Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 20 January 2021 [1]

Case C-872/19 P

Bolivarian Republic of Venezuela
v

Council of the European Union

(Appeal – Common foreign and security policy – Regulation (EU) 2017/2063 – Articles 2, 3, 6 and 7 – Restrictive measures taken with regard to the situation in Venezuela – Action for annulment brought by a third State – Fourth paragraph of Article 263 TFEU – Direct concern – Question of public policy – Concept of 'legal person' – Third State – Inadmissibility)

I. Introduction

1. The deteriorating political and economic situation in the Bolivarian Republic of Venezuela has brought in its wake a state of affairs where ordinary democratic, rule of law and human rights principles appear to have been significantly compromised. It is against this background that the Council of the European Union has since 2017 decided to adopt a series of restrictive measures (sanctions). These restrictive measures impose export bans on the sale, supply, transfer or export of certain military and other equipment (such as riot control vehicles or vehicles used for the transfer of prisoners) to Venezuela. It is clear from the recitals of the decisions and the regulations giving effect to those restrictive measures that the Council feared that that equipment might be used for the purposes of internal repression along with the general suppression of legitimate democratic protest within that State. The measures also extended to the provision of technical, brokering or financial services associated with the supply of that equipment. The measures additionally provide for the possibility of imposing travel bans on certain named natural persons and asset-freezing measures directed against certain named natural or legal persons, entities or bodies. Those particular individualised measures are not, however, the subject of the present proceedings.

2. The present proceedings rather involve an endeavour brought by the Bolivarian Republic of Venezuela to challenge the validity of certain of those restrictive measures. This immediately raises the much broader question of whether a State which is not a member of the European Union is entitled to bring proceedings of this nature before the Union's judicature. While these questions might be thought to touch on important and potentially sensitive issues of public international law, at the more specific level of European Union law, the issues requiring resolution in this appeal might be said to reduce themselves to these: (i) is the Bolivarian Republic of Venezuela a legal person for the

1 Original language: English.

purposes of Article 263 TFEU and (ii) assuming that the answer to the first question is in the affirmative, are the measures imposed of direct concern [2] to the Bolivarian Republic of Venezuela such as would enable it to have the necessary standing to challenge the validity of the restrictive measures for the purposes of Article 263 TFEU? [3]

3. The present case accordingly concerns an appeal brought on 28 November 2019 by the Bolivarian Republic of Venezuela ('the appellant') against the judgment of the General Court (Fourth Chamber, Extended Composition) of 20 September 2019, *Venezuela* v *Council* (T-65/18, EU:T:2019:649; 'the judgment under appeal'). In that judgment, the General Court held that the appellant had not demonstrated that it was directly concerned by the measures within the meaning of the fourth paragraph of Article 263 TFEU. It followed, therefore, that the appellant lacked the necessary standing to maintain its annulment action and the proceedings were accordingly held to be inadmissible on that basis.

4. The appellant claims in essence that the General Court wrongly interpreted the criterion of direct concern provided for in the fourth paragraph of Article 263 TFEU in light of the judgment of 13 September 2018, *Almaz-Antey Air and Space Defence* v *Council* (T-515/15, not published, EU:T:2018:545; 'the *Almaz-Antey* judgment'). This appeal accordingly presents the Court with a unique opportunity to rule on the application of the criteria for admissibility laid down in the fourth paragraph of Article 263 TFEU in relation to an action for annulment brought by a third State against restrictive measures adopted by the Council of the European Union in view of the situation in that State. So far as the appeal is concerned, it is thus necessary to consider, as I have already indicated, whether, in the context of the present proceedings, the appellant is a legal person for the purposes of the fourth paragraph of Article 263 TFEU and, if so, whether it is also directly concerned by the restrictive measures in question.

II. Legal context and background to the dispute

5. On 13 November 2017, the Council adopted Regulation 2017/2063 on the basis of Article 215(2) TFEU and Council Decision (CFSP) 2017/2074 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela. [4]

6. Article 2 of Regulation 2017/2063 specifies that it is prohibited to provide to any natural or legal person, entity or body in, or for use in, Venezuela, technical assistance, brokering services, financing or financial assistance and other services related to the goods and technology listed in the Common Military List of the European Union adopted by the Council on 17 March 2014. [5]

2 The question of individual concern was not addressed so far as the present case was concerned in the judgment under appeal. The Council, in its objection to admissibility, considered that it was not necessary to address this matter in the absence of direct concern on the part of Venezuela. I would note however that Venezuela, in its response to the Council's objection to admissibility, claimed that Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela (OJ 2017 L 295, p. 21), which was adopted on the basis of Article 215 TFEU, is a regulatory act and that it is thus sufficient to show that it is directly concerned by that measure.

3 In the event that it is also established that Venezuela is individually concerned by those measures.

4 OJ 2017 L 295, p. 60. According to paragraph 1 of the judgment under appeal, Decision 2017/2074 'includes, first, a prohibition on the export to Venezuela of arms, military equipment or any other equipment that might be used for internal repression, as well as surveillance equipment, technology or software. Secondly, it includes a prohibition on the provision to Venezuela of financial, technical or other services related to such equipment and technology. Thirdly, it provides for the freezing of funds and economic resources of persons, entities and bodies. According to recital 1 of Decision 2017/2074, the decision responds to the continuing deterioration of democracy, the rule of law and human rights in Venezuela'. In its initial version, the first paragraph of Article 13 of Decision 2017/2074 provided that it was applicable until 14 November 2018. On 6 November 2018, Council Decision (CFSP) 2018/1656 amending Decision 2017/2074 (OJ 2018 L 276, p. 10) extended its validity until 14 November 2019 and amended entry 7 in Annex I to that decision, which concerns one of the persons covered by the freezing of financial assets.

5 OJ 2014 C 107, p. 1.

7. Article 3 of, and Annex I to, Regulation 2017/2063 provide that it is also prohibited to sell, supply or export equipment which might be used for internal repression, such as arms, ammunition, riot control vehicles or vehicles used to transfer prisoners or even explosive substances and to provide technical assistance, brokering services, financing or financial assistance or other services related to that equipment to any natural or legal person, entity or body in, or for use in, Venezuela.

8. Article 4 of Regulation 2017/2063 provides that, by way of derogation from Articles 2 and 3 of that regulation, the competent authorities of Member States may authorise certain operations under conditions which they deem appropriate.

9. Unless the competent authorities of the Member States have given prior authorisation, Articles 6 and 7 of, and Annex II to, Regulation 2017/2063 prohibit the sale, supply or export of equipment, technology or software for packet inspection, network interception, monitoring, jamming and voice recognition, as well as the provision of technical assistance, brokering services, financial assistance and other services related to such equipment, technology and software to any natural or legal person, entity or body in Venezuela or for use in that country.

10. Article 6(2) of Regulation 2017/2063 provides that the competent authorities of the Member States shall not grant any authorisation to sell, supply, transfer or export, directly or indirectly, equipment, technology or software to any person, entity or body in Venezuela or for use in Venezuela if they have reasonable grounds to determine that the equipment, technology or software in question would be used for internal repression by Venezuela's government, public bodies, corporations or agencies, or any person or entity acting on their behalf or at their direction.

11. Article 7(1)(c) of Regulation 2017/2063 provides that unless the competent authority of the relevant Member State has given prior authorisation in accordance with Article 6(2), it shall be prohibited to provide any telecommunication or Internet monitoring or interception services of any kind to, or for the direct or indirect benefit of, Venezuela's government, public bodies, corporations and agencies or any person or entity acting on their behalf or at their direction.

12. Articles 8 to 11 of, and Annexes IV and V to, Regulation 2017/2063 also provide, subject to exceptions, for the freezing of financial assets belonging to certain natural or legal persons, entities or bodies and for a prohibition on making such assets available to them. Article 17(4) of Regulation 2017/2063 provides that 'the list set out in Annexes IV and V [is to] be reviewed at regular intervals and at least every 12 months'. [6]

13. Under Article 20 of Regulation 2017/2063, the aforementioned prohibitions are to apply:

'(a) within the territory of the Union, including its airspace;

(b) on board any aircraft or any vessel under the jurisdiction of a Member State;

(c) to any person inside or outside the territory of the Union who is a national of a Member State;

(d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State;

(e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.'

6 On 6 November 2018, Council Implementing Regulation (EU) 2018/1653 implementing Regulation 2017/2063 (OJ 2018 L 276, p. 1), amended entry 7 in Annex IV to that regulation, relating to one of the persons covered by the freezing of financial assets.

III. The procedure before the General Court and the judgment under appeal

14. By application lodged at the Registry of the General Court on 6 February 2018, the appellant brought an action for annulment against Regulation 2017/2063, in so far as its provisions concern it. The General Court considered that, in so far as it is directed against Regulation 2017/2063, the appellant's action for annulment concerns only Articles 2, 3, 6 and 7 thereof ('the contested provisions').[7]

15. By separate document lodged at the Registry of the General Court on 3 May 2018, the Council raised an objection of inadmissibility pursuant to Article 130 of the Rules of Procedure of the General Court. The Council raised three grounds for inadmissibility, namely, first, that the appellant, the applicant in that case, has no legal interest in bringing proceedings, secondly, that it is not directly concerned by the contested provisions and, thirdly, that it is not a 'natural or legal person' within the meaning of the fourth paragraph of Article 263 TFEU. The appellant filed its comments on that objection on 27 June 2018. By a separate document lodged at the Registry of the General Court on 17 January 2019, the appellant adapted the application on the basis of Article 86 of the Rules of Procedure of the General Court, so that it also refers to Decision 2018/1656 and Implementing Regulation 2018/1653, in so far as their provisions concern it. The Council replied to the statement of adaptation on 5 February 2019.

16. The parties presented oral argument and replied to the questions concerning admissibility put by the General Court at a hearing on 8 February 2019. The General Court considered that it was appropriate to rule on the admissibility of the action for annulment before it by first examining the second ground for inadmissibility invoked by the Council in which it alleged that the appellant is not directly concerned by the contested provisions.

17. In the judgment under appeal, the General Court recalled that, according to settled case-law, the condition that a natural or legal person must be directly concerned by the decision under appeal, as provided for in the fourth paragraph of Article 263 TFEU, requires the fulfilment of two cumulative criteria, namely that the contested measure directly affects the legal situation of the appellant and that it leaves no discretion to its addressees who are responsible for its implementation, as it is purely automatic and derives solely from EU regulations, without the application of other intermediate rules. In order, moreover, to determine whether a measure produces legal effects, it is necessary to look in particular to its subject matter, its content and substance, as well as to the factual and legal context of which it forms part.[8]

18. According to the General Court, the contested provisions contain, first, a prohibition on the sale or supply to any natural or legal person, entity or body in Venezuela of arms, military equipment or any other equipment which might be used for internal repression, as well as surveillance equipment, technology or software. Secondly, the contested provisions contain a prohibition on the provision of financial, technical or other services related to such equipment and technology to the same natural or legal persons, entities or bodies in Venezuela.[9] Moreover, the General Court stated that Article 20 of Regulation 2017/2063 limits the application of the abovementioned prohibitions to the territory of the Union, to natural persons who are nationals of a Member State and to legal persons constituted under the law of one of them, as well as to legal persons, entities and bodies in respect of any business done in whole or in part within the Union.[10]

7 See paragraph 22 of the judgment under appeal. This finding has not been challenged in the present appeal. See paragraph 14 of the appeal.

8 See paragraphs 29 and 30 of the judgment under appeal and the case-law cited.

9 See paragraph 31 of the judgment under appeal.

10 See paragraph 32 of the judgment under appeal.

19. The General Court found that the contested provisions do not impose prohibitions on the appellant and, at most, are likely to have indirect effects on it, in so far as the prohibitions imposed on natural persons who are nationals of a Member State and on legal persons constituted under the law of one of them could have the effect of limiting the sources from which the appellant can obtain the goods and services in question. [11]

20. The General Court stated that, admittedly, in the *Almaz-Antey* judgment, it rejected the argument that the legal situation of an entity established outside the Union was not directly affected by measures which sought to prohibit EU operators from carrying out certain types of transactions with it. The General Court held in that case that prohibiting EU operators from carrying out such transactions amounted to prohibiting the applicant from carrying out the transactions in question with them. [12] The General Court noted, however, that the appellant is not explicitly and specifically referred to in the contested provisions in a manner comparable to the applicant in the case which gave rise to the *Almaz-Antey* judgment. [13]

21. In addition, according to the General Court, the appellant cannot be assimilated to an operator such as the applicant in the case which gave rise to the *Almaz-Antey* judgment as the modes of action of the appellant cannot be reduced to a purely commercial activity, as a State is called upon to exercise public authority prerogatives, in particular in the context of sovereign activities such as defence, police and surveillance missions. Furthermore, the General Court considered that unlike such an operator whose capacity is limited by its purpose, as a State, the appellant has a field of action that is characterised by extreme diversity and cannot be reduced to a specific activity. That very wide range of competences thus distinguishes it from an operator usually carrying out a specific economic activity covered by a restrictive measure. [14]

22. The General Court also stated that prohibitions such as those imposed by the contested provisions are not likely directly to affect the situation of operators who are not active in the relevant markets. In the *Almaz-Antey* judgment, the General Court specifically found that the applicant was a company active in the defence sector referred to in the relevant provisions of the contested measure. [15]

23. The General Court considered that Eurostat data adduced by the appellant showing that the total value of commercial transactions with Venezuela concerning the goods covered by the contested provisions amounted to EUR 76 million in 2016, EUR 59 million in 2017 and EUR 0 in 2018, while likely to demonstrate the effectiveness of the contested provisions, were not such as to demonstrate that, in purchasing the goods and services in question, the appellant acted as an entity similar to an economic operator active on the markets in question and not in the context of its sovereign activities. [16] The General Court stated that, in the absence of a document, such as a contract, the possibility for the appellant to enter into a relationship of legal scope with operators in the European Union is purely speculative and can only result from future and hypothetical negotiations. The General Court thus held that prohibitions introduced by the contested provisions could not be regarded as affecting, as such, the legal situation of the appellant. [17]

11 See paragraph 32 of the judgment under appeal.

12 See paragraph 34 of the judgment under appeal.

13 The General Court noted in paragraph 35 of the judgment under appeal that in the case giving rise to the *Almaz-Antey* judgment, the applicant's name appeared in the annex to the contested decision in question as an undertaking to which it was prohibited to sell or supply the goods and services in question.

14 See paragraph 37 of the judgment under appeal.

15 See paragraph 38 of the judgment under appeal.

16 See paragraphs 39 and 40 of the judgment under appeal.

17 See paragraph 41 of the judgment under appeal.

24. In response to the appellant's claim that according to settled case-law, the fact that a measure of the European Union prevents a public legal person from exercising its own powers as it sees fit has a direct effect on its legal position, with the result that that measure is of direct concern to it, the General Court held that the contested provisions do not directly prohibit the appellant from purchasing and importing the equipment in question and from obtaining the services in question. It also held that they do not affect its ability to exercise its sovereign rights over the areas and property under its jurisdiction and there is nothing in Regulation 2017/2063 to suggest that the Council's intention would have been to reduce its legal capacity. Having regard to the right of any State – or association of States – to take sovereign decisions on the manner in which it intends to maintain economic relations with third States, the measures in question restrict, at most indirectly, the opportunities of the appellant in this respect.[18]

25. The General Court concluded that the legal situation of the appellant was not directly affected by the contested provisions and that the action must be dismissed as inadmissible in so far as it was directed against those provisions.[19]

IV. Forms of order sought in the present appeal

26. The appellant claims that the Court should:

– set aside the judgment under appeal in so far as it dismissed the action as inadmissible;

– declare the action brought by the appellant admissible and refer the case back to the General Court to rule on the merits of the case; and

– order the Council to pay the costs of these proceedings and of the proceedings before the General Court.

27. The Council claims that the Court should:

– dismiss the appeal;

– order the appellant to pay the cost before this Court.

V. The procedure before the Court

28. The fourth paragraph of Article 263 TFEU provides that 'any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'. The conditions laid down in the fourth paragraph of Article 263 TFEU are essential conditions prescribing the necessary *locus standi* requirements in respect of proceedings brought by natural or legal persons seeking judicial review of a Union act. If those essential conditions are not met, it follows that any such proceedings are inadmissible and that inadmissibility therefore constitutes a ground involving a question of public policy which may – and even must – be raised of its own motion by the Union

18 See paragraphs 42 and 43 of the judgment under appeal.

19 See paragraph 51 of the judgment under appeal.

judicature.[20] Therefore, the failure to comply with the essential conditions laid down in the fourth paragraph of Article 263 TFEU in respect of an action for annulment raises an absolute bar to proceedings brought by natural and legal persons which the EU Courts may consider at any time, even of their own motion.[21]

29. Although the present appeal is directed against the ruling of the General Court in the judgment under appeal that the action before it was inadmissible as the legal situation of the appellant was not directly affected by the contested provisions, the Court, by decision dated 7 July 2020, decided to request the appellant, the Council, the European Commission and the Member States to adopt a position in writing, by 11 September 2020, on whether a third State is to be regarded as a legal person within the meaning of the fourth paragraph of Article 263 TFEU.

30. At the request of certain interested parties, the deadline for the submission of such written observations was extended to 25 September 2020. Moreover, certain interested parties requested access to the file in this case. Access was granted given the absence of any objection by the parties. Written observations on the question of whether the appellant is a legal person for the purposes of the fourth paragraph of Article 263 TFEU were submitted by the appellant, the Council, the Kingdom of Belgian, the Republic of Bulgaria, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Republic of Lithuania, the Kingdom of the Netherlands, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, the Kingdom of Sweden and the Commission.

31. In my view, it is convenient to examine the question of whether the appellant is a legal person for the purposes of the fourth paragraph of Article 263 TFEU prior to examining the question of direct concern.

VI. The appeal

A. The concept of 'legal person'

1. Arguments of the parties

32. The appellant notes that the Council, in its response in the present appeal proceedings, accepted that the appellant has international legal personality and is a legal person in accordance with the relevant rules of public international law and domestic law. The obligation to ensure compliance with the rule of law requires the EU to ensure that any natural or legal person is 'entitled to effective judicial protection of the rights they derive from the EU legal order'. In addition, any such person must be allowed to challenge before the EU Courts the measures adopted by the EU institutions that are prejudicial to them, in so far as the conditions established in Article 263 TFEU are met. This is an expression of the *ubi ius ibi remedium* principle, which is a general principle of EU law, and is reflected in Article 47(1) of the Charter of Fundamental Rights of the European Union ('the Charter') as well as in Article 19(1) TEU.

33. The appellant considers that the wording of the fourth paragraph of Article 263 TFEU does not provide any indication – be it even indirect – that would allow to it to be excluded from the concept of 'legal person' set out therein. Moreover, in its order of 10 September 2020, *Cambodia and CRF* v *Commission* (T-246/19, EU:T:2020:415), the General Court held inter alia that the expression 'any natural or legal person' in the fourth paragraph of Article 263 TFEU must be understood as also covering States which are not members of the European Union, such as the Kingdom of Cambodia.

20 See, by analogy, judgment of 29 April 2004, *Italy* v *Commission* (C-298/00 P, EU:C:2004:240, paragraph 35).

21 See, to that effect, judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100, paragraph 45 and the case-law cited).

According to the appellant, that reasoning applies *mutatis mutandis* in the present appeal. In addition, the use of the determiner '*any*', not only in English, but also other language versions,[22] with reference to 'natural or legal person' in the fourth paragraph of Article 263 TFEU indicates that it includes 'all' individuals and entities that are natural and/or legal persons, without distinctions. Any interpretation of the terms 'any natural or legal person' laid down in the fourth paragraph of Article 263 TFEU, to the effect that they would not encompass entities with international legal personality, such as the appellant, would violate the wording of that provision and be *contra legem*. Moreover, such a *contra legem* interpretation would also violate the case-law according to which 'provisions of the Treaty concerning the right of interested persons to bring an action must not be interpreted restrictively, and hence, where the Treaty makes no provision, a limitation in that respect cannot be presumed to exist'.[23]

34. The appellant claims that the above literal interpretation is confirmed – *ad abundantiam* – by a reading of the fourth paragraph of Article 263 TFEU in light of its objective and regulatory context. According to well-established case-law, the objective of the fourth paragraph of Article 263 TFEU 'is to provide appropriate judicial protection for all persons, natural or legal, who are directly and individually concerned by acts of the [EU] institutions'.[24] Moreover, the right to bring an action for annulment is essential to ensure compliance with the requirements stemming from the rule of law principles. Accordingly, the EU Courts have already accepted as a legal person within the meaning of that provision, for example, regions and other territorial entities in a Member State,[25] sub-regional entities in third States,[26] companies established in third States,[27] third States,[28] new Member States before they acceded to the European Union[29] and even organisations without any legal personality under national law, EU law or international law.[30] To exclude the appellant from the judicial protection granted under the fourth paragraph of Article 263 TFEU would run counter to that provision and would deprive it of any legal remedy in respect of measures which have a direct and significant impact on its legal situation. Moreover, EU primary legislation does not contain any indications supporting the view that an entity with international legal personality, such as the appellant, would not be included in the notion of 'legal person' for the purpose of that provision. Indeed, the case-law on the right to intervene pursuant to Article 40 of the Statute of the Court of Justice supports the conclusion that the appellant is a legal person within the meaning of the fourth paragraph of Article 263 TFEU.

35. The Council considers that a third State is not a legal person within the meaning of the fourth paragraph of Article 263 TFEU, except where specific rights have been conferred on it within the EU legal order pursuant to an agreement concluded with the EU. This exception does not apply to the case at hand. The aim of the provision is to strengthen the protection of individuals, not States.[31] Pursuant to Article 47 of the Charter, effective legal protection must exist for every right derived from EU law. Sovereign States, which are not subject to such a system and have no rights conferred on them (nor are they subject to obligations) by EU law, cannot – in principle – claim to have access to EU Courts. To grant a sovereign third State access to EU Courts beyond the limits outlined above would not only be inconsistent with the literal and teleological interpretation of the Treaty provision in

22 '*jede Person*' in German, '*toda persona*' in Spanish, '*toute personne*' in French and '*qualsiasi persona*' in Italian.

23 Judgment of 11 July 1996, *Métropole télévision and Others* v *Commission* (T-528/93, T-542/93, T-543/93 and T-546/93, EU:T:1996:99, paragraph 60). See also, to that effect, judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17, p. 106-107).

24 Judgment of 10 June 2009, *Poland* v *Commission* (T-257/04, EU:T:2009:182, paragraph 53), and order of 10 June 2009, *Poland* v *Commission* (T-258/04, not published, EU:T:2009:183, paragraph 61).

25 Order of 8 February 2007, *Landtag Schleswig-Holstein* v *Commission* (C-406/06, not published, EU:C:2007:90, paragraph 9).

26 Order of 3 July 2007, *Commune de Champagne and Others* v *Council and Commission* (T-212/02, EU:T:2007:194, paragraph 178).

27 Order of 13 May 2019, *Giant (China)* v *Council* (T-425/13 DEP, not published, EU:T:2019:340).

28 Order of 10 September 2020, *Cambodia and CRF* v *Commission* (T-246/19, EU:T:2020:415).

29 Judgment of 10 June 2009, *Poland* v *Commission* (T-257/04, EU:T:2009:182, paragraph 53), and order of 10 June 2009, *Poland* v *Commission* (T-258/04, not published, EU:T:2009:183, paragraph 61).

30 Judgment of 18 January 2007, *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32).

31 See, Opinion of Advocate General Kokott in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:21, point 90).

question, but would in the view of the Council also run against the very system of remedies under EU law (and its underlying spirit), which was designed for the protection of rights granted under EU law.[32] Given that 'the Union possesses a constitutional framework that is unique to it',[33] the remedies provided for under the Treaties cannot be extended to third States. A third State, although a legal person of international law, is nonetheless not subject to that constitutional framework which is limited to the Member States. The Union develops its relations with sovereign third States on the international scene and those relations are governed by international law which, in turn, is based on consent. In the international legal order, subjects of international law do not enjoy an automatic right to a judicial remedy; rather, they have the right not to submit to the jurisdiction of another State or an international tribunal unless they have consented to it. Sovereign third States have no specific rights under the EU Treaties, including any alleged right to be subject to equal treatment or to trade freely and unconditionally with economic operators in the EU. This is consistent with the sovereign immunity doctrine according to which the subjects of international law cannot, via their internal rules, regulate the conduct of other subjects of international law.

36. The Council claims that case-law on the principle of equality between old and new Member States, in which the Court of Justice endorsed the position, advocated by the Republic of Poland, that the latter State enjoyed a right of action in its capacity as a future Member State,[34] cannot serve as a justification for according standing before the EU Courts to a third State such as Venezuela which is not and cannot become a Member State. Moreover, the Council stresses that, while it is true that the Court implicitly recognised that the Swiss Confederation had legal standing in its order of 14 July 2005, *Switzerland* v *Commission* (C-70/04, not published, EU:C:2005:468), this was done in an entirely different context, as the agreement between the European Community and the Swiss Confederation on Air Transport provided for the Swiss Confederation to be treated as a Member State for the purposes of applying specific provisions of the EU internal legislation. In addition, Article 20 of that agreement conferred exclusive jurisdiction on the Court regarding certain matters.

37. The Council also considers that allowing a third State that is targeted by general restrictive measures (embargoes) to challenge such measures on the basis of conditions allowing access to the EU Courts to persons subject to individual measures would run contrary to the distinction established by the Treaties between general and individual restrictive measures and have as an additional effect an undue extension of the scope of the jurisdiction conferred on the EU Courts with respect to the provisions relating to the Common Foreign and Security Policy or with respect to acts adopted on the basis of those provisions. The necessary coherence of the system of judicial protection under the Treaties therefore requires that access to the EU Courts not be exceptionally granted to a third State which, as in the present case, challenges an embargo – that is, restrictive measures of a general nature, which have their legal basis in the first paragraph of Article 215 TFEU and which, in accordance with Articles 24(1) TEU and 275 TFEU, fall outside the jurisdiction of the EU Courts. This conclusion is moreover consistent with the established case-law of the Court, which gives access to EU Courts to different entities considered emanations of a State, when inscribed on the list of persons subject to individual restrictive measures.[35]

38. Moreover, in the view of the Council, recognising that a third State has legal standing to bring actions to challenge acts of the institutions of the Union in the circumstances of the present case would create a legal avenue that could put the EU at a disadvantage vis-à-vis its international partners, whose sovereign decisions pertaining to their international relations, trade or economic

32 The Council cites, to that effect, Opinion 1/17 of 30 April 2019 (EU:C:2019:341, paragraph 109).

33 See Opinion 1/17 of 30 April 2019 (EU:C:2019:341, paragraph 110).

34 Judgments of 26 June 2012, *Poland* v *Commission* (C-335/09 P, EU:C:2012:385, paragraph 45), and of 26 June 2012, *Poland* v *Commission* (C-336/09 P, EU:C:2012:386, paragraph 38).

35 Judgment of 1 March 2016, *National Iranian Oil Company* v *Council* (C-440/14 P, EU:C:2016:128).

policies cannot be challenged before their courts, and in this way would unduly restrict the EU in the conduct of its policies and international relations. This is particularly relevant in the context of the present proceedings, where a third State is contesting provisions of an internal EU act implementing a political decision of the Council to reduce economic relations with it.

39. The Republic of Poland considers that legal persons within the meaning of the fourth paragraph of Article 263 TFEU are, essentially, entities which have legal personality under the law of a Member State or of a third country, but not those countries themselves. It claims that, 'according to reports on the work of the European Convention on the current wording of the fourth paragraph of Article 263 TFEU', the intention of the authors of the Treaties was to protect the rights of *individuals*. The concept of a legal person within the meaning of the fourth paragraph of Article 263 TFEU can also be defined by reference to the context in which it is used in the case-law of the Court of Justice. Pursuant to that case-law, the term 'natural and legal person' is used interchangeably with the term 'individual', or even 'private person', which is in certain contrast to States (and thus excludes States from the scope of the term). The status of States, in contrast to that of individuals, is, however, determined by international law. One of the basic principles of international law is reciprocity. Allowing third countries to bring direct actions against acts of EU law before the Courts of the European Union would result in a lack of reciprocity, both substantive and procedural, in the European Union's relations with those countries, because, although third countries would be able to challenge acts of EU law before the internal Court of the European Union (the Court of Justice), the European Union would not be able to challenge the national acts of those countries and the acts which they adopt within the framework of the various associations of States (international organisations) of which they are members (before their national courts or before the courts of those international organisations). Third countries are not parties to the Treaties on which the European Union is founded (the EU and FEU Treaties) and do not derive their rights and obligations from those Treaties. At the same time, acts of EU law adopted pursuant to the Treaties are not addressed to third countries. Those acts do not have legal effects vis-à-vis third countries and are not binding in their territory, nor do they confer any rights or obligations on third countries. This also includes restrictive measures which, pursuant to Article 215(2) TFEU, may be imposed on natural or legal persons and groups or non-State entities. Internal laws enacted by the European Union, which is a subject of international law, cannot regulate the situation of other subjects of international law such as sovereign States.

40. The Republic of Slovenia considers that an interpretation of the concept of 'legal person' referred to in the fourth paragraph of Article 263 TFEU under which *locus standi* before the Court should also be granted to third countries without their having concluded with the European Union any agreement defining the legal relations between the parties thereto would lead to the risk of the Court becoming the forum for contesting EU policies. Nor would reciprocity be ensured in international relations. The third countries in question should not be permitted to influence EU policies by bringing actions before the Court.

41. The Kingdom of Belgium considers that as international law currently stands, it is indisputable that a third State is a legal person by virtue of the fact that, inter alia, it has legal personality and is able to be a party to legal proceedings. The European Union has never sought to, call into question that state of affairs in international law, and moreover cannot do so. To deny that a third State may be concerned by an EU act would be tantamount to calling into question the European Union's ability to carry out the task conferred on it by Article 3(5) TEU. Moreover, to deny a third State concerned by an EU act the right to effective judicial protection would be tantamount to adopting a restrictive view of the rule of law, a value on which, pursuant to Article 2 TEU, the European Union is founded.

42. The Republic of Bulgaria and the Republic of Lithuania consider that sovereign States have legal personality under international law and that a third State can in principle be regarded as a legal person within the meaning of the fourth paragraph of Article 263 TFEU. However, in order for a third State to bring an action against an EU act, the additional conditions laid down in the fourth paragraph of Article 263 TFEU need to be met. According to both the Republic of Bulgaria and the Republic of Lithuania, the appellant is not directly concerned by the contested provisions.

43. The Hellenic Republic considers that a third State may not be regarded as a legal person within the meaning of the fourth paragraph of Article 263 TFEU. It considers that recognising a right of recourse of third countries against acts of the European Union imposing sanctions may undermine the integrity and autonomy of the sanctions introduced in the Treaties. In addition, it may place the European Union at a disadvantage to third countries which do not recognise a similar right of recourse for the benefit of the European Union in their domestic legal system in connection with the application of international conventions. [36]

44. The Republic of Estonia considers that since neither the fourth paragraph of Article 263 TFEU nor the case-law relating to that provision states exactly who falls within the notion of legal person, it cannot be ruled out that a third State may also be regarded as a legal person within the meaning of that provision. The natural and legal persons referred to in Article 263 TFEU are not privileged applicants, such as the Member States and the institutions of the European Union, and must therefore satisfy additional requirements in order to bring proceedings. The Republic of Estonia considers that the provisions of the fourth paragraph of Article 263 TFEU may not be broadened in such a way that a third State would be in a more favourable position than individuals who seise the General Court on the basis of that provision. If a third State could not be treated as a legal person within the meaning of the fourth paragraph of Article 263 TFEU, it would therefore be unable to protect its interests even where it is certain that its rights have been infringed and that it can prove to the requisite legal standard that all the conditions necessary for it to institute proceedings are satisfied. [37]

45. The Slovak Republic considers that there is no legal basis in the Treaties for the Court to hear actions for annulment brought by sovereign third States, in respect of which the European Union does not even have regulatory competence. No analogy can be drawn between Case C-70/04, which does not address the question whether the Swiss Confederation is a legal person for the purposes of the fourth paragraph of Article 263 TFEU, and the case-law on regions which have legal personality under national law and whose territory fall within the regulatory competence of the European Union or the case-law on interveners in actions before the Court. In accordance with Article 129(1) of the Rules of Procedure of the Court of Justice, 'the intervention shall be limited to supporting, in whole or in part, the form of order sought by one of the parties. It shall not confer the same procedural rights as those conferred on the parties …'. Moreover, under Article 129(2) of those rules, 'the intervention shall be ancillary to the main proceedings'. In addition, the purpose of the fourth paragraph of Article 263 TFEU is to confer legal standing on individuals to bring an action for annulment.

46. The differing wording of Article 215(1) TFEU, which refers to 'the interruption or reduction, in part or completely, of economic and financial relations with *one or more third countries*', and Article 215(2) TFEU, which provides that 'where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against *natural or legal persons* and groups or non-State entities', shows that the concept of 'legal person' referred to in Article 215(2) TFEU covers

36 See, by analogy, judgment of 16 July 2015, *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraph 39).

37 That may impel the third State to seek other routes by which to access the Court of Justice of the European Union, for example by the intermediary of a legal person governed by private law, or to have recourse instead to dispute resolution procedures outside the European Union, for example arbitration.

not States but standard examples of legal persons, such as commercial companies, associations, unions or various other entities. Thus, according to the Slovak Republic, Article 215(2) TFEU permits the adoption of restrictive measures only against natural persons, legal persons, groups or non-State entities, but not directly against third States.

47. Moreover, Article 275 TFEU limits the jurisdiction of the Court of Justice of the European Union (in addition to monitoring compliance with Article 40 TEU) to ruling on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons. There are no grounds for interpreting the concept of 'legal person' appearing in the context of restrictive measures in Article 215(2) TFEU differently from its interpretation in the second paragraph of Article 275 TFEU.

48. Lastly, the Slovak Republic states that if sovereign third States were able to challenge the acts of the EU institutions by means of an action for annulment, that would place the European Union at a disadvantage vis-à-vis its international partners and, therefore, would limit the European Union inappropriately in the implementation of its policies and international relations.

49. The Kingdom of the Netherlands considers that the appellant can be regarded as a legal person within the meaning of the fourth paragraph of Article 263 TFEU. Third States, which under international law pre-eminently enjoy legal personality, may be regarded as legal persons for the purposes of the fourth paragraph of Article 263 TFEU. However, the position of a third State such as the appellant can never be equated with that of the EU institutions or of the Member States. The right to institute proceedings of a third State should therefore be assessed under the fourth paragraph of Article 263 TFEU and the conditions of admissibility laid down therein. The Kingdom of the Netherlands considers, however, that the appellant does not meet those conditions as the restrictive measures in question, first, are not addressed to the appellant, but to specific, identified natural and legal persons from Venezuela and the European Union, and, secondly, are not of direct concern to the appellant.

50. The Kingdom of Sweden considers that a third State is not a legal person pursuant to the fourth paragraph of Article 263 TFEU. Pursuant to Article 275 TFEU, the Court does not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court has jurisdiction to monitor compliance with Article 40 TEU and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V TEU. That is also reflected in Article 24(1) TEU. The fact that there is a link between the individual nature of restrictive measures and access to the Courts of the European Union, as follows from Article 275 TFEU and the fourth paragraph of Article 263 TFEU, also follows from the Court's case-law.[38] Article 215(2) TFEU provides that the Council may adopt restrictive measures against natural or legal persons and groups or non-State entities, where a decision adopted in accordance with Chapter 2 of Title V TEU so provides. It therefore follows from the wording of that provision that restrictive measures under Article 215(2) TFEU, which may be subject to review by the Court, cannot be taken against States.

38 See, for example, judgment of the General Court of 16 July 2014, *National Iranian Oil Company* v *Council* (T-578/12, not published, EU:T:2014:678, paragraph 36); and judgments of the Court of Justice of 28 November 2013, *Council* v *Manufacturing Support & Procurement Kala Naft* (C-348/12 P, EU:C:2013:776, paragraph 50); of 1 March 2016, *National Iranian Oil Company* v *Council* (C-440/14 P, EU:C:2016:128, paragraph 44); and of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 103).

51. The Federal Republic of Germany considers that a third State is a 'legal person' within the meaning of the fourth paragraph of Article 263 TFEU and may bring proceedings thereunder provided that it is directly and individually concerned by the measure in question. In the case of third States, that status can be inferred from general international law, which confers on every State recognised by the community of States the status of legal subject. However, a third State has a right of action only if the other conditions laid down in the fourth paragraph of Article 263 TFEU are present.[39]

52. The Federal Republic of Germany considers that the principle of effective legal protection, in the light of which the conditions of admissibility laid down in Article 263 TFEU must be interpreted, requires that effective recourse to judicial review as to the lawfulness of the acts of the EU institutions referred to in the first paragraph of Article 263 TFEU must be made available to third States also. It is true that third States are not in principle legal subjects bound by EU law. However, restrictive measures such as those at issue in the main proceedings are particularly liable to have specific de facto effects on third States. A refusal to classify third States as legal persons pursuant to the fourth paragraph of Article 263 TFEU would amount to an outright denial of effective legal protection and would to some extent constitute an inconsistency of approach in relation to the capacity of third State natural and legal persons governed by private law to bring proceedings under the fourth paragraph of Article 263 TFEU, which the Court of Justice recognises even in groups of persons who enjoy no or only limited legal recognition in the third State concerned. It would thus seem unacceptable not least on grounds of equality of arms in procedural matters for third-State-based 'organisations without legal recognition', such as the Western Sahara Liberation Front 'POLISARIO' or the Sri Lankan 'Liberation Tigers of Tamil Eelam', to have capacity to bring proceedings under the fourth paragraph of Article 263 TFEU, while their respective State counterparts do not.

53. The Commission considers that no definitive conclusion can be drawn in respect of the terms 'legal person' on the basis of a literal interpretation or a contextual analysis of the fourth paragraph of Article 263 TFEU.

54. If a teleological interpretation of the fourth paragraph of Article 263 TFEU based on the principle of equality of States is adopted, actions by third States are not covered by the EU jurisdiction when they deal with relations with the EU that are governed by international law (*acta jure imperii*). Consequently, third States can be considered as legal persons under the fourth paragraph of Article 263 TFEU only when they act *jure gestionis* or have access to the EU Courts pursuant to an international agreement with the EU. Looking at the objective of the fourth paragraph of Article 263 TFEU, this approach is in line with the principle of effective judicial protection. It does not deny a remedy to the third State but implies that the remedy is granted under the appropriate jurisdiction. Thus, when the third State acts as a sovereign, the remedy is to be accorded in line with international law[40] rather than EU law. This approach is also compatible with Article 47 of the Charter, as the third State would be accorded the rights under the Charter only when it falls in the category of those '*whose rights and freedoms guaranteed by the law of the Union are violated*', that is, when it acts as a private party. According to the Commission, if this approach were applied to the case at hand, the appellant cannot be considered to be a legal person, since the restrictive measures regime, the reasons which the appellant invokes for seeking its invalidation and the relationship between the Union and the appellant as regards the measure all fall in the area of *jure imperii* and are to be regulated as matters of international law.

39 That understanding is consistent with the previous case-law of the EU judicature, which confers capacity to bring proceedings under the fourth paragraph of Article 263 TFEU, in particular on the local authorities of Member States. See judgment of 15 June 1999, *Regione Autonoma Friuli-Venezia Giulia* v *Commission* (T-288/97, EU:T:1999:125, paragraph 41 et seq.).

40 See Article 65 of the Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series*, vol. 1155, p. 331), referring to Article 33 of the UN Charter.

55. The Commission considers that if a teleological interpretation of the fourth paragraph of Article 263 TFEU guided by the openness of the EU legal order is adopted, nothing prevents the fourth paragraph of Article 263 TFEU from being interpreted to include third States within the notion of 'legal person', if a third State decides to submit itself to the jurisdiction of the EU Courts.[41]

56. According to the Commission, where the Union adopts a unilateral act potentially affecting interests of a third country and that third country choses to seek judicial review before the EU Courts instead of opening international dispute settlement mechanisms, there is no reason why the EU Courts should refuse to hear such a case as a matter of principle, without examining whether all the relevant conditions of admissibility are fulfilled. The constitutional traditions of the Member States also do not appear to stand in the way of such an open interpretation: at least in certain Member States, third countries can bring actions before national courts, which can in turn submit, in that context, requests for preliminary ruling to the Court of Justice, including regarding the validity of Union acts.

57. The Commission, however, stresses that the conditions of direct and individual concern must be met by the third State.

2. Analysis

58. It is clear from the observations submitted to the Court, which I have taken the liberty of briefly summarising, that, in the context of the present appeal proceedings, the issue of *locus standi* of the appellant raises not only the general question of whether the concept of 'legal person' pursuant to the fourth paragraph of Article 263 TFEU includes third States, but it also concerns the more narrow question – which is specific to proceedings concerning restrictive measures – of whether the Court has jurisdiction pursuant, inter alia, to Article 275 TFEU to rule in an action for annulment of restrictive measures brought by a third State. In my view, it is convenient to look in the first place at the question of the jurisdiction of the Court.

(a) Jurisdiction of the Court in the field of Common Foreign and Security Policy ('CFSP')

59. In its action before the General Court, the appellant challenged a number of provisions of Regulation 2017/2063. The legal basis of that regulation is Article 215 TFEU.

60. It is settled case-law that the second paragraph of Article 275 TFEU confers on the Court jurisdiction to give rulings on actions, brought subject to the conditions laid down in the fourth paragraph of Article 263 TFEU, concerning the review of the legality of Council decisions, adopted on the basis of provisions relating to the CFSP, which provide for restrictive measures against natural or legal persons.[42] In paragraph 106 of the judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236), the Court stated that the 'jurisdiction of the Court is in no way restricted with respect to a regulation, adopted on the basis of Article 215 TFEU, which gives effect to the positions adopted by the Union in the context of the CFSP. Such regulations constitute European Union acts, adopted on the basis of the FEU Treaty, and the Courts of the European Union must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of the legality of those acts'.

41 The Commission favours this second teleological interpretation.

42 See, most recently, judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793, paragraph 27 and the case-law cited).

61. There is really no reason to depart from that ruling in these proceedings. It follows that the EU Courts have jurisdiction to rule on the validity of restrictive measures adopted pursuant to Article 215 TFEU provided that the applicant complies with the criteria laid down in Article 263 TFEU. For this purpose, it is first necessary to determine whether the appellant is a legal person for the purposes of the fourth paragraph of Article 263 TFEU.

62. It is to this question that I shall now turn.

(b) Fourth paragraph of Article 263 TFEU – Legal person

(1) International law precedents

63. While the issue of the interpretation of Article 263 TFEU is, of course, a matter of EU law for the determination by this Court, the issues of public international law raised in this appeal are nonetheless important and have some bearing on this question.

64. Sovereign States, such as Venezuela, which are recognised by the community of nations enjoy legal personality and are, from the standpoint of international law, regarded as legal persons. It is accordingly inherent in that sovereign status that they can both sue and be sued. That principle is admittedly qualified in certain respects since there may be circumstances where a sovereign State can either plead sovereign immunity as a complete defence or, alternatively, can rely on doctrines such as the Act of State doctrine, so far as the validity of official acts committed within its own State boundaries are concerned.

65. A central part of the Council's case is that the public international law principle of State immunity (including related doctrines such as the Act of State doctrine) effectively precludes proceedings of this kind being brought in the Union's courts by third States. For my part, however, I consider that the established State practice is that the traditional principles of comity accorded to all sovereign States ensure that, save in the case of actual hostilities, such States are permitted to sue in the courts of another sovereign.

66. While this matter has not yet been directly considered by this Court, such that this matter must be considered almost from the perspectives of first principles, the following statement of the relevant international law practice which is contained in the judgment of the US Supreme Court in *Banco Nacional de Cuba v Sabbatino*[43] can nonetheless be regarded as authoritative: 'Under principles of comity governing this country's relations with other nations, sovereign states are allowed to sue in the courts of the United States … Although comity is often associated with the existence of friendly relations between states … the privilege of suit has been denied only to governments at war with the United States … or to those not recognised by this country …'.[44]

67. In that case, the US Supreme Court held that the Republic of Cuba was entitled to sue in the US Federal courts, the strained relationship between the two countries notwithstanding.

68. In principle, therefore, even judged solely by reference to public international law principles, it is clear that the appellant is a legal person for the purposes of the fourth paragraph of Article 263 TFEU. In my view, the principle of State immunity cannot be relied upon in order to limit the appellant's standing before the EU Courts, given that an action is not being brought *against* the appellant, but is rather being brought by it. The doctrine of State immunity, which is a shield or a bar

43 376 US 398 (1964).

44 368 US 398 (1964) at 408-409, per Harlan, J. (footnotes omitted).

to suit,[45] was restated by the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy – Greece Intervening).*[46] In its judgment in that case, the International Court of Justice held that customary international law continues to require that a State be accorded *immunity* in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict.[47]

69. Moreover, I do not think that the recent decision of the European Court of Human Rights in *Democratic Republic of the Congo v. Belgium* (ECtHR, 29 October 2020, CE:ECHR:2020:1006DEC001655419) is really of any assistance in this particular case. In that case, the ECtHR held that an application which had been brought before it by the Democratic Republic of the Congo was inadmissible. That ruling was, however, based on the particular wording and contents of Articles 33[48] and 34[49] of the ECHR. It is clear that the ECHR system is, however, a specific and special one, designed to permit complaints to be brought either by individuals (including legal persons) against Contracting States or by one Contracting State against another Contracting State. It was against that background that the ECtHR thus held that only High Contracting Parties, private persons, groups of individuals or non-governmental organisations may bring an action before it. As the Democratic Republic of the Congo did not fall into any of those categories, the action was declared inadmissible.[50]

70. No true comparison can, however, be made in this respect with the Union judicature established by the Treaties. In the first instance, the wording and context of Article 263 TFEU is different and less prescriptive than in the case of the Convention. It clearly envisages in its fourth paragraph that a challenge may be brought by a legal person, subject only to the requirement that such person is, for example, 'directly and individually concerned' in the manner required by that provision. Critically, however, the fourth paragraph of Article 263 TFEU does not differentiate between the various types of legal persons. Given that the appellant has legal personality by virtue of its status as a sovereign State, it must thus be regarded as a legal person for the purposes of the fourth paragraph of Article 263 TFEU.

71. Secondly, the restrictive measures which are challenged in these proceedings reflect not only the fact that the Member States have elected to pool their own sovereignty in this aspect of foreign and security policy via the European Union but also that by virtue of the Treaties, the Council has been given an express power to adopt measures of that kind as a collective instrument representing the will of the Member States. This Court has frequently indicated that EU law will, where appropriate, take its cue from established public international law principles and practice.[51] All of this means that in this

45 And which is thus defensive in nature. For an overview of the distinction between acts performed *jure imperii* and acts performed *jure gestionis* by a State, see Opinion of Advocate General Saugmandsgaard Øe in *Supreme Site Services and Others* (C-186/19, EU:C:2020:252, points 59 to 63).

46 [2012] ICJ Reports, 99.

47 In that case, the International Court of Justice considered that State immunity for *acta jure imperii* extended to civil proceedings for the acts in question.

48 Article 33 of the European Convention of Human Rights ('the ECHR'), entitled 'Inter-State cases', provides that 'any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party'.

49 Article 34 of the ECHR, entitled 'Individual applications', provides that 'the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto'.

50 I would note that the rules on standing pursuant to the Convention are somewhat less 'generous' than those of the FEU Treaty. While local or regional authorities with legal personality under national law may institute proceedings pursuant to the fourth paragraph of Article 263 TFEU provided they comply with the conditions, inter alia, of direct and individual concern, the European Court of Human Rights in its decision in *Republic of the Congo v. Belgium* (ECtHR, 29 October 2020, CE:ECHR:2020:1006DEC001655419) restated that national authorities exercising public functions have no standing to make an application to the Court under Article 34 of the Convention.

51 See, for example, judgments of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118, paragraph 47), and of 12 November 2019, *Organisation juive européenne and Vignoble Psagot* (C-363/18, EU:C:2019:954, paragraph 48). See also, in that regard, Masson, A. and Sterck, J., 'The Influence of International Law on the Court of Justice's case-law', in Petrlík, D., Bobek, M., Passer, J.M. and Masson, A. (eds), *Évolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux: Liber amicorum Jiří Malenovský*, Bruylant, Brussels, 2020.

context, at least, I consider it appropriate that public international law practice should inform the interpretation of the fourth paragraph of Article 263 TFEU in so far as the meaning of the words 'legal person' is concerned, while accepting, of course, that those words have an autonomous meaning at the level of EU law, which is ultimately for this Court to determine.

72. In these circumstances, it is accordingly appropriate that the Union's judicature should follow the established public international law practice and the associated principle of judicial comity which would also be followed by the individual courts of the Member States in the event that they had adopted restrictive measures of this kind in their own right. That practice and that principle accordingly requires that the Courts of the Union should be open to challenges brought by other sovereign States in their capacity as legal persons.

(2) Existing precedents before EU Courts

73. Article 19(3)(a) TEU provides that the Court of Justice of the European Union shall, in accordance with the Treaties, rule on actions brought by a Member State, an institution or a natural or legal person. Applicants who have standing to bring an action before the Court are thus listed in that provision.[52] As regards the review of the legality of certain acts – referred to as actions for annulment[53] – in addition to actions which may be brought by Member States and EU institutions[54] referred to in the second and third paragraphs of Article 263 TFEU, the fourth paragraph of Article 263 TFEU provides that any natural or legal person may, under certain conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

74. Neither Article 19(3)(a) TEU nor the fourth paragraph of Article 263 TFEU contains a definition of the term 'legal person'. In addition, no other provision of that Treaty, nor indeed the Treaty on the European Union, provides such a definition.[55] That term, which does not contain any reference to national laws, must be regarded as an *autonomous concept* of EU law.[56]

75. The Court of Justice has yet to rule explicitly on whether a third State may be considered a legal person for the purposes of the fourth paragraph of Article 263 TFEU. By contrast, the General Court, in its order of 10 September 2020, *Cambodia and CRF* v *Commission* (T-246/19, EU:T:2020:415, paragraph 51), considered that the expression 'any natural or legal person' in the fourth paragraph of Article 263 TFEU must be understood as also covering States which are not members of the European Union, such as the Kingdom of Cambodia in that instance.[57] Previously, in its judgment of 10 June

52 Aside from preliminary rulings, which are referred to in Article 19(3)(a) TEU, the Court of Justice of the European Union, pursuant to Article 19(3)(c) TEU, may also rule in *other cases* provided for in the Treaties.

53 See Article 264 TFEU, which provides that if the action is well founded, the act will be declared void.

54 The Member States, the European Parliament, the Council and the Commission are sometimes referred to as 'privileged' applicants as they do not have to demonstrate an interest in the proceedings in order to have standing. See the second paragraph of Article 263 TFEU. The Court of Auditors, the European Central Bank and the Committee of the Regions are 'semi-privileged' applicants as they have standing for the purposes of protecting their prerogatives. See the third paragraph of Article 263 TFEU.

55 See, for example, Articles 7, 40 and 42 TEU and Articles 75, 215(2) and 275 TFEU. See also, for example, Article 15(3) TFEU, which refers to a 'legal person *residing or having its registered office in a Member State*'. Emphasis added. The additional qualification or limitation added in that provision – which is not reproduced in Article 267 TFEU – would tend to indicate that the term 'legal person' is very broad in nature.

56 See, by analogy, judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds* (C-201/13, EU:C:2014:2132, paragraphs 14 and 15). Indeed, in paragraph 10 of the judgment of 28 October 1982, *Groupement des Agences de voyages* v *Commission* (135/81, EU:C:1982:371), the Court stated that the meaning of 'legal person' in Article 263 TFEU is not necessarily the same as in the various legal systems of the Member States.

57 In that case, the General Court recalled that the objective of the fourth paragraph of Article 263 TFEU is to grant adequate judicial protection to all persons, natural or legal, who are directly and individually concerned by acts of the institutions of the EU. The General Court held that although non-Member States may not claim the status of litigant conferred on the Member States by the EU system, they may nevertheless bring proceedings under the right of action conferred on legal persons. Thus, where an entity has legal personality, it may, in principle, bring an action for annulment under the fourth paragraph of Article 263 TFEU.

2009, *Poland* v *Commission* (T-257/04, EU:T:2009:182, paragraphs 51 and 52), the General Court[58] considered that the Republic of Poland, which at the relevant time[59] was not a Member State, had standing to bring an action for annulment under the fourth paragraph of Article 263 TFEU.[60]

76. Despite the absence of a direct ruling on this point by the Court of Justice, there are, however, a number of earlier authorities that would tend to indicate that the terms in question are sufficiently broad as to encompass annulment proceedings brought by third States.

77. Perhaps the most compelling precedent of the Court of Justice on the matter is the order of 14 July 2005, *Switzerland* v *Commission* (C-70/04, not published, EU:C:2005:468), in which the Court of Justice examined whether it or the General Court had jurisdiction in an action for annulment brought by the Swiss Confederation.[61] The Court held that the Swiss Confederation was entitled to maintain the proceedings, irrespective of whether this was by reason of the Agreement between the European Community and the Swiss Confederation on air transport (for the purposes of which the Swiss Confederation is assimilated to the status of the Member States for the purposes of the second paragraph of Article 263 TFEU[62]) or whether the Swiss Confederation was independently a legal person for the purposes of the fourth paragraph of Article 263 TFEU.[63] On at least one reading of that order, the Court thereby implicitly considered that the Swiss Confederation was, at the very least, a legal person for the purposes of the fourth paragraph of Article 263 TFEU.

78. In adopting that position, the Court, however, specifically referred to the particular context, which was characterised by the agreement in question. That context is undoubtedly absent in the present case, which is characterised by restrictive measures rather than a bilateral agreement. Nevertheless, the Court, in its judgment of 18 January 2007, *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32), accepted that the Kurdistan Workers' Party (PKK), an organisation which *lacked legal personality*, should have standing to contest restrictive measures imposed on it. The Court held that given that the Community legislature took the view that the PKK *retains an existence sufficient for it to be subject to the restrictive measure*s, it must be accepted, on grounds of consistency and justice, that that entity continues to have an existence sufficient such as would entitle it to contest such measures. According to the Court, the effect of any other conclusion would be that an organisation could be subject to such measures without being able to challenge them.

58 The General Court cited the Opinion of Advocate General Poiares Maduro in *Poland* v *Council* (C-273/04, EU:C:2007:361, point 41). In that point, Advocate General Poiares Maduro considered that given that the Republic of Poland has legal personality under its own domestic law and, like any State, is recognised by international law as having international personality, it had capacity to bring proceedings before the Court to challenge an act adversely affecting it under the fourth paragraph of Article 263 TFEU, provided the criteria of direct and individual concern are met and in order to prevent the right of action in question from being transformed into a kind of *actio popularis*. Ultimately, it can be inferred from Advocate General Poiares Maduro's Opinion that, given that he considered that the time limit for challenging the act in question ran from the date of the entry into force of the Treaty of Accession, the Republic of Poland had standing to bring its action as a Member State and thus as a privileged applicant in accordance with the second paragraph of Article 263 TFEU. In its judgment of 23 October 2007, *Poland* v *Council* (C-273/04, EU:C:2007:622), the Court, despite an objection to admissibility raised by the Council, did not examine the standing of the Republic of Poland, but merely ruled on the substance of the action.

59 Which, crucially, according to the General Court, preceded the Republic of Poland's accession to the Union in May 2004.

60 See also order of 10 June 2009, *Poland* v *Commission* (T-258/04, not published, EU:T:2009:183, paragraphs 60 and 61). In that order, the General Court held that that prior to becoming a Member State, the Republic of Poland had standing to bring an action for annulment in respect of an act pursuant to the fourth paragraph of Article 263 TFEU, which affected it directly and individually. It held, however, that the action was time barred. On appeal, the Court of Justice, in the judgment of 26 June 2012, *Poland* v *Commission* (C-336/09 P, EU:C:2012:386), set aside the order of inadmissibility of the General Court, holding in effect that the Republic of Poland, in the case at hand, had a right of action in its capacity as a Member State.

61 That action was brought against Commission Decision 2004/12/EC of 5 December 2003 on a procedure relating to the application of Article 18(2), first sentence, of the Agreement between the European Community and the Swiss Confederation on air transport and Council Regulation (EEC) No 2408/92 (Case TREN/AMA/11/03 – German measures relating to the approaches to Zurich airport) (notified under document number C(2003) 4472) (OJ 2004 L 4, p. 13).

62 While it is not explicit in the order, such assimilation would be based on the text of the agreement.

63 See order of 14 July 2005, *Switzerland* v *Commission* (C-70/04, not published, EU:C:2005:468, paragraph 22).

79. That judgment is particularly interesting, as it would tend to suggest that the requirement of being a 'natural or legal person' is not strictly adhered to in order for an entity to have standing to challenge restrictive measures pursuant to the fourth paragraph of Article 263 TFEU. Thus, it may be argued that an entity such as the appellant, provided it can demonstrate, inter alia, that it is directly and individually concerned by restrictive measures, must have access to the EU Courts to protect its rights, irrespective of its legal qualification under national, international or perhaps indeed EU law.

80. Moreover, pursuant to the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union, any *person* may intervene before the Courts of the European Union if that *person* can establish an interest in the result of a case submitted to one of those Courts.[64] While the provision in question does not refer to a 'legal person', I consider that the term 'person' undoubtedly includes 'legal person'. Indeed, in its order of 23 February 1983, *Chris International Foods* v *Commission* (91/82 and 200/82, EU:C:1983:45), the Court held that the Commonwealth of Dominica, a third State, could intervene in an action for annulment as it had shown sufficient interest in the outcome of the proceedings.[65]

81. Furthermore, in my view, the fourth paragraph of Article 263 TFEU is not limited to private actors or individuals.[66] The Court has consistently held that, pursuant to the fourth paragraph of Article 263 TFEU, a local or regional entity may, to the extent that it has legal personality under national law, institute proceedings against a decision addressed to it or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to it.[67]

82. An example here is provided by the judgment of 22 November 2001, *Nederlandse Antillen* v *Council* (C-452/98, EU:C:2001:623). In those proceedings, the Netherlands Antilles maintained that since, by virtue of the Constitution of the Kingdom of the Netherlands, they may independently defend their own interests, they should accordingly have *locus standi* to bring proceedings in their own right under the second paragraph of Article 263 TFEU or the third paragraph of Article 263

64 Any analogy with Article 263 TFEU should not be overstated, as an application to intervene is limited to supporting the form of order sought by one of the parties and is not an autonomous action.

65 See, by contrast, order of the Vice-President of the Court of 17 May 2018, *United States of America* v *Apple Sales International and Others* (C-12/18 P(I), not published, EU:C:2018:330), in which the Court of Justice dismissed the appeal brought by the United States of America against the order of the General Court of 15 December 2017, *Apple Sales International and Apple Operations Europe* v *Commission* (T-892/16, not published, EU:T:2017:925), by which the General Court rejected its application to intervene in support of the form of order sought by Apple Sales International and Apple Operations Europe in Case T-892/16, on the sole basis that the United States of America had not established an interest in the result of the case. See also paragraph 14 of the order of 4 June 2012, *Attey and Others* v *Council* (T-118/11, T-123/11 and T-124/11, not published, EU:T:2012:270), in which the General Court indicated that the Republic of Côte d'Ivoire had been granted leave to intervene in that action.

66 In support of the claim that the fourth paragraph of Article 263 TFEU is limited to private actors or individuals, certain parties have observed in these proceedings that in point 25 of his Opinion in *Stichting Woonlinie and Others* v *Commission* (C-133/12 P, EU:C:2013:336), Advocate General Wathelet stated that following the amendments to Article 230 EC introduced by the Treaty of Lisbon, as now reflected in the fourth paragraph of Article 263 TFEU, '*individuals* can now bring an action for annulment without having to prove that they are individually concerned, on condition, however, that the act in question is a regulatory act of direct concern to them and does not entail implementing measures' (emphasis added). In my view, that does not mean that the fourth paragraph of Article 263 TFEU merely grants *locus standi* to private actors. The passage should not be read out of context and in isolation. The appellants in that case were housing corporations and thus private actors, albeit with a social function. See also point 90 of Opinion of Advocate General Kokott in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:21), which states that 'the authors of the Treaty decided, after intensive discussion of the whole problem in the European Convention, with a view to strengthening the legal protection of *individuals* against European Union acts of general application, not to revise the criterion of individual concern, but instead to introduce into the fourth paragraph of Article 263 TFEU a completely new, third possibility for instituting proceedings: … for natural and legal persons to institute proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures' (emphasis added). However, it must be noted that in point 22 of that Opinion, Advocate General Kokott stated that 'all the parties in the present appeal proceedings agree that the fourth paragraph of Article 263 TFEU extended the standing of natural and *legal persons* to institute proceedings'. The question being examined was the extent of that extension. Once again, the appellants in that case were private actors, namely, Inuit Tapiriit Kanatami, a body representing the interests of the Canadian Inuit, and a number of other parties who were mainly producers of or traders in seal products. In any event, I fail to see the relevance of the changes introduced by the Treaty of Lisbon in the context of the present proceedings, as the concept 'legal person' in Article 263 TFEU has existed – and arguably remained unchanged – since the entry into force of the Treaty of Rome in 1953 (see Article 173 EEC).

67 Judgment of 22 March 2007, *Regione Siciliana* v *Commission* (C-15/06 P, EU:C:2007:183, paragraph 29). See also judgment of 10 April 2003, *Commission* v *Nederlandse Antillen* (C-142/00 P, EU:C:2003:217, paragraph 59).

TFEU in order to protect their prerogatives and therefore without having to prove that they were directly and individually concerned by the measure. The Court rejected this claim, holding that the Netherlands Antilles' right to bring proceedings could only be examined under the fourth paragraph of Article 263 TFEU, provided it had legal personality under Netherlands law.

(3) Present proceedings

83. It is not disputed that the appellant has legal personality and is undoubtedly a legal person for the purposes of international law. It was, after all, a founding member of the United Nations in 1945.

84. While, as I have already observed, the Court has never ruled directly on this point, the existing case-law of the General Court and the Court of Justice on standing would nonetheless all tend to suggest that the appellant is a legal person for the purposes of the fourth paragraph of Article 263 TFEU. As the General Court stated in its order of 10 September 2020, *Cambodia and CRF* v *Commission* (T-246/19, EU:T:2020:415, paragraph 46), the provisions of the fourth paragraph of Article 263 TFEU must be given a purposive interpretation [68] and to exclude third States from the judicial protection granted under that article would run counter to its objective.

85. In addition, respect for the rule of law and the principle of effective judicial protection [69] also argues in favour a ruling that the appellant is a legal person for the purposes of the fourth paragraph of Article 263 TFEU. As is apparent inter alia from Article 2 TEU, the rule of law is one of the founding values of the EU. Moreover, while Article 47 of the Charter cannot confer jurisdiction on the Court, that provision, which constitutes a reaffirmation of the principle of effective judicial protection, requires, in its first paragraph, that *any person* whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law. [70]

86. Contrary to the arguments raised by certain parties, and in particular the Council, I do not consider that recognising a third State as a legal person for the purposes of the fourth paragraph of Article 263 TFEU would place the EU at a disadvantage vis-à-vis its international partners and accordingly restrict the EU in the conduct of its internal policies and international relations. In that regard, the Council emphasises what it says is the lack of reciprocal access to the courts of third States, who do not allow the sovereign decisions pertaining to their own international relations, trade, or economic policies to be challenged.

87. I have already dealt with the issue of State practice in international law, so I consider that the fears of the Council regarding a lack of reciprocity are, to that extent, misplaced. In any event, justice, fairness and effective judicial protection are hallmarks of the democratic tradition which is a basic and essential feature of the 27 Member States and the European Union alike. Even if it were the case that the courts of Venezuela (or those of any other third State) were effectively closed to any proceedings brought by the Union or its individual Member States, that would be a matter for that State. This, however, could not take from the Union's obligations to ensure that it maintains the highest democratic standards, respect for the rule of law and adjudication by an independent judiciary. It follows that respect for the rule of law and the principle of effective judicial protection is not based on any notion of reciprocity and they cannot be traded or compromised in diplomatic exchanges or made subject to reciprocal treaty obligations.

68 The General Court cited in that regard judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17, p. 106).

69 The principle of the effective judicial protection of individuals' rights under EU law, which is referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States. Judgment of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraph 55). Such protection is ensured for non-privileged litigants pursuant to the fourth paragraph of Article 263 TFEU.

70 Judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraphs 72 and 73).

88. I would merely add that, contrary to the Council's assertions, the fact that a third State 'is contesting provisions of an internal EU act implementing a political decision of the Council to reduce economic relations with it' can only be regarded as a statement of fact. It is, however, one with no relevance to the legal question of whether the appellant is entitled to maintain these proceedings.

89. Moreover, recognising a third State as a legal person pursuant to the fourth paragraph of Article 263 TFEU does not exempt that State from the necessity to comply with the other relevant criteria governing the issue of standing. Ultimately, allowing a third State access to the EU Courts pursuant to those conditions, far from placing the EU at a disadvantage either internally or externally, ensures above all that the rule of law is adhered to.

90. For all of these reasons, I consider that the appellant must be regarded as a legal person pursuant to Article 263 TFEU, its status as a third State notwithstanding.

B. Direct concern

1. Arguments of the parties

91. In support of the appeal, the appellant relies on a single ground of appeal in which it claims that the General Court wrongly interpreted the criterion of direct concern provided for in the fourth paragraph of Article 263 TFEU in light of the *Almaz-Antey* judgment.

92. The appellant contends that, in assessing whether it is directly concerned by the contested provisions, the General Court wrongly relied on the *Almaz-Antey* judgment, whose relevance to the present case is difficult to perceive. It maintains that the present case, which is the first of its kind in EU case-law, concerns instead an action brought by the government of a third country which is expressly targeted by the restrictive measures. This important feature of the present case, which distinguishes this case from the EU Courts' existing case-law, was completely neglected by the General Court. In that regard, the appellant recalls that, in assessing novel questions relating to the admissibility of an action for annulment, this Court emphasised the importance of 'avoiding excessive formalism which would amount to the denial of any possibility of applying for annulment even though the entity in question has been the object of restrictive Community measures'.[71] The appellant submits that the question of whether it acted as an economic operator active on the markets in question cannot be seen as the guiding criterion to decide whether it is directly concerned by the contested provisions, as this is not what the fourth paragraph of Article 263 TFEU requires. According to the appellant, the contested provisions are aimed at preventing it from purchasing goods and services. As a result, by their own nature and content, the contested provisions directly affect the appellant both from a legal and factual viewpoint.

93. The appellant also claims that the fact that it is not listed as such in a relevant annex to Regulation 2017/2063 in a similar manner to the applicant in the *Almaz-Antey* judgment is irrelevant as the appellant is specifically referred to in the contested provisions. By prohibiting exports of certain items and services to Venezuela, the contested provisions by their very content have significant direct factual and legal effects towards the appellant. The appellant considers that the fact that the activity of the government of a third country is not a *purely commercial activity* is undeniable. However, this fact does not exclude that the appellant can also act as an economic operator in a specific market. Therefore, the circumstance referred to in paragraph 37 of the judgment under appeal is insufficient to conclude that such an entity is not directly concerned by the contested provisions. The appellant

71 Judgment of 18 January 2007, *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32, paragraph 114).

claims that while purchasing the goods and equipment covered by the contested provisions it engaged in a purely commercial activity, as it acted in the manner of a private player within the relevant market. It follows that, contrary to what the judgment under appeal states, the appellant acted as an economic operator.

94. The appellant considers that the contested provisions prevent it from (i) purchasing arms, military equipment or any other equipment which might be used for internal repression, as well as surveillance equipment, technology or software and (ii) obtaining financial, technical or other services related to the above equipment and technology. It is therefore clear that, by affecting the existing economic relationship of the appellant with all the relevant operators in the European Union, the contested provisions have a significant factual effect on it. That effect is, moreover, more than merely indirect. The appellant submits that the General Court erroneously interpreted the case-law referred to in paragraph 46 of the judgment under appeal and, therefore, neglected to consider the crystal-clear circumstance that the contested provisions have direct factual effects on the appellant's situation.

95. The Council claims that the appellant's pleadings in respect of the three limbs of its single plea overlap to some extent. The Council considers that, in essence, the three limbs revolve around the same question, namely whether the General Court erred in law by concluding that the contested provisions of Regulation 2017/2063 do not directly concern the appellant within the meaning of the fourth paragraph of Article 263 TFEU. No other specific provisions or principles of EU law are claimed to have been violated. The Council considers that to the extent that the appellant merely seeks the re-examination of evidence that was before the General Court, the appeal must be dismissed as going beyond the object of an appeal which, in accordance with Article 58 of the Statute of the Court of Justice, must be limited to points of law.

96. The Council considers that the present appeal is inadmissible in part, and also unfounded, and must therefore be dismissed.

97. The Council considers that the appellant does not invoke any specific provision or principle of EU law on the basis of which the General Court would have been required to extend the notion of direct concern beyond the one currently established in the case-law of the EU Courts. It notes that the judgment of 18 January 2007, *PKK and KNK* v *Council*[72] is entirely irrelevant to the present case. In that judgment, the Court decided to adapt the procedural rules governing the admissibility of an action for annulment by extending standing to organisations lacking legal personality. According to the Council, 'there is no issue regarding legal personality in the present case, however: it is uncontested that the appellant is a legal person and therefore in principle has access to the EU courts, subject however to general admissibility conditions, which according to the Council, are not fulfilled in this case'.[73]

98. The question of whether the contested provisions directly affect the appellant's position was determined by the General Court in accordance with the settled case-law, that is to say, 'specifically in each individual case having regard to the regulatory content of the EU act in question'.[74] Contrary to the appellant's allegations, there was consequently no obligation under EU law for the General Court to assess the overall aim of the restrictive measures in question with a view to determining whether the appellant was directly concerned by the contested provisions. If the aim of the measure was used as a criterion to assess whether an EU law act directly affects the legal or factual position of a third State, this would be contrary to the settled case-law of the EU Courts, and such an approach would also expand the category of potential applicants to include any third State with respect to which the

72 C-229/05 P, EU:C:2007:32.

73 I would note that this statement of the Council is somewhat contradicted by the Council's subsequent answer to the question of the Court. I would note however that the Council, in its plea of inadmissibility before the General Court, claimed that the appellant was not a natural or legal person for the purposes of the fourth paragraph of Article 263 TFEU.

74 Judgment of 13 September 2018, *Gazprom Neft* v *Council* (T-735/14 and T-799/14, EU:T:2018:548, paragraph 97).

EU decides as a matter of foreign policy to interrupt or reduce, in part or completely, economic and financial relations. Moreover, whilst the persons, entities or bodies in such third countries, including those which could be considered as emanations of the State, may be hindered in purchasing equipment subject to export restrictions from the EU market, it is clear that such limitations for them produce no direct effect on the legal situation of a third country, as a State, in its capacity *jure imperii*, that is to say, in the capacity in which, according to the appellant, it should have been granted standing.

99. The Council considers that, contrary to the appellant's contention, the General Court did not hold that the appellant was not directly concerned on the sole basis of being insufficiently referred to in the contested provisions. Rather, the General Court reached this conclusion on the basis of a number of relevant elements taken together, which were duly reasoned and supported by the relevant case-law in paragraphs 35 to 48 of the judgment under appeal. In addition, specifically as regards references to the appellant in the contested provisions, it is clear that the appellant is not addressed by those provisions directly. There is simply a prohibition against EU economic operators on having economic and financial relations with natural or legal persons, entities or bodies (established in or operating) in the territory of Venezuela. What are directly addressed are the specific uses of certain equipment by such persons or entities in the territory of Venezuela, 'in view of the risk of further violence, excessive use of force, and violations or abuses of human rights'.

100. The Council considers that, contrary to the appellant's claim (under the first plea), the General Court did fully take into account the specific situation of the State and made an analysis as to whether it can be compared to an economic operator active in a specific market within the meaning of the EU Courts' case-law. It concluded that this is not possible, as a State acting in its *jure imperii* capacity is not comparable to a private or public entity whose existence is limited by its purpose (the commercial activity in question). The appellant does not explain why it considers this conclusion by the General Court to be wrong in law. Its submission that a State can act as an economic operator in a specific market is beside the point made in the analysis of the General Court. The underlying reason for establishing the condition of direct concern for entities other than States is the impact that the application of restrictive measures may have on their economic activity. Such an impact cannot be established in relation to a State given the 'very wide range of competences' and diverse fields of action that are characteristic of a State.

101. The Council considers that the General Court correctly concluded that the appellant, which is not specifically named in the measures and has not demonstrated that it was active on the market affected by export restrictions, failed to meet the requirements of the case-law, for the reasons developed in paragraphs 37 to 40 of the judgment under appeal and on this basis had to refuse standing to the appellant. In so far as the appellant claims that the General Court should have recognised the factual effects of the measures irrespective of the circumstances in which such effects have been recognised as sufficient for establishing *locus standi* in the settled case-law, the appellant actually requests the Court to establish a new rule according to which standing should be granted automatically to third States seeking to contest economic measures taken by the EU in the context of its foreign policy. In other words, the appellant seems to insist on the creation of a new rule which would automatically give standing to third States by allowing them to challenge measures that implement decisions adopted with a view to pursuing legitimate objectives of the Union's external action as laid down in Article 21 TEU, including through the interruption or reduction, in part or completely, of economic or financial relations with one or more third countries (Article 215(1) TFEU).

102. The Council submits that this would be contrary to the system of judicial protection under the Treaties, designed with a view to ensuring the protection of rights granted under EU law. Sovereign third countries have no specific rights under the EU Treaties to be subject to equal treatment or to trade freely and unconditionally with economic operators in the EU. Therefore, by definition they cannot successfully claim to be affected in their legal position as a result of an EU measure which potentially puts them in differentiated treatment (typically only within limited sectors of their activity),

and possibly also vis-à-vis other third States with which the EU does not decide to reduce or interrupt its economic relations. Moreover, creating *ab novo* such a legal avenue would put the EU at a disadvantage vis-à-vis its international partners whose sovereign decisions pertaining to their economic policies cannot be challenged before their courts, and in this way would unduly restrict the EU in the conduct of its policies and international relations. This is particularly relevant in the context of the present proceedings where a third State is contesting provisions of an internal EU act implementing a political decision of the Council to reduce economic relations with that State.

2. Analysis

103. The condition according to which a natural or legal person must be directly affected by the decision forming the subject matter of the action, as provided for in the fourth paragraph of Article 263 TFEU, requires two cumulative criteria to be met, namely that the measure at issue, first, must directly affect the legal situation of the individual and, secondly, it must leave no discretion to the addressees entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules.[75]

104. It is thus necessary to examine whether the General Court has correctly applied the criteria in question in the present case.

105. It is clear from the judgment under appeal that the General Court only examined the first of the two cumulative criteria and found, in effect, that the contested provisions did not directly affect the legal situation of the appellant. The General Court stated, correctly in my view, in paragraph 30 of the judgment under appeal that in order to determine whether a measure produces legal effects, it is necessary to look in particular to its subject matter, its content and substance, as well as to the factual and legal context of which it forms part.[76] This position, which advocates a holistic and pragmatic approach when assessing the effects of a measure and favours substance over form, should be used when examining the effects of a measure on the legal situation of a natural or legal person. Given the novel nature of the present case where, for the first time, a third State has sought the annulment of restrictive measures, such an approach is particularly warranted and complies with the spirit of paragraph 114 of *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32), in which the Court advocated ' *avoiding excessive formalism* which would amount to the denial of any possibility of applying for annulment even though the entity in question has been the object of restrictive … measures'.[77]

106. The main reasoning of the General Court on direct concern in the judgment under appeal may be found in paragraphs 31 to 33 thereof.[78]

75 Order of 10 March 2016, *SolarWorld* v *Commission* (C-142/15 P, not published, EU:C:2016:163, paragraph 22). See also judgment of 10 September 2009, *Commission* v *Ente per le Ville vesuviane and Ente per le Ville vesuviane* v *Commission* (C-445/07 P and C-455/07 P, EU:C:2009:529, paragraph 45 and the case-law cited).

76 While the case-law cited by the General Court in paragraph 30 of the judgment under appeal relates to whether a measure is actionable and thus produces legal effects (in the abstract), I consider that the pragmatic approach advocated can also be used in order to assess whether a measure directly affects the legal situation of any natural or legal person. For an example of such a pragmatic approach when assessing the question of direct concern, see judgment of 5 May 1998, *Glencore Grain* v *Commission* (C-404/96 P, EU:C:1998:196, paragraphs 38 to 54), in which the Court rejected purely theoretical suppositions or arguments which would mitigate against a finding of direct concern.

77 Emphasis added. The fact, as indicated by the Council, that the judgment of 18 January 2007, *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32), specifically related to the question of standing of an organisation lacking legal personality by no means diminishes the need to avoid excessive formalism in other cases.

78 The other, subsequent paragraphs merely provide, in my view, additional justifications for the General Court's ruling that the appellant is not directly concerned by the contested provisions.

107. In paragraph 31 of the judgment under appeal, the General Court found that the contested provisions prohibit first, the sale or supply to any natural or legal person, entity or body in Venezuela of arms, military equipment or any other equipment which might be used for internal repression, as well as surveillance equipment, technology or software and, secondly, the provision of financial, technical or other services related to such equipment and technology to any natural or legal person, entity or body in Venezuela.

108. The General Court then stated that Article 20 of Regulation 2017/2063 limits the application of the prohibitions contained in the contested provisions to the territory of the Union, to natural persons who are nationals of a Member State and to legal persons constituted under the law of one of them, as well as to legal persons, entities and bodies in respect of any business done in whole or in part within the Union and that the contested provisions do not impose prohibitions on the appellant. Thus, according to the General Court, the contested provisions at most are likely to have indirect effects on the appellant as the prohibitions imposed on natural persons who are nationals of a Member State and on legal persons constituted under the law of one of them could have the effect of limiting the sources from which the appellant can obtain the goods and services subject to those prohibitions.[79]

109. For my part, I cannot help thinking that the General Court's assessment of the effects of the contested provisions on the appellant's legal situation is one which, with respect, is highly artificial and unduly formalistic. I feel equally bound to observe that the General Court's analysis is simply at odds with the reality of the restrictive measures in question. Those measures were especially aimed at and were designed to affect the appellant. I say that for the following reasons.

110. First, it is clear, in particular from Articles 6 and 7 of Regulation 2017/2063, that the reference 'to any natural or legal person, entity or body in, or for use in, Venezuela' in the contested provisions *includes* Venezuela's government, public bodies, corporations or agencies, or any person or entity acting on their behalf or at their direction. The specific identification and targeting of the appellant by the contested provisions is evident from the fact that, otherwise, it would not have been necessary expressly to exclude or refer to 'Venezuela's government, public bodies, corporations or agencies, or any person or entity acting on their behalf or at their direction' in Article 6(2) and Article 7(1)(c) of Regulation 2017/2063.[80] The prohibitions contained in the contested provisions therefore specifically identify and target the appellant and various emanations of that State.[81] They seek further to ensure inter alia that the appellant itself (and the various emanations of that State[82]) do not obtain certain specified goods and services from any person identified in Article 20 of Regulation 2017/2063.[83]

79 The distinction between direct and indirect effects on a person's legal situation was also raised for example in the case giving rise to the judgment of 13 March 2008, *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159). See also Opinion of Advocate General Bot in *Commission* v *Infront WM* (C-125/06 P, EU:C:2007:611). In that case, the Court held that a decision which imposed new restrictions on rights held by a person which did not exist when that person acquired those rights and which rendered their exercise more difficult directly affected that person's legal situation.

80 The fact that the contested provisions do not relate merely to natural or legal person, entities or bodies in Venezuela *but* also specifically target and identify the appellant itself and emanations thereof is hardly surprising as it is clear from the recitals 1, 2 and 3 of Regulation 2017/2063 that that regulation was adopted in the light of the continuing deterioration of democracy, the rule of law and human rights in Venezuela and the need to address inter alia internal repression, serious human rights violations or abuses and the repression of civil society or democratic opposition. In that regard, I consider, as observed by the Council, that the aim of a measure would not *in itself* be sufficient to assess whether an EU act directly affects the legal situation of a third State. What is of particular importance, in my view, is the terms and content of the measures in question which, in this instance, expressly identify and target the appellant.

81 Indeed, the Council itself accepts that emanations of the appellant *qua* State may be hindered in purchasing equipment subject to the restrictions in question.

82 As well as, more generally, any other natural and legal persons, entities or bodies in Venezuela. In my view, the contested provisions, to the extent that they limit the possibility for any natural and legal persons, entities or bodies in Venezuela other than the appellant to purchase certain goods and services will also have an *indirect impact* on the legal situation of the appellant.

83 I therefore consider that the General Court erred in law in paragraph 43 of the judgment under appeal when it stated that the measures in question restrict, at most indirectly, the opportunities of the appellant.

111. Given that the prohibitions contained in the contested provisions prevent the appellant from obtaining the listed goods and services from any person identified in Article 20 of Regulation 2017/2063, it is, with respect, simply artificial and formalistic to suggest that a ban on the sale and supply of goods and services to the specifically identified and targeted appellant does not directly, and indeed individually, affect the legal situation of the appellant.[84] From this one might also observe that those measures plainly impact on the reputation of Venezuela as a member of the community of nations: they suggest and are intended to suggest – perhaps with very good reason – that Venezuela's commitment to democratic values and traditions is a hollow one and that that State needs to do much more before it can enjoy the full confidence of the European Union and its Member States so far as the maintenance of these values is concerned.

112. Secondly, while the General Court has correctly outlined the scope *ratione loci* and *ratione personae* of the prohibitions contained in the contested provisions in accordance with Article 20 of Regulation 2017/2063, the fact that those prohibitions are limited to the territory of the Union and that the contested provisions do not impose prohibitions on the appellant *per se* does not mean that the contested provisions do not directly affect the appellant's legal situation.

113. Indeed, Article 20 of Regulation 2017/2063 merely indicates the scope of the EU legislature's competence or jurisdiction – both geographical and personal – in relation to the restrictive measures adopted pursuant to that regulation. Thus, the fact that Regulation 2017/2063 does not '*apply*'[85] to the appellant as the EU legislature clearly does not have direct jurisdiction over it does not necessarily entail that restrictive measures which apply, for example, only within the territory of the Union and are binding on nationals of a Member State, do not directly affect the appellant's legal situation.[86] Any other conclusion would mean that no natural or legal person outside the territory of the Union and who is not a national of a Member State or incorporated or constituted under the law of a Member State who is listed, for example, in Annex IV and Annex V to Regulation 2017/2063 and whose funds or economic resources have been frozen in accordance with Article 8 of that regulation or equivalent restrictive measures would have standing to seek annulment of those measures.[87]

114. The Court, however, has repeatedly stated that, given its significant negative impact on the freedoms and fundamental rights of the person or of the entity concerned, any inclusion in a list of persons or entities subject to restrictive measures, whether based on Article 215 TFEU or on Article 291(2) TFEU, allows that person or entity access to the Courts of the European Union, in that it is similar, in that respect, to an individual decision, in accordance with the fourth paragraph of Article 263 TFEU.[88]

84 Such an artificial approach, which can also be found in paragraph 43 of the judgment under appeal, and in which the General Court states that the contested provisions do not directly prohibit the appellant from purchasing and importing the equipment in question and from obtaining the services in question, would negate the fact, for example, that the right to receive services is a corollary to the right to provide services and that both rights exist in parallel. See, for example, judgment of 31 January 1984, *Luisi and Carbone* (286/82 and 26/83, EU:C:1984:35, paragraph 16), and of 1 July 2010, *Dijkman and Dijkman-Lavaleije* (C-233/09, EU:C:2010:397, paragraph 24).

85 Emphasis added. See language used in Article 20 of Regulation 2017/2063.

86 See, by analogy, 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, paragraphs 241 to 247), and of 13 September 2018, *Rosneft and Others* v *Council* (T-715/14, not published, EU:T:2018:544, paragraph 68). Thus, despite the fact that restrictive measures may be of general application and may impose obligations on persons and entities defined in the abstract does not mean that those measures may not be of direct and individual concern to natural and legal persons named in those measures within the meaning of the fourth paragraph of Article 263 TFEU.

87 I would also note that the Council in its objection to admissibility before the General Court submitted that, in the light of the terms of Article 20 of Regulation 2017/2063, that regulation produces no binding legal effect for the appellant or in the territory of Venezuela and is limited to the territory of the Member States and person subject to their jurisdiction. In my view, this separate objection to admissibility is inherently linked to the question of direct concern.

88 Judgment of 1 March 2016, *National Iranian Oil Company* v *Council* (C-440/14 P, EU:C:2016:128, paragraph 44 and the case-law cited).

115. I would stress in that regard that the inclusion of persons or entities subject to restrictive measures in a list results in the persons or entities being *both directly and individually concerned* by the measures.[89] Moreover, while the freezing of a person's funds or economic resources may perhaps (*quod non*) have a greater impact on that person's legal situation than a ban on the sale of certain goods or the provision of certain services to him,[90] it is nonetheless striking that in the *Almaz-Antey* judgment, the General Court held that such a ban directly affected[91] the legal situation of the applicant in that case.[92] The General Court therefore held in the *Almaz-Antey* judgment that given that the restrictive measure in question in that case prohibited, first, the direct or indirect sale, supply, transfer or export of dual use goods and technology to any person, entity or body in Russia as listed in Annex IV to that decision by nationals of Member States or from the territories of Member States, and, secondly, the provision of technical assistance, brokering services, financing or financial assistance related to the goods and technology referred to, to any person, entity or body in Russia, as listed in Annex IV, the relevant provisions of that decision directly affected the legal situation of the applicant, which was designated by name in Annex IV to the decision in question.[93]

116. The General Court, in the *Almaz-Antey* judgment, thus rejected the Council's contention that the legal situation of the applicant in that case was not affected, as the provision in question did not prohibit the entities referred to from carrying out certain activities, but rather prohibited the sale of dual use goods and technology to those entities by natural and legal persons who come under EU jurisdiction.[94]

117. For my part, I agree that the decision and reasoning in the *Almaz-Antey* judgment is correct and I consider that it should be applied, by analogy, in the present case. In my view, the contested provisions prevent the appellant from purchasing certain specified goods and services from certain defined EU operators and thus directly affects the appellant's legal rights and interests. I will, however, for the sake of completeness and in the light of the novel nature of this case, address certain other arguments of the parties and the reasoning of the General Court.

118. The General Court, in paragraphs 34 to 37 of the judgment under appeal, distinguished the facts in the present case from those that gave rise to the *Almaz-Antey* judgment. In that regard, the General Court noted that in that case the applicant's name appeared in the annex to the contested decision as an undertaking to which it was prohibited to sell or supply the goods and services in question. Moreover, the General Court considered that the appellant cannot be assimilated to an operator such as the applicant in the *Almaz-Antey* judgment as its modes of action could not be reduced to a purely commercial activity.

89 See, in that regard, judgment of 21 September 2005, *Yusuf and Al Barakaat International Foundation* v *Council and Commission* (T-306/01, EU:T:2005:331, paragraphs 184 to 188), confirmed by the Court in 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, paragraph 241).

90 See to that effect, judgments of 28 May 2013, *Abdulrahim* v *Council and Commission* (C-239/12 P, EU:C:2013:331, paragraph 70), and of 6 June 2013, *Ayadi* v *Commission* (C-183/12 P, not published, EU:C:2013:369, paragraph 68 and the case-law cited).

91 On the question of individual concern, which was also found, see paragraphs 68 to 72 of the *Almaz-Antey* judgment.

92 In that regard, no meaningful distinction can be drawn for the purposes of an assessment of *locus standi*, and in particular the existence of direct concern, on the basis of the intensity alone of the effect of a measure on a person's legal situation. It is sufficient, in my view, that such an effect is direct and can in fact be ascertained.

93 See paragraphs 63 and 64 of the *Almaz-Antey* judgment, which specifically relate to the question of direct concern.

94 See paragraph 65 of the *Almaz-Antey* judgment, where the General Court stated 'self-evidently it is for the bodies established in the European Union to apply those measures, given that the acts adopted by the EU institutions are not, as a rule, intended to apply outside the territory of the European Union. That does not, however, mean that the entities affected by the relevant provisions of [Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 13)] are not directly concerned by the restrictive measures applied with regard to them. Indeed, the fact of prohibiting EU operators from carrying out certain types of transaction with entities established outside the European Union amounts to prohibiting those entities from carrying out the transactions in question with EU operators. In addition, accepting the Council's argument in that regard would be tantamount to considering that, even in cases of individual fund freezes, the listed persons subject to the restrictive measures are not directly concerned by such measures, given that it is primarily for the EU Member States and the natural or legal persons under their jurisdiction to apply them'.

119. For my part, I consider that it is wholly irrelevant whether the appellant is named or identified in the body of Regulation 2017/2063 rather than in an annex thereto. If it were otherwise, it would mean that an applicant's entitlement to commence Article 263 TFEU proceedings could be set at naught through the simple expedient of naming or identifying that party in the main body of the regulation itself rather than in an annex.

120. What is important is the effect or impact of the contested provisions and the prohibitions contained therein on the legal situation of appellant rather than the precise form in which those prohibitions are presented. I therefore consider that the General Court erred in law in stating in paragraph 36 of the judgment under appeal that the appellant is not explicitly and specifically referred to in the contested provisions in a manner comparable to the applicant in the case which gave rise to the *Almaz-Antey* judgment.

121. In addition, I consider that it is irrelevant for the purpose of the question of direct concern in the present case that the legal status or activity of the appellant is not limited to that of an economic operator active in certain markets. The fact that the appellant as a State enjoys a diverse range of competences which are not solely commercial in nature by no means per se eliminates, reduces or renders indirect the effects of the contested provisions on the appellant's legal situation.[95] I would note in that regard that aside from the requirement that proceedings must be instituted by a natural or legal person, the fourth paragraph of Article 263 TFEU does not impose any further requirements concerning the status or capacity of that person.[96]

122. I would also add that, contrary to the submissions of the Council, the approach to direct concern which I advocate in this Opinion in respect of the appellant does not create any new rule or 'legal avenue'[97] which automatically grants standing to third States in actions for annulment under Article 263 TFEU in respect of restrictive measures. Rather, what I propose is that the Court follow its existing case-law and merely adapt it to this novel action. Furthermore, and again contrary to the submissions of the Council, the rules on standing laid down in Article 263 TFEU, and in particular the fourth paragraph thereof, are based on the objective criteria which have been laid down in that Treaty and interpreted by the EU Courts, rather than on the existence or absence of any reciprocal arrangements on standing between the EU and third States.

VII. Conclusion

123. For all of the above reasons, I would therefore propose that the Court of Justice should rule that the General Court erred in law in so far as it held that the present proceedings were inadmissible for want of standing on the part of the appellant for the purposes of the fourth paragraph of Article 263 TFEU. I would accordingly suggest that the present proceedings should be remitted to the General Court so that it can proceed to adjudicate on all remaining admissibility issues arising in the annulment proceedings brought by the appellant and on the substance of its action.

95 While the applicant in the *Almaz-Antey* judgment was a joint-stock company operating in the defence sector, rather than a State, given that the appellant qualifies as a legal person for the purposes of the fourth paragraph of Article 263 TFEU, I see no reason to diverge from the General Court's reasoning in that judgment on direct concern in respect of the appellant in the present appeal.

96 Perhaps the only other relevant requirement is that the appellant must have an interest in the outcome of its action (*un intérêt à agir*), but that issue is not in dispute in the present proceedings.

97 To use the language of the Council.