constitutional underpinnings," or "the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar

[21] (Del. Ch 2019), aff'd 237 A 3d. 68 (Del. Supr. 2020).

institutions to make and implement particular kinds of decisions in the area of international relations." As part of the family of theories derived from separation of powers principles, the act of state doctrine overrides otherwise binding law, including state and international law. The Sabbatino decision explained that the Judicial Branch

> will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."

**Russia/Ukraine Eurobond Litigation**

**The Law Debenture Trust Corporation plc v Ukraine**[22] involves an attempt by Russia (through the trustee) to enforce its rights under a eurobond issued to it by Ukraine:

1. The Law Debenture Trust Corporation plc ("the Trustee"), a company incorporated in England and Wales, is the trustee of Notes with a nominal value of US$ 3 billion, maturing on 21 December 2015, and carrying interest at 5% per annum through maturity ("the Notes"). The Notes were issued by Ukraine represented by its Minister of Finance, acting upon the instructions of the Cabinet of Ministers of Ukraine ("the CMU"), and constituted by a trust deed dated 24 December 2013, to which the parties were the Trustee and Ukraine ("the Trust Deed"). The Trust Deed is governed by the law of England and Wales, with the courts of England and Wales having exclusive jurisdiction (subject to the Trustee's right of election to arbitrate, which has not been exercised). The sole subscriber of the Notes was the Russian Federation. Although the Notes were tradeable, the Russian Federation has retained the Notes since their issue.
2. Ukraine's pleaded case is that the Notes are voidable (and have been avoided) for duress. Ukraine contends that the Russian Federation applied massive unlawful and illegitimate economic and political pressure, including threats to its territorial integrity and threats of the use of unlawful force, to Ukraine in 2013 to deter the administration led by President Yanukovych from signing an Association Agreement with the European Union ("the Association Agreement") and to induce acceptance of the Russian Federation's financial support instead, in the form of the Notes. Following the decision by Ukraine not to sign the Association Agreement, protests in Ukraine grew and ultimately President Yanukovych fled, reportedly on 21 February 2014. Shortly afterwards, the Russian Federation invaded Crimea and purported to annex it. Ukraine maintains that the Russian Federation has since supported separatist elements in eastern Ukraine and has interfered militarily and succeeded in destabilising and causing huge destruction across eastern Ukraine. The court has not been asked to consider events subsequent to the hearing of this appeal, which was concluded prior to Russia's invasion of Ukraine in February 2022...
135 Since the proper law of the contract between the parties is English law, it is English law

[22] [2023] UKSC 11 (15 March 2023) at http://www.bailii.org/uk/cases/UKSC/2023/11.html. In the litigation some arguments were raised about the capacity of Ukraine to enter into the contract and about the authority of the Minister. Here I am concentrating on the duress issues.

which must determine whether the contract may be affected by duress; what constitutes duress for this purpose; what impact such duress must have exercised upon the formation of the contract; and what remedial action is available to the innocent party...

136 As Lord Cross of Chelsea explained in Barton v Armstrong [1976] AC 104, 118, the scope of the common law doctrine of duress was traditionally very limited. It was originally confined to threats to life or limb, and only later developed so as to encompass threats to property, and, more recently, economic pressure. However, at a comparatively early date equity began to grant relief in cases where a disposition had been procured by the exercise of pressure which the Chancellor considered to be illegitimate, although it did not amount to common law duress. There was a parallel development in the field of dispositions induced by fraud. At common law, the only remedy was an action for deceit, but equity in the same period in which it was building up the doctrine of undue influence also came to entertain proceedings to set aside dispositions which had been obtained by fraud...

139. The resultant position was summarised by Lord Goff of Chieveley... :

> "it is now accepted that economic pressure may be sufficient to amount to duress … provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract …"

140 Although the courts expressed the relevant test as being whether the pressure was of a kind which the law characterises as "illegitimate", the meaning of that term in this context was not as clear as one might wish. Plainly, "illegitimate" was not synonymous with "unlawful".... Some judges inferred from the analogy drawn with equitable doctrines... that pressure would be illegitimate if it amounted to unconscionable conduct...

145 Ukraine's allegations in relation to duress are presented on the basis that there was a concerted campaign on the part of the Russian Federation to dissuade Ukraine from entering into the Association Agreement. However, the allegations are of distinct kinds of pressure which are treated differently by the English law of duress. Taking the allegations at their highest (as they have to be, for the purpose of determining the Trustee's application for summary judgment), the first category comprises various forms of economic pressure: the imposition of restrictions on trade, and the threat of further restrictions; threats to procure Russian banks to commence insolvency proceedings against Ukrainian businesses; and threats to cancel joint projects, or otherwise withdraw from cooperation in a number of industries (paras 119 and 121 above). This conduct is said to have been "illegitimate and/or unlawful" in two respects. First, it is said to have been carried out not for bona fide reasons but in order to apply pressure to Ukraine... Secondly, it is alleged to have been in breach of unincorporated international law...

146 The second category comprises express or implicit threats of the use of force to destroy Ukraine's security and its territorial integrity... This conduct is said to have been "illegitimate and/or unlawful" in that it was in breach of international law, including ius cogens...

149 The English courts do not appear ever to have considered a case of alleged duress arising from the imposition of trade restrictions by one state upon another, allegedly in breach of international law. Nor has this court been referred to any relevant precedent in the law of any other country.

150 Considering first the demand of the Russian Federation, it is alleged to have been that

Ukraine should not sign the Association Agreement with the EU, but should instead accept the financial support of the Russian Federation. That demand is alleged by Ukraine to have been motivated by political considerations. It was, Ukraine avers, "aimed at frustrating the will of the Ukrainian people to participate in the process of European integration", and encouraging Ukraine instead to join the Eurasian Customs Union formed among the Russian Federation, Kazakhstan and Belarus. In general, the fact a demand by a state is motivated by its political interests cannot render it illegitimate in the eyes of English law. It is inevitable that the demands made by states, even in commercial contexts, will commonly if not invariably be influenced by their political interests. In particular, the Russian Federation's pursuit of its strategic interests in keeping Ukraine within its sphere of influence cannot be regarded as being inherently illegitimate under English law.

151 The acts allegedly carried out or threatened by the Russian Federation in order to impose economic pressure on Ukraine were, to recap: a ban on the import into the Russian Federation of confectionery produced by a Ukrainian manufacturer, ostensibly on the ground of consumer safety or non-conformity with labelling requirements; the classification of about 40 Ukrainian companies as high-risk producers, resulting in checks that their exports to the Russian Federation conformed with Russian customs requirements; for one week, an extension of similar checks to all Ukrainian exports to the Russian Federation; the threat of the imposition of similar checks on a permanent basis if Ukraine entered into the Association Agreement; the threatened suspension of gas supplies; the introduction of new customs procedures; the threat that Russian banks might foreclose on bankrupt factories in eastern Ukraine; the threatened annulment of a free trade agreement; the threat that Ukraine would be excluded from the Eurasian Customs Union; the threatened cancellation of joint projects in a number of industries; and the threatened introduction of measures to protect Russian producers. The questions which arise are (1) whether the pressure imposed by those acts was inherently illegitimate or unacceptable for the purposes of the English law of duress, and, if not, (2) whether the pressure imposed by those acts was rendered illegitimate or unacceptable for the purposes of the English law of duress by virtue of their being (allegedly) in breach of unincorporated international law.

152 In relation to the first of those questions, the imposition or threat of trade restrictions in order to exert pressure upon other states, and thereby achieve political objectives, has been part of the armoury of the state since classical times. It was a familiar aspect of state practice during the period when English commercial law and equity were developing in the eighteenth and nineteenth centuries: for example, during the American War of Independence, the Napoleonic Wars and the War of 1812. Trade sanctions, embargoes and protectionism more widely remain normal and important aspects of statecraft in the modern world. There is, for example, a section of the UK Government's website devoted to the trade sanctions, embargoes and other trade restrictions imposed by this country on other countries (73 countries are currently listed). As it explains, the UK uses sanctions to fulfil a range of purposes, including supporting foreign policy and national security objectives, as well as maintaining international peace and security, and preventing terrorism. Other countries do likewise. In particular, the trade restrictions alleged to have been adopted or threatened by the Russian Federation are another example of the use of such measures by a sovereign state in the pursuit of its interests.

153 There is no trace, as far as the court has been made aware, of the pressure imposed by such

measures ever having been treated in English law as constituting duress. That is so, notwithstanding their long history, and the amplitude of case law concerned with state practice, including restrictions on trade, in other contexts. That appears to us to be unsurprising. Measures of this kind, whether imposed by the UK or by other countries, cannot sensibly be regarded as being, as a category, inherently illegitimate or contrary to public policy. Indeed, they are often imposed for reasons which are widely regarded as morally admirable, such as to encourage other countries to alter objectionable practices (for example, sanctions are currently imposed by the UK for the purpose of encouraging the Russian Federation to cease actions which destabilise Ukraine, including actions which undermine or threaten its territorial integrity, sovereignty or independence). That remains the position even if the measures have the effect of exerting pressure on a targeted state to enter into an agreement which it would not otherwise have concluded. That is not infrequently the purpose of such measures.

154 Nor can warnings or threats of the possibility of restrictions on the importation of Ukrainian goods into the territories of the Russian Federation or the Eurasian Customs Union, or of the cancellation of joint projects in a number of industries, be characterised as duress of goods. There is not, for example, a pleaded case of threats to destroy or damage property, or to seize or detain goods contrary to Russian domestic law or at all. Refusing to accept Ukrainian goods into Russian sovereign territory, or persuading other members of the Eurasian Customs Union to do likewise, is a different matter.

155 The alleged threat that Russian banks might foreclose on Ukrainian creditors is not alleged to involve anything more than the exercise of contractual rights. It is difficult to envisage circumstances, and none are alleged, in which the exercise of pre-existing contractual rights might constitute duress...

156 The remaining question is whether trade restrictions which would not otherwise constitute duress under English law may nevertheless do so by reason only of their constituting a breach of unincorporated international law: in this case, a breach of a variety of treaties to which the Russian Federation and Ukraine are contracting parties.

157 The starting point is that, subject to certain qualifications, "international law and domestic law operate in independent spheres"... Accordingly, as Lord Neuberger stated in Belhaj v Straw, in a judgment with which the majority of the court agreed, "international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts"... On the contrary, the general rule is that stated by Lord Oliver in the Tin Council case... :

> "It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law… Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court … because, as a source of rights and obligations, it is irrelevant."

It follows that, unless there is some relevant exception to that rule, English courts cannot decide whether the Russian Federation has acted, or threatened to act, in breach of its international treaty

obligations towards Ukraine.
158 The supposed exception, in the view of the Court of Appeal, was that domestic law provided a "foothold" for the application of international law. Before considering that question, it is important at the outset not to be misled by the imprecise metaphor of a "foothold". It is simply a way of referring to a situation where it is necessary to decide a question of international law in order to determine a question of domestic law. At times, Ukraine's submissions risked conveying the impression that the relevant question was whether the defence of duress had a foothold in domestic law. But that question does not arise, and does not even make sense. The defence of duress does not need a foothold in English law. As we have explained, the defence arises under English law, under conditions which are defined by English law. That is not in dispute. As we have explained, the metaphor of a foothold is used in respect of international law, and describes a situation in which it is necessary for the English court to decide a question of international law in order to determine a question of English law.
159 A domestic foothold for international law has been found to exist in a number of situations: where a provision of international law has been incorporated by legislation into domestic law...; where a rule of customary international law forms part of the common law ...; where parties have entered into a contractual agreement to apply rules of international law...; where a party attempts to justify a defamatory allegation that a person has acted in breach of international law... ; and, more controversially, where an administrative decision-maker has relied on an interpretation of international law, and his interpretation is challenged... The present case does not fall within any of those categories. Accordingly, the position under international law would only be relevant to a question arising under domestic law in the present case if there was some other rule - a rule of the English law of duress - which required the court, in the circumstances with which this case is concerned, to decide whether conduct which was alleged to constitute illegitimate pressure was in breach of international law.
160 The Court of Appeal considered that there was such a rule. In its view, the question whether the Russian Federation's conduct towards Ukraine was lawful under international law was relevant, under the English law of duress, to deciding whether the pressure imposed by that conduct was "illegitimate". That was the supposed foothold. In adopting that view, the Court of Appeal relied... on Steyn LJ's dictum in CTN Cash and Carry Ltd v Gallaher Ltd that the critical inquiry, in a case of alleged duress, is whether the conduct complained of is "morally or socially unacceptable". International law was treated by the Court of Appeal as providing a guide to what is morally or socially unacceptable, as a matter of domestic English law, in the conduct of states towards one another.
161 The problem with that approach is that this court has rejected a broad test of moral or social acceptability as the touchstone of duress under English law... and has instead adopted a much stricter approach... In Times Travel, Lord Hodge cited with approval at paras 28-29 Professor Jack Beatson's statement in The Use and Abuse of Unjust Enrichment (1991), p 130 that "judges should not, as a general rule, be the arbiters of what is socially unacceptable and attach legal consequences to such conduct", and a similar statement by the editors of Anson's Law of Contract, 31st ed (2020). Accordingly, even assuming that international law could be treated as a guide to the moral or social acceptability of conduct by states towards one another, that is not the relevant test.

162 There appears to us in any event to be no principled basis for treating international law as a guide to the illegitimacy of conduct under the English law of duress. The Court of Appeal cited no authority in support of its approach, and none has been cited to this court. There is no evident reason to suppose that English law contains such a rule, and a number of reasons for concluding that it does not.

163 In the first place, such a rule would be contrary to the approach adopted by the House of Lords in Dimskal Shipping. It was argued in that case that, in deciding whether conduct which took place in Sweden constituted duress under English law, regard should be paid to the law of Sweden. The argument was rejected. Lord Goff stated at p 169:

> "the dispute relates to a contract whose proper law is English law, and the relevant incidents of which are therefore governed by English law. Some cogent reason has to be produced why in such a case the English courts should not simply apply the principles of English law in deciding whether or not the relevant conduct constitutes duress capable of rendering the contract voidable…"

It is to be noted that the objection was one of principle. It would be equally strong whether the position under Swedish law was debatable or clear beyond argument. Similarly, in the present case, it is English law, not international law, which provides the yardstick of legitimacy, whether the alleged breach of international law is arguable or manifest. The point is that non-domestic law, whether national as in Dimskal Shipping, or international as in the present case, does not provide the relevant standard. That is not to deny that international law may be relevant in some cases to an assessment of public policy, although not determinative of the issue; but we have already explained that trade restrictions of the kind in question in the present case cannot be regarded as contrary to English public policy: para 153 above.

164 Furthermore, were a breach of international law to constitute illegitimacy for the purpose of the law of duress, then international treaties would become the source of rights and duties in domestic law, and their adjudication would be the function of domestic courts, contrary to the principles explained at para 157 above. We have explained at para 153 above why trade restrictions cannot be regarded as inherently constituting illegitimate pressure for the purposes of the law of duress. For the reasons explained in para 157 above, an allegation that they have been imposed in breach of obligations under international law does not alter the position on the plane of domestic law. An analogy can be drawn with the position in the Tin Council case, where the House of Lords held that, even if there were a rule of international law that the member states of the International Tin Council were responsible for its debts, no cognisance could be taken of such a rule by domestic courts... As Lord Oliver stated at p 512:

> "It is argued, however, that if one supposes, for example, that [the relevant treaty] contained an express declaration that the member states agreed to underwrite all the liabilities of the ITC, it would be absurd that no cognisance of such a provision should be taken by a domestic court. For my part, I do not think so and, indeed, this is an excellent example of the operation of the non-justiciability principle."

It is again clear from this dictum that the objection is one of principle, which applies however plain the position may be under international law.

165 Counsel for Ukraine submitted that the Court of Appeal's treatment of international law as a guide to relevant standards of behaviour between states, so as to elucidate what might constitute "illegitimate" pressure in that context, was analogous to the use of professional standards in the context of claims for professional negligence. It no more incorporated international law into domestic law, counsel submitted, than the practice in professional negligence cases incorporates professional standards of conduct into the law. We reject this argument for two reasons.

166 First, as has been explained, it was decided in Times Travel that whether pressure is illegitimate is not determined by applying what judges might regard as acceptable standards of behaviour, whether as between private individuals or bodies or as between states. The view taken by the majority in that case was that the relevant standard is one of unconscionability, drawing on the case law through which that concept has developed in the English law of equity.
167 Secondly, there is no true analogy with practice in professional negligence cases. In that context, the applicable rules of English law... establish the relevance of accepted professional standards of conduct to the legal standard of reasonable care. There are no rules in the context of duress requiring the court to consider the obligations imposed by international treaties. As we have explained, if a breach of an unincorporated treaty were treated as a breach of the standard of legitimacy in the context of duress, then the treaty would be determinative of whether one party to an English contract was entitled to enforce it against the other. The treaty would thus become "the source of domestic rights or duties", contrary to Belhaj v Straw... and would have to be interpreted and adjudicated upon by domestic courts, contrary to the Tin Council case... Properly understood, the decision as to whether the pressure imposed on a party to enter into a contract is illegitimate for the purposes of the law of duress, or whether (looking at the same question from a different angle) it is unconscionable for the other party to enforce the contract, is a judgment of a domestic character, made by the court by drawing on standards rooted in English law...
168 This is also consistent with the way in which Ukraine has presented its case to this court. As we have explained, Ukraine's case on duress is based on the fact of the alleged threats, as counsel was at pains to emphasise. The essence of its case is that the pressure imposed by those threats vitiated its consent to the agreements pursuant to which the Notes were issued. Accordingly, if the issue were to go to trial, the question would be whether, applying the standards of English law, the facts established constitute duress. It is not necessary for Ukraine to demonstrate that the conduct of the Russian Federation was unlawful in international law. The critical question is whether it imposed pressure on Ukraine to enter into the relevant agreements which was illegitimate according to English law. It is therefore unnecessary to resort to international law to evaluate the existence or nature of the threats, or to assess the impact they may have had on the formation of the relevant contract, or, as we have explained, to determine whether they imposed illegitimate pressure. If the conduct complained of also constituted a breach of international law, that is incidental.
169 That conclusion makes it unnecessary to consider the doctrine of foreign act of state in this context, since that doctrine would only become potentially applicable if, in the first place, it was necessary for the court to determine the lawfulness under international law (or, conceivably, Russian law) of the Russian Federation's acts or threatened acts imposing economic pressure on Ukraine.

170 We therefore conclude that Ukraine's averments of economic duress are not in themselves capable of establishing its defence....
171 Ukraine complains in its pleadings about statements allegedly made by Mr Glazyev, an adviser to the President of the Russian Federation. He is alleged to have said on 22 September 2013 that if Ukraine signed the Association Agreement, Russia could no longer guarantee Ukraine's status as a state and could possibly intervene if pro-Russian regions of the country appealed directly to Moscow. He is alleged to have said the following day that Russia would support a partitioning of Ukraine if it signed the Association Agreement; that Ukraine's Russian-speaking minority might break up the country in protest at such a decision; and that Russia would be legally entitled to support them. He is also alleged to have said on 1 November 2013 that if Ukraine signed the Association Agreement, the issue of borders between Ukraine and the Russian Federation would have to be discussed.
172 Ukraine avers that these statements amounted to a threat by the Russian Federation of the use of force. That is an issue which is best determined at trial, when what exactly was said, what authority the speaker possessed, and how what was said should be construed in the context of the surrounding circumstances, can be considered. The only question which needs to be decided at the present stage, in this regard, is whether the statements alleged to have been made are capable of amounting to such a threat; and we consider that they are.
173 Although Ukraine's pleadings focus upon the implications of such a threat under international law, Ukraine relied in argument upon the inherent nature of the conduct which is implied by such threats... that appears to us to be a matter which the court can properly take into account.
174 The use of force by the Russian Federation in support of pro-Russian groups seeking to break up Ukraine would almost inevitably involve the use of violence against Ukrainian armed forces, which could be expected to defend their country, and against Ukrainian civilians. That would be a reasonable inference in the light of experience of the subsequent Russian intervention in Crimea and eastern Ukraine during 2014, on which Ukraine relies in its pleadings. More than 9,000 people are said to have lost their lives in the conflict, and 21,000 are said to have been injured.
175 United Kingdom courts have not previously had to consider whether threats to the safety of a state's citizens, or to the safety of members of its armed forces, can constitute duress of the person. We consider that in principle they can.
176 It has long been established that a threat to the person may amount to duress. Such threats, unless justified (eg where made in self-defence), have always been treated as illegitimate. The threat need not be directed at the contracting party. It will suffice, for example, if the threat is directed against the contracting party's family..., or its employees...
177 A threat to the person need not be unlawful under English law in order to constitute duress. For example, in the Royal Boskalis Westminster case, the court did not find it necessary to consider whether the conduct in question (committed by the Iraqi authorities in Iraq) constituted a tort under English law... It has been accepted in criminal law that a threat by A to kill herself unless B commits an offence is capable of constituting duress... The same conclusion would in our view be reached in a civil context if A threatened to kill herself unless B consented to a contract. Even in a situation where the person making the threat is legally entitled to use force

against the person threatened (for example, in the exercise of powers to maintain order or discipline), the making of a demand backed up by such a threat could nevertheless be a form of pressure which English law would regard as illegitimate. One might, for example, envisage a situation in the past in which a ship's commanding officer was entitled to impose flogging on a crew member who had committed a disciplinary offence, and threatened to do so unless the crew member assigned to the officer his right to prize money. Such a threat would be regarded as illegitimate pressure, even if the violence might be lawfully inflicted.

178 If pressure to enter into a contract is illegitimate, it cannot make any difference in principle whether it is exerted by a private individual or body, or by a state. For example, the Royal Boskalis Westminster case concerned a threat by the government of Iraq to use a large number of the plaintiffs' employees as "human shields": a threat which was described by Phillips LJ as "about as cogent and unconscionable a form of duress as one can imagine"... Equally if, for example, State A threatened to assassinate the Prime Minister of State B unless State B signed an agreement, that could constitute duress as understood in English law.

179 The authorities cited in para 176 above demonstrate the capacity of threats against one person to constitute illegitimate pressure upon another person where there is a family or contractual relationship between those persons, but they do not suggest that such a relationship is essential. In principle, the relevant question is whether the threat of physical violence imposed illegitimate pressure upon the person at whom the threat was directed to comply with the demands of the person making the threat. In the particular case of threats directed against a state, a government could hardly be indifferent to threats to the safety of its own citizens or the members of its armed forces, given its responsibilities towards them. If it yielded to the pressure imposed by such threats, any resultant agreement could in principle be susceptible under English law to avoidance on the ground of duress.

180 If, for example, the situation envisaged in para 178 above were varied so that the threat made by State A was not that State B's Prime Minister would be assassinated, but that its cities would be subjected to missile attacks and air strikes, the effect on the resulting agreement could be expected to be the same. In each case, the pressure exerted could well amount to duress as understood in English law.

181 In response, the Trustee pointed out that, under the contract whose validity is in dispute, the Russian Federation paid Ukraine US$ 3 billion through the issuance of the Notes. Ukraine now seeks to exploit the doctrine of duress, the Trustee submitted, in order to avoid its liability to repay the US$ 3 billion, as it contracted to do, when the time for repayment arrived. The Trustee submitted that it is hard to see what is unfair, let alone unconscionable, about treating Ukraine as bound by its obligation to give money back.

182 In reply, Ukraine submitted that the terms of the Notes were onerous and, for Ukraine, unusual, and that that was accepted by the judge and the Court of Appeal. That was disputed by the Trustee, which pointed out that the terms in question were never triggered in any event. These are not issues which this court need resolve for present purposes. The fundamental point is that a contract which was entered into as a result of duress can be set aside. It is not necessary to establish that the contract is in addition disadvantageous to the victim of the duress (although, if the contract conferred a benefit on the victim, an obligation to make restitution might arise). It is also fundamental that duress is assessed as at the time when the impugned contract was entered

into. It is immaterial to the existence of duress whether the terms of the contract were subsequently enforced...
184 Given our acceptance that Ukraine's allegations concerning the threatened use of force are relevant to support its defence of duress, the question arises whether the doctrine of foreign act of state applies, so as to render the issue non-justiciable. In our view it does not...
189 In the present case, following the line of authorities from Dimskal Shipping to Times Travel, whether the contract into which Ukraine entered is liable to be set aside on the ground of duress depends on an assessment, under English law, of whether the pressure imposed by the relevant threats was an illegitimate reason for Ukraine's entering into the contract. Duress of the person or of goods is illegitimate pressure in itself. The resolution of the plea of duress founded on the threat of force does not, therefore, require a ruling on the legality or validity of the alleged conduct of the Russian Federation under international law. To employ Lord Sumption's words in Belhaj v Straw... the invalidity or unlawfulness of the Russian Federation's acts under international law is not part of the subject matter of the action. Nor does any question arise as to the validity or lawfulness of the Russian Federation's conduct under English municipal law. A question does arise as to whether the Russian Federation's alleged threats to the safety of the people of Ukraine and their property renders the Notes issued under the Trust Deed voidable under English law by reason of duress. However, there can be no objection to the English courts' determining that question, where the Russian Federation has arranged that the Trust Deed is governed by English law and that the English courts have jurisdiction to determine any questions arising.
191 In short, the act of state doctrine is not engaged by the defence of duress now put forward by Ukraine because that defence does not place in issue the validity of any foreign sovereign act. Having reached that conclusion, it is unnecessary to consider Ukraine's submissions concerning two exceptions or limitations to the act of state doctrine which might have applied if the doctrine had been engaged: first, the exception which applies where judicial abstention would conflict with fundamental principles of public policy of the domestic forum; and secondly, a commercial exception which is said to apply where the conduct of the foreign state is of a commercial as opposed to a sovereign character. These issues do not arise in the light of the conclusions to which we have come.
192 It remains to consider Lord Neuberger's possible fourth rule.. Lord Neuberger accepted that such a rule has no clear basis in any judicial decisions in this jurisdiction... Lord Neuberger observed...:

> "If a member of the executive was to say formally to a court that the judicial determination of an issue raised in certain legal proceedings could embarrass the Government's relations with another state, I do not consider that the court could be bound to refuse to determine that issue. That would involve the executive dictating to the judiciary, which would be quite unacceptable at least in the absence of clear legislative sanction. However, there is a more powerful argument for saying that such a statement should be a factor which the court should be entitled to take into account when deciding whether to refuse to determine an issue."...

193 The possible existence of such a principle of non-justiciability in the field of foreign

relations is a matter of controversy. In the present case, however, there has been no statement to the court on behalf of the executive drawing attention to any embarrassment to the executive in the conduct of foreign relations or any damage to United Kingdom foreign policy or security interests which is likely to result from the judicial determination of the defence of duress. As a result, there is no scope for the application here of such a principle of non-justiciability...
195 ... the economic pressure alleged by Ukraine is not illegitimate under English law and is therefore not in itself sufficient to establish duress, for the reasons explained above.
196 That is not, however, to say that the allegations of economic pressure are irrelevant. Ukraine's pleaded case is that the economic pressure and the threats of physical violence together compelled them to enter into the agreement in question. Since only the latter threats are capable of constituting duress, it will be necessary to consider their causal impact upon Ukraine's decision to enter into the agreement....the relevant question, so far as the alleged threats of violence to the person are concerned, will be whether those threats were a reason (not *the* reason, or the predominant reason, or the clinching reason) for Ukraine's decision. The onus will be on the Trustee to establish that those threats contributed nothing to Ukraine's decision. The alleged economic pressure, and threats of further economic pressure, are relevant as forming part of a combined strategy with the alleged threats of violence, or at least as part of the factual context in which those threats are alleged to have been made. If they accentuated the impact of the threats of violence, that is a factor which strengthens, not weakens, Ukraine's case... It should not, therefore, be thought that it will be enough for the Trustee to establish that economic pressure, or threats of economic pressure, were the principal reason for Ukraine's decision."

Note paragraph 189, where the Court notes that Russia should not be able to object to English courts applying English rules relating to duress in the normal way, when "the Russian Federation has arranged that the Trust Deed is governed by English law and that the English courts have jurisdiction to determine any questions arising."

**Halkbank**

Halkbank, a bank owned by Turkey, was indicted for conspiring to evade US sanctions against Iran. The indictment states that international payments were made on behalf of the Government of Iran and Iranian banks, including transfers of US dollars that passed through the US financial system in violation of US sanctions laws.[23] Halkbank employees communicated with officials at OFAC, the Office of Foreign Assets Control.[24] And the indictment states that Halkbank with others "devised a scheme to use exports of Turkish gold to allow Iran access to

[23] You can find a link to the indictment here: https://www.justice.gov/usao-sdny/pr/turkish-bank-charged-manhattan-federal-court-its-participation-multibillion-dollar.

[24] *See* https://ofac.treasury.gov/.

the proceeds of Iranian oil sales to Turkey , to evade ... restrictions, and to deceive foreign banks and U.S. regulators."

Halkbank moved to dismiss on the basis that it was immune from prosecution under the Foreign Sovereign Immunities Act of 1976. The US Supreme Court held that the FSIA does not cover criminal cases, and remanded the case to the Second Circuit to consider whether Halkbank benefits from immunity under the common law.

Here is an excerpt from the opinion of Justice Kavanaugh in **Turkiye Halk Bankasi A.S. v. United States** [25]

"Halkbank is a bank whose shares are majority-owned by the Turkish Wealth Fund, which in turn is part of and owned by the Republic of Turkey. In 2019, the United States indicted Halkbank for a multi-year conspiracy to evade economic sanctions imposed by the United States on Iran. The indictment alleged that Halkbank, with the assistance of high-ranking Turkish government officials, laundered billions of dollars of Iranian oil and gas proceeds through the global financial system, including the U. S. financial system, in violation of U. S. sanctions and numerous federal statutes. The indictment further claimed that Halkbank made false statements to the U. S. Treasury Department in an effort to conceal the scheme. Two individual defendants, including a former Halkbank executive, have already been convicted in federal court for their roles in the alleged conspiracy. According to the U. S. Government, several other indicted defendants, including Halkbank's former general manager and its former head of foreign operations, remain at large....

Section 3231 of Title 18 provides: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." Via its sweeping language, § 3231 opens federal district courts to the full range of federal prosecutions for violations of federal criminal law. By its terms, § 3231 plainly encompasses Halkbank's alleged criminal offenses, which were "against the laws of the United States."

Halkbank cannot and does not dispute that § 3231's text as written encompasses the offenses charged in the indictment. Halkbank nonetheless argues that the statute implicitly excludes foreign states and their instrumentalities...

We decline to graft an atextual limitation onto § 3231's broad jurisdictional grant over "all offenses" simply because several unrelated provisions in the U. S. Code happen to expressly reference foreign states and instrumentalities. Those scattered references in distinct contexts do not shrink the textual scope of § 3231, which operates "without regard to the identity or status of the defendant."... Nor will we create a new clear-statement rule requiring Congress to "clearly indicat[e] its intent" to include foreign states and their instrumentalities within § 3231's jurisdictional grant...

We now hold that the FSIA does not grant immunity to foreign states or their instrumentalities in

[25] 143 S. Ct. 940; 598 U.S.—— (2023). Justices Roberts, Thomas, Sotomayor, Kagan, Barrett, and Jackson joined the opinion.

criminal proceedings. Through the FSIA, Congress enacted a comprehensive scheme governing claims of immunity in civil actions against foreign states and their instrumentalities. That scheme does not cover criminal cases...
The FSIA ... sets forth a carefully calibrated scheme that relates only to civil cases...
In stark contrast to those many provisions concerning civil actions, the FSIA is silent as to criminal matters. The Act says not a word about criminal proceedings against foreign states or their instrumentalities. If Halkbank were correct that the FSIA immunizes foreign states and their instrumentalities from criminal prosecution, the subject undoubtedly would have surfaced somewhere in the Act's text. Congress typically does not "hide elephants in mouseholes."...
In sum, Halkbank's narrow focus on § 1604[26] misses the forest for the trees (and a single tree at that). Halkbank's § 1604 argument reduces to the implausible contention that Congress enacted a statute focused entirely on civil actions and then in one provision that does not mention criminal proceedings somehow stripped the Executive Branch of all power to bring domestic criminal prosecutions against instrumentalities of foreign states. On Halkbank's view, a purely commercial business that is directly and majority-owned by a foreign state could engage in criminal conduct affecting U. S. citizens and threatening U. S. national security while facing no criminal accountability at all in U. S. courts. Nothing in the FSIA supports that result...
In short, Halkbank's various FSIA arguments are infused with the notion that U. S. criminal proceedings against instrumentalities of foreign states would negatively affect U. S. national security and foreign policy. But it is not our role to rewrite the FSIA based on purported policy concerns that Congress and the President have not seen fit to recognize. The FSIA does not provide foreign states and their instrumentalities with immunity from criminal proceedings."

Justice Gorsuch argued that the Court should apply the FSIA, with the commercial exception:

"the Court points to 28 U.S.C. § 1330. That provision grants federal courts subject-matter jurisdiction over civil cases against foreign sovereigns when one of the exceptions provided in §§ 1605-1607 applies. From this grant of civil jurisdiction, the Court reasons, it is a "natural inference" that § 1604's immunity rule must apply only in civil cases... More naturally, however, it seems to me that any inference from § 1330 runs the other way. Section 1330 shows that when Congress wanted to limit its attention to civil suits, it knew how to do so. Section 1604 contains no similar language restricting its scope to civil disputes. Instead, it speaks far more broadly, holding that a foreign state "shall be immune" unless a statutorily specified exception applies. Normally, when Congress includes limiting language in one section of a law but excludes it from another, we understand the difference in language to convey a difference in meaning (expressio unius est exclusio alterius).... The Court's interpretation of the FSIA defies this traditional rule of statutory construction. Today, the Court does to § 1604 exactly what it recognizes we may not do to § 3231—grafting an atextual limitation onto the law's unambiguous terms (in this instance, adding a "civil"-only restriction)...

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[26] Halkbank argued the general sovereign immunity under § 1604 applied in criminal cases but the commercial exception under § 1605 applied only in civil cases.

If some of § 1605's exceptions apply only in civil cases, others speak more expansively. Take the exception relevant here. The commercial-activities exception found in § 1605(a)(2) denies sovereign immunity "in any case ... in which the action is based upon a commercial activity carried on in the United States by the foreign state." (Emphasis added). Nowhere does this exception distinguish between civil and criminal actions. Besides, even if the Court's premise were correct and § 1605's exceptions (somehow) applied only in civil actions, what would that prove? It might simply mean that Congress wanted a more generous immunity from criminal proceedings than civil suits...

After declaring that the FSIA applies only to civil suits, the Court holds that "the common law" controls the disposition of any claim of foreign sovereign immunity in criminal cases... Yet rather than decide whether the common law shields Halkbank from this suit, the Court shunts the case back to the Second Circuit to figure that out. All of which leaves litigants and our lower court colleagues with an unenviable task, both in this case and others sure to emerge. Many thorny questions lie down the "common law" path and the Court fails to supply guidance on how to resolve any of them.

Right out of the gate, lower courts will have to decide between two very different approaches. One option is to defer to the Executive Branch's judgment on whether to grant immunity to a foreign sovereign— an approach sometimes employed by federal courts in the years immediately preceding the FSIA's adoption. The other option is for a court to make the immunity decision looking to customary international law and other sources...

Whichever path a court chooses, more questions will follow. The first option— deferring to the Executive—would seem to sound in separation-of-powers concerns. But does this mean that courts should not be involved in making immunity determinations at all? And what about the fact that the strong deference cases didn't appear until the 20th century; were courts acting unconstitutionally before then? If not, should we be concerned that deference to the Executive's immunity decisions risks relegating courts to the status of potted plants, inconsistent with their duty to say what the law is in the cases that come before them?...

The second option—applying customary international law—comes with its own puzzles. If the briefing before us proves anything, it is that customary international law supplies no easy answer to the question whether a foreign sovereign enjoys immunity from criminal prosecution....Nor is it even altogether clear on what authority federal courts might develop and apply customary international law. Article VI of the Constitution does not list customary international law as federal law when it enumerates sources of "the supreme Law of the Land." And Article I vests Congress rather than the Judiciary with the power to "define and punish ... Offences against the Law of Nations." § 8, cl. 10...

Perhaps Article III incorporated customary international law into federal common law. But since Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), federal courts have largely disclaimed the power to develop federal common law outside of a few reserved areas.. And whether customary international law survives as a form of federal common law after Erie is a matter of considerable debate among scholars... Must lower courts confront this long-running debate to resolve a claim of foreign sovereign immunity in criminal cases? And if there is no federal law at work here that might apply under the Supremacy Clause, only general common-law principles, what constraints remain on state prosecutions of foreign sovereigns?"