Second, as subsidy cases have become more complex, the Appellate Body and panels have struggled with the ambiguities of the current law. Global climate change creates acute environmental problems requiring quick government responses that often take the form of measures that affect trade, and the time is ripe for the WTO members to adjust the rules accordingly. The WTO legal system as a whole must become more responsive to these challenges, or WTO adjudicators will have no choice but to tackle complicated issues through innovative or even creative interpretations that some would criticize as judicial overreaching.

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UN Security Council—counterterrorism sanctions—UN sanctions committees—judicial review—assets freezing—right to be heard

COMMISSION v. KADI. Joined Cases C-584/10 P, C-593/10 P, & C-595/10 P. *At* http://curia.europa.eu.
Court of Justice of the European Union (Grand Chamber), July 18, 2013.

In the joined cases brought by the European Commission (Commission), the United Kingdom, and the Council of the European Union (EU) against Yassin Abdullah Kadi,[1] decided on July 18, 2013, the Court of Justice of the European Union (ECJ or Court) sustained the judgment of the General Court that had annulled the Commission regulation freezing Kadi's funds in accordance with the mandate of the United Nations Security Council's sanctions committee. The ECJ ruled that, although the majority of the reasons relied on by EU authorities for listing Kadi were sufficiently detailed and specific to allow him to exercise his rights of defense and judicial review effectively, no information or evidence had been produced to substantiate the allegations, when challenged by Kadi, that he had been involved in activities linked to international terrorism.

The background of this decision can be traced to the attacks on September 11, 2001, after which the Security Council established a new sanctions regime under Chapter VII of the UN Charter.[2] Under this regime, all UN member states must freeze the funds and other financial resources controlled directly or indirectly by persons or entities associated with the network of Al Qaeda or the Taliban.[3] The consolidated list of those persons and entities[4] is drawn up by the Al-Qaida Sanctions Committee and the 1988 Sanctions Committee, respectively, which are subsidiary organs of the Security Council.

[1] Joined Cases C-584/10 P, C-593/10 P, & C-595/10 P, Commission v. Kadi (Eur. Ct. Justice July 18, 2013) [hereinafter *Kadi II*]. The decisions and opinions of the General Court and the Court of Justice of the European Union are available at http://curia.europa.eu.

[2] *See* SC Res. 1267 (Oct. 15, 1999), 1333 (Dec. 19, 2000), 1363 (July 30, 2001), 1388 (Jan. 15, 2002), 1390 (Jan. 16, 2002), 1452 (Dec. 20, 2002), 1455 (Jan. 17, 2003), 1456 (Jan. 20, 2003), 1526 (Jan. 30, 2004), 1617 (July 29, 2005), 1699 (Aug. 8, 2006), 1730 (Dec. 19, 2006), 1732 (Dec. 21, 2006), 1735 (Dec. 22, 2006), 1822 (June 30, 2008), 1904 (Dec. 17, 2009), 1989 (June 17, 2011), 2083 (Dec. 17, 2012).

[3] After the death of Osama bin Laden, the consolidated list of designated persons was divided into the Al-Qaida Sanctions List and a separate list dealing with individuals and entities associated with the Taliban, which is administered by a newly established sanctions committee. *See* SC Res. 1988, para. 1, & 1989, paras. 2, 3 (June 17, 2011).

[4] There are currently about 288 names of individuals and entities on the Al-Qaida Sanctions List, *see* SC Comm. Pursuant to Resolutions 1267 (1999) and 1989 (2011), The List Established and Maintained by the Committee (Sept. 11, 2013), *at* http://www.un.org/sc/committees/1267/consolist.shtml, and about 135 names on the list

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To implement those resolutions within the European Union, the EU Council adopted a regulation in 2002[5] ordering the freezing of the funds and other economic resources of the persons and entities on a list annexed to the regulation, which is amended whenever changes in the UN consolidated list are made. That regulation is binding on all EU member states.

Kadi, a resident of Saudi Arabia, had been designated in 2001 by the sanctions committee as being associated with the Qaeda network. His name was accordingly added to the consolidated list and then to the list annexed to the EU regulation.[6] In December 2001, he challenged that action before the EU General Court (then called the Court of First Instance), contending that the regulation infringed his right to respect for property, his right to be heard, and his right to effective judicial review. In 2005, the General Court rejected his challenge, ruling that European regulations implementing the Security Council measures enjoy, in essence, immunity from jurisdiction.[7]

On appeal, the ECJ reversed that judgment, on the grounds that the courts of the European Union were responsible, in principle, for ensuring the full review of the lawfulness of all EU acts, including those designed to implement UN Security Council resolutions, and that not even the implementation of compulsory UN sanctions could prejudice the principle that all EU measures must respect fundamental rights.[8] The Court found that Kadi's rights of defense, in particular his right to be heard, had been violated because the EU Council had neither communicated the evidence used against him to justify the restrictive measures nor informed him later in that regard, which prevented him from making his views known. Since he had not been able to defend his rights, the Court concluded, the regulation had also infringed his right to an effective legal remedy. Finally, it held that the freezing of funds constituted an unjustified restriction of Kadi's right to property.[9]

The Court thus annulled the regulation that added Kadi to the list, but the effects of the listing were nonetheless maintained for three months to allow the EU Council to remedy the situation and to prevent Kadi from avoiding the application of the measures against him in case the measures should prove justified in the end.[10] The Commission then apprised Kadi of a summary of reasons why he had been listed. After obtaining his comments, the Commission decided, by means of a further regulation,[11] to maintain his name on the European Union list.

Kadi challenged this further regulation and the General Court annulled it,[12] holding, in line with the first *Kadi* judgment (*Kadi I*), that its task was to ensure a full and rigorous judicial review of the lawfulness of the regulation, including the information and evidence substantiating the reasons underpinning the measure. Since that information and evidence had not been

dealing with the individuals and entities associated with the Taliban, *see* SC Comm. Established Pursuant to Resolution 1988 (2011), List of Individuals and Entities (June 27, 2013), *at* http://www.un.org/sc/committees/1988/list.shtml.

[5] Council Regulation (EC) 881/2002, 2002 O.J. (L 139) 9.

[6] Commission Regulation (EC) 2062/2001, 2001 O.J. (L 277) 25.

[7] Case T-315/01, Kadi v. Council, 2005 ECR II-3649.

[8] Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 ECR I-6351 [hereinafter *Kadi I*] (reported by Miša Zgonec-Rožej at 103 AJIL 305 (2009)).

[9] *Id.,* paras. 348–49, 370.

[10] *Id.*, paras. 372–76.

[11] Commission Regulation (EC) 1190/2008, 2008 O.J. (L 322) 25.

[12] Case T-85/09, Kadi v. Commission, 2010 ECR II-5177.

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disclosed, and since the indications contained in the summary of reasons were vague, the General Court noted, Kadi's rights of defense and right to effective judicial protection had been infringed.

The Commission, the Council, and the United Kingdom then appealed,[13] arguing, in essence, that the General Court had erred (1) by not recognizing that the contested regulation was entitled to immunity from judicial review, (2) by applying the wrong level of intensity of judicial review, and (3) by faultily examining Kadi's pleas as regards infringement of his rights of defense, his right to effective judicial protection, and the principle of proportionality.

The ECJ quickly rejected the first ground of appeal. The appellants argued that subjecting the regulation to judicial review would conflict with the Security Council's primary responsibility for international peace and security, as well as the primacy of obligations under the UN Charter over obligations under other agreements. They also contended that it would challenge the uniform application of UN resolutions and ignore the fact that many EU members were forced to violate their UN obligations. Nonetheless, the Court found that the factors advanced in *Kadi I* and cited by the General Court were still valid, including that the reexamination procedure provided on the UN level was inadequate since there had been no change in those factors that could justify a reconsideration of that position (para. 66).

On the second and third grounds, the ECJ addressed the administrative procedure the EU authorities must follow to give effect to the rights of defense and the right to effective judicial protection when listing a person in an EU regulation; it also enunciated corresponding guidelines for the judicial review by EU courts. The Court held that when implementing UN Security Council resolutions, the competent EU authorities had to take due account of the terms and objectives of the resolution in question and to list a person on the basis of the summary of reasons provided by the sanctions committee (paras. 106–07). It further held that the EU authorities must disclose to the individual concerned the evidence underpinning its decision, to ensure that he could make known his views on the grounds relied on against him; and they must examine, in the light of those comments, whether those reasons were well-founded (para. 135).

If necessary, the Court said, the competent EU authority was obligated to seek from the sanctions committee, and the UN member states that had proposed the listing, information or evidence to enable it to undertake a careful and impartial examination into whether the stated reasons were well-founded. That was the task of the authority; it was not up to the listed person to prove the opposite. If the authority did not supply the relevant information or evidence requested by the EU courts, the courts would base their decision solely on the material that had been disclosed to them, the comments and evidence submitted by the listed person and the authority's response to them. Where that material was insufficient to allow a finding that a reason was well-founded, the EU courts should disregard that reason as a basis for the contested decision to list or maintain a listing (para. 137).

The ECJ also explained that where overriding considerations concerning the security of the European Union or its member states or their international relations were found by the competent EU authority to preclude the disclosure of certain information or evidence to the person concerned, the EU courts were nonetheless required to determine whether the nondisclosure

[13] Appeal Brought by the European Commission Against the Judgment of the General Court in Case T-85/09, 2011 O.J. (C 72) 9; 2011 O.J. (C 72) 9 (EU Council appeal); 2011 O.J. (C 72) 10 (UK appeal).

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had been well-founded. If the stated reasons did not preclude disclosure, the information should be provided to the person concerned, failing which the EU courts should examine the lawfulness of the contested measure solely on the basis of the material that had been disclosed to him. If the reasons relied on by the competent EU authority indeed precluded the disclosure to the person concerned, it was for the EU courts to assess whether and to what extent the failure to disclose confidential information or evidence affected the probative value of the confidential evidence (paras. 125–29).

Against this background, the ECJ held that the majority of the reasons relied on against Kadi were sufficiently detailed and specific to satisfy his rights of defense and judicial review. Nonetheless, the EU regulation was annulled since no information or evidence had been produced to substantiate the allegations rejected by Kadi. The Court therefore dismissed the appeals brought by the Commission, the Council, and the United Kingdom.

* * * *

The judgment of the ECJ in *Kadi II* confirms its approach to the question of human rights protection articulated in *Kadi I*, namely, that judicial review of the lawfulness of all EU measures is required, including those which implement UN sanctions (para. 66).[14] The result is unsurprising as regards confirmation of the *Kadi I* approach. That decision has been followed or referred to by other judicial[15] and human rights bodies.[16] In still other cases, the General Court stayed the proceedings pending the ruling in *Kadi II*.[17] The European Court of Human Rights specifically adopted—in the so-called *Nada* case concerning the Swiss authorities—the ECJ's idea that the mere fact that a measure was intended to give effect to a resolution of the UN Security Council did not exclude it from judicial review in the light of fundamental freedoms.[18] On the other hand, the U.S. District Court for the District of Columbia held that the listing of Kadi in the United States was supported by material that demonstrated his support for, among others, Al Qaeda.[19]

The ruling has had little impact inasmuch as, earlier, in October 2012, the Al-Qaida Sanctions Committee had removed Kadi from its list,[20] which is not to say that the judgment lacks

[14] The ECJ had already applied the principles of *Kadi I* in joined cases C-399/06 P & C-403/06 P, *Hassan v. Council*, 2009 ECR I-11393, paras. 69–75.

[15] Case T-318/01, Othman v. Council, 2009 ECR II-1627. The UK Supreme Court in *Her Majesty's Treasury v. Ahmed*, [2010] UKSC 2, [249], [2010] 2 A.C. 534, held that the national order implementing the UN Qaeda sanctions regime was *ultra vires* and annulled it insofar as it did not provide for an effective remedy.

[16] The UN Human Rights Committee, in its views on *Sayadi v. Belgium*, found that the travel ban under the sanctions regime violated freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, and that the accessibility of the list on the Internet violated complainants' honor and reputation under Article 17 of the Covenant. Communication No. 1472/2006, paras. 10.8, 10.12, UN Doc. CCPR/C/94/D/1472/2006 (Oct. 22, 2008).

[17] *E.g.*, Case T-134/11, Al-Faqih v. Commission. *See* Analytical Support and Sanctions Implementation Monitoring Team, Thirteenth Report, Litigation Relating to Individuals on the Al-Qaida Sanctions List, para. 8, UN Doc. S/2012/968, Annex I, at 31 (Dec. 31, 2012) [hereinafter Litigation Relating to Individuals].

[18] Nada v. Switzerland, App. No. 10593/08, para. 212 (Eur. Ct. H.R. Sept. 12, 2012) (Grand Chamber), *at* http://hudoc.echr.coe.int (quoting *Kadi I, supra* note 8, para. 299).

[19] Kadi v. Geithner, Civ. No. 09-0108, 2012 U.S. Dist. LEXIS 36053 (D.D.C. Mar. 19), *appeal dismissed*, 2012 U.S. App. LEXIS 17174, at *52–56 (D.C. Cir. July 31, 2012). Kadi voluntarily dismissed the appeal. *See* Litigation Relating to Individuals, *supra* note 17, at 32.

[20] *See* UN Press Release SC/10785, Security Council Al-Qaida Sanctions Committee Deletes Entry of Yasin Abdullah Ezzedine Qadi from Its List (Oct. 5, 2012), *at* http://www.un.org/en/unpress/index.asp.

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practical effect. Whereas the Court in *Kadi I* discussed the character of the then EC Treaty as a constitutional charter that formed the (inescapable) standard of review for all EU acts, *Kadi II* focused instead on the administrative procedures that EU authorities must follow to give full effect to the rights of defense and the right to effective judicial protection when listing a person in an EU regulation. Thus, the judgment seems to offer a useful concretization of *Kadi I* and will facilitate the application of its principles in daily administrative practice. It will certainly be found to be a praiseworthy continuation of badly needed human rights protection in the sanctions context.

The decision does not go far enough, however, in dealing with some important public international law aspects and the functioning of a UN sanctions regime in a multilevel system, and it should have devoted greater care to the relationship between the UN level and the EU level. The advocate general of the ECJ, in his opinion,[21] had suggested that the listing and delisting procedures within the UN sanctions committee encompassed sufficient guarantees to enable EU institutions to presume that the decisions taken by that body were justified. In consequence, the external lawfulness—the formal and procedural aspects—of an EU regulation implementing UN sanctions should be subject to a "normal" strict review, whereas its internal lawfulness—the merits of the statement of reasons—should be subject only to a limited review addressing manifest errors in the factual finding, the legal classification of the facts, or the assessment of the proportionality of the measure.[22] But it might not always be easy to distinguish these two categories of lawfulness, especially in the field of procedural law (for example, as regards due process), and whether an error is "manifest" is often difficult to say.

If the Security Council has the power to impose targeted sanctions under Chapter VII of the UN Charter, then UN member states have a treaty-based obligation to implement those sanctions effectively, even in a multilevel system. The sanctions committee is the body responsible for deciding on listings and delistings and for giving appropriate reasons for those decisions. Since the relevant (classified) information, if any, is available at the UN level, the necessary judicial review and protection should ideally be carried out at that level. Such an arrangement would promote the consistent implementation of UN sanctions while permitting EU member states to avoid violations of their obligations under the UN Charter.

At the moment, however, proper judicial protection against the imposition of sanctions is not available at the UN level because the sanctions committee reviews its listings as *judex in causa sua* and the ombudsperson's recommendations are not binding on the committee. In this situation, it makes some sense for courts outside the United Nations, like the ECJ, to provide legal protection of listed individuals and to pressure the organization into further reforming the sanctions regime.

One could also envisage a "delegation solution" by which the Security Council would prescribe a specific administrative procedure protecting the listed individual to be applied by UN member states on the national and regional levels. Such a solution could avoid a clash between global law (UN law) and regional law (EU law, but also including more recent regional integration phenomena such as the African Union and the Association of Southeast Asian Nations)

[21] Opinion of Advocate General Bot, Joined Cases C-584/10 P, C-593/10 P, & C-595/10 P (Mar. 19, 2013).

[22] *Id.*, paras. 86–90, 96–109, 110. The UN sanctions monitoring team was happy with these suggestions: "[T]his standard . . . would insulate the European Union authorities (and, by extension, the 1267 Committee) from the majority of legal challenges to listing decisions." Analytical Support and Sanctions Implementation Monitoring Team, Fourteenth Report 3, 13, UN Doc. S/2013/467 (Aug. 2, 2013).

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and the possible fragmentation caused by such cases. In that way, the United Nations would delegate the administration of the sanctions regime to the national and regional levels, at the same time making use of the existing authorities and enforcement mechanisms there.

Yet the Security Council has already improved its own delisting procedure. Therefore, the provision of regional legal protection against an international measure with worldwide application should amount to an episode, that is, take place according to the *Solange* idea of only "as long as"[23] no appropriate legal protection is available at the UN level. Even if cautious and not as explicit as in the advocate general's opinion in *Kadi I*, the ECJ's language there could be seen as indicating the *Solange* idea.[24] Although the improvements on the UN level, especially the establishment of the Office of the Ombudsperson, took place only after the case was filed, *Kadi II* would have been a good opportunity for the Court generally to confirm such a view of the relationship between the levels.

The interesting question arises with regard to the relationship between the EU and the UN levels as to whether the *Solange* idea could also be applied to the administrative branch, with the caveat that the EU administrative authorities should apply EU procedural safeguards only as long as the UN level lacks an adequate administrative procedure. The ECJ requires that EU authorities disclose to the individuals concerned the evidence against them to ensure that they can effectively make known their views and that the authorities examine whether the alleged reasons are well-founded in the light of those comments and the exculpatory evidence provided. The *Solange* concept could produce a surprising result here. An administrative procedure similar to the one on the EU level is already available at the UN level. Listed individuals receive the narrative summary of reasons for the listing, they can address a request for delisting that makes their views known directly to the Office of the Ombudsperson, and the request and comments provided are taken into consideration by the ombudsperson in preparing a comprehensive report for the sanctions committee.[25] While this procedure might not exactly correspond to the above-mentioned standard for the EU authorities, it could be seen as a sufficiently similar administrative procedure at the UN level, so that the EU authorities should not duplicate the work and risk additional conflicts between the levels.

A practicable compromise could be to introduce the requirement of "exhaustion of international remedies" in the sense that an action in the EU courts would necessarily have to be preceded by an unsuccessful petition to the ombudsperson at the UN level.[26] Or since no discretion obtains at the implementing level and the sanctions should be implemented immediately, the EU authorities could just accept and implement the sanctions without further examination. The EU courts would still afford judicial protection "as long as" no such protection could be attained at the UN level. Both ideas could also be combined, which could then

[23] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271 (FRG), 2 C.M.L.R. 540 (1974) (*Solange I*) (holding that so long as European Community law did not provide adequate human rights protection, the German Constitutional Court could examine cases involving the implementation of EC law and thus apply the human rights standard of the German Constitution).

[24] *See* Opinion of Advocate General Poiares Maduro, Case C-402/05 P, para. 51 (Jan. 16, 2008); *Kadi I*, *supra* note 8, para. 322.

[25] SC Res. 2083, paras. 18, 19, & Annex II, para. 7(c) (Dec. 17, 2012).

[26] Juliane Kokott & Christoph Sobotta, *The* Kadi *Case—Constitutional Core Values and International Law—Finding the Balance?*, 23 EUR. J. INT'L L. 1015, 1022, 1024 (2012).

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serve as an example of "UN loyalty,"[27] that is, cooperation and mutual respect between the EU and UN levels, which is the precondition for the functioning of a multilevel system.

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Immunity of international organizations—United Nations—European Convention on Human Rights—right of access to courts—jus cogens

STICHTING MOTHERS OF SREBRENICA v. NETHERLANDS. Application No. 65542/12. Decision on Admissibility. *At* http://hudoc.echr.coe.int.
European Court of Human Rights, June 11, 2013.

On June 11, 2013, in *Stichting Mothers of Srebrenica*,[1] a chamber of the European Court of Human Rights found that the Dutch courts' grant of immunity to the United Nations in a case brought by and on behalf of relatives of individuals killed by the Army of the Republika Srpska in and around Srebrenica in July 1995 did not run afoul of Articles 6 and 13 of the European Convention on Human Rights (Convention).[2] Those provisions guarantee, respectively and among other things, the right of access to a court and the right to "an effective remedy before a national authority" if any Convention right is violated. Having found that the challenged decisions accorded with Dutch obligations under the Convention, the chamber declared the application before the Court inadmissible as "manifestly ill-founded" and "rejected" it pursuant to Article 35(3)(a) and 4. The chamber's decision was unanimous.

The underlying case had been brought by the applicants before the District Court of The Hague in June 2007. It pertained to the activities of the United Nations Protection Force (UNPROFOR), which had been established by Security Council resolution in 1992 as "an interim arrangement to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis."[3] The suit named as defendants the United

[27] *See* CLEMENS A. FEINÄUGLE, THE EXERCISE OF PUBLIC AUTHORITY IN INTERNATIONAL LAW 358 (2011) (Eng. summary). See also Gráinne de Búrca, *The European Court of Justice and the International Legal Order After* Kadi, 51 HARV. INT'L L.J. 1, 43, 49 (2010), who favors a "soft constitutionalist approach" that seeks to mediate the relationship between the norms of the different legal systems.

[1] Stichting Mothers of Srebrenica v. Netherlands, App. No. 65542/12 (Eur. Ct. H.R. June 11, 2013) [hereinafter Decision]. Judgments and decisions of the Court are available at http://hudoc.echr.coe.int.

[2] The chamber also found that the first-named applicant—Stichting Mothers of Srebrenica, a Dutch foundation that was "set up for the express purpose of promoting the interests of surviving relatives of the Srebrenica massacre"—lacked standing to lodge an application concerning the alleged violations of the Convention. Decision, paras. 116–17. Article 34 of the Convention requires that applicants 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." European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 34, Nov. 4, 1950, ETS No. 5, 213 UNTS 222. As with previous applications by nongovernmental organizations that were established "with no other aim than to vindicate the rights of alleged victims," the Court found that Stichting Mothers of Srebrenica was not a "victim" within the meaning of Article 34 as it "ha[d] not itself been affected by the matters complained of." Decision, paras. 115–16. Consequently, its application had to be rejected in accordance with Article 35(4) of the Convention. This decision, though, had no effect on the Court's further consideration of the case, because it was uncontested that the individual applicants, who alleged the same violations of the Convention as Stichting Mothers of Srebrenica, had standing before the Court.

[3] SC Res. 743, para. 5 (Feb. 21, 1992).

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