Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 11 April 2018 [1]

Case C-600/16 P

National Iranian Tanker Company
v

Council of the European Union

(Appeal — Common Foreign and Security Policy — Restrictive measures against the Islamic Republic of Iran with the aim of preventing nuclear proliferation — Freezing of funds — Action for annulment — Re-listing decision following annulment of initial listing decision by EU Courts on the merits — Article 266 TFEU — General principles of EU law — Fundamental rights — Right to an effective remedy — Article 47 of the Charter of Fundamental Rights of the European Union — Articles 6(1) and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms)

I. Introduction

1. In this case, the Court is again asked to rule on the compatibility with EU law of restrictive measures taken by the Council aimed at inducing the Islamic Republic of Iran ('Iran') to comply with its international obligations relating to its nuclear proliferation activities, but it features a novel issue. The restrictive measures in question concern a decision of the Council to re-list an entity, thus freezing its funds. This decision was taken not long after the initial listing decision was declared to be unlawful by the General Court, thereby obliging the Council pursuant to Article 266 TFEU 'to take the necessary measures to comply' with the judgment of the General Court. Thus, the novel issue is as follows: when the Council responds by re-listing that entity on the basis of the same designation criterion, and where the factual situation has not changed in substance, does this breach, among other principles of EU law, the entity's right to an effective remedy with respect to the initial listing decision, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union ('Charter')?

2. That is the key issue that arises in the present appeal brought by National Iranian Tanker Company ('NITC') against the judgment of the General Court of the European Union of 14 September 2016, *National Iranian Tanker Company* v *Council* (T-207/15, EU:T:2016:471, 'the judgment in *NITC II*'), by which the General Court dismissed NITC's action for annulment against certain measures which reinstated NITC on the EU list of persons and entities whose funds and economic resources were to be frozen in the context of restrictive measures taken against Iran to prevent nuclear proliferation ('restrictive measures against Iran').

1 Original language: English.

3. By its first ground of appeal, NITC submits that the General Court erred in law in finding, at paragraphs 45 to 64 and 68 of the judgment in *NITC II*, that the Council's re-listing decision did not breach the principles of *res judicata*, legal certainty, legitimate expectations and finality, and the right to an effective remedy guaranteed by Article 47 of the Charter.

4. At the heart of NITC's arguments is the claim that so long as the Council has the unrestrained power to recast the legal characterisation of the same factual allegations to fulfil a designation criterion, in circumstances in which the General Court has ruled in a final and binding judgment that those factual allegations did not justify the first listing decision, and there has been no change in circumstances since the first listing decision, a party's right to a real and effective remedy with respect to that first judgment is meaningless. This is so, NITC contends, because that party is forced to come back to court to re-litigate what are in substance the same factual and legal points, which is antithetical to the rule of law in the Union legal order.

5. The Council contests NITC's arguments, relying primarily on the *Kadi*,[2] *OMPI*[3] and *Interporc*[4] cases and the discretion vested in it by Article 266 TFEU with respect to the permissible measures it may take once a declaration of nullity is issued by the EU Courts under Article 264 TFEU.

6. Consequently, as requested by the Court, this Opinion will focus on the first ground of appeal.

7. It is worth noting that this appeal is the first in a series of cases that are currently pending before the Court in which a claimant contends that the EU remedial structure, at least in the context of restrictive measures, merits re-interpretation in light of the right to an effective remedy and other principles of EU law.[5] Therefore, the present case offers an opportunity for the Court to develop its case-law, if this is necessary to ensure effective judicial protection for private parties in the European Union.

II. Background to the proceedings

8. NITC is an Iranian company specialised in the transport of crude oil and gas cargoes. It operates one of the largest fleets of oil tankers in the world. Oil tankers are ships designed to carry oil in bulk.

9. Following several resolutions establishing measures to induce Iran to comply with its international obligations relating to nuclear proliferation, on 9 June 2010, the United Nations Security Council ('UNSC') adopted Resolution 1929 (2010) ('Resolution 1929'), which laid down stricter measures against Iran, 'noting the potential connection between Iran's revenues derived from its energy sector and the funding of Iran's proliferation-sensitive nuclear activities'.[6] On 17 June 2010, the European Council invited the Council to adopt measures implementing Resolution 1929 and accompanying measures, which were to focus, inter alia, on key sectors in the oil and gas industry.[7]

2 Judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, and of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518.

3 Judgment of 23 October 2008, *People's Mojahedin Organization of Iran* v *Council*, T-256/07, EU:T:2008:461.

4 Judgment of 6 March 2003, *Interporc Im- und Export* v *Commission*, C-41/00 P, EU:C:2003:125.

5 See *Bank Tejarat* v *Council*, C-248/17 P, pending, and *Islamic Republic of Iran Shipping Lines and Others* v *Council*, C-225/17 P, pending.

6 United Nations Security Council, Resolution 1929 (2010), adopted by the Security Council at its 6335th meeting, on 9 June 2010, recital 17.

7 European Council conclusions, EUCO 13/10, 17 June 2010, Annex II 'Declaration on Iran', point 4.

10. On 26 July 2010, the Council adopted Decision 2010/413/CFSP concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP ('Decision 2010/413').[8] Annex II to that decision lists the persons and entities — other than those designated at the United Nations level — whose funds and economic resources are to be frozen.[9]

11. On 23 January 2012, the Council adopted Decision 2012/35/CFSP amending Decision 2010/413 ('Decision 2012/35'),[10] with a view to strengthening the restrictive measures against Iran in response to its serious and deepening concerns over the nature of Iran's nuclear programme.[11] Recital 13 of that decision states that fund-freezing measures 'should be applied to additional persons and entities providing support to the Government of Iran allowing it to pursue proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems, *in particular persons and entities providing financial, logistical or material support to the Government of Iran*'.[12]

12. Decision 2012/35 thereby added the following point to Article 20(1) of Decision 2010/413, providing for the freezing of funds belonging to the following persons and entities:

'(c) other persons and entities not covered by Annex I that *provide support to the Government of Iran*, and persons and entities associated with them, as listed in Annex II'.[13]

13. On 23 March 2012, the Council adopted Regulation (EU) No 267/2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010 ('Regulation No 267/2012').[14] For the purposes of implementing Article 20(1)(c) of Decision 2010/413 (as amended by Decision 2012/35[15]), Article 23(2) of Regulation No 267/2012 provides for the freezing of funds and economic resources of the persons, entities and bodies listed in Annex IX thereto, identified as:

'(d) being other persons, entities or bodies that *provide support, such as material, logistical or financial support, to the Government of Iran*, and persons and entities associated with them'.[16]

A. The first listing

14. On 15 October 2012, the Council adopted Decision 2012/635/CFSP amending Decision 2010/413 ('Decision 2012/635').[17] The Council considered it necessary to adopt additional restrictive measures against Iran in view of its failure to engage seriously in negotiations to address international concerns about its nuclear programme.[18] Recital 16 of that decision states that 'in particular Iranian State-owned entities engaged in the oil and gas sector' are to be included in the list of persons and entities subject to restrictive measures set out in Annex II to Decision 2010/413, 'since they provide a substantial source of revenue for the Iranian Government'.

8 OJ 2010 L 195, p. 39. Recital 22 of that decision refers to Resolution 1929 and the potential connection between Iran's revenues from its energy sector and the funding of its nuclear proliferation activities.

9 See Decision 2010/413, Articles 23(2), 24(2) and 25(1).

10 OJ 2012 L 19, p. 22. Recital 8 of that decision reiterates the potential connection between Iran's revenues derived from its energy sector and the funding of its nuclear proliferation activities as underlined in Resolution 1929.

11 See Decision 2012/35, recitals 5 and 6.

12 My emphasis.

13 Decision 2012/35, Article 1(7)(a)(ii). My emphasis. Article 1(8) of that decision replaced Article 24(2) of Decision 2010/413, so as to provide that where the Council decides to subject a person or entity to the measures referred to in, inter alia, Article 20(1)(c), it must amend Annex II accordingly.

14 OJ 2012 L 88, p. 1.

15 See Regulation No 267/2012, recital 11.

16 My emphasis. Under Article 46(2) of Regulation No 267/2012, where the Council decides to subject a person, entity or body to the measures referred to in, inter alia, Article 23(2) of that regulation, it must amend Annex IX accordingly.

17 OJ 2012 L 282, p. 58.

18 Decision 2012/635, recital 5.

15. To that end, Article 1(8)(a) of Decision 2012/635 replaced Article 20(1)(c) of Decision 2010/413, so as to provide that 'other persons and entities not covered by Annex I that provide support to the Government of Iran and entities owned or controlled by them or persons and entities associated with them, as listed in Annex II' would be subject to restrictive measures. Article 2 of Decision 2012/635 listed NITC in Annex II to Decision 2010/413, containing the list of persons and entities, inter alia, providing support to the Government of Iran. [19]

16. Also on 15 October 2012, the Council adopted Regulation (EU) No 945/2012 implementing Regulation No 267/2012 ('Implementing Regulation No 945/2012'). [20] In view of the situation in Iran and in accordance with Decision 2012/635, the Council considered that additional persons and entities should be subject to restrictive measures set out in Annex IX to Regulation No 267/2012. [21] Article 1 of that implementing regulation listed NITC in Annex IX to Regulation No 267/2012, containing the list of persons and entities, inter alia, providing support to the Government of Iran. [22]

17. NITC was listed in Decision 2012/635 and Implementing Regulation No 945/2012 on the basis of the designation criterion set forth in Article 20(1)(c) of Decision 2010/413 and Article 23(2)(d) of Regulation No 267/2012 ('the first listing') for the following reasons:

'Effectively controlled by the Government of Iran. Provides financial support to the Government of Iran through its shareholders which maintain ties with the Government.'

18. On 16 October 2012, NITC was notified by the Council of the first listing. An exchange of correspondence between NITC and the Council ensued. [23]

19. On 21 December 2012, the Council adopted Regulation No 1263/2012 amending Regulation No 267/2012 ('Regulation No 1263/2012'). [24] Regulation No 1263/2012, inter alia, replaced Article 23(2)(d) of Regulation No 267/2012 by the following: 'being other persons, entities or bodies that *provide support, such as material, logistical or financial support, to the Government of Iran* and entities owned or controlled by them, or persons and entities associated with them'. [25] The designation criterion applied to NITC was thus not affected.

20. On 27 December 2012, NITC brought an action before the General Court seeking the annulment of Decision 2012/635 and Implementing Regulation No 945/2012 in so far as those measures concerned NITC.

B. The judgment of the General Court in NITC I

21. In its judgment of 3 July 2014, *National Iranian Tanker Company* v *Council* (T-565/12, EU:T:2014:608, 'the judgment in *NITC I*'), the General Court upheld NITC's first plea that the Council had committed a manifest error of assessment in considering that the designation criterion had been met for listing NITC. [26]

22. Since the judgment in *NITC I* is at the heart of this case, I consider it useful to set out the General Court's reasoning in some detail.

19 Decision 2012/635, Annex, Part B. Entities, point 31.

20 OJ 2012 L 282, p. 16.

21 Implementing Regulation No 945/2012, recital 2.

22 Implementing Regulation No 945/2012, Annex, Part B. Entities, point 31.

23 See judgment of 3 July 2014, *National Iranian Tanker Company* v *Council*, T-565/12, EU:T:2014:608, paragraphs 16 to 18.

24 OJ 2012 L 356, p. 34.

25 Regulation No 1263/2012, Article 1(11)(a). My emphasis.

26 Judgment in *NITC I*, paragraph 66. The General Court rejected NITC's second plea alleging breach of the obligation to state reasons: ibid., paragraphs 35 to 47. Having upheld the first plea, it did not examine the remaining pleas: ibid., paragraph 67.

23. First, the General Court rejected the Council's argument, put forward at the hearing, that NITC's involvement in the Iranian oil and gas sector through its business in transporting crude oil produced in Iran was sufficient evidence in itself that NITC provided financial support to the Iranian Government, since the transport of oil was unrelated to the alleged existence of links between NITC's shareholders and that government. [27]

24. The General Court also rejected the Council's argument, advanced at the hearing, that NITC remained, after its privatisation, under the control of the National Iranian Oil Company ('NIOC'), an entity wholly owned by the Iranian State and also subject to restrictive measures by reason of its provision of financial support to the Iranian Government. The General Court reached this conclusion because the grounds for NITC's listing did not refer to any indirect financial support resulting from links between NITC and NIOC. [28]

25. The General Court additionally stated as follows: 'Further, and in any event, in so far as the aim of the abovementioned arguments of the Council is to establish that the applicant provides indirect financial support to [the] Government of Iran, as a consequence of its business in transporting oil and gas by sea, it is clear that the applicable legislation lays down the criterion of the provision of financial support to the Government of Iran, not the criterion of the provision of indirect financial support. Contrary to what is claimed by the Council, *the mere fact that, through its transport business, the applicant is involved in the Iranian oil and gas sector, which represents one of the Government of Iran's main sources of revenue, cannot be regarded as being covered by the legal criterion of provision of financial support to the Government of Iran*.' [29]

26. Next, as regards NITC's ownership structure, the General Court found that neither the listing proposals submitted by three Member States nor the other documents in the Council's file identified NITC's shareholders or contained 'the slightest evidence' capable of supporting the grounds relied on. [30] In that regard, the General Court ruled that the Council could not invoke certain factual arguments — including that NITC's shareholders were three State pension funds, with 33 % of NITC's capital being held by the State Pension Fund, 33 % by the Social Security Retirement Fund and 33 % by the NIOC Pension and Savings Fund — since those arguments were not part of the Council's file and not disclosed to NITC in good time. [31]

27. Consequently, the General Court found that the material that could be taken into consideration contained no evidence capable of supporting the grounds relied on and therefore the first listing must be annulled. [32]

28. As regards the temporal effects of the annulment, the General Court rejected NITC's argument that it should take effect immediately, since that would enable NITC to transfer all or part of its assets outside the EU, without the Council being able, if appropriate, to apply in good time Article 266 TFEU, with a view to correcting the irregularities identified in the judgment, and consequently, the effectiveness of any freezing of assets in relation to NITC which might in the future be taken by the Council could be seriously and irreversibly prejudiced. [33]

27 Judgment in *NITC I*, paragraph 58.

28 Judgment in *NITC I*, paragraph 59.

29 Judgment in *NITC I*, paragraph 60. My emphasis.

30 Judgment in *NITC I*, paragraph 61.

31 Judgment in *NITC I*, paragraph 62 (referring to paragraphs 51 and 52).

32 Judgment in *NITC I*, paragraphs 64 to 67.

33 Judgment in *NITC I*, paragraph 77.

29. As regards the application of Article 266 TFEU, the General Court stated: 'the annulment by this judgment of the applicant's listing stems from the fact that the reasons stated for that listing are not supported by sufficient evidence. Although it is for the Council to decide on what measures to adopt to comply with this judgment, a further listing of the applicant cannot automatically be ruled out. In the course of a further review, the Council has the possibility of again listing the applicant on the basis of reasons which are supported to the requisite legal standard.'[34]

30. On that basis, the General Court ruled that the effects of the restrictive measures in question should be maintained in relation to NITC until the date of expiry of the period for bringing an appeal as set forth in Article 56, first paragraph, of the Statute or, if an appeal was brought within that period, until the dismissal of the appeal.[35]

31. The Council did not appeal against the judgment in *NITC I*. Thus, the annulment of the first listing took effect on 20 September 2014.[36]

C. The second listing

32. About one month later, by letter dated 23 October 2014, the Council notified NITC that it intended to re-list it under the designation criterion set out in Article 20(1)(c) of Decision 2010/413 and Article 23(2)(d) of Regulation No 267/2012, referring to persons and entities that provide support to the Government of Iran. This was the same designation criterion which had been used for the listing decision annulled by the General Court in the judgment in *NITC I*.

33. An exchange of correspondence between NITC and the Council ensued.[37] In particular, on 27 October 2014, the Council sent NITC six emails containing the supporting documents mentioned in the Council's letter of 23 October 2014. These supporting documents included information on the shareholder pension funds of NITC and NITC's oil transport activities, the majority of which bore no official date,[38] and one of which the Council had put before the General Court in the judgment in *NITC I*.[39]

34. By letter of 5 February 2015, the Council provided NITC with a declassified extract of the proposal to re-list it ('the re-listing proposal').[40] Under the heading of financial support to the Iranian Government through NITC's shareholders who are government-owned/controlled, the re-listing proposal indicated that, according to an official document of NITC dated 21 August 2006, NITC was

34 Judgment in *NITC I*, paragraph 77 (citations omitted).

35 Judgment in *NITC I*, paragraph 78.

36 According to the information before the Court, the date of notification of the judgment in *NITC I* to the parties was 9 July 2014. In light of the time limit set forth in Article 56, first paragraph, of the Statute (2 months plus 10 days for distance), the effects of the first listing were maintained in relation to NITC until 19 September 2014.

37 See judgment in *NITC II*, paragraphs 23 to 29.

38 Annexed to NITC's submissions in this appeal, the supporting documents comprised: (1) article, 'Divestment of State Companies in Iran' (not dated, RELEX date 20 December 2013); (2) article, 'New Labor Minister ends Saeed Mortazavi's appointment on the Social Security Organization's Board of Trustees', Iran Daily Brief (dated 19 August 2013, RELEX date 16 October 2014); (3) webpage of Social Security Organization concerning membership of board of directors (access date 13 October 2014, RELEX date 16 October 2014); (4) text, 'Social Security Law of the Islamic Republic of Iran' (not dated, RELEX date 16 October 2014); (5) Dun & Bradstreet report on Social Security Organization (not dated, RELEX date 16 October 2014); (6) Dun & Bradstreet report on Civil Servants Pension Fund (not dated, RELEX date 16 October 2014); (7) 'unofficial translation' of extract from interview with former NITC Chairman Mr Soori (not dated, RELEX date 16 October 2014); (8) NITC letter to EU High Representative Baroness Ashton, 'Statement of NITC in relation to the Lloyd's List article dated 18 January 2012 — "NITC to be targeted by sanctions"' (dated 19 January 2012, RELEX date 16 October 2014); and (9) webpage of NIOC, listing NITC's activities as one of NIOC's subsidiaries (access date 12 February 2014, RELEX date 16 October 2014). RELEX denotes the Council Working Party of Foreign Relations Counsellors.

39 The General Court cited the letter specified in point 8 of note 38 in its examination of NITC's plea alleging breach of the obligation to state reasons: see judgment in *NITC I*, paragraphs 10 and 34.

40 Extract from COREU CFSP/0084/14, Doc 16211/14 LIMITE, 27 November 2014, annexed to NITC's submissions in this appeal ('re-listing proposal').

owned by three pension funds — the State Retirement Fund (33 %), the Social Security Organization (33 %) and the Oil Industry Employees Retirement and Savings Fund (34 %) — which was further detailed through links to open-source information and several of the supporting documents mentioned above. [41]

35. Under the heading of NITC's provision of logistical support to the Iranian Government through the transport of Iranian oil products, the re-listing proposal indicated that, according to a letter from NITC to the EU High Representative for Foreign Affairs and Security Policy, NITC is a worldwide leading tanker shipping company, the activities of which are limited to the carriage of crude oil. [42] NITC's transport activities were further supported by reference to the NIOC website and a link to a 2012 article from the Institute for the Study of War, which the Council had put before the General Court in the judgment in *NITC I* to the effect that NITC transported almost half of the crude oil produced in Iran in 2011. [43] The re-listing proposal stated that since oil is a very significant source of revenue for the Iranian Government, NITC's transportation to export markets and its distribution to ports and islands is a key logistical concern of that government and an integral part of oil commerce. [44] Also, according to this re-listing proposal, news reports indicated that the Iranian Government was dependent on NITC to export oil, with links to five such reports (three dated before NITC's first listing), as well as one report on NITC's transport activities following the judgment in *NITC I*. [45]

36. In its submissions, NITC contends that all material information relied on by the Council at the time of the re-listing is and was publicly available or provided by NITC in correspondence between NITC and the EU.

37. On 12 February 2015, the Council adopted Decision (CFSP) 2015/236 amending Decision 2010/413 ('Decision 2015/236') [46] and Regulation (EU) 2015/230 implementing Regulation No 267/2012 ('Implementing Regulation 2015/230'). [47] By those measures (together, 'the contested measures'), the Council re-listed NITC in Annex II to Decision 2010/413 [48] and Annex IX to Regulation No 267/2012 [49] pursuant to the designation criterion set forth in Article 20(1)(c) of Decision 2010/413 and Article 23(2)(d) of Regulation No 267/2012, referring to persons and entities that provide support to the Government of Iran. As mentioned above, this was the same designation criterion on which the first listing had been based.

38. NITC was re-listed in Decision 2015/236 and Implementing Regulation 2015/230 ('the second listing') for the following reasons:

'The National Iranian Tanker Company provides financial support to the Government of Iran through its shareholders the Iranian State Retirement Fund, the Iranian Social Security Organization, and the Oil Industry Employees Retirement and Savings Fund, which are State-controlled entities. Moreover, NITC is one of the largest operators of crude oil carriers in the world and one of the main transporters of Iranian crude oil. Accordingly, NITC provides logistical support to the Government of Iran through the transport of Iranian oil.'

41 Re-listing proposal, points 1 to 6.

42 Re-listing proposal, point 7.

43 Re-listing proposal, point 8. See judgment in *NITC I*, paragraph 50.

44 Re-listing proposal, point 9.

45 Re-listing proposal, point 11 (citing links to news reports dated (in the order of listing) 21 June 2012, 17 April 2012, 11 December 2013, 15 November 2012, 16 April 2012 (note 43 and accompanying text above) and 11 July 2014).

46 OJ 2015 L 39, p. 18.

47 OJ 2015 L 39, p. 3.

48 Decision 2015/236, Annex, B. Entities, point 140.

49 Implementing Regulation 2015/230, Annex, B. Entities, point 140.

39. Consequently, NITC's re-listing was based on two grounds. The first ground concerned NITC's provision of financial support to the Iranian Government through its shareholders. This was the same ground that had been used for the first listing, with some modified language and the names of the three shareholder pension funds of NITC added. The second ground concerned NITC's provision of logistical support to the Iranian Government through its economic activity transporting Iranian oil. In the judgment in *NITC I*, the General Court had ruled in substance that the mere fact that NITC transports Iranian oil did not equate with the provision of financial support to the Iranian Government, but was not asked to consider that of logistical support. [50]

40. On 16 February 2015, NITC was notified by the Council of the second listing. [51]

41. It should be noted that on 16 January 2016, NITC's re-listing in Decision 2015/236 was suspended, [52] and its re-listing in Implementing Regulation 2015/230 deleted, [53] by the Council. [54] This occurred in the broader context of the Joint Comprehensive Plan of Action ('JCPOA') [55] between the E3/EU+3 [56] and Iran, which embodies a long-term solution to the Iranian nuclear issue and includes a comprehensive lifting of UNSC, EU and national sanctions related to Iran's nuclear programme. [57]

III. Proceedings before the General Court and the judgment in *NITC II*

42. On 24 April 2015, NITC brought an action before the General Court, seeking the annulment of the contested measures against it.

43. Also on 24 April 2015, NITC submitted an application for interim measures seeking the suspension of the operation of the contested measures against it.

A. The President of the General Court's order in NITC II

44. By order of 16 July 2015 in *National Iranian Tanker Company* v *Council* (T-207/15 R, EU:T:2015:535) ('the order in *NITC II*'), the President of the General Court dismissed NITC's application for interim measures, finding that the conditions relating to the balance of interests and urgency were not satisfied. [58] Yet, the President considered that the condition of a prima facie case was satisfied, since the parties' arguments revealed a legal disagreement over the scope of Article 47 of the Charter and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), both of which he noted enshrine the right to an effective remedy, that is to say, to effective judicial protection 'in practice as well as in law'. [59]

45. Since the order in *NITC II* features in the parties' arguments in this case, I will set out the President's reasoning on this point.

50 See point 25 above.

51 Judgment in *NITC II*, paragraph 32.

52 Council Decision (CFSP) 2015/1863 of 18 October 2015 amending Decision 2010/413 (OJ 2015 L 274, p. 174), Article 1(16).

53 Council Implementing Regulation (EU) 2015/1862 implementing Regulation No 267/2012 (OJ 2015 L 274, p. 161), Article 1.

54 Council Decision (CFSP) 2016/37 of 16 January 2016 concerning the date of application of Decision 2015/1863 (OJ 2016 L 11 I, p. 1); Information concerning the date of application of Council Regulation (EU) 2015/1861 amending Regulation No 267/2012 and Implementing Regulation 2015/1862 (OJ 2016 CI 15, p. 1).

55 Available at http://www.consilium.europa.eu/en/policies/sanctions/iran/jcpoa-restrictive-measures/.

56 China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the EU High Representative.

57 See Information Note on EU Sanctions to be lifted under the Joint Comprehensive Plan of Action (JCPOA), Brussels, 16 January 2016, Last updated 3 August 2017, SN 10176/1/17 REV 1, available at note 55above.

58 Order of the President of the General Court of 16 July 2015, *National Iranian Tanker Company* v *Council*, T-207/15 R, EU:T:2015:535 ('order in *NITC II*'), paragraphs 59, 80 and 81.

59 Order in *NITC II*, paragraphs 43 (citing ECtHR, 13 November 2007, *Ramadhi and Others* v *Albania*, CE:ECHR:2007:1113JUD003822202R, paragraph 48) and 50.

46. In particular, the President of the General Court observed that if the Council is entitled to rely on the case-law concerning Article 266 TFEU in order to correct the findings of illegality that led to the annulment of a restrictive measure by adopting a new measure which has the same practical effect as the earlier measure and where the factual situation has not changed in substance, the Council would be able to maintain in force, by systematically bringing appeals, an uninterrupted series of restrictive measures, even without the factual context forming the basis of those measures and their annulment having changed in substance. [60]

47. According to the President of the General Court, this situation raised the question whether the right to an effective remedy necessitated a time-bar, requiring the Council to include all of the reasons and evidence in its first listing, and thus preventing it, if the EU Courts censured those reasons and evidence, from using them to justify the re-listing of the same party. He pointed out that the present case seemed to illustrate the need for such a time-bar, since NITC's economic activity transporting Iranian oil and the composition of NITC's shareholding did not appear to have changed between the dates of the first listing in 2012 and the re-listing in 2015. He also noted that the evidence supporting the re-listing referred to by the Council in its observations pre-dated NITC's first listing, save for one later document that did not contain anything novel. [61]

48. The President of the General Court further stated that it was not possible for NITC to claim that the judgment in *NITC I* was, strictly speaking, *res judicata* since, by virtue of its date of adoption, the re-listing decision related to a different period of NITC's economic activity from the first listing. Still, he observed, that activity (the transport of Iranian oil) remained unchanged in substance and the difference in time periods was the result of NITC's re-listing, taken by the Council on a factual basis that had also not changed in substance. It could thus be considered that *res judicata* was excluded only on account of the Council's extending artificially the restrictive measures imposed on NITC by now presenting evidence which could have been invoked at the time of the first listing. He noted that such an approach, even if not incompatible with *res judicata*, could contribute to a breach of NITC's right to an effective remedy. [62]

49. According to the President of the General Court, it followed, on the one hand, that it may be necessary, in light of the right to an effective remedy, to apply a restrictive interpretation to the case-law on Article 266 TFEU. On the other hand, it could be argued that the scope of the right to an effective remedy must not be unduly limited to an action for annulment coupled with interim relief, since a party could bring an action for damages. It would be for the General Court to rule on the matter in the main action. [63]

B. The judgment of the General Court in NITC II

50. By the judgment in *NITC II*, the General Court dismissed the action for annulment brought by NITC in its entirety.

51. NITC put forward five pleas in law, the first of which is most pertinent here alleging breach of the principles of *res judicata*, legal certainty and legitimate expectations and the right to an effective remedy under Article 47 of the Charter. [64] The General Court rejected this plea for the following reasons.

60 Order in *NITC II*, paragraphs 43 and 44.
61 Order in *NITC II*, paragraphs 45 and 46.
62 Order in *NITC II*, paragraph 47.
63 Order in *NITC II*, paragraphs 48 and 49.
64 Judgment in *NITC II*, paragraph 39.

52. In the first place, as regards *res judicata*, the General Court considered that one of the grounds and the evidence relied on by the Council in support of the contested measures were different from those put before the General Court in the judgment in *NITC I* and thus NITC's re-listing was not in breach of that principle.[65]

53. With respect to financial support, the General Court found that the Council relied on new documents that were not included in the file at the time of the first listing and on which the General Court did not give a ruling in the judgment in *NITC I*.[66] It considered that even though the Council relied on evidence that related, for the most part, to a date earlier than the first listing, the Council could not be criticised for that fact, since obtaining evidence to substantiate the grounds against a party sometimes proves difficult for the Council because, inter alia, it is dependent on the diligence of the Member States in producing such evidence.[67] It is therefore possible that the Council may obtain the evidence necessary to substantiate the grounds for a listing after the date on which that listing was decided; although those circumstances do not purge the first listing decision of its irregularity, they may still suffice to render lawful a subsequent re-listing decision adopted on the basis of the same grounds as those relied on at the time of the first listing, in so far as the evidence obtained by the Council substantiates those grounds to the requisite legal standard.[68]

54. Moreover, with respect to logistical support, the General Court found that even though the factual circumstances supporting that ground, namely NITC's activities in the transport of Iranian oil, were put forward by the Council at the hearing in the previous case in support of the ground relating to financial support, the General Court had not in any way examined whether NITC's involvement in the Iranian energy sector might constitute logistical support to the Iranian Government.[69] The General Court also rejected NITC's argument that the Council should have relied on logistical support in the first listing, since a single ground suffices to justify the inclusion of a party in the lists at issue; thus, the Council is free to select the ground that it considers most relevant, and a possible error in the selection of that ground does not prevent it from relying later on a ground that it could have relied on at the time of the first listing.[70]

55. In the second place, as regards legal certainty and legitimate expectations, the General Court found that although the Council did not appeal the judgment in *NITC I* and did not re-list NITC within the period for bringing an appeal, this could not have caused NITC to entertain any justified expectation that it would not be re-listed, and the Council was not obliged to re-list within that period.[71]

56. Finally, as regards the right to an effective remedy under Article 47 of the Charter, the General Court held that NITC's re-listing in no way called into question the effectiveness of the action brought in the case that gave rise to the judgment in *NITC I*.[72] This was so for three reasons.

57. First, the first listing was deleted retroactively from the Union legal order, such that NITC was deemed never to have been included on the list concerned for the period prior to the judgment in *NITC I*.[73]

65 Judgment in *NITC II*, paragraphs 45, 46, 50 and 55.
66 Judgment in *NITC II*, paragraph 51.
67 Judgment in *NITC II*, paragraph 52.
68 Judgment in *NITC II*, paragraph 52.
69 Judgment in *NITC II*, paragraph 53.
70 Judgment in *NITC II*, paragraph 54.
71 Judgment in *NITC II*, paragraphs 56 to 60.
72 Judgment in *NITC II*, paragraph 62.
73 Judgment in *NITC II*, paragraph 63.

58. Second, none of the principles relied on by NITC (*res judicata*, legitimate expectations and legal certainty) precluded its re-listing, and in so far as the evidence against NITC was sufficient to justify its re-listing, the annulment of the first listing did not constitute an element liable to call into question the lawfulness of the re-listing.[74]

59. Third, the annulment of the first listing by the judgment in *NITC I* could constitute the basis for an action for damages.[75] The General Court underlined that when the Council decides to re-list a party following a judgment annulling the first listing, the Council must be 'particularly rigorous' in its re-examination in order to ensure that the re-listing decision is not affected by the same irregularities as those identified in the annulment judgment and to prevent that party from being, for the second time, unjustly subject to restrictive measures.[76] Consequently, the General Court reasoned that if it were found that NITC's re-listing was vitiated by the same irregularities as those identified in the judgment in *NITC I*, the Council's failure to fulfil its 'obligation of rigour' could be taken into account in assessing the unlawfulness of its conduct in a subsequent action for damages and thus the General Court's finding that the first listing was unlawful in the judgment in *NITC I* could facilitate the award of damages to NITC as a result of subsequent and unjustified re-listings.[77]

IV. Proceedings before the Court of Justice

60. By appeal lodged on 24 November 2016, NITC requests the Court to set aside the judgment in *NITC II* and to annul the contested measures in so far as they apply to NITC and, in the alternative, to declare that Article 20(1)(c) of Decision 2010/413 and Article 23(2)(d) of Regulation No 267/2012, as amended, are inapplicable in so far as they apply to NITC by reason of illegality. NITC also requests the Court to order the Council to pay the costs of the appeal and the proceedings before the General Court.

61. The Council requests the Court to dismiss the appeal, or alternatively, if the Court decides to set aside the judgment in *NITC II* and give final judgment itself, to dismiss the application for annulment and a declaration of inapplicability. The Council also requests the Court to order NITC to pay the costs of the appeal.

62. NITC and the Council participated in the hearing before the Court which took place on 24 January 2018.

V. The first ground of appeal, alleging infringement of the principles of *res judicata*, legal certainty, legitimate expectations and finality, as well as the right to an effective remedy under Article 47 of the Charter

A. Arguments of the parties

63. By its first ground of appeal, NITC invites the Court to develop its case-law so that constraints are placed on the Council's designation powers so that it cannot reinstate restrictive measures against a party by relying on the same designation criterion and the same factual allegations which were rejected by the EU Courts on the merits in a previous judgment. NITC argues that this is necessary to guarantee the party's right to an effective remedy under Article 47 of the Charter. Otherwise, the Council is in the position of being able to hold back or 'warehouse' legal and factual points and thus

74 Judgment in *NITC II*, paragraph 64.
75 Judgment in *NITC II*, paragraph 65.
76 Judgment in *NITC II*, paragraph 66.
77 Judgment in *NITC II*, paragraph 67.

engage in abusive litigation that strips a party of its right to an effective remedy with respect to the judgment declaring the first listing void. The law and practice as it stands results in a 'never-ending litigation loop', requiring that party to come back to court indefinitely. Also, given the narrow availability of damages and the fact that the EU Courts have declined to grant interim relief in relation to restrictive measures, NITC submits that it is all the more important that the Court give effect to the right to an effective remedy in these proceedings.

64. First, NITC underlines the particular circumstances of this case, in which: (1) NITC won a final and binding judgment of the General Court annulling the first listing on the merits; (2) the factual allegations against NITC did not materially change since those proceedings; and (3) the additional evidence used for NITC's re-listing that was not put forward for the first listing was always available to the Council with reasonable diligence.

65. In that regard, NITC stresses that the factual allegations for its re-listing are the same factual allegations on which the Council relied unsuccessfully to justify the first listing, namely that NITC provides support to the Iranian Government because, first, its shareholders (certain Iranian pension funds) are said to be controlled by that government; and second, it is a key transporter of Iranian oil which provides a substantial source of revenue to that government. The Council merely 'relabelled' the same factual allegations from financial to logistical support. Given that the designation criterion in question entails a non-exhaustive list of the kinds of support that may be provided to the Iranian Government, NITC asserts that the Council could go on re-listing it on the basis of the same factual allegations, using different labels each time, no matter how frequently it succeeded before the General Court.

66. In addition, NITC submits that all of the material information relied on by the Council for its re-listing were publicly available documents taken from the internet or had been provided by NITC in correspondence between NITC and the EU. NITC further contends that in so far as documents were available to the Council prior to the first listing, the Council and the Member States owe each other duties of sincere cooperation and therefore the Council must ensure that the Member States have gathered all available evidence in order for the Council to put its whole case at the time of the first listing.

67. Second, NITC maintains that the suggestion in the order of the President of the General Court in *NITC II* to apply a restrictive interpretation to the case-law on Article 266 TFEU should be adopted. This entails imposing a time-bar, requiring the Council to include all of the reasons and evidence in the first listing and precluding it from using them to re-list the same party, which in NITC's view is the correct approach. NITC criticises the General Court for not addressing these points in the judgment in *NITC II* and for taking a narrow interpretation to the right to an effective remedy. As regards Article 266 TFEU, NITC also disputes the Council's assertion that, with the benefit of hindsight and in light of the judgment in *NITC I*, it came to consider NITC's provision of logistical support based on its economic activity of transporting oil, contending that the Council had already unsuccessfully advanced arguments based on such activity in connection with the provision of financial support before the General Court in the judgment in *NITC I*.

68. Third, NITC considers that, although the principle of *res judicata* is not strictly engaged in this case, the right to an effective remedy and the other principles relied on demand that the Council 'bring its entire case' to be litigated at once, absent some compelling public interest.[78] It underscores that this bar would thus not be absolute, and that even if it might unduly benefit parties in certain cases, this would be no different from the approach taken in the Court's case-law to other types of procedural bars such as time limits and, in any event, the consequences for private parties in the absence of such constraints are particularly grave in restrictive measures cases.

78 In its submissions, NITC finds that this is inspired by relevant case-law in the United Kingdom in the context of civil litigation, citing as examples *Henderson v. Henderson* (1843) 3 Hare 100; and *Johnson v. Gore Wood* [2002] 2 AC 1.

69. Fourth, NITC finds it striking that the Council makes no attempt to explain or justify its conduct in connection with its re-listing, and argues that the Council's reliance on the *Kadi, OMPI* and *Interporc* cases is misplaced.

70. Fifth, NITC calls attention to the case-law of the European Court of Human Rights ('the ECtHR') on Articles 6(1) and 13 of the ECHR and emphasises that the right to an effective remedy under Article 47 of the Charter must be effective in practice as well as in law.

71. The Council rejects NITC's assertion that the principles of *res judicata*, legal certainty, legitimate expectations and finality and the right to an effective remedy preclude it from adopting the re-listing decision in this case.

72. First, the Council argues, on the basis of the *Kadi*, *OMPI* and *Interporc* cases, that there is no requirement that the Council must rely on all possible grounds and evidence at the time of the first listing or that the statement of reasons for a new listing decision must be limited to subsequent facts or circumstances or to evidence which only became available after the initial listing.

73. Second, the Council relies on Article 266 TFEU that it is for the institution concerned to take the necessary measures to comply with the ruling of the EU Courts. The Council underlines in this regard that it is for the Council, not the Court, to review all of the potentially relevant facts and decide if the party concerned should be re-listed. The Council also stresses that the scope of review under Article 266 TFEU is different than what may be found in common law systems and that NITC's attempt to limit the case-law on Article 266 TFEU in the restrictive measures context is not possible.

74. Third, the Council disputes NITC's assertion that it merely requalified the same facts from financial to logistical support, and contends that logistical support is a completely distinct ground. The Council submits that it learns from the restrictive measures case-law and that, in hindsight, it could have considered the logistical support ground at the time of the first listing. Yet, in its view, it was entitled to conceive of the support that NITC gave as being financial support through the link with its shareholders which is why it indicated this in the first listing, and it is not obliged to specify every possible ground of support that a given entity may be deemed to provide to the Iranian Government.

75. Fourth, the Council maintains that it does not act in an abusive way when it adopts re-listing decisions, as illustrated by its practice concerning restrictive measures against Iran. It also submits that an action for damages is available if the Council were to adopt a re-listing decision that ignored a previous judgment of the EU Courts.

76. Fifth, the Council asserts that the order in *NITC II* merely indicated that there was a legal disagreement between the parties that called for examination in the main action; it did not find that the re-listing decision breached NITC's right to an effective remedy.

B. Analysis

77. On the basis of the following analysis, I conclude that the first ground of appeal should be rejected. While I take the view that this appeal cannot be resolved by reference to the *Kadi, OMPI* and *Interporc* cases, and that restrictive measures taken by the Council are limited by the right to an effective remedy under Article 47 of the Charter including pertinent case-law of the ECtHR on Articles 6(1) and 13 of the ECHR, I do not consider that the General Court erred in law in finding that the re-listing decision complied with the right to an effective remedy under Article 47 of the Charter or otherwise erred in EU law.

78. My analysis is divided into three main parts.

79. First, I will begin with some preliminary observations in order to frame the relevant legal issues before the Court in this appeal.

80. Second, I will assess the application of the *Kadi, OMPI* and *Interporc* cases in the circumstances of this appeal.

81. Third, I will examine the right to an effective remedy under Article 47 of the Charter, taking into account: (a) the Court's case-law on Article 266 TFEU, (b) pertinent case-law of the ECtHR on Articles 6(1) and 13 of the ECHR; and (c) its application in the circumstances of this appeal.

1. Preliminary observations

82. At first glance, the issues raised by the first ground of appeal may appear deceptively simple.[79] The Court's case-law on the principles of *res judicata*, legal certainty and legitimate expectations is settled and, in my view, was correctly applied by the General Court in the judgment in *NITC II*. It is also not arguable that NITC was prevented from having access to a court to obtain judicial review of the contested measures in the sense of the Court's case-law on the right to an effective remedy.[80] Moreover, the Court's case-law under Article 266 TFEU, according to which it is for the institution whose act has been declared void by a judgment of the EU Courts to take the necessary measures to comply with that judgment,[81] vests the institution concerned with discretion as to how to respond.[82]

83. On closer examination, however, the issues presented by this appeal are more delicate and complex.

84. Put simply, this appeal entails consideration as to whether the discretion afforded to an Union institution under Article 266 TFEU, with respect to what it is obliged to do to remedy the wrong identified in a judgment of the EU Courts, is curtailed by the right to an effective remedy as guaranteed by Article 47 of the Charter, read in the light of the pertinent case-law of the ECtHR on Articles 6(1) and 13 of the ECHR. The decision of the Council in the present case to re-list NITC after the General Court declared the first listing to be void brings this question into sharp focus.

85. Therefore, in my view, the key issue raised by this appeal essentially concerns whether it is necessary for the Court to refine its case-law on Article 266 TFEU in light of the right to an effective remedy, as guaranteed by Article 47 of the Charter, so as to ensure effective judicial protection for private parties in disputes involving re-listing decisions and, indeed, perhaps more broadly.

86. The present case also concerns the interpretation of certain principles relied on by NITC — *res judicata*, legal certainty, legitimate expectations and the finality of judgments. On the basis in particular of observations made by the representative of NITC at the hearing before the Court, I view all of those contentions as a subset for the argument that NITC was entitled to an effective remedy under Article 47 of the Charter with regard to the first listing, but which it did not receive. They will therefore only be considered in so far as they are relevant to NITC's arguments with respect to Article 47 of the Charter.

79 Borrowing the words from the Opinion of Advocate General Ruiz-Jarabo Colomer in *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:36, point 2.

80 See e.g. judgments of 6 October 2014, *Schrems*, C-362/14, EU:C:2015:650, paragraph 95, and of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraphs 44 to 59; see also e.g. Opinions of Advocate General Wathelet in *Berlioz Investment Fund*, C-682/15, EU:C:2017:2, point 67, and of Advocate General Kokott in *UBS Europe and Others*, C-358/16, EU:C:2017:606, point 77.

81 The first paragraph of Article 266 TFEU states: 'The institution, body, office, or entity whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union'.

82 See e.g. judgment of 14 June 2016, *Commission* v *McBride and Others*, C-361/14 P, EU:C:2016:434, paragraphs 52 and 53. See further part V.B.3(a) below.

2. Kadi, OMPI and Interporc in the circumstances of this appeal

87. I consider that this appeal cannot be resolved on the basis of the *Kadi, OMPI* and *Interporc* cases for the following reasons.

88. First, in *Kadi I*,[83] concerning the judicial review of EU restrictive measures implementing UNSC resolutions in the context of the fight against terrorism, this Court ruled, inter alia, that because the Council had failed to inform Mr Kadi of the reasons for his listing, the evidence on which that listing was based, or afforded him the right to be heard, his fundamental rights of defence and effective judicial review had been infringed and there was an unjustified restriction on his fundamental right to property.[84] The Court therefore annulled the measures in question in so far as they concerned Mr Kadi, but the effects of such measures were maintained for a maximum period of three months to allow the Council to remedy the infringements found.[85]

89. In order to remedy these infringements, the Commission communicated to Mr Kadi the summary of reasons for his inclusion on the list of restrictive measures provided by the UNSC and gave him the opportunity to comment on those reasons, following which the Commission considered that Mr Kadi's listing was justified and thereby maintained his name to the list of restrictive measures for reasons of his association with the Al Qaeda network.[86] In other words, Mr Kadi was not de-listed in the same way as NITC.

90. Thereafter, Mr Kadi challenged the restrictive measures maintaining his listing which were annulled by the General Court.[87] On appeal to this Court in *Kadi II*[88] by the Commission, the Council and the United Kingdom from this successful challenge before the General Court, this Court, in dismissing the appeal, again dealt with issues concerning the judicial review of UN-implemented EU restrictive measures and whether observance of Mr Kadi's fundamental rights required disclosure of the information and evidence relied on, since the Commission had maintained his listing on the basis of a narrative summary of reasons provided by the UNSC.[89] The Court found that, with respect to one of the reasons, although the material concerning factual allegations taking place in 1992 might have been sufficient to justify the initial listing of Mr Kadi in 2002, that same material, not otherwise substantiated, could not justify maintaining his listing after 2008 given how far apart the two measures were in time.[90]

91. Consequently, as the listing decision in *Kadi I* contained no reasons at all, *Kadi II* concerned the Court's examination, and for the first time, of the reasons and evidence relied on by the Union institution concerned to support maintaining the listing of Mr Kadi. Therefore, in my view, the Court in *Kadi II* did not engage in assessment of the legality of a re-listing decision taken by the Council on the basis of reasons and factual allegations on which the EU Courts had ruled in a previous annulment action.

83 Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461 ('*Kadi I*').

84 *Kadi I*, paragraphs 333 to 371.

85 *Kadi I*, paragraphs 372 to 376.

86 See Opinion of Advocate General Bot in *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:176, points 19 to 28.

87 Judgment of 30 September 2010, *Kadi* v *Commission*, T-85/09, EU:T:2010:418.

88 Judgment of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518 ('*Kadi II*').

89 See *Kadi II*, paragraphs 103 to 134.

90 *Kadi II*, paragraph 156.

92. Second, *OMPI II*[91] was not subject to a judgment of this Court on appeal and is not binding on it.

93. That said, in that case, the designated entity brought an annulment action against the Council's re-listing decision in the context of EU autonomous restrictive measures with a view to combating terrorism. By its first plea, the applicant argued that the re-listing decision breached Article 266 TFEU and the previous judgment,[92] by which the General Court annulled the initial listing decision due to an absence of reasons (formal defects) and infringement of the rights of the defence (procedural defects).[93] In particular, the applicant argued that the re-listing decision was based on the same national decision and the same items of evidence that were used for the previous decision and that the Council was not entitled to 'recycle' such matters to form the basis of the re-listing decision in view of the principles of legal certainty and legitimate expectations.[94]

94. The General Court rejected this plea, ruling that: 'It suffices to note that the annulment of a measure for *formal or procedural defects* in no way prejudices the right of the institution that was the author of the measure to adopt a new measure on the basis of the same matters of law and fact as those serving as the basis for the measure annulled, provided that on this occasion it observes the *formal and procedural rules* whose breach gave rise to the annulment and that the legitimate expectations of the persons are duly protected.'[95] The General Court also held that, even if it were established that the re-listing decision was based on the same national decision and the same items of evidence as the previous decision, that could have no bearing on the lawfulness of that decision and that the applicant's legitimate expectations had been protected.[96]

95. *OMPI II* was thus confined to a situation in which the initial listing decision was annulled for formal and procedural defects. This is not the case in respect of the first listing at issue in this appeal, which was annulled on the substance.[97] Also, as the initial listing had not contained any reasons, *OMPI II* concerned a situation in which the General Court assessed the reasons and evidence set forth in the re-listing decision for the first time.

91 Judgment of 23 October 2008, *People's Mojahedin Organization of Iran* v *Council*, T-256/07, EU:T:2008:461 ('*OMPI II*'), appeal withdrawn by order of the President of the Court of 3 June 2009, *People's Mojahedin Organization of Iran* v *Council*, C-576/08 P, not published, EU:C:2009:335. There was a third judgment of 4 December 2008, *People's Mojahedin Organization of Iran* v *Council*, T-284/08, EU:T:2008:550, appeal dismissed by judgment of 21 December 2011, *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853.

92 Judgment of 12 December 2006, *Organisation des Modjahedines du peuple d'Iran* v *Council*, T-228/02, EU:T:2006:384 ('*OMPI I*'), not appealed.

93 *OMPI II*, paragraphs 3, 50 and 52.

94 *OMPI II*, paragraphs 72 and 73.

95 *OMPI II*, paragraph 75 (referring to paragraph 65). My emphasis.

96 *OMPI II*, paragraph 76 (referring to paragraph 67).

97 Of note, in the judgment in *NITC I*, the General Court stressed, in the context of its examination of the plea concerning alleged breach of the obligation to state reasons, that NITC's claim that its shareholders no longer maintained ties with the Iranian Government concerned the assessment of whether the grounds advanced by the Council were well founded and hence concerned the *substantive legality* of the listing decision. This was separate from the question whether reasons were stated for the listing which concerned an *essential procedural requirement*. See judgment in *NITC I*, paragraph 46.

96. Third, *Interporc*[98] is situated within the framework of access to documents of the EU institutions, specifically the Commission on the basis of its then Code of Conduct.[99] The litigation arose because the applicant sought access to certain documents leading to the national authorities' decision to recover import duties from it.[100] Following the rejection of the applicant's initial request, the Secretary-General of the Commission adopted a decision rejecting its confirmatory application on the basis of the exception for protection of the public interest (court proceedings)[101] which was annulled by the General Court because the statement of reasons was inadequate.[102]

97. In the implementation of that judgment under Article 266 TFEU, the Secretary-General adopted a new decision, again rejecting the confirmatory application, but on different grounds, citing a new ground (the so-called authorship rule)[103] as well as protection of the public interest (court proceedings).[104] The applicant lodged an action for annulment against the new decision, contending, inter alia, that it could not be based on reasons that had not been considered in the initial decision.[105]

98. On appeal to this Court in *Interporc*, this argument was rejected. After taking note of the case-law on Article 266 TFEU, the Court held that, given that it followed from the first judgment that the initial decision never existed and that the Secretary-General was required, under Article 266 TFEU, to take a further decision, the General Court was correct in ruling that the Secretary-General was entitled to undertake a full review of the application for access and thus could rely in the subsequent decision on grounds other than those on which he based the initial decision, notably the authorship rule.[106] The Court further held that the possibility of a full review also implied that the Secretary-General was not supposed, in the subsequent decision, to reiterate all the grounds for refusal in order to adopt a decision correctly implementing the annulment judgment, but simply had to base his decision on those grounds that he considered, in exercising his discretion, to be applicable in the case.[107]

99. Consequently, while it could be argued that *Interporc* provides support for the Council's discretion to put forward a new ground (here logistical support) to substantiate NITC's re-listing, I take the view that there are three compelling reasons to distinguish it from this appeal.

100. First, *Interporc* is situated within a different context, that of access to documents of the EU institutions (and early beginnings at that), in which the EU legal framework and the Union's objectives to be achieved are distinct from those of the Common Foreign and Security Policy ('CFSP') in which EU restrictive measures are situated. Moreover, the immediate consequences for the claimant's legal position are, in my view, more serious when it comes to the imposition of restrictive measures against it. As the Court has recognised, the freezing of funds has considerable negative effects and impacts the rights and freedoms of the party concerned.[108]

98 Judgment of 6 March 2003, *Interporc Im- und Export* v *Commission*, C-41/00 P, EU:C:2003:125 ('*Interporc*').

99 Commission Decision 94/90/EC of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58), implementing the Code of Conduct concerning public access to Commission and Council documents annexed thereto. That decision was repealed by Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (OJ 2001 L 345, p. 94), to give effect to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) ('Regulation No 1049/2001'). Of note, that regulation is based on what is now Article 15(3) TFEU, which along with Article 42 of the Charter recognises the right of access to documents of the EU institutions and bodies as a matter of primary Union law.

100 Judgment of 6 February 1998, *Interporc* v *Commission*, T-124/96, EU:T:1998:25 ('*Interporc I*'), paragraphs 9 to 13.

101 *Interporc I*, paragraphs 14 to 18.

102 *Interporc I*, paragraphs 54 to 57. This judgment was not appealed.

103 Then in effect; it was deleted in Regulation No 1049/2001.

104 Judgment of 7 December 1999, *Interporc* v *Commission*, T-92/98, EU:T:1999:308 ('*Interporc II*'), paragraph 20.

105 *Interporc II*, paragraph 52.

106 *Interporc*, paragraph 31.

107 *Interporc*, paragraph 32.

108 See e.g. judgments of 16 November 2011, *Bank Melli Iran* v *Council*, C-548/09 P, EU:C:2011:735, paragraph 49, and of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 70 and the case-law cited.

101. Second, the legal arguments placed before the Court in *Interporc* are different from those in this appeal, and in particular there was no alleged breach of the right of an effective remedy in the *Interporc* case.[109] I do not find this to be all that surprising, considering that the Court's judgment in *Interporc* was delivered on 6 March 2003, nearly 7 years before the Charter became binding (with the entry into force of the Lisbon Treaty on 1 December 2009) and hence at a time when the Court's jurisprudence on the Charter had not yet been fully developed. That said, I would point out that the Court's judgment in *Interporc* and some related cases have generated criticism in their own right on account of the so-called 'infinite loop' of litigation before the EU Courts resulting from the fact that, under this case-law, the EU institutions are entitled to rely on one ground of exception at a time, combined with the fact that the EU Courts are precluded under Article 263 TFEU from issuing orders to the institution concerned to produce the requested document.[110]

102. Third, *Interporc* did not concern a situation in which an institution adopted a wholly fresh decision relying on a ground that was based on factual allegations that had been expressly rejected in a previous annulment judgment.

103. On this basis, I am not convinced that the *Kadi, OMPI* and *Interporc* cases provide clear authority for the Council's re-listing decision in this appeal.

3. The right to an effective remedy under Article 47 of the Charter in the circumstances of this appeal

104. The first paragraph of Article 47 of the Charter states that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions set down by that article. The second paragraph of Article 47 of the Charter establishes further remedial rights including that everyone has the right to a fair trial.

105. At the outset, I recall that under Article 51(1) of the Charter, the Council is bound by the provisions of the Charter. Pursuant to Article 52(3) of the Charter, the meaning and scope of the right to an effective remedy and the right to a fair trial under Article 47 of the Charter must be the same as those laid down in Articles 6(1) and 13 of the ECHR.[111] This is determined not only by the text of the ECHR, but also by the case-law of the ECtHR in the light of which Article 47 of the Charter should be interpreted.[112]

106. Accordingly, the Council is bound by Article 47 of the Charter when adopting restrictive measures, just as with any other Union measure. Moreover, the Council's compliance with Article 47 of the Charter with respect to restrictive measures will be informed by pertinent case-law of the ECtHR on Articles 6(1) and 13 of the ECHR. The principles developed within that case-law will be analysed along with the Court's case-law on Article 266 TFEU.

109 I note that there was no breach of the right to an effective remedy specifically alleged in *Kadi II* and *OMPI II* either. *Kadi II* was concerned with the procedural safeguards underpinning the right of effective judicial protection: see *Kadi II*, paragraphs 97 to 165. In *Kadi I*, the Court found that the applicants' right to an effective remedy had been infringed, but this was based on failure to inform them of the evidence against them and their rights of defence: see *Kadi I*, paragraphs 349 to 351. And although it was not raised in *OMPI II*, the right to an effective remedy was distinguished from the right to a fair hearing in *OMPI I*, paragraphs 89 and 94.

110 See Leonor Rossi and Patricia Vinagre e Silva, *Public Access to Documents in the EU* (Hart 2017), pp. 59 to 62, 175 to 177 and 197 to 198. Of note, with particular regard to access to documents, the EU Courts have rejected claims to reconsider its case-law precluding the EU Courts from issuing orders to the institutions in light of, inter alia, Article 47 of the Charter: see e.g. judgments of 2 October 2014, *Strack* v *Commission*, C-127/13 P, EU:C:2014:2250, paragraphs 145 to 148, and of 11 June 2015, *McCullough* v *Cedefop*, T-496/13, not published, EU:T:2015:374, paragraphs 16 to 28.

111 Article 52(3) of the Charter; Explanations Relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) ('Explanations'), Explanation on Article 47, pp. 29 and 30. This is subject to Union law providing 'more extensive protection' pursuant to Article 52(3) of the Charter: see my Opinion in *Egenberger*, C-414/16, EU:C:2017:851.

112 Explanation on Article 52, p. 33. See also e.g. judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, C-205/15, EU:C:2016:499, paragraph 41 and the case-law cited; Opinion of Advocate General Wathelet in *Berlioz Investment Fund*, C-682/15, EU:C:2017:2, points 73 and 74.

(a) The Court's case-law on Article 266 TFEU

107. As already mentioned, under Article 266 TFEU the institution whose act has been declared void under Article 264 TFEU is required to take the necessary measures to comply with the judgment annulling that act. Those measures do not relate to the elimination of that act from the Union legal order because the very annulment by the EU Courts has that effect; rather, they are concerned in particular with eradicating the consequences of the act in question which are affected by the illegalities found to have been committed. [113]

108. As the Court has held, in order for the institution concerned to carry out its obligation under Article 266 TFEU to comply with the annulment judgment and implement it fully, that institution must have regard not only to the operative part of that judgment, but also to the grounds which led to the judgment and constitute the essential basis for it, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. [114]

109. It is equally well established in the Court's case-law that for the purposes of carrying out its obligation under Article 266 TFEU, the institution concerned has a discretion to decide on the necessary measures that should be taken in order to give due effect to the annulment judgment depending on the particular circumstances of the case. [115] As the Court has consistently held, it is not for the EU Courts to take the place of the institution concerned in order to specify the measures to be taken to comply with their judgments. [116] Accordingly, Article 266 TFEU is also interpreted as precluding the EU Courts from issuing orders or directions to the institution concerned to remedy the illegality identified in the annulment judgment. [117]

110. Nevertheless, to my mind, on the basis of the Court's case-law under Article 266 TFEU, it is one thing to give the institution concerned the discretion as to how it chooses to correct the illegalities identified in the annulment judgment. It is quite another for the faculty to be deployed by that institution in a manner that empties Article 47 of the Charter of its substance.

(b) Pertinent case-law of the ECtHR on Articles 6(1) and 13 of the ECHR

111. Referring to the ECtHR's decision in *Hornsby v. Greece* [118] in the judgment in *NITC II*, the General Court considered that the right to an effective remedy in the field of restrictive measures would be 'illusory' if the Union legal order allowed a judgment given by the EU Courts to remain inoperative to the detriment of a party, and thus the execution of a judgment of the General Court must be regarded as an integral part of the 'trial' for the purposes of the right to an effective remedy under Article 47 of the Charter. [119] Indeed, in *Hornsby v. Greece*, the ECtHR held that Article 6(1) of the ECHR embodies

113 Judgment of 7 June 2006, *Österreichische Postsparkasse* v *Commission*, T-213/01 and T-214/01, EU:T:2006:151, paragraph 54.

114 See e.g. judgment of 14 June 2016, *Commission* v *McBride and Others*, C-361/14 P, EU:C:2016:434, paragraph 35 and the case-law cited.

115 See e.g. judgments of 28 January 2016, *CM Eurologistik and GLS*, C-283/14 and C-284/14, EU:C:2016:57, paragraph 76; and of 14 June 2016, *Commission* v *McBride and Others*, C-361/14 P, EU:C:2016:434, paragraphs 52 and 53; Opinion of Advocate General Sharpston in *Commission* v *McBride and Others*, C-361/14 P, EU:C:2016:25, point 70. This was emphasised in the Opinion of Advocate General Léger in *Interporc*, C-41/00 P, EU:C:2002:162, points 65 to 69.

116 See Opinion of Advocate General Léger in *Mattila* v *Council and Commission*, C-353/01 P, EU:C:2003:403, point 30 and the case-law cited.

117 See e.g. judgment of 2 October 2014, *Strack* v *Commission*, C-127/13 P, EU:C:2014:2250, paragraph 146. This case-law dovetails with that concerning the scope of the EU Courts' powers under Article 263 TFEU, precluding them from issuing directions to the institutions, even where they concern the manner in which their judgments are to be complied with: see e.g. order of 26 October 1995, *Pevasa and Inpesca* v *Commission*, C-199/94 P and C-200/94 P, EU:C:1995:360, paragraph 24.

118 ECtHR, 19 March 1997, *Hornsby v. Greece*, CE:ECHR:1997:0319JUD001835791, paragraphs 40 and 41.

119 Judgment in *NITC II*, paragraph 61.

the 'right to a court' of which the right of access constitutes one aspect and that it would be inconceivable that this article should describe in detail procedural guarantees afforded to litigants — proceedings that are fair, public and expeditious — without protecting the implementation of judicial decisions. [120]

112. As regards the scope of the right to a fair hearing before a tribunal as guaranteed in Article 6(1) of the ECHR, the ECtHR ruled that this right 'must be interpreted in the light of the Preamble to the [ECHR], which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into question'. [121] The ECtHR further stated: 'Legal certainty presupposes respect for the principle of *res judicata*, that is the principle of the finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case.' [122]

113. With regard to the principle of *res judicata*, the ECtHR underlined that 'in all legal systems the *res judicata* effects of judgments have limitations *ad personam* and as to material scope' [123] and that 'it is the State's responsibility to organise the legal system in such a way as to identify related proceedings and where necessary to join them or prohibit the further institution of new proceedings related to the same matter, in order to circumvent reviewing final adjudications treated as an appeal in disguise, in the ambit of parallel sets of proceedings'. [124]

114. Consequently, in its case-law on Article 6(1) of the ECHR, the ECtHR has dealt with matters in which a subsequent judgment quashed an already final judgment and established a framework regarding the application of legal certainty and *res judicata* (finality of judgments) in which it amplified its various components.

115. For example, in *Kehaya and Others v. Bulgaria*, [125] the question whether the State or the applicants were the owners of the same land was re-examined in subsequent proceedings and decided differently. [126] The ECtHR considered that 'providing a "second chance" for the State to obtain a re-examination of a dispute already determined by way of final judgments in contentious proceedings' was 'unbalanced and created legal uncertainty'. [127] Thus, it held that the applicants' rights under Article 6(1) of the ECHR were jeopardised because the subsequent judgment 'set at naught an entire judicial process which had ended in a final judicial decision … and which had, moreover, been executed'. [128] By depriving of any legal effect the final judgment in the first proceedings, the State authorities acted in breach of the principle of legal certainty inherent in Article 6(1) of the ECHR. [129]

120 *Hornsby v. Greece*, paragraph 40. See also e.g. ECtHR, 25 July 2017, *Panorama Ltd and Miličić v. Bosnia and Herzogovina*, CE:ECHR:2017:0725JUD006999710, paragraph 62 and the case-law cited.

121 See e.g. ECtHR, 28 October 1999, *Brumărescu v. Romania*, CE:ECHR:1999:1028JUD002834295, paragraph 61; 24 July 2003, *Ryabykh v. Russia*, CE:ECHR:2003:0724JUD005285499, paragraph 51; 21 April 2016, *Chengelyan and Others v. Bulgaria*, CE:ECHR:2016:0421JUD004740507, paragraph 31 and the case-law cited.

122 ECtHR, 6 December 2005, *Popov v. Moldova (No. 2)*, CE:ECHR:2005:1206JUD001996004, paragraph 45 (citations omitted); see also e.g. 27 October 2016, *Vardanyan and Nanushyan v. Armenia*, CE:ECHR:2016:1027JUD000800107, paragraph 67 and the case-law cited.

123 See e.g. ECtHR, 12 January 2006, *Kehaya and Others v. Bulgaria*, CE:ECHR:2006:0112JUD004779799, paragraph 66; 16 January 2014, *Brletić v. Croatia*, CE:ECHR: 2014:0116JUD004200910, paragraph 43.

124 ECtHR, 13 November 2007, *Driza v. Albania*, CE:ECHR:2007:1113JUD003377102, paragraph 69.

125 ECtHR, 12 January 2006, *Kehaya and Others v. Bulgaria*, CE:ECHR:2006:0112JUD004779799.

126 *Kehaya and Others v. Bulgaria*, paragraphs 59 to 60, 62, 67 and 68.

127 *Kehaya and Others v. Bulgaria*, paragraph 69.

128 *Kehaya and Others v. Bulgaria*, paragraph 70.

129 *Kehaya and Others v. Bulgaria*, paragraph 70.

116. Moreover, *Esertas v. Lithuania* [130] involved a situation in which the claims were not identical but concerned exactly the same legal relations and the same circumstances which were crucial for deciding the dispute, only the time period for such claims was different. [131] The ECtHR held that 'a situation where the facts already determined by a final decision in one case are later overruled by the courts in a new case between the same parties, is similar to the one where, following a re-opening of the proceedings, a binding and enforceable decision is quashed in its entirety'. [132] Consequently, it ruled that such a situation may also amount to a breach of the principle of legal certainty in violation of Article 6(1) of the ECHR. [133]

117. With regard to the right to an effective remedy enshrined in Article 13 of the ECHR, the ECtHR has stressed in its case-law that, although the scope of that provision may vary depending on the nature of the applicant's complaint under the ECHR, 'the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities' of the State, [134] or 'in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred'. [135] Against this background, the ECtHR concluded that 'irrespective of whether the final decision to be executed takes the form of a court judgment or a decision by an administrative authority, domestic law as well as the [ECHR] provides that it is to be enforced'. [136] With this conclusion, the ECtHR drew a line to the abovementioned *Hornsby v. Greece* case and related jurisprudence in which it developed this maxim out of the so-called 'right to a court' deriving from Article 6(1) of the ECHR. [137]

118. On this basis, I observe that the ECtHR's interpretation of the right to a fair trial for the purposes of Article 6(1) of the ECHR takes into account the need to guarantee legal certainty by precluding a subsequent judgment that is deemed to give a public authority a 'second chance' to litigate the same issues in substance as those raised in the first judgment even in situations where *res judicata* is not strictly engaged. Moreover, in considering the effectiveness of the remedy in practice as well as in law, the ECtHR's interpretation of Article 13 of the ECHR places emphasis on ensuring the enforcement of a judgment and that such a judgment must meaningfully be obtained, carried out and afford sufficient redress to the claimant. I consider that these points inform the interpretation of the right to an effective remedy under Article 47 of the Charter and its application to the re-listing decision in this appeal.

130 ECtHR, 31 May 2012, *Esertas v. Lithuania*, CE:ECHR:2012:0531JUD005020806.

131 *Esertas v. Lithuania*, paragraphs 23 and 24.

132 *Esertas v. Lithuania,* paragraph 25.

133 *Esertas v. Lithuania*, paragraph 25.

134 ECtHR, 27 June 2000, *İlhan v. Turkey*, CE:ECHR:2000:0627JUD002227793, paragraph 97; see also e.g. 12 September 2012, *Nada v. Switzerland*, CE:ECHR:2012:0912JUD001059308, paragraph 207 and the case-law cited.

135 ECtHR, 26 October 2000, *Kudła v. Poland*, CE:ECHR:2000:1026JUD003021096, paragraphs 157 and 158; see also e.g. 16 January 2018, *Ciocodeică v. Romania*, CE:ECHR:2018:0116JUD002741309, paragraph 88 and the case-law cited. Of note, Article 35(1) of the ECHR, which sets out the rule on exhaustion of domestic remedies, is based on the assumption reflected in Article 13 of the ECHR, with which it has a 'close affinity', that there is an effective domestic remedy available in respect of the alleged breach of a party's ECHR rights: see *Kudła v. Poland*, paragraph 152. The ECtHR considers that a remedy which is dependent on discretionary action of the State authorities cannot be regarded as effective within the meaning of Article 35(1) of the ECHR: see e.g. ECtHR, decision of 29 June 2004, *B. and L. v. The United Kingdom*, CE:ECHR:2004:0629DEC003653602, p. 9; 29 April 2008, *Burden v. The United Kingdom*, CE:ECHR:2008:0429JUD001337805, paragraph 40 and the case-law cited.

136 ECtHR, 13 November 2007, *Ramadhi and Others v. Albania*, CE:ECHR:2007:1113JUD003822202R, paragraph 49. See also e.g. ECtHR, 3 February 2009, *Nuri v. Albania*, CE:ECHR:2009:0203JUD001230604, paragraph 8; 3 February 2009, *Hamzaraj v. Albania (No. 1)*, CE:ECHR:2009:0203JUD004526404, paragraph 26.

137 See note 120 above. See also e.g. ECtHR, 31 July 2012, *Manushaqe Puto and Others v. Albania*, CE:ECHR:2012:0731JUD000060407, paragraphs 72, 90 and 94 (citing *Hornsby v. Greece*, paragraph 40).

(c) Application in the circumstances of this appeal

119. I therefore take the view that Article 47 of the Charter, read in the light of pertinent case-law of the ECtHR on Articles 6(1) and 13 of the ECHR, should be interpreted as curtailing a Union institution's discretion under Article 266 TFEU to adopt measures to remedy a wrong identified in a judgment of the EU Courts in circumstances deemed to give that institution a 'second chance' to re-examine legal issues that were decided by the EU Courts in the previous judgment and thereby depriving litigants of their effective remedy with respect to that judgment.[138] I underscore that remedies under Article 47 of the Charter have to be effective in practice as well as in law.

120. Contrary to the Council's submissions, such an approach is not aimed at limiting the Court's case-law on Article 266 TFEU in the field of restrictive measures. It rather ensures, more generally, that the remedial regime established by Article 266 TFEU is fully compliant with Article 47 of the Charter.

121. Moreover, such an approach is not obviated by the availability of an action for damages to engage the EU's non-contractual liability.[139] I acknowledge that an action for damages is in principle available to compensate a party for damage suffered as a result of unlawful acts and conduct of the Council in connection with the adoption of re-listing decisions in the field of restrictive measures.[140] Yet, an action for damages seems to me incapable of providing redress for breach of the right to an effective remedy in the circumstances of this appeal if the Council's discretion to choose the measures it considers necessary to remedy the wrong is deemed compatible with Article 266 TFEU. Under these circumstances, the conditions for the EU's non-contractual liability to be incurred, namely the requirement of a *sufficiently serious breach* of a rule of law intended to confer rights on individuals,[141] would not be satisfied.

122. That being said, in my view, there is no error of law in the General Court's judgment in *NITC II*.

123. I consider that the grounds of financial support and logistical support constitute separate grounds relied on by the Council for re-listing NITC on the basis of the designation criterion under Article 20(1)(c) of Decision 2010/413 and Article 23(2)(d) of Regulation No 267/2012, referring to the provision of support for the Government of Iran.

124. The wording 'such as' in Article 23(2)(d) of Regulation No 267/2012 ('support, such as material, logistical or financial support') indicates that the three types of support specified therein are not exhaustive[142] and thus other types of support may be covered.[143] Indeed, the EU Courts have held that this criterion refers to *any support* which, even though it has no actual direct or indirect connection

138 It should be noted that the exercise of the rights enshrined in Article 47 of the Charter is always subject to justified limitations as provided for in Article 52(1) of the Charter. See e.g. *Kadi II*, paragraph 101.

139 See Articles 268 and 340, second paragraph, TFEU.

140 See e.g. judgment of 13 December 2017, *HTTS* v *Council*, T-692/15, EU:T:2017:890 (action for damages rejected); and *Bateni* v *Council*, T-455/17, pending; see also, in that regard, judgment of 18 September 2015, *HTTS and Bateni*, T-45/14, not published, EU:T:2015:650, paragraph 66.

141 See e.g. judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraphs 29 and 30.

142 It may be useful to note that not all language versions of Article 23(2)(d) of Regulation No 267/2012 are the same. The majority refers to the term support at the beginning of the enumeration of examples for providing support ('support, such as material, logistical or financial support'). Yet, some versions (see e.g. the Estonian, Finnish and German versions) immediately mention the three examples of material, logistical or financial support. This appears to lend further weight to the position that the grounds of financial and logistical support are separate and that the General Court did not decide on the merits of 'support' in general, but rather on the ground of financial support in the judgment in *NITC II*.

143 See e.g. judgment of 1 March 2016, *National Iranian Oil Company* v *Council*, C-440/14 P, EU:C:2016:128, paragraph 84; order of 4 April 2017, *Sharif University of Technology* v *Council*, C-385/16 P, not published, EU:C:2017:258, paragraph 68.

with nuclear proliferation, is nevertheless capable, as a result of its qualitative or quantitative significance, of encouraging such development, by providing the Iranian Government with resources or facilities of, inter alia, a material, financial or logistic nature which allow it to pursue proliferation activities. [144]

125. On that basis, I take the view that NITC's right to an effective remedy was not breached in this case because not only was the judgment in *NITC I* effectively enforced, but also the ground of logistical support had not been adjudicated by the General Court in that judgment. Consequently, it does not appear from the material before the Court that the Council secured a re-examination of what had been decided in the judgment in *NITC I*.

126. Furthermore, even though the General Court's finding, reproduced at point 54 above, on the breadth of the Council's power to recast the claim into one concerning logistical support might potentially generate friction with the case-law of the ECtHR on 'second chance' litigation (see points 112 to 116 above), no detailed submissions applying such case-law to the circumstances of this appeal have been made.

127. I also point out that the material placed before the Court in this appeal has not substantiated the allegation that the Council engaged in so-called 'warehousing' and thus held back legal and factual arguments at the time of the first listing for use in re-listing NITC.

128. Accordingly, I conclude that although this appeal cannot be resolved by the *Kadi, OMPI* and *Interporc* cases, and restrictive measures taken by the Council are limited by the right to an effective remedy under Article 47 of the Charter including pertinent case-law of the ECtHR on Articles 6(1) and 13 of the ECHR, I do not consider that the re-listing decision breached NITC's right to an effective remedy under Article 47 of the Charter in the circumstances of this appeal.

VI. Conclusion

129. In light of the foregoing analysis, I propose that the Court should dismiss NITC's first ground of appeal.

144 Judgment of 28 April 2016, *Sharif University of Technology* v *Council*, T-52/15, EU:T:2016:254, paragraphs 54, 59 and the case-law cited (appeal dismissed by order of 4 April 2017, *Sharif University of Technology* v *Council*, C-385/16 P, not published, EU:C:2017:258). See also e.g. judgments of 1 March 2016, *National Iranian Oil Company* v *Council*, C-440/14 P, EU:C:2016:128, paragraphs 79 to 81, and of 8 September 2016, *Iranian Offshore Engineering & Construction* v *Council*, C-459/15 P, not published, EU:C:2016:646, paragraph 58 and the case-law cited.