

Opinion

Aftermath of an Unwise Decision: The U.N. Terrorist Sanctions Regime After *Kadi II*

*Peter Margulies**

Introduction

The European Court of Justice (ECJ) in *Kadi II*¹ sought to promote certainty, but instead produced a dangerous muddle. In requiring more formal judicial review of decisions by the United Nations Sanctions Committee to freeze the assets of suspected terrorist financiers, the ECJ failed to observe appropriate limits for EU institutions in a complex and comprehensive United Nations regime. *Kadi II* failed to display the appropriate level of deference to Sanctions Committee decisions, which are issued pursuant to the Security Council's mandate to maintain international peace. The ECJ also failed to defer to common sense inferences drawn by the Sanctions Committee, and ignored the procedural safeguard supplied by the 2009 establishment of the Committee's Office of the Ombudsperson. These flaws put European Union (EU) states in a no-win position, caught between their duty to comply with the decisions of EU tribunals and their duty to comply with Security Council resolutions. While the Security Council and EU member states may be able to establish a tribunal that meets the ECJ's concerns, that effort will require compromises that may undermine the sanctions program.

This essay proceeds in five Parts. I first briefly provide background on the history of the UN sanctions regime and earlier relevant case law from the EU courts. The second part notes positive preliminary aspects of the ECJ's decision, including its finding of jurisdiction and its recognition that the Sanctions Committee had provided adequate notice to subjects of asset freezes of the reasons for the measures taken. It then analyzes the ways in the ECJ failed to display appropriate deference to the UN Security Council sanctions framework or properly acknowledge the benefits of the Office of the Ombudsperson. The third part offers a comparative perspective, discussing US courts' stance on international law rules and designation of foreign terrorist groups. This part acknowledges that judicial review is an important principle and that US courts have also struggled with the interaction of constitutional values and international norms. The fourth Part, analyzes the implications of the *Kadi II* ruling, recognizing that further measures by the Security Council may be needed to introduce possible measures to address the procedural issues flagged by the ECJ

* Professor of Law, Roger Williams University School of Law. I thank Marko Milanovic for comments on a previous draft.

¹ See Joined Cases C-584/10, C-593/10 & C-595/10, *Kadi v. European Commission* (European Court of Justice 18 July 2013) (hereinafter *Kadi II*).

while meeting the state concerns about disclosure of sensitive intelligence information. Part V offers concluding observations.

I. Factual Background to the UN Sanctions

In the late 1990s, the United Nations Security Council became concerned with the financing of terrorism. The activity was largely unregulated at the time. Unfortunately, collective action problems were impeding efforts to combat it.

Financing is an essential attribute of modern terrorism. Terrorist operations that target civilians in violation of international law are costly. These operations require planning, recruitment, training, and appropriate equipment. Financing by private citizens or state sponsors underwrites continued attacks and the infrastructure that supports them. Often, the financing is serpentine and opaque, involving money-laundering or drug-trafficking.² Coordination with other states to combat financing is difficult, time-consuming, and often requires states to disclose sensitive national security information to other states.³ Individual states understand the risk posed by unregulated terrorist financing, but nonetheless encounter great difficulty in collaborating with other states to reach an effective solution. As in any other endeavour requiring collective action, regulation is only as good as the regulatory scheme's weakest link. State holdouts thus undermine the possibility of progress.

Security Council Resolution 1267 sought to overcome the collective action problem, requiring states to collaborate on identifying, neutralizing, and deterring sources of terrorist funding.⁴ Resolution 1267 set up a Sanctions Committee to list terrorist financiers and freeze their assets. The regime, as well as the companion regime involving individual states authorized by Resolution 1373,⁵ which the EU has adopted in its so-called "autonomous sanctions" framework, was enacted pursuant to Chapter VII of the U.N. Charter, which grants the Security Council "primary responsibility... for the maintenance of peace and security at the global level."

Pursuant to Resolution 1267, the Sanctions Committee consults records of financial transactions that have resulted in funding terrorist attacks, traces the sources of funding for the attacks, and places suspected terrorist financiers on a list of offenders. EU countries are obliged to freeze the assets of any offender. The EU then provides each individual who challenges his designation with a list of reasons for the sanction. The ECJ's decision in July, 2013 followed its 2008 ruling (*Kadi I*), in which the tribunal had held that the 1267 sanctions scheme violated *Kadi's* fundamental rights.⁶

² See P. Williams, "Terrorist financing and organized crime: nexus, appropriation, or transformation?", in T. Biersteker & S. Eckert (eds.), *Countering the Financing of Terrorism*, Abingdon & New York: Routledge 2008, pp. 138-39 (describing the connections between the now-defunct Tamil Tigers (LTTE) of Sri Lanka and criminal conduct, including heroin trade, human trafficking, gun-running, and extortion).

³ Cf. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726 (2010) (noting US Congress's view that "international cooperation is required for an effective response to terrorism") (citation omitted).

⁴ SC Res. 1267 (Oct. 15, 1999).

⁵ SC Res. 1373 (Sept. 28, 2001).

⁶ Joined Cases C-402/05 & C-415/05, *Kadi v. Council*, [2008] E.C.R. I-06351. For a valuable account of the initial history of the *Kadi* litigation, albeit one more skeptical about the UN

According to the ECJ, the sanctions scheme was flawed because it failed to provide the subject of sanctions with a right to be heard by a neutral, independent body. That failure in turn abridged the subject's right to an effective legal remedy for erroneous deprivations of property.⁷

After the 2008 ruling, the Sanctions Committee relisted the petitioner. The Security Council responded to *Kadi I* by creating an Office of the Ombudsperson to provide help to individuals aggrieved by their listing,⁸ and subsequently made the Ombudsperson's recommendations regarding delisting more robust.⁹ In October, 2012, the Committee delisted Kadi after a recommendation by the Ombudsperson. In *Kadi II*, the ECJ held that the sanctions regime was still infirm because it did not provide for an independent adversarial hearing on each asset freeze. In addition, the ECJ held that there was no factual predicate in the evidence disclosed to the ECJ for the sanctions imposed on Kadi.

II. *Kadi II*: Upsetting the Balance between Fairness and Efficacy

The dynamic relationship between fairness and efficacy in counterterrorism sanctions requires a delicate balance for a reviewing court. By failing to show adequate deference to the Security Council sanctions framework, *Kadi II* upset that balance. This section explains *Kadi II*'s failure in detail. First, however, it analyses the ECJ's threshold determinations, which warrant praise.

II.1. Threshold Rulings in *Kadi II*

The ECJ correctly ruled that it had jurisdiction over the petition.¹⁰ The respondents, including the Council of the European Union, had argued that because the sanctions originated in the Security Council, which under international law can override the policies of individual states, the ECJ lacked jurisdiction. According to the respondents, only a clear violation of *jus cogens* – peremptory norms of international

sanctions regime than the opinion offered here, see C. Eckes, *EU Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford & New York: Oxford University Press 2009, pp. 223-28; see also J. Genser & K. Barth, 'When Due Process Concerns Become Dangerous: The Security Council's 1267 Regime and the Need for Reform', *Boston College International & Comparative Law Review* 2010-1, pp. 10-23 (discussing EU and member state litigation through 2010).

⁷ See *Kadi I*, paras. 286-88. Cf. G. de Burca, 'The European Court of Justice and the International Legal Order After Kadi,' *Harvard International Law Journal* 51-1, pp. 23-24 (stating rationale for decision).

⁸ See S. Eckert & T. Biersteker, Watson Institute for International Studies, Brown University, 'Due Process and Targeted Sanctions: An Update of the "Watson Report"', at 6 (December 2012), at http://www.watsoninstitute.org/pub/Watson%20Report%20Update%202012_12.pdf (accessed on 4 September 2013).

⁹ See S.C. Res. 1989, U.N. Doc. S/RES/1989 (July 1, 2011). The strengthening of the Ombudsperson followed a decision of the ECJ holding that the Ombudsperson as originally conceived did not meet the requirements of independence and comprehensive review that the ECJ had outlined in its 2008 decision. See Case T-85/09, *Kadi v. Comm'n*, E.C.R. II-05177 [2010]. Cf. D. Hoerauf, 'The United Nations Al-Qaida Sanctions Regime After U.N. Resolution 1989: Due Process Still Overdue?', *Temple International and Comparative Law Journal* 2012-2 (acknowledging that Resolution 1989 improved process, while suggesting further reforms).

¹⁰ *Kadi II*, paras. 65-68.

law such as diplomatic immunity – would give rise to jurisdiction. The ECJ rightly ruled that such narrow jurisdiction would amount to an abdication of the ECJ’s responsibility.

Second, the ECJ’s holding improved on the General Court’s ruling below by agreeing that the Sanctions Committee had provided the petitioner with sufficiently clear notice of the bases for the asset freeze.¹¹ The ECJ held that the summary provided to the petitioner contained a number of clear allegations. For example, the summary charged that Kadi had worked closely with a key associate of Osama bin Laden and that Kadi and the bin Laden associate had agreed to hire an individual who had trained with bin Laden and had led a group in Tunisia affiliated with Al Qaeda. According to the Sanctions Committee, this web of connections had facilitated the petitioner’s transfer of arms to militants in the Balkans and elsewhere. The General Court had said that these claims were not specific enough to allow the petitioner an opportunity for rebuttal. The ECJ disagreed, ruling that the summary of charges gave the petitioner the opportunity that fairness required.

III.2. *Kadi II* and the Failure of Deference

After this promising beginning, the *Kadi II* decision went astray by abandoning the deference that should inform review of counterterrorism sanctions. The ECJ discounted three compelling reasons for deference. It minimized the deference due the Security Council and the complex determinations of the Sanctions Committee, which often involved “geopolitical” factors not readily susceptible to judicial review.¹² Moreover, the ECJ failed to defer to common sense inferences made by the Sanctions Committee, based on facts that the ECJ conceded, such as the petitioner’s involvement with militants in the 1990s. Finally, the ECJ failed to consider here that the system worked: the Ombudsperson recommended delisting whilst suggesting that the sanctions regime was capable of responding to updated data and did not need the prodding of an EU tribunal. I discuss each failure of deference in turn.

II.2.a. *Kadi I*’s Lack of Respect for the Security Council Counterterrorism Framework

The ECJ’s refusal to defer to the Security Council’s comprehensive scheme should prompt questions regarding the tribunal’s view of its role. As Advocate General Bot noted in December, 2012, when he argued for a less intrusive ECJ review, the U.N. sanctions regime is a comprehensive yet fragile mechanism.¹³ Several articles of the U.N. Charter interact to implement this authority: Article 30 of the Charter, for example, empowers the Security Council to determine the existence of threats to

¹¹ *Idem*, paras. 139-50. The ECJ found that one of the reasons, involving a claim that Kadi had owned several Albanian firms affiliated with Al Qaeda, was insufficiently detailed. *Idem*, para. 141.

¹² Opinion of Advocate General Bot (March 19, 2013), Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Para. 80, available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=135223&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1765372> (accessed on 5 May 2014) AG Bot, para. 80).

For the ECJ’s discussion of the Security Council sanctions regime, see *Kadi II*, paras. 101, 104 (acknowledging Security Council’s role in “maintenance of international peace and security” without suggesting need for adequate deference to that role).

¹³ Opinion of Advocate General Bot, *supra* note 24, para. 68.

global or regional peace and decide on an appropriate reaction. Article 41 of the Charter empowers the Security Council to decide on measures short of military force to effectuate its decisions. Sanctions are a key element in this repertoire, which the Security Council selected by enacting Resolution 1267. Under Article 103 of the UN Charter, decisions pursuant to the Charter prevail over decisions of states and regional bodies. Impeding the UN's sanctions regime thus undermines EU member states' compliance with the Charter.

The comprehensive nature of the UN sanctions scheme is crucial to its success. Advocate General Bot reminded the ECJ that "financing of terrorism employs such diffuse, complicated and concealed channels that ... prevention requires action to be taken at a very early stage... prevention must seek to paralyze an entire set of networks ..." ¹⁴ The comprehensive nature of the regime provides a valuable deterrent to the machinations of terrorist financiers. ¹⁵ The "strategic and geopolitical interests" reflected in this comprehensive regime counsel caution in judicial review. ¹⁶ Any interference with the comprehensive scheme weakens the deterrent value of sanctions, giving terrorist financiers further opportunities for funding violence. ¹⁷ In this fashion, according to Advocate General Bot, unduly intrusive review of the UN sanctions program "encroach[es] on the prerogatives of the Security Council." ¹⁸ The ECJ did not address this point, apparently assuming without evidence that its ruling would not undermine the effectiveness of the sanctions regime. Since the UN Charter provides that Security Council resolutions are binding on EU and all other UN member states, the ECJ's nonchalance conflicts with international law.

II.2.b. The ECJ's Second-Guessing of Reasonable Inferences

In reviewing the decision of the Sanctions Committee, the ECJ also second-guessed elementary inferences from uncontested facts. Even in a system with more formal and elaborate procedural safeguards, this would be an inappropriate intrusion into the province of the initial fact finder. The ECJ's freewheeling factual review suggested that the ECJ was interested in proving a point about perceived excesses in counterterrorism policy, not playing a responsible role in a complex system.

Second-guessing facts is a signature method in the ECJ's decision. For example, the ECJ accepted Kadi's concession that he had founded the Muwafaq Foundation, a putative charity that was part of Osama bin Laden's network in the early 1990s. ¹⁹ The tribunal also accepted Kadi's concession that in 1992 he had hired Shafiq Ben Mohamed Al-Ayadi to head the European offices of the Muwafaq Foundation. Kadi acknowledged that he had made this personnel decision at the recommendation of Wa'el Hamza Abd Al-Fatah Julaidan, whom the Sanctions Committee described as a notorious Al Qaeda financier. ²⁰ Al-Ayadi, according to the Sanctions Committee, was an associate of bin Laden who had received paramilitary training in Afghanistan, met

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Idem, para. 80.

¹⁷ Idem, para. 68.

¹⁸ Idem, para. 71.

¹⁹ *Kadi II*, para. 154.

²⁰ Idem, para. 28.

bin Laden in Tunisia, and served as head of the Al Qaeda offshoot, the Tunisian Islamic Front, which also sent members to train with bin Laden. The ECJ admitted that it was “conceivable” that the hiring of Al-Ayadi in 1992 and the alleged involvement of Al-Ayadi and Julaidan in terrorist activities with bin Laden could have justified Kadi’s listing in 2002.²¹ However, the ECJ opined, that same confluence of persons and projects could not justify continuing to list Kadi in 2008.²²

The ECJ’s approach to these uncontested facts illustrates the perils of intrusive review of Sanction Committee decisions. The Court’s approach did not provide adequate guidance for future sanctions decisions. In holding that evidence that sufficed in 2002 did not suffice in 2008, the Court may have taken the view that the mere passage of time required the Sanctions Committee to submit fresh evidence of Kadi’s terrorist ties. However, the Court did not state this view clearly, leaving counterterrorism officials to guess about the law. Is new evidence required two years after an initial listing, or every five years? The Court did not specify.

Moreover, placing the burden on counterterrorism officials to produce new evidence after a certain amount of time has passed is not the only approach. The process that is due in a particular context necessarily involves weighing the risk of false positives (the risk that the government has wrongly accused an individual) against the risk of false negatives (the risk that an individual who has engaged in wrongdoing will go undetected). A workable approach must balance those risks, along with the government’s interest in security and the individual’s interest in liberty. A burden-shifting approach could have struck this balance more effectively, even assuming that the passage of time warranted revisiting Kadi’s listing. A prudent decision maker could have shifted the burden of proof to Kadi to provide new evidence that he had been listed wrongfully in 2002 or that he had since revamped his operations to eliminate ties to terrorists. Kadi had failed to do either. Instead, he opted for the generic claim that in the early 1990s bin Laden had been viewed as an ally of the West, and that Kadi at that time had no knowledge of any facts to the contrary.²³ If the ECJ agreed that this claim did not rebut the Sanction Committee’s evidence in 2002, it should have rejected the same claim in 2008, absent proof from Kadi to the contrary. An individual who has worked with known terrorists should cite more than the mere passage of time as proof that he has changed. The ECJ, by finding Kadi’s generic claim sufficient, revealed a naiveté wholly unsuited to the shadowy world of terrorist financing.

II.2.c. The Wages of Failing to Take “Yes” for an Answer

The adverse impact of intrusive review is manifest in the ECJ’s discounting of the Ombudsperson’s role. The Ombudsperson can be viewed as an example of what some scholars have called “new governance.”²⁴ New governance entails greater

²¹ *Idem*, para. 156.

²² *Ibid.*

²³ *Idem*, para. 154.

²⁴ N. Gunningham & D. Thornton, ‘Explaining Corporate Environmental Performance: How Does Regulation Matter?’, *Law and Society Review* 2003-1, pp. 73-74 (noting the lack of efficacy of legal sanctions); O. Lobel, ‘Citizenship, Organizational Citizenship, and the Law of Overlapping Obligations’, *California Law Review* 2009-2, pp. 470-73 (discussing new models of governance

collaboration and informality between stakeholders, with decreased reliance on formal mechanisms such as court orders and top-down regulation. New governance theorists believe that formality often frustrates dialogue, leading to less information-sharing. Regulators who lack sufficient information regulate clumsily. That perceived incompetence diminishes the regulator's legitimacy. The result is a widespread resort to strategies such as regulatory "stone-walling" that impair regulations' effectiveness. Formal mechanisms thus create the illusion of accountability, while missing out on the substance. New governance fosters collaboration because it replaces suspicion between regulators and regulated with a new ethic of trust.

The Ombudsperson is only a partial realization of the new governance ideal, although its benefits echo the virtues that new governance theorists envision. As reflected in the sanctions regime, the Office of the Ombudsperson engages informally with listed individuals and entities, and with the Sanctions Committee. These informal interactions are not wholly *ad hoc*; rather, they are governed by a substantive standard: whether a "reasonable and credible" basis supports a given asset freeze. The Ombudsperson meets in a timely fashion with persons and entities that seek delisting.²⁵ Following up on these meetings, the Ombudsperson acquires evidence from the Sanctions Committee which the Committee would be highly reluctant to share with less reliable interlocutors. The Ombudsperson then determines whether the listing meets the "reasonable and credible" standard. Through this diligent process, the Ombudsperson ensures that listings are up to date, and gives listed individuals a voice in the process.²⁶

Admittedly, a full realization of the new governance ideal would provide an even greater voice to communities affected by sanctions, particularly in the early phase of formulating sanctions criteria and institutional design. In the US, for example, new governance approaches such as collaborative rulemaking involve intensive consultation between regulators and regulated individuals and entities about underlying norms. However, this lack of complete realization should not obscure the Ombudsperson's value. Because of the Ombudsperson's efforts, the Sanctions Committee has repeatedly delisted individuals and entities, including Kadi himself, that had been mistakenly placed on the list or are no longer involved in financing terrorism.

Recently, the Security Council strengthened the Ombudsperson's role, providing that the Ombudsperson's recommendations regarding delisting would be presumptively binding on the Sanctions Committee. The Committee could upset the Ombudsperson's recommendation only with a consensus of the Committee or a vote in the Security Council itself.²⁷ Moreover, as Advocate General Bot and others have

emphasizing cooperation and dialog); M. Steilen, 'Collaborative Departmentalism', *Buffalo Law Review* 2013-2, pp. 375-77 (arguing for collaboration between branches of government as yielding better decisions). Some examples of professional self-regulation also fit within this paradigm, see R. Atkinson, 'The Foundations of Neo-Classical Professionalism in Law and Business', *Georgetown Journal of Law and Public Policy* 2012-2), pp. 448-52 (praising flexibility of professional self-regulation, while suggesting limits to this approach).

²⁵ See S. Eckert & T. Biersteker, *supra* note 8.

²⁶ See Advocate General Bot, *supra* note 24, para. 81.

²⁷ S. Eckert & T. Biersteker, *supra* note 8, p. 7.

pointed out, the Ombudsperson ensures trust between the Sanctions Committee and states. States that offer sensitive information to the Sanctions Committee risk disclosure of intelligence sources and methods. States that work with the Sanctions Committee must have confidence that sources and methods will remain secret. That “confidence and collaboration” is essential to an “effective global fight against terrorism.”²⁸

The need for trust between states and the Sanctions Committee creates a significant obstacle to the “old governance” path required by the ECJ: a more formal judicial process for challenging Committee decisions. Establishing an EU-based judicial process to review listing decisions would be complex. Judges for such a tribunal would come from a broad spectrum of EU states with disparate approaches to security. For example, Member States such as Bulgaria, Cyprus, and Belgium may have widely differing approaches to selecting judicial personnel and ensuring the secrecy of sensitive foreign intelligence information. Newer EU members from the East and South may have less developed procedures in these areas. Analogous concerns have already produced havoc in the EU’s economic arrangements, as the example of Greece demonstrates. Differences in the security realm similarly make uniformity difficult to achieve. Without adequate security, states (including third countries such as the US) would not provide information to the Sanctions Committee. This would preserve the shell of due process at the cost of undermining the Security Council’s sanctions regime, giving clandestine terrorist financiers the advantage that the Security Council hoped to neutralize.

These concerns have impeded the effectiveness of the autonomous sanctions promulgated by the EU outside of the UN sanctions process. The ECJ’s insistence that it be the final arbiter regarding disclosure of national security information has posed substantial difficulties for state cooperation with the autonomous sanctions regime.²⁹ Moreover, despite more formal procedures than those governing the UN regime, the autonomous sanctions regime has been plagued by repeated allegations of unfairness. For example, the People’s Mojahedin of Iran (PMOI), an opponent of Iran’s theocratic government, litigated for years both in the US and the EU to obtain access to information that regulators cited as a basis for the PMOI’s continued listing.³⁰ Recently, both the EU and the US delisted the PMOI. However, the formality of the EU autonomous sanctions process may have hindered, rather than helped, this result. In the EU PMOI litigation, France refused to declassify information that supported

²⁸ See Advocate General Bot, *supra* note 24, para. 85. For a more optimistic view suggesting that *Kadi II* will encourage further harmonization between the UN, regional, and state bodies, see C. Feinaugle, ‘International Decision: Featured Decision: Commission v. Kadi’, *American Journal of International Law*, 2013-4, pp. 881-83.

²⁹ See C. Eckes, ‘Decision-Making in the Dark? – Autonomous EU Sanctions and National Classification’, in Iain Cameron (ed.), *Aspects of EU Sanctions*, Intersentia Press, Cambridge, Antwerp, Portland forthcoming 2013, p. 186, Amsterdam Law School Legal Studies Research Paper No. 2012-64, at <http://papers.ssrn.com/abstract=2075794> (accessed 5 September 2013), at p. 13; cf. V. Baehr-Jones, ‘Mission Possible: How Intelligence Evidence Rules Can Save UN Terrorist Sanctions’, *Harvard National Security Journal* 2011-2, p. 447 (discussing intelligence rules).

³⁰ See *C-27/09 French Republic v. PMOI*, [2011]. The Grand Chamber, in rejecting France’s appeal, sustained the judgment of the Court of First Instance (CFI). See *T-284/08 People’s Mojahedin Organization of Iran v. Council* [2008] ECR II-3487.

the group's designation.³¹ France may have been more receptive to overtures from a trusted Ombudsperson named by the Council of Europe, who could have more efficiently pressed for the PMOI's delisting.

These points appear to have been lost at the ECJ. A court that respected the Security Council's comprehensive framework for addressing global terrorist financing would have held that the system worked. The Ombudsperson, at the time of the decision in *Kadi II*, had already prompted the Sanctions Committee to delist Kadi in 2012. In this and many other matters, the Office of the Ombudsperson had provided the independent voice that the ECJ in *Kadi I* had demanded. The ECJ could also have found that Kadi's delisting mooted his appeal, thus allowing more time for the integration of new procedural safeguards. However, the ECJ in *Kadi II* did not choose either path. By holding that a more formal judicial process was necessary, the ECJ elevated theory over practice. The ECJ did not deign to explain how more formality would improve on the ECJ's own faulty inferences, enhance the Ombudsperson's valuable efforts, or pry loose sensitive information from wary states. A responsible decision would have at least attempted to answer these questions.

III. A Comparative Perspective: US Courts, Judicial Review, and International Law

Despite my claim above that the ECJ's decision was not responsible, comparison with the US courts reveals that the ECJ was in a difficult position. It was being asked to approve something which the US courts disfavour: curbs on judicial review. Moreover, the US courts have declined to hold that international law modified the US constitutional principles or domestic statutes. The US sanctions regime provides for judicial review, which is often deferential to listing decisions but has retained some teeth. However, the formal adherence to due process in the US sanctions regime does not necessarily lead to results that are more accurate or just than the ombudsperson approach that the *Kadi II* Court viewed as insufficient. This is because of the deference that characterizes judicial review in the US model.

Judicial review is a mainstay of the US constitutionalism.³² As the US Supreme Court acknowledged in the landmark case of *Boumediene v. Bush*,³³ upholding Guantanamo detainees' access to the Great Writ of *habeas corpus*, judicial review is an important structural check on excesses wrought by the political branches.³⁴ In many ways, that structural check is most needed when national security threats engender fear that can cloud the political branches' judgment.³⁵

Moreover, the US courts have not permitted international law to override values deemed fundamental to the US constitutional scheme. American courts have held

³¹ See *PMOI*, T-284/08, para. 71-73 (discussing problems caused by France's refusal to disclose information to CFI); cf. I. Cameron, 'Introduction', in *Aspects of EU Sanctions*, supra note __, pp. 21-22 (discussing history of PMOI litigation).

³² See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").

³³ 553 U.S. 723 (2008).

³⁴ *Idem*, pp. 742-46.

³⁵ D. Cole, 'Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay', *Cato Supreme Court Review* 2007-08, pp. 47 (noting virtues of judicial review).

that individual rights guaranteed by the US Constitution, such as the right to a jury trial in criminal cases, trump bilateral agreements with other nations.³⁶ Moreover, just a few years ago, the US Supreme Court held that American courts lacked the power to enforce a judgment of the International Court of Justice (ICJ) regarding consular notification for foreign nationals in the US criminal justice system.³⁷ While the procedural background for the latter case was complex and enforcement of the ICJ judgment in the case would have clashed with constraints that usually bind the US courts,³⁸ the Supreme Court's decision exhibited little or no deference to the ICJ. US courts' deference to international bodies is neither blind nor automatic; EU tribunals' refusal to defer to international bodies is therefore not foreign to the US experience.

However, US courts' review of the US designation of foreign terrorist organizations exhibits deference driven by national security concerns. Under the designation process, the Secretary of State determines whether there is evidence indicating that particular organizations such as Al Qaeda or Hamas have a track record of terrorism, such as the targeting of civilians.³⁹ The government then informs the organization's representatives, who have an opportunity to review unclassified evidence and submit

³⁶ See *Reid v. Covert*, 354 U.S. 1 (1956).

³⁷ See *Medellin v. Texas*, 552 U.S. 491 (2008). Scholars criticizing the ECJ's decision in *Kadi I* have analogized that decision to *Medellin*. See G. de Burca, 'The European Courts and the Security Council: Between Dedoublement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci', *European Journal of International Law* 2009-3, p. 853 (criticizing *Kadi I* for "largely instrumentalist and self-serving approach to international legal obligations"); J. Weiler, 'Kadi – Europe's Medellin?', *European Journal of International Law* 2008-5, p. 896 (critiquing *Kadi I* as unduly neglecting the "international context" of UN sanctions determinations); but see A. Nollkaemper, 'The European Courts and the Security Council: Between Dedoublement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci', *European Journal of International Law* 2009-3, pp. 868-69 (arguing that human rights norms stressed in *Kadi I* are also international in nature and effect). In addition, scholars have addressed the larger issue of conflicts within international law, including conflicts between human rights law and the law of armed conflict, see M. Milanovic, 'Norm Conflict in International Law: Whither Human Rights?', *Duke Journal of Comparative and International Law*, 2009-1, pp. 79-83 (suggesting that in armed conflicts, human rights law may require introduction of procedural safeguards for detention of suspected terrorists, even when such safeguards are not required under the law of armed conflict, which other scholars argue preempts the field); J. Farrant, 'Is the Extra-Territorial Application of the Human Rights Act Legally Justified?', *International Criminal Law Review* 2009-5, pp. 833-54 (arguing that law of armed conflict should generally preempt human rights law, because of exigency of situations presented in armed conflicts).

³⁸ *Medellin*, 552 U.S. at 509-11 (suggesting that since UN Charter scheme for enforcement of ICJ judgment required request by aggrieved state for Security Council decision subject to US veto, the UN scheme entailed action by US political branches and was inconsistent with *automatic* enforcement of ICJ judgment by US courts); see also C. Vazquez, 'Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties', *Harvard Law Review* 2008-2, pp. 649-51 (suggesting that *Medellin* is defensible under this narrow rationale, but not under more sweeping theory that would undermine US compliance with treaties).

³⁹ *Humanitarian Law Project*, 130 S. Ct. at 2713-14; see also P. Margulies, 'Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech', *Hastings Law Journal* 2012-2, pp. 482-83 (discussing designation process); R. Chesney, 'The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention', *Harvard Journal of Legislation* 2005-1, pp. 9-20 (discussing evolution of US laws on provision of material support for terrorism).

material rebutting the government's assertions.⁴⁰ If the government determines that its evidence warrants designation of the group as a foreign terrorist organization, the group can appeal to a federal court, which will set aside a designation that is arbitrary and capricious, not based on substantial evidence, or is inconsistent with procedural safeguards.⁴¹ Although courts often defer to government judgments about designation, the US regime complies with the due process principles, because it gives an entity notice of a pending designation, an opportunity to respond, and a further opportunity to seek judicial review of a designation.

Judicial review by US courts is facilitated by an asset the ECJ lacks: procedures for safeguarding sensitive information. First, the trustworthiness of each US judge is assessed by the executive branch during the judicial selection process and during confirmation by the US Congress. A judicial candidate who lacks the diligence to handle sensitive information would not pass this rigorous assessment. Moreover, judges hearing national security cases have the power to consider evidence *in camera*, i.e., in their chambers outside of public view. These procedures ease concerns that sensitive information will be heedlessly disclosed or fall into the wrong hands.

While US courts have provided a meaningful check against government overreaching,⁴² the US regime is not perfect. In at least one case, the government engaged in unreasonable delays in its investigation of the entity under investigation, substantially harming the organization and frustrating individuals who had donated to the entity in good faith to assist charitable efforts.⁴³ The organization caught in this overreaching could have benefited from a more flexible regime, such as the ombudsperson approach, that encouraged greater informal interchange between the government and the entity at an earlier stage.

Consideration of the US designation process confirms the dynamic relationship between efficacy and fairness in efforts to combat terrorist financing. A framework that requires formal judicial involvement will either unduly impede regulation of financing or encourage courts to adopt a deferential standard of review. That

⁴⁰ 8 U.S.C. § 1189(c)(3); cf. *People's Mojahedin Org. of Iran v. United States Dep't of State*, 613 F.3d 220 (D.C. Cir. 2010) (discussing process and holding that the government had violated due process by failing to give DFTO an opportunity to view unclassified evidence prior to making a final decision denying petition to revoke designation).

⁴¹ See *Holy Land Found. for Relief & Devel. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003); *United States v. Afshari*, 426 F.3d 1150, 1160 (9th Cir. 2005) (upholding designation process and precluding collateral review of designation in later criminal cases alleging that defendant provided material support to designated group). A related process occurs under the US International Emergency Economic Powers Act (IEEPA). See *Emergency Coalition to Defend Educ. Travel v. United States Dep't of the Treasury*, 545 F.3d 4, 12-13 (D.C. Cir. 2008).

⁴² See *People's Mojahedin Org. of Iran v. United States Dep't of State*, 613 F.3d 220 (D.C. Cir. 2010) (requiring further action by Secretary of State to ensure fairness of process and support designation); *In re People's Mojahedin Org. of Iran*, 680 F.3d 832 (D.C. Cir. 2012) (requiring that government act promptly on petition to vacate designation).

⁴³ *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009); cf. N. Crimm, 'What Could Globalization Mean for Domestic Islamic-Socio-Political Activism?', *Fordham International Law Journal* 2013-3, pp. 606-11 (arguing that US counterterrorism measures have had adverse effect on Islamic activism and philanthropy); A. Shanor, 'Beyond Humanitarian Law Project: Promoting Human Rights in a Post-9/11 World', *Suffolk Transnational Law Review* 2011-3, p. 536-37 (same).

deference may leave some aggrieved individuals and entities *worse off* than they would be under a more informal regime. On the other hand, a regime that is too deferential to sanctions decisions will lose legitimacy, perhaps spurring more individuals to defy the rules and contribute to terrorist groups.

IV. A Solution to *Kadi I*'s Conundrum: Sanctions Review Tribunal

In the wake of *Kadi II* and in light of the difficulty of recreating the US model, EU countries are in an impossible position. They can either fail to comply with Security Council Resolution 1267, which binds all signatories to the UN Charter, or fail to comply with the ECJ's decision. Each course is unlawful. Because this situation is untenable in the long term, some further solution is necessary.

The answer may be that the Security Council or the Sanctions Committee will have to take a step previously rejected: creation of a quasi-judicial entity, perhaps called a Sanctions Review Tribunal, to hear appeals from Sanctions Committee decisions. That entity might be located within the Office of the Ombudsperson, which has gained a substantial measure of good will from states, international bodies, and listed individuals. The Sanctions Review Tribunal would apply a measure of deference to Sanctions Committee decisions, akin to the "margin of appreciation" that the EU tribunals apply to decisions of member states.⁴⁴ To assuage concerns about leaks of sensitive information and the disclosure of intelligence sources and methods, establishment of the tribunal would have to include careful vetting of members, their staffs, and attorneys for the parties. The Sanctions Review Tribunal would also have to provide for summaries of sensitive data and, if necessary, *in camera* review of classified evidence. In addition, the tribunal could include an opt-out for parties

⁴⁴ See Cases G-356-57/11, *O & Maahanmuuttovirasto v. L*, [2012] E.C.R. I, at para. 74-82, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0356:EN:HTML> (holding that in deciding whether to grant residence permit to third country national seeking to join his family, a Member State is entitled to margin of appreciation in determining whether that individual has adequate resources for support of his family, but margin of appreciation is balanced against provisions of European Charter and directives of EU promoting family reunification); Koen Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy', *Fordham International Law Journal*, 36-5, p. 1367 (discussing margin of appreciation in context of ECJ's ruling on individual rights in *O*). See also Catherine Bratic, 'A Comparative Approach to Understanding Developments in Privacy Rights in the European Court of Human Rights', *Columbia Journal of European Law* 2013-2, p. 366 (asserting that because EU has committed itself to sign European Convention on Human Rights, EU institutions including European Court of Justice will be bound by jurisprudence interpreting European Convention, including principles of deference and proportionality). Cf. *Zana v. Turkey*, Decision of 25 November 1997, ECHR, at 51(ii) (upholding criminal conviction of an official who, after attacks on civilians by a Kurdish group designated as a terrorist organization, described the group as a "national liberation movement"); R. Sloane, 'Human Rights for Hedgehogs?: Global Value Pluralism, International Law, and Some Reservations of the Fox', *Boston University Law Review*, 2010-2, p. 983 (arguing that the margin of appreciation allows states to "implement or interpret human rights in ways that may be sensitive or responsive to prevailing social, cultural, and other norms within their polities"). While European tribunals have typically applied the margin of appreciation in cases challenging individual state policies, including law enforcement measures as in *Zana*, a comparable measure of deference is surely appropriate regarding EU and state implementation of Security Council resolutions that promote international peace and security under the United Nations Charter. See Opinion of Advocate General Bot, *supra* note 24, para. 68.

seeking more informal dispute resolution. Those parties would use the services of the Office of the Ombudsperson as that office has functioned since 2009.

A Sanctions Review Tribunal with independence from the Sanctions Committee would have a number of benefits. Because the Tribunal would provide an opportunity to be heard to targets of sanctions in an independent forum, it would presumably satisfy the ECJ. If participants in the tribunal were properly vetted, it would hopefully meet with the approval of states and United Nations bodies. Of course, a Sanctions Review Tribunal would not be free from flaws. The adversarial nature of proceedings in the tribunal might not be conducive to resolution of the complex questions posed by international terrorist financing. Members of the tribunal might not have the fact-finding capacity to address the global transactions involved.⁴⁵ However, establishment of a Sanctions Review Tribunal would rescue EU states from their current impossible position, and allow the important work of the Sanctions Committee to continue.

V. Conclusion

The ECJ's goal in *Kadi II* was commendable: promoting justice and fairness in a process that can seem arbitrary and harsh. US courts aspire to similar ends. However, the ECJ failed to pay sufficient heed to the delicate balance between fairness and efficacy in counterterrorism sanctions. *Kadi I* prompted reforms, including the establishment of the Office of the Ombudsperson that enhanced the alignment of fairness and efficacy. Minding that balance in *Kadi II* required a measure of deference to the Security Council's comprehensive framework. Without major changes, *Kadi II* will be remembered as a hollow victory for due process and an expensive monument to the obstacles facing effective global counterterrorism policy.

⁴⁵ See S. Eckert & T. Biersteker, *supra* note __, at 37 (arguing that “excessively narrow and rigid institutional framework of formal judicial review could impair the ability of the 1267 Committee to take effective decisions in the collective interest”).