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1. LEGAL STANDING OF THIRD STATES IN THE ACTION FOR ANNULMENT AGAINST INTERNATIONAL SANCTIONS. THE *VENEZUELA* CASE BETWEEN EU LAW AND INTERNATIONAL DISPUTE SETTLEMENT

1. Introduction

The recently released opinion delivered by Advocate-General Hogan in case C-872/19 P (*Bolivarian Republic of Venezuela v. Council*) addressed an unprecedented issue in ECJ's case-law, namely the legal standing of third States in an action for annulment under Article 263, paragraph 4, of the Treaty on the Functioning of the European Union (TFEU) challenging the validity of EU acts introducing restrictive measures. Before entering into more detail on the controversial issues at stake in this case, it is useful to briefly provide a summary of the relevant facts. The case originated from the action filed by the Venezuelan Government to the General Court (hereinafter GC), seeking the annulment of Regulation 2017/2063, adopted under the legal basis of Article 215 TFEU, and of CFSP Decision 2017/2074, as well as of other implementing and updating acts (Case T-65/18, *Venezuela v. Council*). The contested acts introduced restrictive measures imposing 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 Venezuelan individuals or entities, together with the prohibition for European economic operators to provide software, communication technology and services to Venezuelan operators. The objective of the said measures was to prevent the Venezuelan government from using such equipment, technology and services to pursue its policy of violent repression of internal legitimate democratic protests in the aftermath of the contested elections for a Constituent Assembly which took place on July 30th, 2017. In addition to the trade restrictions, the contested acts also introduced travel bans and the freezing of funds and assets targeting the individuals listed in Annexes IV and V, who were suspected of committing violations of human rights against Venezuelan protesters and of supporting the repressive and anti-democratic actions of the government. It is worth noting that the listed individuals appear to be mostly prominent political personalities and high-ranking officials of the Venezuelan administration, armed forces, law enforcement, judiciary and intelligence services. Actions against the acts introducing restrictive measures were initiated by at least a dozen of the targeted individuals and, at time of writing, are pending before the GC.

The GC's judgment only took into consideration Regulation No 2017/2063, as it was the first act to be challenged in the Venezuelan action. Therefore, GC disregarded the CFSP Decision entirely. Accepting the Council's objections on inadmissibility, the GC ruled that the case should be dismissed as inadmissible, having concluded that the applicant, a third State, had not fulfilled the conditions laid down in Article 263, paragraph 4, detailing the legal standing of natural and legal persons. It is necessary to point out that the GC decided to examine only one of the grounds for inadmissibility that had been submitted by the Council, namely the question whether Venezuela was "directly affected" by the contested measures, without addressing the issue whether a third State can be considered as a "legal person" within the meaning of Article 263, paragraph 4, TFEU. In the following pages, I will examine the arguments of the GC and the opposite considerations expressed by Advocate-General Hogan in his Opinion, before providing some thoughts on the EU position in international dispute settlement adjudication.

2. *The case before the General Court*

The GC's arguments for dismissing the case were based on the analysis of the Regulation's contested provisions (those introducing the general ban on sales of equipment, materials, communication technology and services that could be used by the Venezuelan government for violent repression). All measures targeted to individuals were thus excluded from the scope of the case. Consequently, the first novelty in this case derives from the fact that the contested measures were precisely those that in previous judgments had been qualified by the Court of Justice as "measures of general application" (Case C-72/15, *Rosneft*) and as such excluded from the scope of the case. It is necessary to point out though that in *Rosneft* the contested acts were both the regulation and the CFSP decision, and that the Court affirmed its full jurisdiction for the regulation in its entirety, while excluding it for the part of the decision that introduced measures of general application. So, my point is that the contested provisions in the *Venezuela* case fall entirely within the jurisdiction of EU Courts as parts of the regulation adopted under Article 215 TFEU. But, if the GC had also considered the action against the CFSP decision (not considered only because it was second in line in the action brought by Venezuela), the same provisions would likely be excluded from the jurisdiction in application of the *Rosneft* case-law. This is bound to create a deadlock should the case be admitted, as the Court would have jurisdiction on the regulation's provisions, but not on the corresponding CFSP ones.

The Council's objections on admissibility relied on three grounds: first, that the Bolivarian Republic of Venezuela has no legal interest in bringing proceedings, second, that it is not directly concerned by the contested provisions and, third, that Venezuela is not a 'natural or legal person' within the meaning of the fourth paragraph of Article 263 TFEU (case T-65/18, point 23). As anticipated, the GC only considered the second ground, concluding that Venezuela was not directly affected by the contested provisions, which are formally addressed to European economic operators. Precedents are limited on this issue. The GC referred primarily to the case *Almaz-Antey v. Council* (T-515/15): in this case, the GC rejected the argument that the legal situation of an entity established outside the Union was not directly affected by measures which sought to prohibit Union operators from carrying out certain types of transactions with it (in the framework of a sanctions regime against Russia). In addition, the applicant in the *Almaz* case was expressly referred to in the contested measure. Its name appeared in fact 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 (case T-65/18, point 35). The differences with the present case were that Venezuela is not referred to in the contested regulation in a manner comparable to the applicant in the *Almaz Antey* case (case T-65/18, point 36), and it is not a private undertaking, but a sovereign State. According to the General Court, "unlike such an operator whose capacity is limited by its purpose, as a State, the Bolivarian Republic of Venezuela has a field of action that is characterized 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" (Case T-65/18, point 37).

There are other relevant cases, though, that have been referred to by the GC. In *Poland v. Commission* (case T-257/04) the GC stated, in the context of an action for annulment brought by Poland after its accession to the EU but out of time with respect to the time-limits established by the Treaty for the action of annulment, that the State did not need to wait the formal entry into force of the Accession Treaty in order to gain standing before EU Courts: the GC affirmed that "although non-member countries, including new Member States before accession, cannot claim the status of litigant conferred on the Member States by the Community system, they may bring proceedings under the right of action conferred on legal persons" (case T-257/04, point 52). In the Venezuela case the GC dismissed the relevance of this precedent in the light of the ascertained direct and individual concern to Poland of the contested provisions. In the order of July 14th, 2005, *Switzerland* v. *Commission* (C-70/04), the action brought by a non-Member State was considered admissible 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 EU internal legislation. In addition, Article 20 of that agreement conferred exclusive jurisdiction on the Court regarding certain matters. Interestingly, though, the most significant case was decided by the General Court *after* the Venezuela case. The order of the Court in case T-246/19, *Cambodia and CRF v. Commission*, delivered on September 10th, 2020, addressed the plea for inadmissibility submitted by the Commission, which relied largely on the *Venezuela* case, in the action filed by the Kingdom of Cambodia against a Commission implementing regulation adopted in the framework of the Generalized System of Preferences' EBA arrangement. The contested regulation aimed at imposing safeguard measures with regard to imports into the EU of rice originating in Cambodia and Myanmar. The trade restrictive measures were considered necessary to compensate market distortions on the EU internal market. Strangely, the GC did not refer to the *Venezuela* judgment of just one year before. On the contrary, it argued that the action was admissible, on the basis of Cambodia's status as a legal person, and on the direct and individual effect of the regulation on the economic situation of the State (the contested regulation, as the Commission made clear, required implementing measures to be adopted by the customs authorities of the Member States, so it could not be considered as a "regulatory act which… does not entail implementing measures" under Article 263, paragraph 4, TFEU). In addition, the GC considered the third Stat's involvement in the preliminary investigation and in the procedure for the adoption of safeguard measures under the GSP Regulation. The difference with the *Venezuela* case is mainly the context, namely the GSP arrangement, that provides a procedure for the adoption of safeguard measures involving the participation of the third State concerned. Such context cannot be assimilated to the adoption of unilateral economic sanctions, but this wasn't in any way explained by the GC, which just considered the

economic impact of the measures on the State on the basis of commercial flows and other indicators.

As Venezuela, in the GC's view, was not able to demonstrate that it effectively acted as an economic operator and not in its sovereign capacity, since a sovereign State cannot be assimilated to an operator active in the relevant market, the GC concluded that the third country was not directly affected by the regulation and dismissed the action. What the GC stated here is that since a State has unlimited competences, derived from its nature as a political sovereign subject, its action cannot be restricted to economic activities and transactions. And for these reasons, it is impossible to affirm that measures, formally addressed to European economic operators, prohibiting them to sell goods or provide services to undetermined economic operators in Venezuela, directly affect the State of Venezuela.

Having limited the analysis to the problem of fulfillment of the conditions laid down by Article 263, paragraph 4, for the legal standing of legal persons in the action for annulment, the General Court disregarded the problem of whether a third State may be considered as a legal person within the meaning of the said provision. According to the precedents mentioned before, and to the considerations that follow, I don't think this is an issue. The real and controversial problem is whether a third State may start an action of annulment under Article 263 TFEU against international economic sanctions adopted against it by the EU institutions in pursuance of foreign policy objectives.

3. *The legal standing of a third State in Advocate-General Hogan's Opinion*

After the Bolivarian Republic of Venezuela filed its appeal on November 28th, 2019, the Court of Justice decided to request the appellant, the Council, the European Commission and the Member States to adopt a position in writing on whether a third State is to be regarded as a legal person within the meaning of the fourth paragraph of Article 263 TFEU. A dozen of Member States responded, in addition to the Council and the Commission, expressing very different points of view. The majority of comments stressed the fact that a third State is to be considered as a legal person in that it undoubtedly has legal personality, in both international and national law, but it should comply with the conditions laid down in Article 263, paragraph 4, for actions brought by natural and legal persons, in exactly the same way as private legal persons. Interesting considerations were made by the Council and the Commission, the former highlighting the difference between general sanctions against third States and individual sanctions against "private" legal persons, and admitting action only for the second category, the latter pointing to the classic distinction between *acta iure imperii* and *acta iure gestionis*, and affirming that a third State may bring action in EU Courts exclusively when it acts *iure gestionis*. The Advocate-General didn't go into such distinction, dismissing it as irrelevant to the point, since the distinction between *acta iure imperii* and *iure gestionis* is traditionally used as a defensive tool, in order to invoke or challenge State immunity from jurisdiction. Which is true, but, as I will try to explain later, it is my opinion that on this point the Council and the Commission are, from different perspectives, basically touching the same strings, which are at the core of the problem: the distinction and the different scope and effects between sanctions against States ("measures with general application", in the wording of the *Rosneft* judgment) and targeted sanctions against individuals, legal persons included. And, as a consequence, the different position (and legal standing) of the third

country concerned as the target of politically motivated sanctions as a sovereign State, or as the target of economic sanctions as an economic operator.

Advocate-General Hogan, instead of focusing on this crucial point, argued that a third State should be considered as a legal person within the meaning of Article 263, paragraph 4, on the basis of a number of considerations, all directed at demonstrating that the restrictive measures directly affected the State of Venezuela. Well, it's clear from the very text of the regulation that this is indeed the case (Articles 2, 3, 6 and 7 prohibit the sale and supply of material, equipment, technology and related services "to any natural and legal person, entity or body in, or for use in, Venezuela"; Articles 6, paragraph 2, and 7, paragraph 1, letter *c*, are even more explicit, as they prohibit Member States to authorize, and EU operators to provide services "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"). But, in my view it is possible to object that the indisputable fact that the contested measures directly affect the legal situation of the third country concerned is not enough to establish its legal standing before the EU judiciary in an action for annulment against international economic sanctions. Moreover, it appears uncoherent to exclude from the scope of the action the measures that target specific individuals, as they form integral part of the sanctions regime put in place against the State of Venezuela. In a way different from the general measures, targeted measures also affect the State directly, as they hit the core of the administration of the State, and as the targeted persons are in large majority organs of the State.

4. *Extraterritorial effect of EU sanctions?*

There is another issue that opens a different observation perspective, but is worth mentioning here, namely the problem of extraterritorial effects of EU unilateral measures. Both the GC and Advocate-General Hogan were very careful in clarifying that the EU acts were not directly addressed to the third State, but exclusively to EU-based economic operators, and were meant to be enforced on EU territory. But, by affirming that the contested measures are of "direct concern" to the applicant because they produce a direct impact on the economy of the third State, isn't the EU judiciary affirming that the said measures indeed do produce some legal effect on the territory of a third country? In the *Cambodia* judgement, the GC, in point 61, affirmed: "The contested regulation thus has direct legal effects on the Kingdom of Cambodia since, by means of that regulation, the Commission has changed the legal situation of the Kingdom of Cambodia as a country benefiting from the full suspension of Common Customs Tariff duties". Immediately after this statement, the GC went on, explaining that "self-evidently it is for importers 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. Despite that, the entities affected by the contested regulation are liable to be directly concerned by the safeguard measures applied to them" (point 64). This situation, which is common to many unilaterally enacted EU measures, especially in the field of the EU's trade policy, has been described as "extraterritorial reach" of EU law (E. Barett Ludgate, *Biofuels, Sustainability and Trade-Related Regulatory Chill*, in *Journal of International Economic Law*, 2012, pp. 157 ff.) or "territorial extension" of the scope of EU law (J. Scott, *Extraterritoriality and Territorial Extension in EU Law*, in *American Journal of Comparative Law*, 2014, p. 87 ff.). Contrary to this approach, in a more formalistic perspective, other authors argue that market access is

certainly the object of unilateral trade regulation, and as such, the latter is applied within the territory of the regulating State (or the EU), thus excluding any extraterritorial effects (C. Ryngaert and M. Koekkoek, *Extraterritorial Regulation of Natural Resources. A Functional Approach*, in *Global Governance Through Trade*, Cheltenham, 2015, p. 260). Boycotts, according to Bartels, are a typical example of trade measures which are extraterritorial in their effects (L. Bartels, *Article XX of the GATT and the Problem of Extraterritorial Jurisdiction*, in *Journal of World Trade*, 2002, 370 ff.).

Economic sanctions like the ones adopted against Venezuela are indeed trade measures, aimed at limiting the possibility for EU exporters and service providers to export their goods and services to the targeted country. They certainly are formally addressed exclusively to EU subjects whose activities take place on EU territory, but their political aim is precisely to produce an influence on the targeted country, namely to induce its government to stop all forms of violent repression and reinstate the full functioning of democratic institutions, principles and procedures. So, the measures have the declared objective of making it more difficult for the government to carry out its repressive policy, and to put pressure on it so that it changes it. Does all this imply that the contested acts are of direct concern to the third State? And, going further, that they produce an extraterritorial effect of some kind? The issue remains open to further discussion, as it involves wider questions regarding not only the scope and effects of EU law, but also of international law.

5. *Critical observations*

The crucial problem in the *Venezuela* case, as I have already argued in the past (A. Mignolli, *Corte di giustizia e misure restrittive individuali tra ampliamento della giurisdizione e self-restraint*, in *Studi sull'integrazione europea*, 2018, pp. 279 ss.), is the distinction (or better the lack thereof) between sanctions against third States and restrictive measures against individuals (natural and legal persons). Article 215 provides two distinct legal bases for the two situations (paragraph 1 for sanctions against States and paragraph 2 for restrictive measures against individuals), but in practice the EU acts introducing such measures in the context of a sanctions regime addressing a third country always refer to Article 215 without specifying the paragraph, as they contain both sets of measures in the same act, in order to put in place a comprehensive sanctions regime. In this way, the boundary between the two situations gets blurry and unclear. In addition, the separation established by Article 40 TEU between CFSP competences and TFEU competences is of no help here: As a matter of fact, it only succeeds in separating the material measures that, decided in the CFSP framework, are to be implemented by the Member States (for example, travel bans), from those other measures, of economic, commercial and financial nature, that, falling within the competences of the EU, are implemented by EU acts.

I am convinced that keeping the distinction between sanctions against States and sanctions against individuals in mind is still a useful exercise, as it also helps place the relations that are established by the EU acts on the correct legal plane. What I'm arguing here is that while targeted measures affecting individuals are correctly subjected to the ECJ's jurisdiction under EU law, the same result could be problematic for measures against third States, whose legal collocation in the framework of international law is in my opinion more correct. As a consequence, an action for annulment under Article 263 TFEU, which can be assimilated to a domestic action, may (and has to) be open for the natural and legal persons who are targets of restrictive measures, in the name of the right of each individual to judicial

review of the legal acts that affect them (Article 47 of the Charter of Fundamental Rights of the EU, Article 275 TFEU). The same can't be said of sanctions against States, which should be more correctly addressed in the framework of international law, using all the means for peaceful dispute settlement at the disposal of the States and other subjects of international law. It can be noted that Venezuela's legal action is based not only on violations of principles of EU law (violation of the right to be heard, violation of the obligation to state the reasons and provide sufficient evidence for the adoption of the measures) and factual considerations (erroneous assessment of the facts) but also on violations of customary international law, as the restrictive measures are, according to Venezuela, unlawful countermeasures. All this seems to point towards the conclusion that the relation created by the enactment of a sanctions regime against a third State may cause the emergence of an international legal dispute, which, to my knowledge, falls outside the scope of the ECJ's jurisdiction (merely as an example, complaints against the U.S. sanctions were filed by Iran in 2018 with the International Court of Justice, not an American federal court). It is entirely possible for the EU as a subject of international law to be party to an international dispute, and the ECJ itself has repeatedly affirmed the compatibility of international adjudication with the Treaties, with some conditions: In Opinion 1/17 on the CETA dispute settlement system, the Court said that a dispute settlement system established by an agreement is consistent with the Treaties if the tribunal does not interpret EU law. This would be a problem for situations like the case at hand, since a hypothetical international arbitral tribunal would need to interpret EU law in order to adjudicate on a dispute regarding international sanctions. On the other hand, the Court never complained about other international dispute settlement systems, like the one established in the framework of the WTO. If it's true that the WTO panels and Appellate Body are not technically international jurisdictions, it is also true that their reports are pretty much automatically approved, and it cannot be denied that they have constantly interpreted EU law in the countless trade disputes that have involved the EU over the years (for considerations on the evolving attitude of the EU towards international adjudication, see A. Rosas, *The EU and international dispute settlement*, in *Europe and the World*, 2017, pp. 1-46).

All the above considerations lead to some final observations. The Court of Justice itself very clearly pointed out the distinction between "measures of general application" and individually targeted measures in the framework of the EU policy of sanctions against third States, affirming, with regard to the legality of the former, that "the extent of the requirement to state reasons depends on the nature of the measure in question, and that, in the case of measures intended to have general application, the statement of reasons may be limited to indicating the general situation which led to the measure's adoption, on the one hand, and the general objectives which it is intended to achieve, on the other" (*Rosneft*, point 120). In addition, as already mentioned, in that same case the Court excluded its jurisdiction on the parts of the CFSP decision that introduced "measures of general application", as its jurisdiction on restrictive measures is limited, under Article 275, paragraph 2, TFEU, to the judicial review of 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 of the Treaty on European Union. Such distinctions should probably be kept in mind while addressing the possibility of actions challenging the legality of the sanctions regime as a whole brought by the third State concerned. As it has been observed, it is almost tantamount to an invitation to use EU Courts as a forum for the solution of (political?) international controversies (L. Lonardo, When Does a Third Country Have Standing To Challenge an EU Act in EU Courts. The Opinion of AG Hogan in Venezuela v. Council).

From yet another perspective, there is the problem of how the Court would address the issue of legality when faced with the judicial review of measures adopted on the basis of complex political decisions and assessment of facts such as those adopted against Russia, Iran and, now, Venezuela, to mention just the situations that originated the more controversial case-law, should the targeted States be allowed to bring action against them.

Similar problems already arose in the different situation of measures targeting individuals, especially legal persons and economic operators, not on grounds of any illegal behaviors, but simply because with their legitimate activity they benefitted the economy of the third country object of the sanctions (*Rosneft* and other similar cases). Here, the natural and legal persons were targeted in the context of the adoption of general measures against the State, in consideration of their importance for the economy of the State in question. The restrictions were thus instrumental in pursuing the objective of putting pressure on the State to change the policy that prompted the EU to enact the sanctions. It is clear that, given the non-existence of any objective grounds for sanctioning the targeted subjects, other than their political and economic significance, the motivation for the restrictive measures is exclusively political, and indeed the Court of Justice found itself in a tough spot exercising its duty of judicial review and had to bow to the political discretionary power of the institutions ("Since both the political background at the time of the adoption of those measures and the importance of the oil sector for the Russian economy were also well known, the fact that the Council chose to adopt restrictive measures against the players in that industry can be readily understood in the light of the declared objective of those acts", *Rosneft*, point 124). So, in this perspective the historic and political context of the measures and the (presumed) knowledge of their objective by the targeted individuals constitute a sufficient state of reasons. I believe that the same would happen if the Court were conferred jurisdiction on actions brought against economic sanctions by the targeted State, as the alternative would be a Court that analyzes and reviews the legality of a third State's policies and behaviors on the one hand, and the legality of the EU's response, on the other. I am not in any way implying that the Court of Justice is not entitled to consider and apply international law, only that it has time and again demonstrated its unwillingness to delve into the institution's political decision-making process and its motivations, and it is probably not in the best position to do that.

If all the above is correct, I don't think that the discussion of the problem of reciprocity, raised by the Council and some Member States as a reason for dismissing the action, and rightly confuted by the Advocate-General on the basis of the democratic values of the Union and its openness to judicial review and protection of fundamental rights and rule of law principles, is pertinent to this situation. Rather, I argue that it is time that the Union starts to consider the possibility of using the means of peaceful dispute settlement that international law makes available to international law subjects not only in the context of cooperation or trade and investment agreements, but also for controversies of political nature like those concerning economic sanctions.

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