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ASSET FREEZES AND MONEY LAUNDERING

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We have seen already that the US International Banking Act states that in making its decision as to whether to approve a foreign bank's establishment of a branch or an agency in the US the Federal Reserve Board shall "consider whether the foreign bank has adopted and implements procedures to combat money laundering" and "may also take into account whether the home country of the foreign bank is developing a legal regime to address money laundering or is participating in multilateral efforts to combat money laundering." In addressing the financial crisis, the G20 countries agreed to work together to deal with money laundering. At the international level the Financial Action Task Force promulgates standards on money laundering. Since 9/11 these standards also address the financing of terrorism. Governments use asset freezes as ways of preventing terrorism or as sanctions against other Governments. In recent years such asset freezes have often been co-ordinated at the international level through the United Nations Security Council. Financial institutions are required to implement anti-money-laundering (AML) measures and asset freezes as a condition of their licensing.

These materials address some issues relating to asset freezes, and we will also read the Financial Action Task Force's International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation. These are among the standards which the G20 countries have committed to implement and which are the subject of IMF/World Bank FSAP reviews. Over time they have developed from focusing on money laundering as related to organized crime to addressing the financing of terrorism and the proliferation of weapons of mass destruction. In this area general issues relating to policing have an impact on the regulation of financial institutions. Financial institutions are co-opted as components of regimes of crime

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control and public security.

Asset Freezes and the UN Security Council

In Libyan Arab Foreign Bank v Bankers Trust we saw that unilateral asset freezes can be problematic for banks required to implement them: a bank might find that the laws of one jurisdiction where it carries on business require it to act in ways which are inconsistent with the laws of another jurisdiction whose laws bind it. Multilateral freezes should be easier for banks with cross-border operations to manage, as they can avoid the problems Bankers Trust faced in the Libyan Arab Foreign Bank case. Multilateral sanctions are adopted by the United Nations Security Council.[2] To the extent that multilateral freezes can be made effective they also operate more effectively as sanctions or to inhibit the financing of terrorism. Some multilateral sanctions target countries, and others target named individuals. But individuals have no standing to challenge a decision by the Security Council to impose an asset freeze. The Security Council adopted resolution 1730 (2006)[3] to ask the UN Secretary-General to establish a "focal point" to consider requests for de-listing.[4]

Where the Security Council adopts sanctions, individual states may adopt unilateral sanctions as well. For example, the Security Council adopted sanctions with respect to Iran including embargos with respect to nuclear and conventional weapons and materiel and a travel ban and assets freeze for designated persons and entities.[5] The US imposed additional unilateral sanctions with respect to Iran.[6]

A **2012 Report by a Panel of Experts on the Multilateral Iran sanctions** [7] stated:

The sanctions measures specified in resolution 1929 (2010) and previous resolutions are part of a

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[2] *See generally, e.g.*, http://www.un.org/sc/committees/index.shtml.

[3] *See* http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1730%282006%29.

[4] There is a guide to the delisting process at http://www.un.org/sc/committees/pdf/De-listing%20process%20flowchart.pdf.

[5] *See* http://www.un.org/sc/committees/1737/ .

[6] *See, e.g.*, National Defense Authorization Act FY 2013.

[7] Final Report of the Panel of Experts submitted in accordance with resolution 1984 (2011) at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/395 .

coordinated and intensive effort by the international community to persuade the Islamic Republic of Iran to resolve outstanding questions about the nature of its nuclear programme and demonstrate that it is for purely peaceful purposes. Sanctions remain one element of a dual-track approach to the country, which includes diplomatic efforts by China, France, Germany, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America. These sanctions are targeted at specific activities, institutions, entities and individuals related to the Islamic Republic of Iran's prohibited proliferation-sensitive nuclear activities and development of a nuclear weapon delivery system, in addition to transfers of conventional weapons.

Sanctions are slowing the procurement by the Islamic Republic of Iran of some critical items required for its prohibited nuclear programme. At the same time, prohibited activities, including uranium enrichment, are continuing. The Islamic Republic of Iran has still not complied with the requests of the International Atomic Energy Agency for information to clarify the possible military dimensions of its programme. In the present report, the Panel identifies the acquisition of high-grade carbon fibre as one of a number of critical items that the Islamic Republic of Iran requires for the development of more advanced centrifuges. The report also contains an analysis of the country's requirements for uranium ore in the context of its current and future planned activities, while noting that no procurement attempts have been reported to the Security Council Committee established pursuant to resolution 1737 (2006).

The Iranian ballistic missile programme continues to develop, as demonstrated by additional launches, their prohibition under resolution 1929 (2010) notwithstanding. In the present report, the Panel provides th e conclusions of its investigation into the June 2011 launch of the Rasad satellite, which was reported to the Committee.

The Panel takes note of the recent designations by the Security Council Committee established pursuant to resolution 1718 (2006) concerning the Democratic People's Republic of Korea of two Democratic People's Republic of Korea entities and their links to the Iranian ballistic missile programme...

The Panel concludes that financial sanctions have been implemented by many Member States with rigour and welcomes the new Financial Action Task Force standard on financing of proliferation...

Security Council resolutions are targeted at specific activities, institutions, entities and individuals related to the Islamic Republic of Iran's prohibited nuclear and missile activities, and conventional arms imports and exports. It is difficult to assess their impact, in particular measured against stronger and more comprehensive sanctions imposed by Member States unilaterally.

Unilateral sanctions are an issue that Member States raise regularly with the Panel in the context of their implementation of targeted Security Council sanctions. A number of Member States, which implement only these sanctions, have expressed concern to the Panel that unilateral sanctions have a negative impact on legitimate economic activities allowed under United Nations sanctions...

Financial and business restrictions

The relevant Security Council resolutions contain two categories of financial restrictions. The first, targeted financial sanctions, require freezing of funds and other assets of designated entities and individuals (resolution 1737 (2006), paras. 12-15; resolution 1747 (2007), para. 6; resolution 1803

(2008), para. 7; and resolution 1929 (2010), paras. 11, 12 and 19). The designated individuals and entities are listed in the annex to resolution 1737 (2006), annex I to resolution 1747 (2007), annexes I and III to resolution 1803 (2008) and annexes I to III of resolution 1929 (2010). Two Iranian financial institutions are designated: Bank Sepah and Bank Sepah International (resolution 1747 (2007)) and First East Export Bank (resolution 1929 (2010)).

The second category of restriction is activity-based sanctions, which impose restrictions on financial or business dealings with the Islamic Republic of Iran under specific conditions. The restrictions are as follows:

(a) Preventing the transfer of financial resources or services related to the supply, sale, transfer, manufacture or use of the prohibited items (resolution 1737 (2006), para. 6; and resolution 1929 (2010), paras. 8 and 13);

(b) Preventing the provision of financial services and transfer of financial assets or resources that could contribute to the Islamic Republic of Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems (resolution 1929 (2010), para. 21);

(c) Prohibiting Iranian banks from initiating new business activities in Member States if related to the Islamic Republic of Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems (resolution 1929 (2010), para. 23);

(d) Prohibiting financial institutions of Member States from initiating new business in the Islamic Republic of Iran if related to the Islamic Republic of Iran's proliferation-sensitive nuclear activities, or the development of nuclear weapon delivery systems (resolution 1929 (2010), para. 24).

The activity-based sanctions of resolution 1929 (2010) build on those set out in resolutions 1737 (2006) and 1803 (2008). Two Iranian financial institutions are named in paragraph 10 of resolution 1803 (2008), in which the Security Council calls upon States to exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in the Islamic Republic of Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad. Vigilance over transactions involving Iranian banks, including the Central Bank of Iran, was also called for in the sixteenth preambular paragraph of resolution 1929 (2010).

Member States are also obliged to require their nationals, persons subject to their jurisdiction and firms incorporated in their territory or subject to their jurisdiction to exercise vigilance when doing business with entities in the Islamic Republic of Iran, including those of the Islamic Revolutionary Guards Corps and the Islamic Republic of Iran Shipping Lines (resolution 1929 (2010), para. 22).

To implement financial sanctions, Member States require mechanisms to identify and freeze assets of designated entities and individuals, and to monitor and regulate financial and business transactions with the Islamic Republic of Iran. A high standard of communication and coordination between regulatory authorities and the private sector is needed.

While many Member States noted that they had such systems in place, only a few shared information regarding suspicious transaction reports, violations or attempted violations. For example: (a) One State bordering the Islamic Republic of Iran said that it had revoked the licence of a money transfer company

in 2008; (b) One State informed the Panel that its financial intelligence unit had received and investigated several suspicious transaction reports in connection with transactions involving Bank Saderat during the period 2006-2007. It could not be ascertained that those were relevant to United Nations resolutions. The financial intelligence unit had also carried out checks on the basis of information received from other Member States during 2007, but no information had been found related to United Nations sanctions; (c) One State said that on-site inspections of Bank Mellat had identified twoexamples of failure to follow proper procedures; (d) One State noted that transactions from banks in one Middle Eastern State with Iranian shareholders had been blocked based on intelligence received from foreign sources...

There is no general understanding of the definition of "vigilance" in the context of paragraph 22 of resolution 1929 (2010). Member States reported various mechanisms to comply with this requirement, such as: (a) Some regulatory authorities closely supervised business with the Islamic Republic of Iran; (b) Some authorities required notification or authorization in advance for transfers of funds involving an Iranian person or entity over specific thresholds. One State reported a requirement for non-personal financial transactions to be licensed on a case-by-case basis. Other Member States had systems in place to license individual financial transactions, or to license a class of financial transactions; (c) Some Member States reported that they simply generally supervised business to ensure that no prohibited activities took place...

The Panel received no reports that the Islamic Republic of Iran had successfully developed significant new channels for transactions following the adoption of resolution 1929 (2010), although some Member States shared information that it remained interested in doing so. One State noted that monitoring Iranian-related transactions through banks in some third countries was difficult. One State bordering the Islamic Republic of Iran informed the Panel of Iranian requests to open new financial institutions. Those requests were not pursued, apparently because of that State's burdensome legislation. Another State, on another continent, disclosed similar requests. Another State said that the Islamic Republic of Iran had requested information about procedures for opening financial institutions using Iranian or mixed capital. In most cases, the Islamic Republic of Iran did not pursue these enquiries.

The compliance department of one large international financial institution stated that the Islamic Republic of Iran was known to be seeking to develop covert relationships with existing institutions, and new relationships in jurisdictions with weak regulations. A representative of another large international financial entity also noted that Iranian banks were creative in seeking to circumvent sanctions, including by opening new branches...

The Financial Action Task Force issued revised standards in February 2012, including a new standard on implementation of targeted financial sanctions related to proliferation. Member States may need to put in place mechanisms to meet this standard. The inclusion of this standard in future mutual evaluation reviews could provide the Panel with useful information regarding the implementation of United Nations targeted financial sanctions.

Responses to financial sanctions

Member States informed the Panel that Iranian entities and citizens not designated under sanctions were deploying measures to deal with the effects of sanctions, in particular unilateral ones, some of which might be intended only to protect legitimate transactions, such as: (a) An increasing number of Iranian-related financial transactions involved non-sanctioned Iranian banks with correspondent accounts with foreign banks, or money transfer businesses based in the Islamic Republic of Iran with access to foreign banks. Some of those transactions might have been initiated by sanctioned banks; (b) An increase in cash transfers between Iranians resident overseas and their friends and relatives inside the Islamic Republic of Iran, which was notable in Member States with many Iranian residents. One State, which monitors all cross- border financial transactions, reported a several-fold increase over the past two years in cash transfers to the Islamic Republic of Iran. The State suggested that sanctions had made electronic transfers more difficult. Another factor was the increasing regulation of money transfer businesses, which were now required to register as financial institutions. The media also reported an increase in cash transactions; (c) One State said that hawala transactions had increased in recent years in inverse proportion to the reduction of bank transactions with the Islamic Republic of Iran; (d) One border State reported that barter transactions were a growing component of trade with the Islamic Republic of Iran. Barter arrangements were also reported by the media; (e) Some Member States reported cases of companies set up for the purpose of transferring funds to or from the Islamic Republic of Iran. For example, the Panel was informed of the case of a small non-financial firm led by an expatriate Iranian that had transformed itself into a company involved in transferring funds received from a non-sanctioned Iranian bank to recipients throughout the world. Some $11 billion had been processed over 18 months. Understanding whether and how the above-described methods could be used for financing procurement for sanctioned nuclear and ballistic programmes is challenging. These programmes are industrial in scale and require sources of financing for procurement that are large and reliable.

Practices of financial entities

The Panel held discussions with representatives of several international financial institutions, insurers, banking associations and legal entities in Europe,Asia and North America.

For the purposes of implementing United Nations targeted sanctions, many large financial institutions said that they relied on commercial software providers for systems to screen transactions. Screening against individuals designated by the United Nations was often complicated by a lack of sufficient identifying detail.

Most institutions required screening to be able to identify possible non-compliance under all relevant jurisdictions in which they operated. Some providers offered screening services against additional, proprietary criteria. Most institutions said that they deployed many staff and expended significant resources to ensure that adequate due diligence was carried out.

The Panel was informed by many institutions and regulatory authorities that they took a highly risk-averse approach to compliance with sanctions on the Islamic Republic of Iran. Many regarded possible penalties for violating unilateral sanctions (in addition to negative publicity and reputational

damage) as of greater concern than possible violations of United Nations sanctions, and formulated corporate compliance procedures accordingly. Some entities reported that they had decided that resources needed for adequate compliance with all relevant sanctions regimes were too costly where business was connected with the Islamic Republic of Iran and had decided to do no such business at all.

Channels for transactions with some Iranian banks have been blocked following the termination of financial messaging services to these banks in response to unilateral financial sanctions.

The Panel observed that the practices of many financial institutions were widening the scope of United Nations financial sanctions. For example, two large insurance entities informed the Panel that company policy was to turn down almost all business connected with the Islamic Republic of Iran because of the burdensome nature of necessary due diligence and potential complexities should a claim arise. Many protection and indemnity clubs have terminated third-party liability cover for Iranian vessels because of unilateral sanctions. The Panel was informed that Iranian insurance companies might provide alternative cover. It is unclear whether the compliance policies of international banks would allow transactions to be processed should Iranian insurance companies pay out against a claim.

Challenges

Asset freezes

Only a few Member States reported that assets had been frozen in response to Security Council resolutions. Most Member States informed the Panel that no assets had been frozen because no relevant assets had been present. Two said that business related to the Islamic Republic of Iran had already scaled back significantly by the time that United Nations asset freezes were put in place.

There are several possible reasons for the lack of reports of assets frozen under the relevant United Nations resolutions. Some Member States may lack mechanisms to freeze assets in connection with the resolutions, or may have failed to take action swiftly to ensure that no funds were removed from their jurisdiction before such freezes took effect. Some Member States may require assistance or advice in the implementation of asset freezes. For example, one State enquired about procedures followed elsewhere with regard to property subject to asset freezes.

A banking association reported to the Panel in writing that its members were concerned about the ability of the competent authorities to respond to enquiries and licensing requests in a timely manner. Many competent authorities struggled with the lack of precision in the language of United Nations resolutions (such as the definition of “acting on their behalf”).

Unilateral sanctions

The issue of unilateral financial sanctions is not within the Panel’s mandate. The issue is, however, raised often by Member States in the course of the Panel’s consultations regarding United Nations financial sanctions. In addition to United Nations sanctions on the Islamic Republic of Iran, a number of jurisdictions have imposed their own financial sanctions regimes (referred to here as “unilateral sanctions regimes”). Such regimes and sanctions have increased over the past year.

Some Member States reported that they sought to comply with both United Nations sanctions and

unilateral regimes, and others that they complied only with United Nations sanctions.
One example of the difficulties imposed by unilateral sanctions on legitimate transactions is illustrated by an enquiry from an international humanitarian organization to the United Nations regarding the transfer of funds from the Islamic Republic of Iran. The Committee, assisted by the Panel, subsequently recommended that the humanitarian organization should seek advice from Member States that had jurisdiction over their activities regarding restrictions imposed by sanctions regimes, and, where necessary, request such Member States to seek an exemption from the Committee in connection with the transfer of items, financial resources or assets to or from the Islamic Republic of Iran.
One State reported that it had been approached by an international humanitarian organization for advice on transferring funds to the Islamic Republic of Iran following the imposition of unilateral sanctions. The State responded that it could not influence the policies of individual banks.
The media also reported difficulties with humanitarian transactions.

Conclusions
The Panel finds a high level of awareness among Member States and the private sector of United Nations financial sanctions. Many Member States are implementing sanctions through their financial regulatory bodies with rigour.
Understanding whether and how Iranian circumvention of United Nations financial sanctions could be used for financing procurement for sanctioned nuclear and ballistic missile programmes is challenging. These programmes are industrial in scale and require sources of procurement financing that are large and reliable.
Legitimate trade may be hindered by the practices for financial transactions followed by some entities in response to unilateral sanctions.

As mentioned above, people designated on the basis of Security Council resolutions have no right to challenge the designations directly in any tribunal: there is no individual standing to challenge acts of the UN Security Council. But the Security Council resolutions are implemented by means of domestic measures in UN Member States (and in the EU by EU institutions and the Member States). Courts in the EU have found that persons designated under UN sanctions regimes have rights to due process under EU law, which they can invoke before EU courts and the domestic courts of EU Member States.

Commission v Yassin Abdullah Kadi [8] illustrates the approach of the EU's Court of Justice to these issues:

[8] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P (Jul. 18, 2013) at http://www.bailii.org/eu/cases/EUECJ/2013/C58410.html

1 By their appeals, the European Commission, the Council of the European Union and the United Kingdom of Great Britain and Northern Ireland seek to have set aside the judgment of the General Court of the European Union of 30 September 2010 in Case T-85/09 Kadi v Commission [2010] ECR II-5177 ('the judgment under appeal'), by which that Court annulled Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban (OJ 2008 L 322, p. 25; 'the contested regulation'), in so far as that measure concerns Mr Kadi.

Legal context

The Charter of the United Nations

2 Under Article 1(1) and (3) of the Charter of the United Nations, signed at San Francisco (United States of America) on 26 June 1945, the purposes of the United Nations are inter alia to 'maintain international peace and security' and to 'achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.

3 Under Article 24(1) of the Charter of the United Nations, the United Nations Security Council ('the Security Council') is given primary responsibility for the maintenance of international peace and security. Article 24(2) thereof provides that, in discharging those duties, the Security Council is to act in accordance with the purposes and principles of the United Nations.

4 Under Article 25 of the Charter of the United Nations, the Members of the United Nations [UN] agree to accept and carry out the decisions of the Security Council in accordance with that Charter.

5 Chapter VII of the Charter of the United Nations, headed 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression', defines the action to be taken in such cases. Article 39 of that Charter, which introduces Chapter VII, provides that the Security Council is to determine the existence of any such threat, any such breach or any such act and is to make recommendations, or decide what measures are to be taken, in accordance with Articles 41 and 42 of the Charter, to maintain or restore international peace and security. Under Article 41 of that Charter, the Security Council may decide what measures, not involving the use of armed force, are to be employed to give effect to its decisions and it may call upon the Members of the United Nations to apply such measures.

6 By virtue of Article 48(2) of the Charter of the United Nations, the decisions of the Security Council for the maintenance of international peace and security are to be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

7 Article 103 of the Charter of the United Nations states that in the event of a conflict between the obligations of the Members of the United Nations under that Charter and their obligations under any other international agreement, their obligations under that Charter are to prevail.

Actions of the Security Council against international terrorism and the implementation of those actions by the European Union

8 Since the late 1990s, and even more since the attacks of 11 September 2001 in the United States, the Security Council has adopted a number of resolutions under Chapter VII of the Charter of the United Nations in order to combat terrorist threats to international peace and security. Initially directed solely against the Taliban of Afghanistan, those resolutions were subsequently extended to include Usama bin Laden, Al-Qaeda and persons and entities associated with them. The resolutions provide, inter alia, for the freezing of assets of the organisations, entities and persons identified by the committee established by the Security Council in accordance with Resolution 1267 (1999) of 15 October 1999 ('the Sanctions Committee') on a consolidated list ('the Sanctions Committee Consolidated List').

9 In order to deal with delisting requests made by organisations, entities or persons named on that list, Security Council Resolution 1730 (2006) of 19 December 2006 provided for the establishment of a 'focal point' within the Security Council, responsible for examination of such requests. That focal point was established in March 2007.

10 Under paragraph 5 of Security Council Resolution 1735 (2006) of 22 December 2006, when States propose names of organisations, entities or persons to the Sanctions Committee for inclusion on the Consolidated List, they must 'provide a statement of case; the statement of case should provide as much detail as possible on the basis(es) for the listing, including: (i) specific information supporting a determination that the individual or entity meets the criteria above; (ii) the nature of the information; and (iii) supporting information or documents that can be provided'. Under paragraph 6 of that resolution, States are requested 'at the time of submission, to identify those parts of the statement of case which may be publicly released for the purposes of notifying the listed [on the Sanctions Committee Consolidated List] individual or entity, and those parts which may be released on request to interested States'.

11 Under paragraph 12 of Security Council Resolution 1822 (2008) of 30 June 2008, States must, inter alia, 'for each such proposal [of names to the Security Council for inclusion on the Consolidated List] identify those parts of the statement of case that may be publicly released, including for use by the [Sanctions] Committee for development of the summary described in paragraph 13 below or for the purpose of notifying or informing the listed individual or entity, and those parts which may be released upon request to interested States.' Paragraph 13 of that resolution provides, first, that the Sanctions Committee, when it adds a name to its Consolidated List, is to make accessible on its website 'a narrative summary of reasons for listing' and, secondly, that that committee is to make accessible on the same site, 'narrative summaries of reasons for listing' names on that list before the adoption of Resolution 1822/2008.

12 As regards delisting requests, Security Council Resolution 1904 (2009) of 17 December 2009 established an 'Office of the Ombudsperson', whose task, under paragraph 20 thereof, is to assist the Sanctions Committee in the consideration of such requests. Under that same paragraph, the person appointed to be the Ombudsperson must be an individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, including law, human rights,

counter-terrorism, and sanctions. The mandate of the Ombudsperson, as described in Annex II to that resolution, covers a stage of gathering information from the State concerned and a stage of consultation, in the course of which dialogue may be engaged with the organisation, entity or person requesting delisting from the Sanctions Committee Consolidated List. Following those two stages, the Ombudsperson must draw up a 'comprehensive report' and present it to the Sanctions Committee, which must then consider the delisting request, with the assistance of the Ombudsperson, and after doing so decide whether to approve that request.

13 Since the Member States considered, in a number of Common Positions adopted under the Common Foreign and Security Policy, that European Union action was required in order to implement the Security Council Resolutions on combating international terrorism, the Council adopted a series of regulations providing for, inter alia, the freezing of the assets of organisations, entities and individuals identified by the Sanctions Committee.

14 In parallel with the regime described above, which is aimed solely at organisations, entities and individuals designated by name by the Sanctions Committee as being associated with Usama bin Laden, the Al-Qaeda network and the Taliban, there exists a wider regime of sanctions provided for by Security Council Resolution 1373 (2001) of 28 September 2001, which was likewise adopted in response to the terrorist attacks of 11 September 2001. That resolution, which also provides for asset-freezing measures, differs from the resolutions mentioned above in that the identification of the organisations, entities or persons which it is intended to cover is left entirely to the discretion of the States.

15 At European Union level, Resolution 1373 (2001) was implemented by Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93) and by Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70, and corrigendum, OJ 2010 L 52, p. 58). Those measures contain a list, which is regularly reviewed, of organisations, entities and persons suspected of being involved in terrorist activities.

Background to the proceedings

The case which gave rise to the Kadi judgment

16 On 17 October 2001 Mr Kadi, identified as being an individual associated with Usama bin Laden and the Al-Qaeda network, was listed on the Sanctions Committee Consolidated List.

17 Mr Kadi's name was subsequently added to the list in Annex I to Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No 337/2000 (OJ 2001 L 67, p. 1), by Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001 (OJ 2001 L 277, p. 25). He was subsequently listed in Annex I to Council Regulation (EC) No

881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001 (OJ 2002 L 139, p. 9).

18 On 18 December 2001 Mr Kadi brought before the General Court an action seeking the annulment, initially, of Regulations No 467/2001 and No 2062/2001, then of Regulation No 881/2002, in so far as those regulations concerned him. The grounds for annulment were, respectively, infringement of the right to be heard, the right to respect for property and the principle of proportionality, and also of the right to effective judicial review.

19 By judgment of 21 September 2005 in Case T-315/01 Kadi v Council and Commission [2005] ECR II-3649, the General Court dismissed that action. In essence, the General Court held that it followed from the principles governing the relationship between the international legal order under the United Nations and the European Union legal order that Regulation No 881/2002, being designed to implement a Security Council resolution leaving no latitude in that regard, could not be the subject of judicial review of its internal lawfulness and thus enjoyed immunity from jurisdiction, except as regards its compatibility with rules falling within the ambit of jus cogens, understood as a body of rules of public international law binding on all subjects of international law, including the bodies of the UN, and from which no derogation is possible.

20 Accordingly, the General Court, applying the standard of universal protection of the fundamental rights of the human person covered by jus cogens, ruled out, in the given case, any infringement of the rights relied on by Mr Kadi. As regards, in particular, the right to effective judicial review, the General Court stated that it was not for it to review indirectly whether Security Council Resolutions are compatible with such fundamental rights as are protected by the European Union legal order, nor to verify that there had been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it had taken, nor, again, to review indirectly the appropriateness and proportionality of those measures. The General Court added that any such lacuna in the judicial protection available to Mr Kadi is not in itself contrary to jus cogens.

21 By its judgment of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351 (‘the Kadi judgment’), the Court set aside the judgment of the General Court in Case T-315/01 Kadi v Council and Commission and annulled Regulation No 881/2002 in so far as it concerned Mr Kadi.

22 In essence, the Court held that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all European Union acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by that treaty. The Court held further that, notwithstanding the fact that undertakings given in the UN context must be observed when implementing Security Council resolutions, it does not follow from the principles governing the international legal order under the United Nations that an act adopted

by the European Union such as Regulation No 881/2002 thereby enjoys immunity from jurisdiction. The Court added that there is no basis for such immunity in the EC Treaty.
23 In those circumstances the Court held, in paragraphs 326 and 327 of the Kadi judgment, that the Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all European Union acts in the light of fundamental rights, including where such acts are designed to implement Security Council resolutions, and that the General Court's reasoning was consequently vitiated by an error of law.
24 Ruling on the action brought by Mr Kadi before the General Court, the Court held, in paragraphs 336 to 341 of the Kadi judgment, that the effectiveness of judicial review means that the competent European Union authority is bound to communicate the grounds for the contested listing decision to the person concerned and to provide that person with the opportunity to be heard in that regard. The Court stated that, as regards a decision that a person's name should be listed for the first time, for reasons connected with the effectiveness of the restrictive measures at issue and with the objective of the regulation concerned, it was necessary that that disclosure and that hearing should occur not prior to the adoption of that decision but when that decision was adopted or as swiftly as possible thereafter.
25 In paragraphs 345 to 349 of the Kadi judgment, the Court added that, since the Council had neither communicated to Mr Kadi the evidence relied on against him to justify the restrictive measures imposed on him nor afforded him the right to be informed of that evidence within a reasonable period after those measures were enacted, Mr Kadi had not been in a position effectively to make known his point of view in that regard, with the consequence that the rights of defence and the right to effective judicial review had been infringed. The Court also stated, in paragraph 350 of that judgment, that that infringement had not been remedied before the Courts of the European Union, given that the Council had not adduced before them any such evidence. In paragraphs 369 to 371 of that judgment, the Court concluded, on the same grounds, that Mr Kadi's fundamental right to respect for property had been infringed.
26 The effects of the annulled regulation in so far as it concerned Mr Kadi were maintained for a maximum period of three months in order to allow the Council to remedy the infringements found.

The response of the European Union institutions to the Kadi judgment and the contested regulation
27 On 21 October 2008 the Chairman of the Sanctions Committee communicated the narrative summary of reasons for Mr Kadi's listing on that committee's Consolidated List to France's Permanent Representative to the UN, and authorised its transmission to Mr Kadi.
28 That summary of reasons is worded as follows:

> 'The individual Yasin Abdullah Ezzedine Qadi … satisfies the standard for listing by the [Sanctions Committee] because of his actions in (a) participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; (b) supplying, selling, or transferring arms and related material to; (c) recruiting for; or (d) otherwise supporting acts or activities of; Al-Qaeda, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof (see United

Nations Security Council Resolution 1822 (2008), paragraph 2).

Mr Qadi has acknowledged that he is a founding trustee and directed the actions of the Muwafaq Foundation. The Muwafaq Foundation historically operated under the umbrella of Makhtab Al-Khidamat/Al Kifah (QE.M.12.01), an organisation founded by Mr Abdullah Azzam and Mr Usama Muhammed Awad bin Laden (QI.B.8.01), and the predecessor to Al-Qaeda (QE.A.4.01). Following the dissolution of Makhtab Al-Khidamat/Al Kifah in early June 2001 and its absorption into Al-Qaeda, a number of NGOs formerly associated with Makhtab Al-Khidamat/Al Kifah, including the Muwafaq Foundation, also joined with Al-Qaeda.

In 1992, Mr Qadi hired Mr Shafiq Ben Mohamed Ben Mohamed Al-Ayadi (QI.A.25.01) to head the European offices of the Muwafaq Foundation. During the mid-1990s, Mr Al-Ayadi also headed the Muwafaq Foundation branch in Bosnia and Herzegovina. Mr Qadi hired Mr Al-Ayadi on the recommendation of known Al-Qaeda financier Mr Wa'el Hamza Abd Al-Fatah Julaidan (QI.J.79.02), who fought with Mr bin Laden in Afghanistan in the 1980s. At the time of his appointment by Mr Qadi as the Muwafaq Foundation's European director, Mr Al-Ayadi was operating under agreements with Mr bin Laden. Mr Al-Ayadi was one of the principal leaders of the Tunisian Islamic Front, went to Afghanistan in the early 1990s to receive paramilitary training, and then went to Sudan with others to meet Mr bin Laden, with whom they concluded a formal agreement regarding the reception and training of Tunisians. They later met with Mr bin Laden a second time, securing an agreement for bin Laden collaborators in Bosnia and Herzegovina to receive Tunisian mujahidin from Italy.

In 1995, the leader of Al-Gama'at Al-Islamiya, Mr Talad Fuad Kassem, said that the Muwafaq Foundation had provided logistical and financial support for a mujahidin battalion in Bosnia and Herzegovina. In the mid-1990s, the Muwafaq Foundation was involved in providing financial support for terrorist activities of the mujahidin, as well as arms trafficking from Albania to Bosnia and Herzegovina. Some involvement in the financing of these activities was provided by Mr bin Laden.

Mr Qadi was also a major shareholder in the now closed Sarajevo-based Depositna Banka, in which Mr Al-Ayadi also held a position and acted as nominee for Mr Qadi's shares. Planning sessions for an attack against a United States facility in Saudi Arabia may have taken place at this bank.

Mr Qadi further owned several firms in Albania which funnelled money to extremists or employed extremists in positions where they controlled the firm's funds. Mr Bin Laden provided the working capital for four or five of Mr Qadi's companies in Albania.'

29 That summary of reasons was also published on the website of the Sanctions Committee.

30 On 22 October 2008 France's Permanent Representative to the European Union transmitted that summary of reasons to the Commission, which sent it to Mr Kadi on the same day, informing him that, for the reasons set out in that summary, it envisaged maintaining his listing in Annex I to Regulation No

881/2002. The Commission gave Mr Kadi until 10 November 2008 to comment on those reasons and to provide it with any information that he might consider relevant before it took its final decision.

31 On 10 November 2008 Mr Kadi sent his comments to the Commission. He argued, on the basis of documents certifying that the Swiss, Turkish and Albanian authorities had decided not to pursue criminal investigations against him concerning his alleged support of terrorist organisations or involvement in financial crime, that, whenever he had been given the opportunity to express his point of view on the evidence said to inculpate him, he had been able to demonstrate that the allegations made against him were unfounded, and he requested the production of the evidence in support of the claims and assertions made in the summary of reasons relating to his being listed on the Sanctions Committee Consolidated List and the relevant documents in the Commission's file, and asked that he be allowed to submit comments on that evidence. While drawing attention to the vagueness and generality of a number of the allegations contained in that summary of reasons, he disputed, with supporting evidence, that any of the reasons relied on against him were well founded.

32 On 28 November 2008 the Commission adopted the contested regulation.

33 According to recitals 3 to 6, 8 and 9 of the preamble to that regulation:

> '(3) In order to comply with [the Kadi judgment], the Commission has communicated the … [summary] of reasons provided by the … Sanctions Committee, to Mr Kadi … and given [him] the opportunity to comment on these grounds in order to make [his] point of view known.
>
> (4) The Commission has received comments by Mr Kadi … and examined these comments.
>
> (5) The list of persons, groups and entities to whom the freezing of funds and economic resources should apply, drawn up by the … Sanctions Committee, includes Mr Kadi …
>
> (6) After having carefully considered the comments received from Mr Kadi in a letter dated 10 November 2008, and given the preventive nature of the freezing of funds and economic resources, the Commission considers that the listing of Mr Kadi is justified for reasons of his association with the Al-Qaida network. ...
>
> (8) In view of this, Mr Kadi … should be added to Annex I.
>
> (9) This Regulation should apply from 30 May 2002, given the preventive nature and objectives of the freezing of funds and economic resources under Regulation … No 881/2002 and the need to protect legitimate interests of the economic operators, who have been relying on the legality of [the regulation annulled by the Kadi judgment].'

34 In accordance with Article 1 of the contested regulation and the annex thereto, Annex I to Regulation No 881/2002 was amended to that effect, inter alia, by the addition of the following entry under the heading 'Natural persons':

> 'Yasin Abdullah Ezzedine Qadi (alias (a) Kadi, Shaykh Yassin Abdullah; (b) Kahdi, Yasin; (c) Yasin Al-Qadi). Date of birth: 23.2.1955. Place of birth: Cairo, Egypt. Nationality: Saudi Arabian. Passport number: B 751550, (b) E 976177 (issued on 6.3.2004, expiring on 11.1.2009). Other information: Jeddah, Saudi Arabia.'

35 The contested regulation, in accordance with Article 2 thereof, entered into force on 3 December 2008

and is applicable from 30 May 2002.
36 By letter of 8 December 2008, the Commission replied to Mr Kadi's comments of 10 November 2008.

The procedure before the General Court and the judgment under appeal
37 By application lodged at the Registry of the General Court on 26 February 2009, Mr Kadi brought an action for annulment of the contested regulation in so far as it concerns him. In support of his claims, he put forward five pleas in law. The second plea alleged breach of the rights of the defence and of the right to effective judicial protection, and the fifth plea alleged a disproportionate restriction on the right to property.

38 In the judgment under appeal, the General Court, relying on paragraphs 326 and 327 of the Kadi judgment, first held, in paragraph 126 of the judgment under appeal, that its task was to ensure 'in principle the full review' of the lawfulness of the contested regulation in the light of the fundamental rights guaranteed by the European Union. It added, in paragraphs 127 to 129 of the judgment under appeal, that, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection, the review carried out by the Courts of the European Union of Union measures to freeze funds can be regarded as effective only if it concerns, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying them.
39 The argument of the Commission and the Council concerning the Court of Justice's failure to comment, in the Kadi judgment, on the scope and intensity of such judicial review was held, in paragraph 131 of the judgment under appeal, to be clearly wrong.
40 In that regard, the General Court held in essence, in paragraphs 132 to 135 of the judgment under appeal, that it is obvious, particularly from paragraphs 326, 327, 336 and 342 to 344 of the Kadi judgment, that it was the intention of the Court of Justice that judicial review, in principle full review, should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in that measure are based.
41 The General Court further stated, in paragraphs 138 to 146 of the judgment under appeal, that, by repeating the essence of its reasoning, in connection with the regime mentioned in paragraphs 14 and 15 of this judgment, in its judgment of 12 December 2006 in Case T-228/02 Organisation des Modjahedines du peuple d'Iran v Council [2006] ECR II-4665, the Court of Justice approved and endorsed the standard and intensity of judicial review determined in that judgment, namely that the Courts of the European Union must review the assessment made by the institution concerned of the facts and circumstances relied on in support of the restrictive measures at issue and determine whether the information and evidence on which that assessment is based is accurate, reliable and consistent, and such review cannot be barred on the ground that that information and evidence is secret or confidential.
42 After having also emphasised, in paragraphs 148 to 151 of the judgment under appeal, that the effect on Mr Kadi's rights of the restrictive measures to which he had been subject for almost ten years was marked and long-lasting, in paragraph 151 of that judgment the General Court confirmed 'the principle of

a full and rigorous judicial review of [freezing measures such as those at issue in this instance]'.
43 Examining, next, the second and fifth pleas in law in support of annulment, the General Court found, in paragraphs 171 to 180 of the judgment under appeal, that there was a breach of Mr Kadi's rights of defence, after observing, in essence, that:
– those rights had been respected only in a purely formal and superficial sense, since the Commission considered itself strictly bound by the findings of the Sanctions Committee and at no time envisaged calling them into question in the light of Mr Kadi's comments or making any real effort to refute the exculpatory evidence adduced by Mr Kadi;
– Mr Kadi was refused access by the Commission to the evidence against him despite his express request, whilst no balance was struck between his interests and the need to protect the confidentiality of the information in question, and
– the few pieces of information and the vague allegations in the summary of reasons relating to the listing of Mr Kadi on the Sanctions Committee Consolidated List, for example, that Mr Kadi was a shareholder in a Bosnian bank in which planning sessions for an attack on a United States facility in Saudi Arabia 'may have' taken place, were clearly insufficient to enable Mr Kadi to mount an effective challenge to the allegations against him.
44 The General Court also found, in paragraphs 181 to 184 of the judgment under appeal, that the principle of effective judicial protection had been infringed on the grounds, first, that since Mr Kadi was afforded no proper access to the information and evidence used against him, Mr Kadi had been unable to defend his rights with regard to that information and evidence in satisfactory conditions before the Courts of the European Union and, secondly, that that infringement had not been remedied in the course of the proceedings before the General Court, given that no evidence of that kind or any indication of the evidence relied on against Mr Kadi had been disclosed to the General Court by the institutions concerned.
45 The General Court further held, in paragraphs 192 to 194 of the judgment under appeal, that since the contested regulation had been adopted without Mr Kadi having been able to put his case to the competent authorities, notwithstanding the fact that the measures freezing his assets, given their general application and duration, represented a significant restriction on his right to property, the imposition of such measures constituted an unjustified restriction of that right, and consequently that Mr Kadi's claim that the infringement by that regulation of his fundamental right to respect for property entailed a breach of the principle of proportionality was well founded.
46 The General Court therefore annulled the contested regulation in so far as it concerns Mr Kadi....

The appeals
59 The Commission, the Council and the United Kingdom put forward various grounds in support of their respective appeals. There are, in essence, three. The first ground, raised by the Council, alleges an error of law in that the contested regulation was not recognised as having immunity from jurisdiction. The second ground, raised by the Commission, the Council and the United Kingdom, alleges errors of

law with regard to the level of intensity of judicial review determined in the judgment under appeal. The third ground, again raised by those three appellants, alleges that the General Court erred in its examination of Mr Kadi's pleas in respect of infringement of his rights of defence and his right to effective judicial protection, and in respect of infringement of the principle of proportionality.

The first ground of appeal: error of law in that the contested regulation was not recognised as having immunity from jurisdiction

Arguments of the parties

60 In relation to the first ground of appeal, the Council, supported by Ireland, the Kingdom of Spain and the Italian Republic, complains that the General Court erred in law, in particular in paragraph 126 of the judgment under appeal, by refusing, pursuant to the Kadi judgment, to recognise that the contested regulation had immunity from jurisdiction. The Council, supported by Ireland, formally requests the Court to reconsider the principles set out in that regard in the Kadi judgment.

61 Referring to paragraphs 114 to 120 of the judgment under appeal, the Council, supported by Ireland and the Italian Republic, claims that the refusal to grant the contested regulation immunity from jurisdiction is contrary to international law. That refusal wholly ignores the fact that it is the Security Council which has primary responsibility for determining the measures necessary for the maintenance of international peace and security and ignores the primacy of obligations under the United Nations Charter over those arising under any other international agreement. It disregards the obligation to act in good faith and the duty to provide mutual assistance which must be respected when implementing Security Council measures. That approach leads the European Union's institutions to substitute themselves for the international bodies which have the relevant powers. It amounts to reviewing the legality of Security Council resolutions in the light of European Union law. The uniform, unconditional and immediate application of those resolutions is jeopardised. States which are members both of the United Nations and of the European Union find themselves in an impossible position as regards meeting their international obligations.

62 The refusal to grant the contested regulation immunity from jurisdiction is also contrary to European Union law. It wholly ignores the fact that, under that law, the European Union institutions are bound to comply with international law and with the decisions of organs of the UN, where those institutions exercise, on the international stage, powers that have been transferred to them by the Member States. It disregards the need to strike a balance between the maintenance of international peace and security, on the one hand, and the protection of human rights and fundamental freedoms, on the other.

63 Mr Kadi contends that any challenge to the position that a European Union measure such as the contested regulation does not have immunity from jurisdiction is contrary to the principle of res judicata, given that that challenge concerns a question of law which was settled between the same parties by the Kadi judgment following consideration of the same arguments as those raised in the present case.

64 Referring to various passages in that judgment, Mr Kadi disputes, in any event, that the refusal to grant the contested regulation immunity from jurisdiction is contrary to international law and to

European Union law.

Findings of the Court
65 In paragraph 126 of the judgment under appeal, the General Court held that, in accordance with paragraphs 326 and 327 of the Kadi judgment, the contested regulation could not be afforded any immunity from jurisdiction on the ground that its objective is to implement resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.
66 Various factors, set out in paragraphs 291 to 327 of the Kadi judgment, were advanced in support of the position stated by the Court in that judgment, and there has been no change in those factors which could justify reconsideration of that position, those factors being, essentially, bound up with the constitutional guarantee which is exercised, in a Union based on the rule of law ... by judicial review of the lawfulness of all European Union measures, including those which, as in the present case, implement an international law measure, in the light of the fundamental rights guaranteed by the European Union.
67 That European Union measures implementing restrictive measures decided at international level enjoy no immunity from jurisdiction has moreover been confirmed in ... Hassan and Ayadi v Council and Commission [2009] ECR I-11393, paragraphs 69 to 75, and, more recently, in the judgment of 16 November 2011 in ... Bank Melli Iran v Council [2011] ECR I-0000, where it is stated, in paragraph 105, with reference to the Kadi judgment, that, without the primacy of a Security Council resolution at the international level thereby being called into question, the requirement that the European Union institutions should pay due regard to the institutions of the United Nations must not result in there being no review of the lawfulness of such European Union measures, in the light of the fundamental rights which are an integral part of the general principles of European Union law.
68 It follows that the judgment under appeal, in particular paragraph 126 thereof, is not vitiated by any error of law with regard to the General Court's refusal, in accordance with the Kadi judgment, to afford the contested regulation immunity from jurisdiction.
69 The first ground of appeal must therefore be rejected.

The second and third grounds of appeal: respectively, errors of law relating to the level of intensity of judicial review defined in the judgment under appeal and errors committed by the General Court in the examination of the pleas for annulment based on infringement of the rights of the defence, the right to effective judicial protection and the principle of proportionality
70 The second and third grounds of appeal should be examined together, since the subject of both is, in essence, a criticism of errors of law vitiating the interpretation of the rights of the defence and the right to effective judicial protection adopted by the General Court in the judgment under appeal....

Findings of the Court
– The extent of the rights of the defence and of the right to effective judicial protection
97 As stated by the General Court in paragraphs 125, 126 and 171 of the judgment under appeal, the

Court held, in paragraph 326 of the Kadi judgment, that the Courts of the European Union must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order, including review of such measures as are designed to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations (see also, to that effect, Hassan and Ayadi v Council and Commission, paragraph 71, and Bank Melli Iran v Council, paragraph 105). That obligation is expressly laid down by the second paragraph of Article 275 TFEU.

98 Those fundamental rights include, inter alia, respect for the rights of the defence and the right to effective judicial protection.

99 The first of those rights, which is affirmed in Article 41(2) of the Charter of Fundamental Rights of the European Union ('the Charter') (see, to that effect, the judgment of 21 December 2011 in Case C-27/09 P France v People's Mojahedin Organization of Iran [2011] ECR I-0000, paragraph 66), includes the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality.

100 The second of those fundamental rights, which is affirmed in Article 47 of the Charter, requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons, without prejudice to the power of the court having jurisdiction to require the authority concerned to disclose that information, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question ...

101 Article 52(1) of the Charter nevertheless allows limitations on the exercise of the rights enshrined in the Charter, subject to the conditions that the limitation concerned respects the essence of the fundamental right in question and, subject to the principle of proportionality, that it is necessary and genuinely meets objectives of general interest recognised by the European Union...

102 Further, the question whether there is an infringement of the rights of the defence and of the right to effective judicial protection must be examined in relation to the specific circumstances of each particular case ... including, the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question ...

103 In this case, it is necessary to determine whether, in the light of the requirements stated, in particular, in Article 3(1) and (5) TEU and Article 21(1) and (2)(a) and (c) TEU, relating to the maintenance of international peace and security while respecting international law, and specifically the principles of the Charter of the United Nations, the fact that Mr Kadi and the Courts of the European Union did not have access to the information and evidence relied on against him, to which the General Court draws attention, particularly in paragraphs 173, 181 and 182 of the judgment under appeal, constitutes an infringement of

the rights of the defence and the right to effective judicial protection.

104 In that regard, as the Court has previously stated, specifically in paragraph 294 of the Kadi judgment, it must be emphasised that, in accordance with Article 24 of the Charter of the United Nations, the Security Council has been invested by the members of the UN with the primary responsibility for the maintenance of international peace and security. To that end, it is the task of the Security Council to determine what constitutes a threat to international peace and security and to take the measures necessary, by means of the adoption of resolutions under Chapter VII of that Charter, to maintain or restore international peace and security, in accordance with the purposes and principles of the United Nations, including respect for human rights.

105 In that context, as is apparent from the resolutions, referred to in paragraphs 10 and 11 of this judgment, governing the regime of restrictive measures such as those at issue in this case, it is the task of the Sanctions Committee, on the proposal of a UN member supported by a 'statement of case' which should provide 'as much detail as possible on the basis(es) for the listing', the 'nature of the information' and 'supporting information or documents that can be provided', to designate, applying the criteria laid down by the Security Council, the organisations, entities and individuals whose funds and other economic resources are to be frozen. That designation, put into effect by the listing of the name of the organisation, entity or individual concerned on the Sanctions Committee Consolidated List which is maintained at the request of the Member States of the UN, is to be based on a 'summary of reasons' which is to be produced by the Sanctions Committee in the light of the material which the Member State proposing the listing has identified as capable of disclosure, particularly to the party concerned, and which is to be made accessible on its website.

106 When the European Union implements Security Council resolutions adopted under Chapter VII of the Charter of the United Nations, on the basis of a Common Position or a joint action adopted by the Member States pursuant to the provisions of the EU Treaty relating to the common foreign and security policy, the competent European Union authority must take due account of the terms and objectives of the resolution concerned and of the relevant obligations under that Charter relating to such implementation (see the Kadi judgment, paragraphs 295 and 296).

107 Consequently, where, under the relevant Security Council resolutions, the Sanctions Committee has decided to list the name of an organisation, entity or individual on its Consolidated List, the competent European Union authority must, in order to give effect to that decision on behalf of the Member States, take the decision to list the name of that organisation, entity or individual, or to maintain such listing, in Annex I to Regulation No 881/2002 on the basis of the summary of reasons provided by the Sanctions Committee. On the other hand, there is no provision in those resolutions to the effect that the Sanctions Committee is automatically to make available to, in particular, the European Union authority responsible for the adoption by the European Union of its decision to list or maintain a listing, any material other than that summary of reasons.

108 Accordingly, both in respect of an initial decision to list the name of an organisation, entity or individual in Annex I to Regulation No 881/2002 and, as in the present case, in respect of a decision to

maintain such a listing originally adopted before 3 September 2008, the date of the Kadi judgment, Article 7a(1) and (2) and Article 7c(1) and (2) of Regulation No 881/2002, inserted by Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation No 881/2002 (OJ 2009 L 346 p. 42) in order to amend the listing procedure following that judgment, as is explained in recital 4 of the preamble to Regulation No 1286/2009, refer exclusively to the 'statement of reasons' provided by the Sanctions Committee for the purposes of the taking of such decisions.

109 In the particular case of Mr Kadi, it is apparent from the file that the initial listing of his name, on 17 October 2001 in the Sanctions Committee Consolidated List followed a request by the United States on the basis of the adoption on 12 October 2001 of a decision in which the Office of Foreign Asset Control identified Mr Kadi as a 'Specially Designated Global Terrorist'.

110 As is apparent from recital 3 of the preamble to the contested regulation [Regulation No 1190/2008], following the Kadi judgment the Commission, by means of that regulation, decided to maintain the name of Mr Kadi on the list in Annex I to Regulation No 81/2002 on the basis of the narrative summaries of reasons which had been transmitted by the Sanctions Committee. As the General Court recorded in paragraph 95 of the judgment under appeal, and as the Commission confirmed at the hearing before the Court, the Commission was not, for that purpose, put in possession of evidence other than such a summary of reasons.

111 In proceedings relating to the adoption of the decision to list or maintain the listing of the name of an individual in Annex I to Regulation No 881/2002, respect for the rights of the defence and the right to effective judicial protection requires that the competent Union authority disclose to the individual concerned the evidence against that person available to that authority and relied on as the basis of its decision, that is to say, at the very least, the summary of reasons provided by the Sanctions Committee (see, to that effect, the Kadi judgment, paragraphs 336 and 337), so that that individual is in a position to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in bringing an action before the Courts of the European Union.

112 When that disclosure takes place, the competent Union authority must ensure that that individual is placed in a position in which he may effectively make known his views on the grounds advanced against him...

113 As regards a decision whereby, as in this case, the name of the individual concerned is to be maintained on the list in Annex I to Regulation No 881/2002, compliance with that dual procedural obligation must, contrary to the position in respect of an initial listing... precede the adoption of that decision (see France v People's Mojahedin Organization of Iran, paragraph 62). It is not disputed that, in the present case, the Commission, the author of the contested regulation, complied with that obligation.

114 When comments are made by the individual concerned on the summary of reasons, the competent European Union authority is under an obligation to examine, carefully and impartially, whether the alleged reasons are well founded, in the light of those comments and any exculpatory evidence provided with those comments...

115 In that context, it is for that authority to assess, having regard, inter alia, to the content of any such

comments, whether it is necessary to seek the assistance of the Sanctions Committee and, through that committee, the Member of the UN which proposed the listing of the individual concerned on that committee's Consolidated List, in order to obtain, in that spirit of effective cooperation which, under Article 220(1) TFEU, must govern relations between the Union and the organs of the United Nations in the fight against international terrorism, the disclosure of information or evidence, confidential or not, to enable it to discharge its duty of careful and impartial examination.

116 Lastly, without going so far as to require a detailed response to the comments made by the individual concerned ... the obligation to state reasons laid down in Article 296 TFEU entails in all circumstances, not least when the reasons stated for the European Union measure represent reasons stated by an international body, that that statement of reasons identifies the individual, specific and concrete reasons why the competent authorities consider that the individual concerned must be subject to restrictive measures...

117 As regards court proceedings, in the event that the person concerned challenges the lawfulness of the decision to list or maintain the listing of his name in Annex I to Regulation No 881/2002, the review by the Courts of the European Union must extend to whether rules as to procedure and rules as to competence, including whether or not the legal basis is adequate, are observed...

118 The Courts of the European Union must, further, determine whether the competent European Union authority has complied with the procedural safeguards set out in paragraphs 111 to 114 of this judgment and the obligation to state reasons laid down in Article 296 TFEU, as mentioned in paragraph 116 of this judgment, and, in particular, whether the reasons relied on are sufficiently detailed and specific.

119 The effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person in Annex I to Regulation No 881/2002 ... the Courts of the European Union are to ensure that that decision, which affects that person individually ... is taken on a sufficiently solid factual basis ... That entails a verification of the allegations factored in the summary of reasons underpinning that decision... with the consequence that judicial review cannot be restricted to an assessment of the abstract cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.

120 To that end, it is for the Courts of the European Union, in order to carry out that examination, to request the competent European Union authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination ...

121 That is because it is the task of the competent European Union authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded.

122 For that purpose, there is no requirement that that authority produce before the Courts of the European Union all the information and evidence underlying the reasons alleged in the summary provided by the Sanctions Committee. It is however necessary that the information or evidence produced

should support the reasons relied on against the person concerned.

123 If the competent European Union authority finds itself unable to comply with the request by the Courts of the European Union, it is then the duty of those Courts to base their decision solely on the material which has been disclosed to them, namely, in this case, the indications contained in the narrative summary of reasons provided by the Sanctions Committee, the observations and exculpatory evidence that may have been produced by the person concerned and the response of the competent European Union authority to those observations. If that material is insufficient to allow a finding that a reason is well founded, the Courts of the European Union shall disregard that reason as a possible basis for the contested decision to list or maintain a listing.

124 If, on the other hand, the competent European Union authority provides relevant information or evidence, the Courts of the European Union must then determine whether the facts alleged are made out in the light of that information or evidence and assess the probative value of that information or evidence in the circumstances of the particular case and in the light of any observations submitted in relation to them by, among others, the person concerned.

125 Admittedly, overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations may preclude the disclosure of some information or some evidence to the person concerned. In such circumstances, it is none the less the task of the Courts of the European Union, before whom the secrecy or confidentiality of that information or evidence is no valid objection, to apply, in the course of the judicial review to be carried out, techniques which accommodate, on the one hand, legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process...

126 To that end, it is for the Courts of the European Union, when carrying out an examination of all the matters of fact or law produced by the competent European Union authority, to determine whether the reasons relied on by that authority as grounds to preclude that disclosure are well founded...

127 If the Courts of the European Union conclude that those reasons do not preclude disclosure, at the very least partial disclosure, of the information or evidence concerned, it shall give the competent European Union authority the opportunity to make such disclosure to the person concerned. If that authority does not permit the disclosure of that information or evidence, in whole or in part, the Courts of the European Union shall then undertake an examination of the lawfulness of the contested measure solely on the basis of the material which has been disclosed...

128 On the other hand, if it turns out that the reasons relied on by the competent European Union authority do indeed preclude the disclosure to the person concerned of information or evidence produced before the Courts of the European Union, it is necessary to strike an appropriate balance between the requirements attached to the right to effective judicial protection, in particular respect for the principle of an adversarial process, and those flowing from the security of the European Union or its Member States or the conduct of their international relations...

129 In order to strike such a balance, it is legitimate to consider possibilities such as the disclosure of a summary outlining the information's content or that of the evidence in question. Irrespective of whether such possibilities are taken, it is for the Courts of the European Union to assess whether and to what the extent the failure to disclose confidential information or evidence to the person concerned and his consequential inability to submit his observations on them are such as to affect the probative value of the confidential evidence ...

130 Having regard to the preventive nature of the restrictive measures at issue, if, in the course of its review of the lawfulness of the contested decision, as defined in paragraphs 117 to 129 of this judgment, the Courts of the European Union consider that, at the very least, one of the reasons mentioned in the summary provided by the Sanctions Committee is sufficiently detailed and specific, that it is substantiated and that it constitutes in itself sufficient basis to support that decision, the fact that the same cannot be said of other such reasons cannot justify the annulment of that decision. In the absence of one such reason, the Courts of the European Union will annul the contested decision.

131 Such a judicial review is indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned ... those being shared values of the UN and the European Union.

132 Notwithstanding their preventive nature, the restrictive measures at issue have, as regards those rights and freedoms, a substantial negative impact related, first, to the serious disruption of the working and family life of the person concerned due to the restrictions on the exercise of his right to property which stem from their general scope combined, as in this case, with the actual duration of their application, and, on the other, the public opprobrium and suspicion of that person which those measures provoke....

133 Such a review is all the more essential since, despite the improvements added, in particular after the adoption of the contested regulation, the procedure for delisting and ex officio re-examination at UN level they do not provide to the person whose name is listed on the Sanctions Committee Consolidated List and, subsequently, in Annex I to Regulation No 881/2002, the guarantee of effective judicial protection, as the European Court of Human Rights, endorsing the assessment of the Federal Supreme Court of Switzerland, has recently stated in paragraph 211 of its judgment of 12 September 2012, Nada v. Switzerland ...

134 The essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognition of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered...

– The errors of law affecting the judgment under appeal

135 It follows from the criteria analysed above that, for the rights of the defence and the right to effective

judicial protection to be respected first, the competent European Union authority must (i) disclose to the person concerned the summary of reasons provided by the Sanctions Committee which is the basis for listing or maintaining the listing of that person's name in Annex I to Regulation No 881/2002, (ii) enable him effectively to make known his observations on that subject and (iii) examine, carefully and impartially, whether the reasons alleged are well founded, in the light of the observations presented by that person and any exculpatory evidence that may be produced by him.

136 Second, respect for those rights implies that, in the event of a legal challenge, the Courts of the European Union are to review, in the light of the information and evidence which have been disclosed inter alia whether the reasons relied on in the summary provided by the Sanctions Committee are sufficiently detailed and specific and, where appropriate, whether the accuracy of the facts relating to the reason concerned has been established.

137 On the other hand, the fact that the competent European Union authority does not make accessible to the person concerned and, subsequently, to the Courts of the European Union information or evidence which is in the sole possession of the Sanctions Committee or the Member of the UN concerned and which relates to the summary of reasons underpinning the decision at issue, cannot, as such, justify a finding that those rights have been infringed. However, in such a situation, the Courts of the European Union, which are called upon to review whether the reasons contained in the summary provided by the Sanctions Committee are well founded in fact, taking into consideration any observations and exculpatory evidence produced by the person concerned and the response of the competent European Union authority to those observations, will not have available to it supplementary information or evidence. Consequently, if it is impossible for the Courts to find that those reasons are well founded, those reasons cannot be relied on as the basis for the contested listing decision.

138 Hence, in paragraphs 173, 181 to 184, 188 and 192 to 194 of the judgment under appeal, the General Court erred in law by basing its finding that the rights of the defence and the right to effective judicial protection and, consequently, the principle of proportionality had been infringed, on the failure of the Commission to disclose to Mr Kadi and to the General Court itself the information and evidence underlying the reasons for maintaining the listing of Mr Kadi's name in Annex I to Regulation No 881/2002, when, as is apparent from paragraphs 81 and 95 of the judgment under appeal, the General Court had recognised, both in order to reject Mr Kadi's application for a measure of organisation of procedure in order to secure that disclosure and in the course of the hearing, that the Commission was not in possession of that information and evidence.

139 Contrary to what is stated in paragraphs 181, 183 and 184 of the judgment under appeal, the passages in the Kadi judgment to which the General Court referred in those paragraphs do not indicate that the fact that the party concerned and the Courts of the European Union do not have access to information or evidence which the competent Union authority does not have in its possession constitutes, as such, an infringement of the rights of the defence or the right to effective judicial protection.

140 Further, and bearing in mind that the assessment, by the General Court, of whether the statement of

reasons is or is not sufficient is subject to review by the Court on an appeal ... the General Court erred in law by basing, as is apparent from paragraphs 174, 177, 188 and 192 to 194 of the judgment under appeal, its finding that there had been such an infringement on the fact that, in its opinion, the allegations made in the summary of reasons provided by the Sanctions Committee were vague and lacking in detail, even though such a general conclusion cannot be drawn if each of those reasons is examined separately.
141 Admittedly, as the General Court correctly ruled by endorsing, in paragraph 177 of the judgment under appeal, the argument of Mr Kadi set out in the fourth indent of paragraph 157 of that judgment, the last of the reasons stated in the summary provided by the Sanctions Committee, namely the allegation that Mr Kadi had been the owner in Albania of several firms which funnelled money to extremists or employed those extremists in positions where they controlled the funds of those firms, up to five of which received working capital from Usama bin Laden, is insufficiently detailed and specific given that it contains no indication of the identity of the firms concerned, of when the alleged conduct took place and of the identity of the 'extremists' who allegedly benefitted from that conduct.
142 On the other hand, the same cannot be said of the other reasons stated in the summary provided by the Sanctions Committee.
143 The first reason, based on Mr Kadi's acknowledgement that he is a founding trustee and directed the activities of the Muwafaq Foundation, which always operated under the umbrella of Makhtab al-Khidamat/Al Kifah – founded by, among others, was Usama bin Laden, which was the predecessor to Al-Qaeda and which, following the dissolution of Makhtab al-Khidamat/Al Kifah in June 2001, was absorbed into Al-Qaeda – is sufficiently detailed and specific, in that it identifies the entity concerned and Mr Kadi's role in relation to it, together with mention of an alleged link between that entity, on the one hand, and Usama bin Laden and Al-Qaeda, on the other.
144 The second reason is based on the fact that, in order to manage the European offices of the Muwafaq Foundation, Mr Kadi appointed, in 1992, Mr Al-Ayadi on the recommendation of Mr Julaidan, a financier who had fought alongside Usama bin Laden in Afghanistan in the 1980s. When he was appointed, Mr Al-Ayadi was said to be one of the principal leaders of the Tunisian Islamic Front and to be operated under agreements with Usama bin Laden. Mr Al-Ayadi is said to have gone to Afghanistan, in the early 1990s, to receive paramilitary training there, then, with other individuals, to Sudan to conclude there with Usama bin Laden an agreement regarding the reception and training of Tunisians and, later, an agreement regarding the reception of Tunisian mujahidin from Italy by Usama bin Laden's collaborators in Bosnia and Herzegovina.
145 That second reason is sufficiently detailed and specific, in that it contains the necessary detail concerning the time and context of the appointment in question and information on the individuals involved in the allegation that that appointment was connected with Usama bin Laden.
146 The third reason, which is based on a statement allegedly made in 1995 by Mr Talad Fuad Kassem, the leader of the Al-Gama'at al Islamiyya, to the effect that the Muwafaq Foundation provided logistical and financial support to a mujahidin battalion in Bosnia and Herzegovina, is based on the fact that, that Foundation was said to be involved, in the mid 1990s, alongside Usama bin Laden, in providing financial

support for terrorist activities of those mujahidin and to have assisted in the trafficking of arms from Albania to Bosnia and Herzegovina.

147 That third reason is sufficiently detailed and specific, since it identifies the person who made the statement concerned, the forms of activity reported, the time when they were allegedly carried out and their alleged link with the activities of Usama bin Laden.

148 The fourth reason is based on the fact that Mr Kadi was one of the major shareholders in the Bosnian bank Depositna Banka, now closed, in which Mr Al-Ayadi held a position and acted as nominee for Mr Kadi, and where planning sessions for an attack against a United States facility in Saudi Arabia might have taken place.

149 Contrary to what is stated in paragraph 175 of the judgment under appeal, that fourth reason is sufficiently detailed and specific, in that it identifies the financial institution through which Mr Kadi allegedly contributed to terrorist activities and the nature of the alleged terrorist project concerned. The circumstance that the indication that it was in that institution that planning sessions for that alleged project took place is expressed as a possibility is not incompatible with the essential requirements of the duty to state reasons, since the reasons for listing on a European Union list may be based on suspicions of involvement in terrorist activities, without prejudice to the determination of whether those suspicions are justified.

150 Although it emerges from paragraphs 138 to 140 and 142 to 149 of this judgment that errors of law were made by the General Court, it is necessary to determine whether, notwithstanding those errors, the operative part of the judgment under appeal can be seen to be well founded on legal grounds other than those maintained by the General Court, in which event an appeal must be dismissed...

– The unlawfulness of the contested regulation

151 It must be observed, as regards the first reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 143 of this judgment, that, in his comments of 10 November 2008 submitted in support of his action before the General Court, Mr Kadi, while acknowledging that he had been a founding trustee of the Muwafaq Foundation, denied that it had provided any support to terrorism and that there was any link between it and Makhtab al-Khidamat/Al Kifah. Attaching to those comments the Muwafaq Foundation's Constitution and Declaration of Trust, Mr Kadi claimed that the objects and purpose of that foundation were exclusively charitable and humanitarian, directed mainly towards providing relief to people suffering famine in the world, in particular in the Sudan. While admitting that he was involved in international strategic decisions of the Muwafaq Foundation, he denied any involvement in the day-to-day management of its activities across the world, particularly in the recruitment of local staff. He also disputed that the Muwafaq Foundation joined Al-Qaeda in June 2001, stating in particular, and providing documents in support of his contention, that the foundation had ceased operations by 1998 at the latest.

152 In its reply of 8 December 2008 to the comments of Mr Kadi, also submitted to the General Court, the Commission contended that the fact that some or all of the activities of the entity concerned had

ceased did not rule out the possibility that that entity, having continuous legal personality, had joined Al-Qaeda.

153 It is however clear that no information or evidence has been produced to substantiate the allegations of the Muwafaq Foundation's involvement in international terrorism in the form of links with Makhtab al-Khidamat/Al Kifah and Al-Qaeda. In such circumstances, the indications of the role and duties of Mr Kadi in relation to that foundation are not such as to justify the adoption, at European Union level, of restrictive measures against him.

154 As regards the second reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 144 of this judgment, Mr Kadi, in his comments of 10 November 2008, while accepting that he had recruited, in 1992, on the recommendation of Mr Julaidan, Mr Al-Ayadi to head the European offices of the Muwafaq Foundation, none the less asserted that the sole aim of that foundation in Europe was to provide support to refugees from Bosnia and Croatia during the Balkans conflict in the 1990s. Mr Kadi stated that Mr Julaidan, who, at that time, was working with him on a project supporting vocational training for refugees from Croatia, had recommended Mr Al-Ayadi to him because of his professional experience in the management of humanitarian work and because of his integrity. Mr Kadi also claimed that, in 1992, he had no grounds to suspect that Mr Al-Ayadi and Mr Julaidan were supporting terrorist activities, stating that, in the 1980s, Usama bin Laden was regarded as an ally of the West against the Soviet Union, that only after 1996 was Usama bin Laden described as a threat to international security, and that only in October 2001 and September 2002 respectively were Mr Al-Ayadi and Mr Julaidan listed on the Sanctions Committee Consolidated List. Lastly, Mr Kadi asserts that he had no knowledge of the Tunisian Islamic Front and the alleged links between Mr Al-Ayadi and that organisation.

155 In its reply of 8 December 2008 to Mr Kadi's comments, the Commission asserted that the recruitment of Mr Al-Ayadi by Mr Kadi on the recommendation of Mr Julaidan, combined with the fact that Mr Al-Ayadi and Mr Julaidan had contacts with Usama bin Laden, justified the conclusion that those various individuals had acted in concert or were part of one single network. The Commission added that, in such circumstances, it was of no consequence that Mr Kadi claimed to have been unaware of the alleged links between Mr Al-Ayadi and the Tunisian Islamic Front.

156 In that regard, while it is conceivable that the material relied on in the summary of reasons provided by the Sanctions Committee as regards the recruitment by Mr Kadi, in 1992, of Mr Al-Ayadi on the recommendation of Mr Julaidan and the alleged involvement of Mr Al-Ayadi and Mr Julaidan in terrorist activities in association with Usama bin Laden might have been deemed sufficient to justify the initial inclusion, in 2002, of Mr Kadi's name in the list of persons in the annex to Regulation No 881/2002, it must be observed that that same material, not otherwise substantiated, cannot justify maintaining, after 2008, the listing of Mr Kadi's name in that regulation, as amended by the contested regulation. Given how far apart in time those two measures are, that material, which refers to 1992, is no longer sufficient in itself to justify, in 2008, maintaining, at European Union level, the name of Mr Kadi in the list of persons and entities subject to the restrictive measures at issue.

157 As regards the third reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 146 of this judgment, in his comments of 10 November 2008, Mr Kadi asserted that he had no knowledge of Mr Talad Fuad Kassem. He also stated that he had never provided financial, logistic or any other support of any kind to that individual, to the organisation which he led or to mujahidin in Bosnia and Herzegovina. Mr Kadi also maintained that, so far as he was aware, neither the Muwafaq Foundation nor any of its employees had ever provided any such support of that kind.
158 In its reply of 8 December 2008 to Mr Kadi's comments, the Commission asserted that the statement of Mr Talad Fuad Kassem served as partial corroboration of the fact that Mr Kadi had used his position for purposes other than ordinary business purposes. The Commission added that, in such circumstances, it was irrelevant whether or not Mr Kadi knew Mr Talad Fuad Kassem.

159 However, no information or evidence has been submitted which makes it possible to determine the accuracy of the statement attributed to Mr Talad Fuad Kassem in the summary of reasons provided by the Sanctions Committee and to assess, having regard, in particular, to Mr Kadi's claim that he had no knowledge of Mr Talad Fuad Kassem, the probative value of that statement in respect of the allegations that the Muwafaq Foundation was providing support to terrorist activities in Bosnia and Herzegovina in association with Usama bin Laden. In such circumstances, the indication relating to the statement of Mr Talad Fuad Kassem does not constitute sufficient basis to justify the adoption, at European Union level, of restrictive measures against Mr Kadi.
160 As regards the fourth reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 148 of this judgment, in his comments of 10 November 2008, Mr Kadi denied ever having provided financial support to international terrorism through Depositna Banka or through any other entity. He explained that he had acquired an interest in that bank for entirely commercial reasons having regard to the prospects of social and economic reconstruction in Bosnia after the Dayton Peace Accord of 1995, and that he had, in order to comply with local law, appointed Mr Al-Ayadi, a Bosnian national, as his nominee to hold his shares in that bank. Relying on reports from international firms of auditors relating to the period from 1999 until 2002 and on the report of a financial analyst engaged by a Swiss magistrate covering the period from 1997 to 2001, he claimed that none of those reports suggest that Depositna Banka was involved in any way in the funding or support of terrorism. Mr Kadi disputed that that bank had been closed, explaining, and providing supporting documents, that it had merged with another bank in 2002. Further, he produced documents relating to an occasion, in 1999, when United States authorities, the manager of Depositna Banka and the political authorities in Bosnia were in contact to discuss legal issues relating to the banking sector in Bosnia and Herzegovina. Lastly, Mr Kadi claimed that if the Saudi Arabian authorities had had grounds to suspect that any attacks were planned, within the Depositna Banka, against United States interests in Saudi Arabia, they would inevitably have questioned him, as the Saudi Arabian owner of that institution. According to Mr Kadi the Saudi Arabian authorities have never done so.

161 In its reply of 8 December 2008 to Mr Kadi's comments, the Commission asserted that the indications that Depositna Banka was used for the planning of an attack in Saudi Arabia serve as partial corroboration that Mr Kadi had used his position for purposes other than ordinary business purposes.
162 However, since no information or evidence has been produced to support the claim that planning sessions might have taken place in the premises of Depozitna Banka for terrorist acts in association with Al-Qaeda or Usama bin Laden, the indications relating to the association of Mr Kadi with that bank are insufficient to sustain the adoption, at European Union level, of restrictive measures against him.
163 It follows, from the analysis set out in paragraph 141 and paragraphs 151 to 162 of this judgment, that none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.
164 In those circumstances, the errors of law, identified in paragraphs 138 to 140 and 142 to 149 of this judgment, which vitiate the judgment under appeal are not such as to affect the validity of that judgment, given that its operative part, which annuls the contested regulation in so far as it concerns Mr Kadi, is well founded on the legal grounds stated in the preceding paragraph.
165 Consequently, the appeals must be dismissed.

Asset Freezes in the US

Here is an excerpt from the judgment of the District Court for the District of Columbia in **Kadi v Geithner** in March 2012.

This case, brought by Yassin Abdullah Kadi, a citizen and permanent resident of Saudi Arabia, involves a challenge to the decision of the Office of Foreign Assets Control ("OFAC") to designate him as a "specially designated global terrorist ("SDGT")...The listing of SDGTs is governed by the International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq. ("IEEPA"), and Executive Order 13,224 (66 Fed. Reg. 49,079 (Sept. 23, 2001)) ("EO 13,224"). IEEPA "authorizes the President to declare a national emergency when an extraordinary threat to the United States arises that originates in substantial part in a foreign state." Holy Land Found. v. Ashcroft ... (D.C. Cir. 2003). Such a declaration provides the President with extensive authority set forth in 50 U.S.C. § 1702, which permits the President to block property subject to the jurisdiction of the United States. Specifically, the President is authorized to:

> investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with

> respect to any property, subject to the jurisdiction of the United States . . . .50 U.S.C. § 1702(a)(1)(B).

IEEPA further provides that, in the event of "judicial review of a determination made under this section, if the determination was based on classified information . . . such information may be submitted to the reviewing court ex parte and in camera." ...

After September 11, 2001, the President issued EO 13,224 invoking his authority under IEEPA and the United Nations Participation Act, 22 U.S.C. § 287c. The Executive Order declared a "national emergency" with respect to "grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks . . . committed on September 11, 2001, . . . and the continuing and immediate threat of further attacks on United States nationals or the United States." ... ordered the blocking of property of twenty-seven specific terrorists and terrorist organizations ... The Secretary of the Treasury is authorized to designate additional persons whose property or interests in property should be blocked, where the Secretary finds that such persons "act for or on behalf of" or are "owned or controlled by" designated terrorists, or they "assist in, sponsor, or provide . . . support for" (including "financial . . . support" or "financial . . . services") or are "otherwise associated with" them... The Secretary has delegated his authorities under the Executive Order to the Director of OFAC.... Persons designated pursuant to the Executive Order are referred to as "specially designated global terrorists" (SDGT).... ..Kadi is a citizen and permanent resident of Saudi Arabia and a self-described "prominent Saudi Arabian businessman and philanthropist."... On October 12, 2001, OFAC designated Kadi a SDGT pursuant to the IIEPA and EO 13,224 .. which, by operation of law, resulted in the blocking of all of his property and interests in property subject to the jurisdiction of the United States. It is undisputed that OFAC did not give notice to Kadi before blocking his assets. The designation was made known to Kadi and to the public through a press release instructing financial institutions to freeze Kadi's assets.... A press release was also issued by authorities in the United Kingdom... By letter dated October 15, 2001, OFAC also mailed Kadi a "Notice of Blocking" providing direct notice of the designation and blocking and advising him of the administrative procedures available to challenge OFAC's action... Notice of the designation was also published on October 26, 2001 in the Federal Register...

Kadi thereafter sought judicial review in the High Court in London.... In response to a request for information by the United Kingdom, the United States Treasury Department faxed a two-page document to United Kingdom officials in October 2001 ("two-page fax"), which Kadi learned about during his court proceedings in London... Kadi places much emphasis on this two-page fax, which summarized unclassified information relating to Kadi's financial support of terrorist activities through a charitable organization known as the Muwafaq Foundation and his other ties to terrorists and terrorism financing. ...Kadi claims that around May 23, 2002, he met with OFAC staff at the U.S. Embassy in Saudi Arabia, where OFAC denied knowledge of the two-page fax... However, there is no dispute that Kadi received a copy of the two-page fax, reviewed it, and proceeded to refute various contentions as part of his petition for reconsideration.

Kadi petitioned OFAC for reconsideration on December 21, 2001.In the months and years thereafter, he

has submitted several witness statements and other materials in support of his petition and has engaged in a series of exchanges with OFAC. On March 12, 2004, OFAC issued a twenty-page unclassified memorandum denying Kadi's request for reconsideration ("OFAC Memorandum")... Kadi maintains that this is the only formal written statement he has received from the United States government... Based on these events, Kadi filed this action on January 16, 2009, challenging the evidentiary basis for his designation and the freezing of his assets, and raising an array of constitutional claims. Specifically, he claims violations under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., the IEEPA, and the First, Fourth, and Fifth Amendments. On May 22, 2009, defendants filed a motion to dismiss or, in the alternative, for summary judgment. Kadi opposes the motion and seeks discovery under Rule 56(f). Kadi also seeks leave to file an amended complaint. The Court heard argument with respect to the pending motions on April 9, 2010, and thereafter requested supplemental briefing, which has now been completed....

Plaintiffs challenge Kadi's designation as a SDGT as violating the requirements of the APA, IIEPA, and EO 13,224. The APA requires that the Court "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."... The court must be satisfied that the agency has "'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"... The agency's decisions are entitled to a "presumption of regularity,"... and although "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.".. The Court's review is confined to the administrative record, subject to limited exceptions not applicable here....

I. APA Claim

A. Standard for Motion for Summary Judgment and Discovery

Before addressing the merits of Kadi's APA claim, the Court first considers Kadi's preliminary argument that summary judgment is inappropriate because there are disputed issues of material fact. Alternatively, he claims that the motion for summary judgment is premature because he has not been provided an opportunity to obtain discovery on his claims...

In general, summary judgment "is proper only after the plaintiff has been given adequate time for discovery."... However, a party opposing summary judgment and seeking to obtain discovery under Rule 56(f) has the burden of stating "concretely why additional discovery is needed to oppose a motion for summary judgment."..

Kadi argues that because the classified record was not made available to him, he is unable to respond to the motion for summary judgment. Moreover, he claims that because subsequent decisions by other countries "vindicated him," the administrative record is therefore incomplete, and he contends that he should be given an opportunity to supplement it. The Court rejects these arguments. Subsequent to the 2004 decision, Kadi has had several years and opportunities to petition OFAC to supplement the

administrative record, but he has not done so. Moreover, absent "evidence that the agency has given a false reason . . . discovery is inappropriate in cases under the APA."... Although Kadi attempts to argue that OFAC has acted in bad faith, nothing in the record supports Kadi's contention. Even if the Court permitted discovery, it is doubtful that it would garner additional facts that would help to decide whether the agency action was arbitrary and capricious, given the deferential review of such actions... Accordingly, the Court will deny Kadi's motion for discovery under Rule 56(f) with respect to the APA claim and will proceed to resolve it.

B. Merits of the APA Claim

Kadi's APA claim primarily challenges OFAC's decision to continue his SDGT designation as arbitrary and capricious, as based on a lack of sufficient procedural safeguards, for insufficiency of the evidence in the administrative record, and for OFAC's misplaced reliance on the facts that were in the record.... In considering the merits of the claim, the Court has reviewed the parties' submissions, the arguments made by the parties at the hearing before the Court, and the entire administrative record, which consists of both the classified and unclassified record.

In reviewing a challenge to the agency's decision as arbitrary and capricious, the Court bears several considerations in mind. The D.C. Circuit has stated that "a highly deferential review applies" to examination of a SDGT designation. ...As previously stated, the "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.".. The agency's decisions are entitled to a "presumption of regularity," ...and although "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.".. The Court, then, "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." .. Courts are particularly mindful that their review is highly deferential when matters of foreign policy and national security are concerned...

1. Overview of the OFAC Decision and Kadi's Arguments6

After petitioning OFAC for reconsideration in December 2001, Kadi and the agency engaged in several meetings and Kadi provided numerous statements and submissions. On March 12, 2004, OFAC notified Kadi that his petition for reconsideration was denied and that his name would remain on the list of SDGTs.. OFAC emphasized that its determination rested on the "totality of the record" (both classified and unclassified), which showed that Kadi had financial relationships — primarily through the Muwafaq Foundation, but also through other Kadi companies — with many persons and organizations that were designated SDGTs by OFAC:

> No one element, no one contact, no one accusation of funding is taken as being determinative of the assessment that AL-QADI has been providing support to terrorists through his actions. Rather, when considering the number of sources, the numbers of activities and length of time, the totality of the evidence, both classified and unclassified, this provides a reason to believe Yasin AL-QADI has funded terrorist and extremist

individuals and operations.

In deciding that Kadi's continued designation was warranted, OFAC considered an administrative record of over 2800 pages, which included the extensive submissions Kadi made to OFAC during the reconsideration process, as well as other documents. OFAC also considered a classified record. Based on its assessment of all this evidence, OFAC determined that "a reasonable basis remains to continue the designation of [Kadi] under E.O. 13224." OFAC invoked each of the three grounds authorized in EO 13,224, finding that there was "reason to believe" that Kadi was:

• acting for or on behalf of al Qaida, Osama Bin Laden, and Makhtab al-Khidamat, persons listed in the Annex to E.O. 13,224;

• assisting in, sponsoring, or providing financial, material, or technological support for, or financial or other services to or in support of, among others, al Qaida, Osama Bin Laden, Makhtab al-Khidamat, Hamas, the Revival of Islamic Heritage Society, Al-Haramayn (Bosnia),Chafiq Ayadi, and Wa'el Julaidan, persons subject to E.O. 13,224; and

• associated with, among others, al Qaida, Osama Bin Laden, Makhtab al-Khidamat, Hamas, the Revival of Islamic Heritage Society, Al-Haramayn (Bosnia), Chafiq Ayadi, and Wa'el Julaidan . . . .

Although OFAC invoked all three grounds, and emphasized its decision to continue the designation based on the totality of the record, OFAC's decision appears to rely primarily on Kadi's financial support of terrorism. Neither Kadi nor the Government take the position that all three criteria must be satisfied in order to uphold the designation.

The OFAC Memorandum contains repeated emphasis on "money" and "funding," both in the "Conclusion" and throughout the final decision. The Government states that it is not moving for summary judgment on the "otherwise associated with" criterion, nor does it seek summary judgment on the "material support" or "services" element of the basis for designation... These terms, however, are the focus of Kadi's vagueness and overbreadth claims.

Kadi acknowledges the highly deferential review accorded to OFAC's decision. But he claims that the administrative record, even when viewed in its totality, shows that "there is no 'substantial evidence' ... of any sort" to support the designation.. and he argues that the evidence underlying OFAC's decision is unreliable. Specifically, Kadi claims that the administrative record fails to support OFAC's findings that he (1) provided support to terrorism through his leadership in the Muwafaq Foundation; (2) provided financial or other support to SDGTs; or (3) had any other ties to justify the sanctions imposed against him... As part of his attack on the sufficiency of the evidence, Kadi takes issue with OFAC's reliance on his own statements as evidenced in the frequent reference to them in the OFAC Memorandum. He also protests OFAC's use of classified information to support the continued designation. Finally, Kadi continues to dispute the accuracy and reliability of certain pieces of evidence in the record, notably the two-page fax, news articles, and the affidavit submitted by FBI Agent Richard Wright. He also points to subsequent decisions by other countries, with varying procedural postures, as purported indicators of OFAC's error in continuing his designation.

Kadi argues that the two-page fax sent by the United States to the United Kingdom contained

"substantially erroneous" information. He further claims that the fax's reliance on "non-evidential sources" such as news articles and information from websites constituted hearsay.... But Kadi's argument that the Government is categorically foreclosed from considering "hearsay" sources is wrong. Courts, including the D.C. Circuit, have held that hearsay evidence can be considered as part of the administrative record. ..Accordingly, OFAC's reliance on newspaper articles, whether in the two-page fax or in the administrative record generally, was entirely proper.

Kadi also alludes to the findings by other investigative bodies around the world that, according to him, have considered the same or similar terrorism allegations against him, and "vindicated" him in every forum... However, the decisions cited by Kadi all post-date the March 2004 OFAC decision under review and are not part of the administrative record. Notwithstanding the impropriety of considering such decisions, the Court would, in any event, be reluctant to rely on the decisions of other countries based on information that likely differed from the administrative record compiled by and available to OFAC. Moreover, these decisions may have been reached under different standards of proof or review, which further undermines any persuasiveness they would have.

2. Kadi's Involvement in the Muwafaq Foundation

The Court now turns to the evidentiary basis for OFAC's conclusion that Kadi provided support — particularly financial support — to terrorist causes and to other SDGTs. OFAC emphasizes Kadi's leadership in the Muwafaq Foundation in its March 2004 decision. Accordingly, the Court looks first to Kadi's relationship with that entity.

The Muwafaq Foundation — Arabic for "Blessed Success" or "Holy Success" — was founded in the Channel Islands on May 31, 1992 as a charitable foundation. Sudan was the first country in which Muwafaq was active; it subsequently operated in Pakistan, Afghanistan, Ethiopia, Somalia, Bosnia/Herzogovina, Albania, Austria, and Germany... Kadi refers to Muwafaq as a "highly decentralised operation" that "carried out separate activities in various countries or regions"; therefore, it had "no central administration," and "no central accounting systems nor any central bank accounts.".. Muwafaq reportedly terminated operations in 1996 or 1997, but the OFAC Memorandum states that Muwafaq "continued to operate until mid-2001 under the umbrella of Makhtab al-Khidamat . . . considered to be the precursor to al-Qaida," before Makhtab al-Khidamat dissolved and was absorbed into Osama Bin Laden's organization, and that "Muwafaq . . . joined [al-Qaida]."... Kadi's submissions also note that Muwafaq is still registered in Holland and Belgium..

The administrative record reflects that Kadi played a significant leadership role in Muwafaq. Kadi is one of six trustees, and the others "delegated . . . the running and operation of the Foundation" to Kadi, who "was the driving force behind the administration of the foundation.".. He effectively conceded that he directly supervised the individual country offices. Kadi "selected the managers responsible for the various countries"; worked with them to determine "which charitable activities to engage in"; helped "raise money for those activities" ; and, "[w]henever possible," he visited the country locations where

Muwafaq operated "to meet with the country managers regarding the activities of the Foundation," "about 3-4 times a year" for each country. ..Significantly, in addition to choosing and managing Muwafaq's personnel, Kadi also transferred funds to the organization. He concedes that he made those transfers, but argues that they were "solely and exclusively for the charitable purposes of the foundation." OFAC relied on Kadi's involvement in Muwafaq and, in particular, activities claimed to have occurred in Bosnia, Albania, Sudan, and Pakistan, to conclude that Kadi financially supported terrorist activities, primarily through Muwafaq, but also through other Kadi-owned entities. It considered Kadi's relationships with, and financial transfers to, designated terrorists Abdul Latif Saleh, Wa'el Julaidan, and Chariq Ayadi — who were all involved in Muwafaq.

a. Activities in Albania and Bosnia and Kadi's Relationship to Saleh
OFAC pointed to Kadi's activities in Albania, through Muwafaq and other Kadi-owned entities, as evidence of Kadi's financial support of terrorist activities and other SDGTs. OFAC also concluded that "[s]ome involvement in the financing of these activities had also been provided by Osama Bin Laden." .. According to OFAC's findings, Muwafaq gave logistical and financial support to Al-Gama'at Al-Islamiya, a mujahadin battalion in Bosnia that was designated as a SDGT on October 31, 2001. The organization also transferred $500,000 to terrorist organizations in the Balkans in the mid-1990s.... OFAC also found that Muwafaq was involved in arms trafficking from Albania to Bosnia. And OFAC concluded that as of late 2001, Kadi had continued to finance institutions and organizations in the Balkans after Muwafaq ceased operations there, including two entities that were designated as SDGTs in early 2002 —The Revival of Islamic Heritage Society's Pakistan and Afghanistan offices and the Bosnia-Herzegovina branch of the Al-Haramain Foundation..
Kadi also owned several Albanian companies, which, according to OFAC, "funneled money to extremists or employed extremists in positions where they controlled the firms' funds."... In addition, "Bin Laden allegedly provided the working capital for four or five of AL-QADI's companies in Albania." ... In 1992, Kadi met Abdul Latif Saleh at a medical conference, and soon thereafter entered into several business ventures with him, including Karavan, an Albanian construction and property development company, and what OFAC characterizes as Kadi's main Albanian firm.. According to OFAC, Saleh was general manager of all of Kadi's businesses in Albania and held 10% of Kadi Group investments in Albania... He was also an "official signer" for Karavan and its bank accounts, and had authorization to withdraw money directly from Kadi's bank accounts and transfer funds.. Saleh was also the head of Muwafaq's Albanian operations..

Kadi himself admits that money was taken from his local businesses "to make payments to support [Muwafaq's] activities."... Money was often taken from Karavan's accounts to fund Muwafaq, and Karavan's accounts were also used to make contributions to other nongovernmental organizations; Kadi would then reimburse Karavan... This arrangement was confirmed by OFAC's interviews with two Karavan employees — Violet Spaho, a financial manager, and Amr Al Zainy (aka Amr al-Zaini), who

was Karavan's director and Kadi's financial representative in Albania. According to OFAC, when Karavan was ready to send a large sum of money back to Saudi Arabia as profits, the main office in Saudi Arabia instructed Karavan to give the funds to charitable causes, which included Muwafaq.... OFAC pointed to large wire transfers in and out of Kadi's personal bank accounts, as well as large cash withdrawals made from Karavan accounts and large payments to Saleh..

In 1999, Saleh was deported from Albania. Kadi claimed that Saleh was deported as a matter of mistaken identity — he shared the same name with an Egyptian citizen who was "a member of the Jihad Group." ... However, OFAC had a different account. It found that Saleh was expelled because of his ties with known terrorists, including Osama Bin Laden, and stated that Saleh's number had been found in the phone books of Bin Laden associates who had targeted the U.S. Embassy in Tirana in 1998. OFAC, based on an interview with Al Zainy, noted that when Wa'el Julaidan, a SDGT characterized by OFAC as a "Bin Laden associate," visited Albania, Saleh treated Julaidan as his boss... OFAC also believed that Saleh had founded and organized the Albanian Islamic Jihad (AIJ).. OFAC claimed that Kadi was an active supporter and fundraiser for AIJ, and noted that Muwafaq operated a school in Kukes in 1997, where several students had been selected for membership in AIJ.. Kadi confirmed that Muwafaq financially supported the school, and that Saleh was involved in running it, but stated that it shut down due to financial problems..

b. Involvement in Other Countries and Other Muwafaq Ties

OFAC also considered Muwafaq's involvement in other countries such as Pakistan and Sudan, and other connections that indicated that Muwafaq was tied to terrorist activites and SDGTs. Muwafaq's Pakistan operation was established in Islamabad in 1992, and Kadi hired Amir Mehdi to be its local director.... As director, Mehdi's responsibilities included handling and distributing Muwafaq funds. Mehdi turned out not to be a good choice. Kadi himself conceded that the Pakistan Government raided Muwafaq's office in Islamabad on March 21, 1995, and that subsequently "the officials of the FIA (the Pakistan security services) arrested Amir Mehdi on March 29, 1995." .. Kadi's only explanation was that FIA had also conducted raids and targeted other Muslim charities working in Pakistan.. According to OFAC, however, the reason for the raid was Mehdi's involvement in terrorist activities. Specifically, one of Mehdi's telephone numbers had been used by associates of terrorists in Pakistan and abroad, and open source reporting had indicated that the raid was triggered by Ramzi Yousef's arrest for the first World Trade Center bombing... Kadi claimed that he terminated Mehdi's employment following his release from arrest in 1995... The Pakistan offices were permanently closed in 1997...

OFAC also pointed to ties between Muwafaq's office in Sudan and Osama Bin Laden, as well as Kadi's claimed acknowledgment that Muwafaq's Sudan office had "provided assistance to jihad activities in the Middle-East and the Balkans." .. The administrative record reflects that Sudan was the first country in which Muwafaq was active, and that it had an office in Khartoum... OFAC stated that when Muwafaq opened in Sudan, around 1991 to 1993, Osama Bin Laden was based in the country. Kadi closed the

office in 1996, apparently having become embroiled in accusations of terrorism... The Africa Confidential had implicated Muwafaq in terrorism, but Kadi and the publication eventually settled a libel action. OFAC considered that resolution, but rejected Kadi's claim that it supported a finding that Muwafaq was not involved in supporting terrorist activities or SDGTs..

OFAC also considered Muwafaq's relationship to Makhtab al-Khidamat, an umbrella organization established in the early 1980s that was believed to be the precursor to al-Qaida. OFAC found that "Muwafaq was part of Makhtab al-Khidamat and continued to operate under the Makhtab al-Khidamat umbrella until mid-2001, when the latter dissolved and was absorbed into Osama Bin Laden's organization. Subsequently, a number of Arab [NGOs] and organizations formerly affiliated with Makhtab al-Khidamat . . . joined Al-Qaida. These included Muwafaq." .. Kadi denies this claim, noting that Muwafaq had ceased operating by 1998 at the latest....

c. Kadi's Arguments

Kadi disputes OFAC's findings and maintains that Muwafaq was an organization engaged in charitable activities, not in supporting terrorism. He claims that he provided a legitimate explanation for any expenditures through Muwafaq, which OFAC simply ignored, and accuses OFAC of drawing a conclusory connection between Muwafaq (and by extension, Kadi) and terrorism, by failing to consider "all of the good works done by the Foundation.".. Although Kadi admits that he transferred large amounts of cash to certain Muwafaq personnel who were implicated in terrorist activities, Kadi claims no knowledge of their involvement and states that, in any case, his involvement with them predated their designations as SDGTs.

Kadi surmises that the "principal source" for accusations against Muwafaq was likely the October 19, 1999 USA Today article authored by Jack Kelley... The article, titled "Saudi Money Aiding Bin Laden Businessmen Are Financing Front Groups," described how prominent businessmen in Saudi Arabia were transferring tens of millions of dollars to Bin Laden-linked bank accounts, and identified "Blessed Relief" as a "front" for Bin Laden... Kadi contends that this article was unreliable because USA Today later conceded that it had "several errors" and because Kelley was subsequently found "to have fabricated several high-profile stories." ...

To the extent Kadi contends that newspaper articles cannot be relied upon by the Government at all, that proposition is not well-grounded. As already stated, reliance on hearsay is plainly allowed. Furthermore, reliance on newspaper articles has been permitted to "fill in evidentiary gaps when there is corroboration," as well as to provide background information... This is consistent with the generally recognized principle that reliability of evidence and reasonableness are the touchstones of measuring the agency's decision, in contrast to Kadi's assumption that newspapers are per se unreliable.

More to the point, Kadi does not claim that Kelley fabricated any assertions in the article that would be relevant here. And, although USA Today ultimately corrected some errors that appeared in the article, the published correction post-dated OFAC's decision and hence is not part of the administrative record. The same reasoning applies to Kadi's reliance on Kelley's subsequent resignation. Moreover, OFAC does not

appear to rely significantly on Kelley's article. And Kadi, as part of his submissions, provided OFAC with his version of the claims made in the Kelley article.. OFAC therefore had the benefit of Kadi's account which it then reasonably discredited based on the evidence in the record as a whole.

Contrary to Kadi's argument that OFAC "failed to consider" the good works of Muwafaq, both the March 2004 OFAC Memorandum and the administrative record indicate otherwise. OFAC acknowledged that Kadi had provided evidence of Muwafaq's involvement "in substantial charitable activities." Nevertheless, OFAC concluded that this evidence "by no means undermines the determination that the charity was, in addition, used to fund terrorism." .. It was not unreasonable for OFAC to conclude that charitable organizations that perform good works could also concurrently act as conduits for terrorist activities. In its Memorandum, OFAC cited to the April 12, 2002 testimony by the Deputy Assistant Secretary for Terrorism and Violent Crime before the House Financial Subcommittee on Oversight and Investigations:

> Investigation and analysis by enforcement agencies have yielded information indicating that terrorist organizations sometimes utilize charities to facilitate funding and to funnel money. Charitable donations to non-governmental organizations (NGOs) are commingled and then often diverted or siphoned to groups or organizations that support terrorism . . . . Though these charities may be offering humanitarian services here or abroad, funds raised by these various charities are sometimes diverted to terrorist causes. This scheme is particularly troubling because of the perverse use of funds donated in good will to fuel terrorist acts.

Simply because Muwafaq was a charitable organization or performed charitable deeds does not make it immune to designation by OFAC. Indeed, other courts have upheld OFAC's designations of charitable organizations, notwithstanding their status or involvement in good deeds....

As for Kadi's argument that he did not intend to provide financial support to SDGTs or for terrorist acts through Muwafaq or his other companies, that claim is unavailing. Kadi's intent in donating to terrorist causes or to SDGTs is not relevant here... Moreover, the Court rejects Kadi's contention that OFAC should have disregarded any pre-designation information about individuals or organizations....

The Court has reviewed the evidence both in the classified and unclassified records. The record, taken as a whole, and with references to various sources over different periods of time, confirms Kadi's close involvement in Muwafaq and, in turn, Muwafaq's involvement in the financing of terrorist activities and support of SDGTs, despite whatever charitable works the foundation may also have undertaken. Evidence in the unclassified record indicates that Kadi was integrally involved in running Muwafaq, including the hiring and placement of SDGTs in key roles in the foundation, who then had the authority and ability to receive money from Kadi, to access Kadi's funds, and to designate and divert those funds to other sources and causes. Kadi himself admitted to transferring funds to such Muwafaq personnel, or allowing them access to his personal funds. Although he claimed in every instance that either the funds were accessed for charitable purposes or that he had no knowledge to what ends the funds may have actually been used, OFAC reasonably concluded that Kadi's claims were incredible considering all the

other evidence in the record. And although the Court cannot cite to any specific information in the classified record, the Court's careful review confirms that there is substantial evidence in the record before OFAC that Kadi was involved, through Muwafaq, in providing financial support for terrorists.

3. Financial Support to other SDGTs

Substantial evidence in the record also supports OFAC's conclusion that Kadi provided financial support to other SDGTs, including Muhammad Salah, Chafiq Ayadi, and Wa'el Julaidan. In each instance, Kadi claims that his association with these individuals pre-dated their designations and that the transfers of money he provided to them were all for legitimate purposes. He claims that these relationships were benign, that he "worked with individuals who he knew, trusted, and respected, based on their track records in the relevant charitable or humanitarian field,"... and that OFAC had no basis to conclude that any of these individuals "were connected with terrorism in any way" because they were designated years after Kadi had known them.. Some of these contentions have already been addressed by the Court, but they are unavailing in all respects and unsupported by the evidence in the record...

a. Wa'el Julaidan

Julaidan was designated a SDGT on September 6, 2002. Kadi stated that he has known Julaidan as a family friend, and that their relationship predated Julaidan's SDGT designation by twenty years.. According to Kadi, Julaidan came from a reputable family and had a reputation for trustworthiness.. Julaidan was the head of the Saudi Joint Relief Committee in Kosovo and had assisted Kadi in creating a women's teachers' college for Croatian and Bosnian refugees.. While Kadi admits to a longstanding personal and business relationship with Julaidan, he contends that there is no basis for the allegations that Julaidan was an associate of Osama Bin Laden or that Kadi himself was aware of this fact..

Kadi admitted that he provided significant financial benefits to Julaidan. For example, he stated that he gave shares of a business he owned, "KA Stan," to Julaidan as a "reward for the assistance he provided to [Kadi's] charitable activities in Bosnia." .. The only shareholders in KA Stan were Kadi, Julaidan, and Chariq Ayadi, another SDGT. See id. Kadi also acknowledged that he transferred $1.25 million through Karavan directly to Julaidan's personal account between February 24, 1998 and August 3, 1998.. Kadi stated that the money was intended to fund the creation of housing units for Al Emam University in Sanaa, Yemen, a project that was being overseen by Julaidan's company Maram.. Kadi also admitted that he transferred the funds at issue to Jualaidan's personal account,.. but claimed it was "solely and exclusively for the purpose of supporting the University Housing Project, and not for any other purpose," ... He explained that he did not transfer the funds to Maram, because he "had entrusted the University Housing Project to . . . [Julaidan] alone." .. This explanation is puzzling, particularly because Maram was Julaidan's own company, and Kadi had relied on a table of information purporting to show that Julaidan made payments of substantially the same amounts to his company soon thereafter.

Kadi's table was submitted to OFAC to demonstrate that the funds had a legitimate purpose, corroborated by timing. The table shows that after each of the five payments to Julaidan, Julaidan then made a

payment to Maram of substantially the same amount, to correspond with construction invoices for the same figures.. However, there are several problems with Kadi's version of events, and with the information he provided to OFAC. For instance, $100,000 appears to be unaccounted for in the table.. Although Julaidan received a total of $1.25 million from Kadi, the table reflects that only $1.15 million was transferred to Maram.... Footnote 2 to Kadi's table also states that "[a]ccording to bank statements of Maram's account . . . [one] sum [$300,000] was never received in Maram's account . . . . ." Kadi presumably believes this is not a problem because his table still shows "invoices" and "demands" to Maram totaling $1.249 million. But the mere existence of invoices (and "demands") does not necessarily show that Kadi's transfers to Julaidan were used to pay those specific invoices, particularly because "money is fungible."

OFAC also reasonably discredited Kadi's claim that he did not know of Julaidan's relationship to Osama Bin Laden. Kadi himself conceded that it was "common knowledge" that both Julaidan and Bin Laden had known each other through their involvement in repelling the Russian invasion of Afghanistan in the 1980s. ..Kadi explained, though, that he had no knowledge whether this association continued. However, Kadi also stated that he asked Julaidan on "several occasions" whether he had an ongoing relationship with Bin Laden, which Julaidan had denied.. It is somewhat disingenuous, then, for Kadi to claim that he had no knowledge or suspicion at all that Julaidan may have continued working with Bin Laden.

Kadi also acknowledged that the Saudi Arabian government had frozen Julaidan's assets in 2002 based on its finding that Julaidan had supported Osama Bin Laden's terrorism network. The administrative record contained a press release from the Saudi Embassy in DC issued on September 10, 2002 that referred to Julaidan as a "Bin Laden operative" and stated: "Julaidan, a Saudi fugitive is believed to have funneled money to al-Qaeda. . . . Osama Bin Laden and a top al-Qaeda lieutenant, Abu Zubaida, have acknowledged Julaidan as a known associate for their operations. Julaidan, who fought with Bin Laden in Afghanistan during the 1980s, allegedly provided financial and logistical support to the al-Qaeda network."... Kadi's only response to this evidence was that the incident occurred years after the transaction at issue. That argument is not compelling... Kadi also does not rebut OFAC's observation that Osama Bin Laden referred to a close relationship with Julaidan in a 1999 interview on Al-Jazeera TV, where Bin Laden reportedly said: "We are all in one boat, as is known to you, including our brother Wa'el Julaidan," when referring to the assassination of al-Qaida "co-founder" Abdullah Azzam..

Ultimately, OFAC concluded that Kadi's explanation for why he transferred $1.25 million to Julaidan, and conveyed other financial benefits to Julaidan, should not be credited, and that his continued designation was warranted on the basis of his support of and relationship with SDGT Julaidan. OFAC also rejected Kadi's excuse that he knew Julaidan before he was designated, and his plea that transactions or activities he engaged in with Julaidan prior to Julaidan's designation should be disregarded... OFAC's conclusions were substantially supported by the record, both classified and unclassified, and are consistent with the caselaw in this Circuit.

b. Chariq Ayadi

Ayadi was designated a SDGT on October 12, 2001 — the same day as Kadi. He was hired by Kadi to run Muwafaq's European operations, based on Julaidan's recommendation. Ayadi oversaw Muwafaq's European operations from 1992 to around 1995 or 1996. Kadi acknowledged transferring significant sums to Ayadi's personal bank account during that time. As with Julaidan, Kadi maintained that these transfers were solely for charitable purposes... Kadi also entrusted Ayadi with other aspects of his business. In early 1996, Kadi purchased a majority holding in the now-closed Sarajevo-based Depositna Bank. Kadi designated Ayadi the "nominee" for the shares.. He explained that he chose Ayadi as his representative because Ayadi was of Bosnian nationality, and under local law, shareholders of a bank must be of Bosnian nationality.. OFAC regarded Depositna Bank as suspect for other reasons. It "has been associated with Islamic extremists," including serving as the site for planning sessions for an attack against a U.S. facility in Saudi Arabia in the mid-1990s. .. As previously stated, Ayadi was also one of three shareholders, along with Julaidan and Kadi, in KA Stan... OFAC also cited to Ayadi's expulsion from Tunisia for his involvement in the Tunisian Islamic Front.
As with Julaidan, Kadi admitted to transferring the funds to Ayadi's personal accounts, but claimed they were intended for legitimate charitable purposes. He also claimed that he knew Ayadi nine years prior to his designation and had never heard of the Tunisian Islamic Front or any allegations linking Ayadi to the organization until he was designated a SDGT in October 2001. In short, Kadi maintained that he had no knowledge of Ayadi's involvement with the Tunisian Islamic Front or terrorist activities...

c. Muhammad Salah
Kadi also admitted to transferring funds to Muhammad Salah, who was designated a SDT on July 27, 1995 pursuant to Executive Order 12,947, and a SDGT on October 31, 2001 pursuant to EO 13,224. . Salah is a self-declared Hamas operative. Yet again, as with Julaidan and Ayadi, Kadi claimed that the transfer of funds he made to Muhammad Salah was for legitimate and charitable reasons..
OFAC's March 2004 Memorandum and its motion to dismiss focus a great deal on an $820,000 land deal involving Salah.. The details of the land deal are complicated and muddled, but the most salient facts that OFAC considered can be summarized briefly. In July 1991, Kadi, via his company Qadi International, wired $820,000 from the Swiss branch of Faisal Finance to the Quranic Literacy Institute (QLI) in Chicago. The money was used to purchase and develop land in Woodridge, Illinois. Salah, a QLI "employee"/volunteer, was involved in the flow of money that followed the land deal. He was arrested by the Israeli government on January 25, 1993, around the time Kadi was wiring money to him, and pled guilty to illegally channeling funds for Hamas in Israeli military court in January 1995.

Kadi did not dispute that the deal occurred, nor did he dispute that he was transferring money to Salah. ..Kadi admitted that although he only met Salah on two or three occasions "at the most,".. in less than a one-year period he transferred $167,000 directly to Salah's personal account.. He maintained that the money was intended for various QLI expenses "and mainly to support individuals working for QLI.".. He claimed that he sent the money to Salah personally at the request of another individual, Dr. Zaki, with

whom he had longstanding ties... Kadi presented extensive documentation (and briefing) in support of his interpretation of the deal as legitimate. He claimed he had no idea that Salah was involved in Hamas. The breakdown of money transferred by Kadi directly to Salah was as follows: (1) $27,000 on March 16, 1992; (2) $30,000 on July 3, 1992; (3) $50,000 on October 7, 1992; and (4) $60,000 around February 1993.. Upon learning that Salah was arrested in January 1993, Kadi instructed his bank to stop the last transfer but, according to Kadi, the transfer proceeded regardless. AR 303. Kadi claimed that he ceased making transfers to Salah after he was arrested, but admitted that he continued to transfer funds to QLI. . In 1994, QLI sold the Woodridge land, but did not repay the $820,000 "loan" to Kadi.

In 1999, the Government brought a civil forfeiture action against QLI, Muhammad Salah, and his wife in federal court in the Northern District of Illinois, which included allegations against Kadi. The proceeds of the land deal were tied up in that litigation. On a motion to dismiss, the district judge concluded, based in part on the 1998 affidavit of FBI Special Agent Robert Wright, that "the circumstances surrounding the Woodridge land deal, the relationship between QLI and Salah, and the efforts of QLI to provide financial support to Salah all raise the inference that QLI ordered Kadi to transmit the money used to purchase the Woodridge land with the intent that it would be used to support Salah in his activities on behalf of Hamas."..

Kadi spent much time refuting the assertions made in the Wright affidavit submitted in the forfeiture action, and maintained that he never intended to obfuscate the details of the land purchase or his involvement in it.. He claimed that in April 2005 Wright "was under investigation for disciplinary conduct, was suspended and his employment was subsequently terminated by the FBI.". However, Kadi did not contend that Wright's problems were probative of the reliability of his statements contained within the administrative record. Moreover, those problems occurred in April 2005, subsequent to OFAC's March 2004 decision challenged by Kadi here, and are therefore not part of the administrative record. ..Once again, Kadi claims that all the transfers he made were to support legitimate charitable objectives, not terrorism. Here too, based on the evidence in the classified and unclassified records, including the findings in the forfeiture action and the Wright affidavit, OFAC reasonably rejected Kadi's explanation for why he was transferring funds to SDGT Salah's personal accounts, and the overall structuring of the deal, as well as Kadi's contention that he had no knowledge of Salah's affiliation with Hamas or other terrorist activities.

4. Financial Support and Ties to Bin Laden

Kadi disputed having ties to Osama Bin Laden, and contended that he neither managed money nor businesses for Osama Bin Laden directly, or for his benefit.. Kadi also asserted that Bin Laden, in turn, had no financial interest in any of Kadi's businesses.. Kadi claimed that he met Bin Laden on a few occasions ending in 1993, but that those encounters did not involve or concern terrorism.. However, OFAC reasonably relied on other evidence in the record, which indicated that Kadi's ties with Osama Bin Laden may have continued, including reference to a letter found in 2002 that was addressed to Bin Laden and referred to Kadi as "managing money for Bin Lad[e]n in Sudan.". OFAC noted that Kadi opened up

a Muwafaq office in Sudan around the same time Bin Laden was based in the country.. The letter, according to OFAC, also appeared to generally refer to Kadi as one of Bin Laden's "former managers."

5. Other Acts of Financial Support and Investment

OFAC pointed to other acts of financial support and investments by Kadi with individuals who have ties to terrorist activities, although OFAC did not appear to rely on these ties directly in applying the criteria of EO 13,224 to Kadi. The OFAC Memorandum described Kadi's involvement in BMI, Inc. as further support for Kadi's ties to terrorists. OFAC claimed that one of Kadi's co-investors in BMI was a SDT named Mousa Abu Marzook, a Hamas leader also associated with Muhammed Salah. Kadi maintained that his investment in BMI was "passive" and "entirely innocent." He claimed that he was not aware of a relationship between BMI and Marzook.. OFAC also concluded that Kadi made use of entities other than Muwafaq to send money to extremists and identified SDGT Asbat al-Ansar as one such recipient. According to OFAC, acting through "an unspecified Albania-based Islamic group," Kadi "promised fund transfers to an official of the al-Qa'ida supported terrorist group Asbat al-Ansar," which was designated on September 23, 2001.. Kadi contended that he did not know of the organization Asbat al-Ansar.

The Court has carefully reviewed both the classified and unclassified records and finds that the administrative record as a whole amply supports OFAC's findings and its determination to continue Kadi's designation. OFAC reasonably concluded that Kadi provided financial support — primarily through the Muwafaq Foundation, but also through other means — to many persons who were designated SDGTs. It also had good reason to reject Kadi's explanations that his numerous financial transfers to these SDGTs were legitimate, or that they were, in every instance, made without Kadi's knowledge of their affiliations with terrorist groups and activities. OFAC reasonably concluded that these claims were simply too incredible, in light of the totality of the evidence before it.

Ultimately, Kadi's arguments attacking the sufficiency of the evidence before OFAC are without merit. OFAC relied on more information than Kadi's own voluminous statements and submissions, although it is evident that OFAC seriously considered his explanations, asked follow-up questions, and requested additional information in order to address continuing areas of concern. And Kadi's claim that the two-page fax, and the articles cited and the sources represented therein, contained deficiencies, is besides the point. While providing Kadi a window into OFAC's reasoning, these items do not represent the whole picture — the information relied on by OFAC that Kadi attacks as unsubstantiated is further supported by the classified record, which confirms Kadi's financial transactions and relationships with SDGTs.

The Court fully acknowledges and is sympathetic to Kadi's argument that he is at somewhat of a disadvantage in being unable to review the whole administrative record, in particular the classified record... And admittedly, OFAC's unclassified Memorandum draws heavily from Kadi's own statements and submissions, as well as "information available to the U.S. Government," without elaborating in that public record as to what the source of this information might be. Hence, the March 2004 OFAC

Memorandum, standing alone, may be somewhat unsatisfying to Kadi. However, "[a]n agency's decision need not be 'a model of analytic precision to survive a challenge,' and '[a] reviewing court will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."... And, as previously stated, it was wholly proper for OFAC to rely on classified material in making its determination. See, e.g., IEEPA, 50 U.S.C. § 1702(c) ("[I]f the determination was based on classified information . . . such information may be submitted to the reviewing court ex parte and in camera"); Holy Land Found. ... ("'due process require[s] the disclosure of only the unclassified portions of the administrative record'") (quoting People's Mojahedin Org. of Iran, 327 F.3d at 1242 (emphasis in original)); Nat'l Council of Resistance of Iran, 251 F.3d at 208-09 (holding that the "opportunity to be heard at a meaningful time and in a meaningful manner" does not include access to the classified record)...And as also previously addressed, there are compelling reasons why portions of the record must remain classified. The Court has carefully reviewed both the classified and unclassified records, and finds that there is substantial evidence to support OFAC's conclusion that Kadi's continued designation as a SDGT was warranted. Accordingly, the Court finds that OFAC "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action . . . including a rational connection between the facts found and the choice made."...

II. Constitutional Claims

...Given the Court's determination that substantial evidence supports OFAC's conclusion that Kadi should remain designated as a SDGT, the merits of Kadi's constitutional claims stand on weak footing. Indeed, as previously expressed, some of these constitutional claims — including Kadi's argument that OFAC exceeded its statutory authority — parallel the arguments raised by Kadi relating to his APA claim...

A. Ability to Raise Constitutional Claims

To begin with, the Government argues that all of Kadi's constitutional claims must be dismissed because Kadi is a non-resident alien with no substantial connections to this country and hence he lacks the ability to assert any rights under the United States Constitution.. In arguing to the contrary, Kadi claims that because the blocking and freezing of his assets in the United States occurred as a result of action initiated by the United States itself, he should be entitled to raise constitutional claims in response to those actions.. Alternatively, without conceding the accuracy of OFAC's claims as to his contacts with the United States, Kadi argues that he satisfies the standards to raise due process claims.

There is no clear path to resolving these arguments. The D.C. Circuit has not explicitly addressed what criteria this Court should apply in considering whether a foreign national residing outside the United States can satisfy the "substantial connection" test to raise rights under the U.S. Constitution related to the blocking or freezing of his assets. Nor has the D.C. Circuit addressed whether such rights turn on the presence of property in the United States, or whether Kadi can raise certain constitutional claims, but not others.... Some cases in this jurisdiction provide guidance, but no case provides definitive answers. In several cases, the D.C. Circuit has addressed whether foreign nationals have rights under the U.S.

Constitution in the context of cases involving the designation of Foreign Terrorist Organizations ("FTOs")... These cases have looked to the presence of property as the benchmark for satisfying the "substantial connections" test, and whether a party has the ability to raise constitutional claims, at least with respect to that property.

In National Council of Resistance of Iran, the D.C. Circuit held that two Iranian organizations designated as FTOs were entitled to due process protections under the Fifth Amendment because they had "developed substantial connections with this country.".. The court pointed to the designated organizations' "overt presence within the National Press Building" and "claim[ ] [of] an interest in a small bank account.".. In People's Mojahedin of Iran, the D.C. Circuit held that "[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise,".., and that plaintiffs there lacked substantial connection to the United States. The court stated: "We put to one side situations in which an organization's bank deposits were seized as a result of the Secretary's designation. Neither . . . [petitioner] suffered that fate, presumably because no United States financial institutions held any of their property." Hence, the court found that People's Mojahedin of Iran could not raise constitutional claims because it had no property in the United States, nor any other substantial connections. Id. Ultimately, events had evolved such that two organizations — National Council of Resistance of Iran and People's Mojahedin of Iran — were found to be alter egos. Hence, the D.C. Circuit concluded that People's Mojahedin of Iran, via National Council of Resistance of Iran's connections, had sufficient connections to bring a constitutional claim. In analyzing "substantial connections" to the United States, the court remained focused on property rather than physical presence, stating:

> [T]here is before us at least a colorable allegation that at least one of the petitioners has an interest in a bank account in the United States. . . . We have no idea of the truth of the allegation . . . but for the present purposes, the colorable allegation would seem enough to support their due process claims. Russian Volunteer Fleet v. United States, 282 U.S. 481, 491-92, 51 S. Ct. 229, 75 L. Ed. 473, 71 Ct. Cl. 785 (1931), makes clear that a foreign organization that acquires or holds property in this country may invoke the protections of the Constitution when that property is placed in jeopardy by government intervention. Nat'l Council of Resistance of Iran, 251 F.3d at 204.

In 32 County, which also involved a challenge to an organization's FTO designation, the D.C. Circuit concluded that "[t]he Secretary therefore did not have to provide 32 County . . . with any process before designating them as [FTOs]" because it was not shown "that either organization possessed any controlling interest in property located within the United States, nor do they demonstrate any other form of presence here.". Taken together, then, these cases at least imply that a foreign national with property in the United States has a sufficient connection to the United States to raise at least some constitutional claims.

Further obfuscating matters, however, and subsequent to the briefing in this case, the Southern District of New York dismissed claims against Kadi for lack of personal jurisdiction in litigation relating to the

September 11 terrorist attacks... In that case, plaintiffs attempted to secure personal jurisdiction over Kadi by arguing that he had sufficient contacts with the United States. They claimed that Kadi had incorporated a branch of Muwafaq in Delaware in 1992, which remained operational until 1997, and that he made financial transfers to individuals in the United States who then transferred the money for use for terrorist purposes.. They also claimed that he was involved in real estate investments in Massachusetts and Pennsylvania. See id. Considering these allegations, the court concluded that Kadi lacked sufficient contacts with the United States for personal jurisdiction. Neither party has asserted that this Court should rely on the analysis applied by In re Terrorist Attacks on September 11, 2001 to resolve whether Kadi has substantial connections sufficient to raise his constitutional claims here. And that case, in light of the caselaw in this Circuit, does not necessarily bar Kadi from raising at least some of his constitutional challenges to the designation and continued blocking of his assets, provided that Kadi has some property here.

Another case, Al-Aqeel v. Paulson, 568 F. Supp. 2d 64 (D.D.C. 2008), also indicates that the ruling in In re Terrorist Attacks on September 11, 2001 does not dispositively address Kadi's ability to raise constitutional claims. Al-Aqeel, like Kadi, was a citizen and resident of Saudi Arabia, who sought to challenge his SDGT designation. And like Kadi, Al-Aqeel had also been named in September 11-related litigation in the Southern District of New York. The Government argued that Al-Aqeel lacked insufficient connections to the United States to raise any constitutional claims, and pointed to Al-Aqeel's arguments regarding lack of personal jurisdiction in an earlier case then pending in the Southern District of New York... Rejecting those arguments, the court observed that the issue in Burnett was whether Al-Aqeel, as a defendant, had purposefully availed himself of the protections of the law of the forum — the State of New York — for the court there to exercise personal jurisdiction over him.... The court reasoned that the question before it was whether Al-Aqeel, as a plaintiff, had sufficient connections with the United States as a whole to have standing to raise claims under the United States Constitution.. Ultimately, the court concluded that Al-Aqeel had established sufficient contacts in the United States, through his frequent visits to the United States, his position as an officer of a United States corporation, and his involvement in helping the organization acquire property in the United States, to raise "at least his due process claims under the Fifth Amendment." Id. However, the court also concluded that Al-Aqeel had no standing to raise a Fourth Amendment claim, because the assets blocked were overseas and he was a citizen of Saudi Arabia.

There is arguably a factual dispute over whether Kadi does, indeed, have sufficient connections to the United States, which may hinge on what importance is placed on the assets which have been blocked here. Kadi's complaint does not clearly indicate where his assets have been frozen, and if any of those assets were located in the United States. Instead, he simply complains generally that his assets have been seized. At the hearing, the Government either could not or would not identify whether Kadi had any assets within the United States that had been blocked or frozen... Kadi also could not enumerate which assets have been, in fact, blocked, although he emphasized that his claim to the $820,000 "loan" he provided to QLI should be considered an asset...

The administrative record indicates that it is likely that Kadi may have had some property in the United States. Kadi recites several connections to the United States...including the following: (1) he was a director of Global Diamond Resources, a U.S. company, and his shares and ownership interests in the company were frozen and blocked under the Notice of Blocking sent to Kadi "care of" Global Diamond Resources .. and (2) he wired $820,000 to QLI in 1992, and the proceeds of that transaction had initially been tied up in the civil forfeiture litigation in Illinois. Although Kadi's claim to the $820,000 at the time of the challenged action is dubious, he does nevertheless claim that he has property interests in the United States that were frozen as a result of the designation.

Ultimately, the issue of standing regarding Kadi's constitutional claims necessarily implicates the validity of OFAC's blocking order on which Kadi's constitutional claims rest. This goes to the merits question of whether the blocking order itself was valid. In those circumstances, if the jurisdictional facts "are inextricably intertwined with the merits of the case," the issue of standing need not be conclusively resolved, but instead the court should "defer its jurisdictional decision until the merits are heard."... Even assuming Kadi does have standing, all of his arguments on the merits of his constitutional claims are nonetheless unavailing for the reasons explained below.

B.Fifth Amendment Due Process Claim

Kadi makes a host of arguments in support of his claim that defendants violated his right to due process. Specifically, he contends that defendants failed to give him adequate notice of the charges, or a "thorough statement of reasons" for the decision, adequate time to respond, or an opportunity to cross-examine witnesses or to plead his case before "any independent tribunal."... He also claims that the Government improperly relied on classified evidence without providing him access. These arguments are all unavailing.

The D.C. Circuit in Holy Land Foundation squarely rejected the proposition that due process requires most of the protections requested by Kadi. The court held that notice and a meaningful opportunity to be heard are satisfied by the provision of a post-deprivation administrative remedy and the opportunity to submit written submissions to OFAC, even where (as here) the initial designation provided no notice or opportunity to be heard... The Holy Land Foundation court also stated that there was no automatic right to access classified evidence, to confront and cross-examine witnesses, or to obtain procedures which approximate a judicial trial..

Here, Kadi was provided with even more post-deprivation process than was provided to Holy Land Foundation. Kadi's opportunity to be meaningfully heard is evidenced by the extensive submissions he made to challenge his continued designation. He submitted three lengthy witness statements and numerous exhibits.. Moreover, Kadi's lawyers had at least four face-to-face meetings with OFAC over the 2002-2003 time frame.. OFAC also sent Kadi a five-page letter with detailed questions about twelve continued areas of concern — "the answers to which will help us issue a determination on the petition." . Kadi provided a forty-one page response to the questionnaire.. He also availed himself of the opportunity to rebut the evidence he considered erroneous, including the allegations in the Wright affidavit regarding

Kadi's involvement with QLI and the Illinois land deal, sources cited in the two-page fax, and newspaper articles referred to in the record. Accordingly, even if he did not receive the full unclassified administrative record prior to the March 2004 decision, he did receive an opportunity, in substance, to rebut the evidence found in the unclassified administrative record through his own submissions to OFAC, as well as the opportunity to respond robustly to OFAC's follow-up questions addressing previous statements Kadi had made and identifying specific facts and areas of concern relevant to the designation decision. This case is unlike People's Mojahedin Org. of Iran v. U.S. Dep't of State.., where the court expressed concern that it was unable to discern what facts were relied on and what conclusions Treasury had drawn from the record to support the FTO re-designation. There is no such confusion here. The March 2004 OFAC Memorandum and the administrative record, including the back and forth exchanges with Kadi, show that OFAC considered all of Kadi's submissions and explained its assessment of the evidence. Therefore, it is clear that the requirements of due process were satisfied.

C.Fifth Amendment - Takings Claim

Kadi next contends that OFAC's freezing of his assets has deprived him of use of his property, and that the deprivation is "permanent" because "[t]he provisions of IEEPA, E.O. 13,224, and the implementing regulations provide no mechanism for Mr. Kadi to further contest his designation or the blocking of his assets.".. As a threshold matter, the allegation that there is no "mechanism . . . to further contest his designation" is untrue. OFAC provides for a reconsideration process that Kadi, in fact, used.

In any event, courts in this jurisdiction that have considered similar "takings" challenges under the Fifth Amendment have rejected them.

Even if the Notice of Blocking constituted a "taking," pursuant to the Tucker Act jurisdiction would rest in the Court of Federal Claims, not here... Kadi characterizes his claim as not being subject to the Tucker Act because he does not seek money damages.. But that characterization is contradicted by his complaint, which labels Count Three as a "Right to Just Compensation.". Moreover, the Seventh Circuit has suggested that "just compensation" is the only remedy available for a takings violation.

Accordingly, the Court lacks jurisdiction to resolve Kadi's takings claim. And, even if the Court had jurisdiction, the Court agrees with other courts that have found that the blocking of assets does not constitute a taking under the Fifth Amendment.

D.First Amendment - Speech and Association

Kadi claims that the SDGT designation and blocking order substantially interfere with his rights to freedom of speech and freedom of association. He contends that his designation prohibits him from making humanitarian contributions to "legitimate charitable organizations" and states that he "does not have a knowing affiliation with any terrorist group or individual including Osama Bin Laden or Al-Qaeda . . . and does not have a specific intent to further the illegal aims of any terrorist group or individual." .

As previously stated, it is doubtful that Kadi, as a non-resident alien with unclear ties to the United States, can even raise a challenge to OFAC's action under the First Amendment. But assuming he could,

his First Amendment claims fail....
Because money is fungible, even allowing for good-intentioned financial support to organizations and individuals involved in terrorism would be problematic, as organizations could free up other resources to be used towards violent terrorist objectives.. In addition, EO 13,224 and the implementing regulations construct a regime that provides for the listing of a limited number of SDGTs, permits entities and individuals to contest their designations, and allows the Government to delist individuals and entities and remove their SDGT designations. ..This carefully constructed government regime for designating SDGTs, which takes into consideration the concerns regarding the fungibility of money and resources described above, satisfies the "narrowly tailored" prong of the strict scrutiny test.

2. Freedom of Association
Kadi's freedom of association claim fares no better. The Government contends that Kadi's designation was not based on mere membership, but instead was based on his financial support of terrorist groups.. Kadi responds that he "is completely prohibited from making contributions, and thus barred from engaging in a critical form of associational activity.". He also argues that such a prohibition cannot be sustained "in the absence of a specific intent to further the organization's unlawful ends.".
This Circuit comprehensively addressed this issue in Islamic American Relief Agency, and held that a SDGT blocking order does not violate freedom of association because it does not prohibit associational activity; rather, it targets the financial support of terrorism.... So, too, here Kadi was designated primarily on the basis that he provided funding to terrorist organizations. Hence, his First Amendment freedom of association claim is foreclosed.

E.Fourth Amendment
Kadi claims that freezing or blocking his assets "constitute[s] an unreasonable search and seizure without probable cause.". He alleges that "[d]efendants initially froze or blocked [Kadi's] assets in October 2001, without reasonable suspicion, probable cause or warrant and without specifying their reasons for doing so.". He further asserts that "[d]efendants continue to freeze or block [Kadi's] assets without providing him with the information in the administrative record upon which OFAC made its determination that [Kadi] is a 'terrorist,' any summary of the allegedly 'classified' information, or any specification of any charges against him to which he might have responded." .
Defendants argue that the Fourth Amendment is inapplicable to blocking and seizure orders of this nature. They also contend that "blocking actions pursuant to E.O. 13224 are per se reasonable under the Fourth Amendment and thus should not be subject to a 'probable cause' standard or warrant requirement." Defs.' Mot. at 45. Finally, defendants argue that blocking actions fall under the "special needs" exception to the warrant and probable cause requirements.
As discussed above, subsequent to the initial briefing in this case Al Haramain III was decided by the Ninth Circuit. Al Haramain III found in relevant part that the Government had violated the Fourth Amendment rights of Al Haramain Islamic Foundation, Oregon ("AHIF-Oregon"). There, the

Government had also argued that the special needs exception to the warrant and probable cause requirement under the Fourth Amendment applied, and that the blocking orders, in any event, were per se reasonable. The Ninth Circuit rejected those arguments, and concluded that OFAC violated AHIF-Oregon's Fourth Amendment right to be free of unreasonable seizures... The court reasoned that the exigent circumstances exception to the Fourth Amendment's warrant requirement may have applied to the initial designation and blocking, but once the Government had blocked the assets to foreclose any asset flight concerns, it could have obtained a warrant with respect to the specific assets identified. ..The court rejected the Government's argument (also raised here) that obtaining warrants would be unduly burdensome or impractical.

The Government urges this Court not to follow the Ninth Circuit's decision in Al Haramain III, but instead to adopt the approach of other district courts in this jurisdiction in finding that blockings of this nature do not constitute seizures... This Court .. has expressed some reluctance to find that, categorically, blocking orders could never be "seizures" under the Fourth Amendment..

However, the Court need not resolve the issue, nor need it decide as a general matter whether blocking orders categorically fall within one of the enumerated exceptions to the Fourth Amendment warrant requirement. Even assuming that the blocking order at issue here constituted a "seizure," having already concluded above that OFAC's decision to maintain the SDGT designation of Kadi was supported by substantial evidence, it follows that the blocking order was not issued unreasonably or without probable cause. Indeed, the courts in Islamic American Relief Agency and Holy Land Foundation concluded that because the Government had the authority to issue the blocking order under IEEPA and EO 13,224, and because the courts had already determined in each instance that OFAC's decision to issue a blocking order was not arbitrary and capricious, the plaintiffs in those cases could not state a cognizable Fourth Amendment claim.... So, too, here, the Court has concluded that substantial evidence in the administrative record supports OFAC's decision to block Kadi's assets; hence, there was no Fourth Amendment violation, either at the time of the initial blocking or as a result of the denial of reconsideration in March 2004.

Al Haramain III is actually consistent with this ruling. The Ninth Circuit balanced the interests of a domestic organization to be free from blocking orders, and reasoned that "the number of designated persons located within the United States appears to be very small. The warrant requirement will therefore be relevant in only a few cases."... The court, in fact, explicitly stated: "We address only the facts of this case: OFAC's seizure of assets of a United States entity located within the United States. We do not address the requirements under the Fourth Amendment for other situations including, for example, designations of foreign entities or designations by executive order.". Here, of course, a foreign entity/individual was designated pursuant to EO 13,224. Given these limitations as stated by the Ninth Circuit, confining its holding to circumstances not present in this case, Kadi's reliance on Al Haramain III is unpersuasive.

Moreover, the Government's concerns about the practicability of obtaining warrants seem well-founded...Given the concerns raised by the Government in securing warrants, this Court would be

reluctant to apply Al Haramain III to the present situation, where the designated person is a foreign national, with significant overseas ties and assets. For all these reasons, Kadi's Fourth Amendment claim will be denied.

F.Vagueness and Overbreadth

In Counts Six and Seven, Kadi asserts that the SDGT designation violated his First and Fifth Amendment rights because the designation criteria are unconstitutionally vague and overbroad, both on their face and as applied to him individually.. Count Six maintains that the EO 13,224 criterion "otherwise associated with" other designated persons or entities allows designation "without regard to the character or intent of the association or support.". Kadi contends that his Count Six challenge to "otherwise associated with" encompasses a challenge to the terms "material support" and "services," which are incorporated by reference into the definition of "otherwise associated with.".. Count Seven asserts that IEEPA, EO 13,224, and the implementing regulations suffer from vagueness and overbreadth flaws "because they do not define such critical terms as 'terrorist organization', 'specially designated global terrorist' or 'any other term related to terrorism'". The complaint does not indicate which specific provision of IEEPA Kadi is challenging here. Presumably, he challenges the language in Sections 1(c) and (d) of EO 13,224, which authorize the designation of persons who provide various kinds of support for "acts of terrorism." The regulatory language at issue is apparently in 31 C.F.R. § 594.310, which defines a SDGT as "any foreign person or persons listed in the Annex or designated pursuant to Executive Order 13224 of September 23, 2001."

The Supreme Court has instructed that a statute is unconstitutionally overbroad only where the overbreadth is "substantial . . . relative to the statute's plainly legitimate sweep." United States v. Williams.. (2008). Moreover, "[i]nvalidation for overbreadth is 'strong medicine' that is not to be casually employed."... A law that does not reach constitutionally protected conduct, and therefore passes muster under the overbreadth test, may still be challenged on grounds that it is unduly vague in violation of due process... However, a law is unconstitutionally vague on its face only if it is "impermissibly vague in all its applications." The Supreme Court has instructed that laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."... Laws must also "provide explicit standards for those who apply them" to prevent "arbitrary and discriminatory enforcement." "[G]reater tolerance" is given to "enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.".. If, however, a law threatens to inhibit the exercise of constitutionally protected rights, such as the right of free speech or of association, then "a more stringent vagueness test should apply.". But, still, a plaintiff who "engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

Although Kadi's complaint mounts both vagueness and overbreadth challenges to IEEPA and EO 13,224, he focuses on vagueness and does not really address the overbreadth claims, nor does he respond to the Government's arguments on overbreadth. Hence, the Court will focus here on Kadi's vagueness

arguments as well. Even if Kadi had developed his overbreadth arguments, his claim would fail because IEEPA and EO 13,224 have a plainly legitimate sweep — to prevent terrorist attacks by foreclosing financial and other support to terrorists and terrorist organizations...

1. "Otherwise Associated With"

Kadi argues that the provision of EO 13,224 allowing designation on the basis that one is "otherwise associated with" another SDGT is impermissibly vague because it "could encompass First Amendment protected speech and association.". He contends that EO 13,224 permits persons who have never engaged in or supported terrorism or terrorist acts to be designated based on mere "association" with or "support" of a SDGT. The Government, for its part, responds that Kadi's challenge has been mooted by the new definition of "otherwise associated with" at 31 C.F.R. § 594.316(b). 24 Kadi counters that OFAC's 2007 definition of "otherwise associated with" had not been promulgated at the time of Kadi's designation. . In addition, although Kadi acknowledges that the term "otherwise associated with" has been subsequently defined in the regulations, he maintains that the newly defined phrase remains constitutionally infirm because the terms incorporated within the new definition — specifically, "material support" and "services" — are themselves impermissibly vague because no showing of knowledge or intent that the support or services were directed to a designated entity is required..

Kadi's challenge to the term "otherwise associated with" — including the incorporated terms "material support" and "services" — fails. As an initial matter, Kadi cannot bring a facial vagueness challenge to these terms because the basis for his designation was his financial support to other SDGTs — conduct that is "clearly proscribed" under the law... But even if he could raise a facial challenge to EO 13,224, the newly defined term, promulgated at 31 C.F.R. § 594.316(b), remedies any deficiencies that might have existed. The term "otherwise associated with" is now defined to mean:

(a) [t]o own or control; or

(b) [t]o attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to.

The district court in Kindhearts I rejected a similar challenge in the context of EO 13,224 and the implementing regulations relating to the designation of SDGTs.. That court reasoned that the phrase "otherwise associated with" had been clarified by the newly adopted definition and, in any event, limited any applicability the phrase might have to protected speech and conduct.. It further stated that neither "material support" nor "services" as used in the definition of "otherwise associated with" rendered the term unconstitutionally vague. Moreover, in rejecting an attack on "material support" and its underlying terms on vagueness grounds, the Supreme Court in Humanitarian Law Project IV reasoned that "a person of ordinary intelligence would understand the term 'service' to cover [the activities] performed in coordination with, or at the direction of, a foreign terrorist organization.". The courts that have addressed vagueness and overbreadth challenges to the term "otherwise associated with" have ultimately rejected them. S

The case is even more compelling here, where Kadi's conduct involves providing financial support to

designated entities and individuals. .. Although Kadi claims that basing a designation on being "otherwise associated with" other SDGTs could include First Amendment protected speech and association and that "services" could encompass activities that are pure speech or advocacy, no such activities are at issue here. As previously discussed, it is clear from Kadi's complaint that he does not claim that he has sought to engage in those kinds of activities, but was foreclosed or chilled from doing so. As the Government points out, the term "otherwise associated with" applies to specific types of conduct beyond mere association, and the basis for Kadi's designation is focused on the provision of financial support to SDGTs and terrorist organizations. Hence, his vagueness challenge to the term "otherwise associated with" cannot succeed.

2. "SDGT," "Terrorist Organization," and "Any Other Term Related to Terrorism"
Kadi's challenges on vagueness grounds to the terms "SDGT," "terrorist organization" and, as a catch-all, "any other term related to terrorism" are even more attenuated. He argues that the IEEPA, EO 13,224, and the implementing regulations are vague both on their face and as applied to him, because they fail to define these terms.. His challenge is unpersuasive.
Kadi is wrong that the regulations fail to define these terms. ...Moreover, Kadi's argument that the Court should find impermissibly vague "any other term related to terrorism" casts too wide a net for the Court to seriously consider it. Kadi responds that the definition of SDGT.. does not cure the vagueness problem because it is circuitous and self-referential — that is, "the only way to know with certainty what qualifies as a [SDGT] is for OFAC to designate an individual or entity as an SDGT.". But Kadi's contention identifies no deficiency in the definition, and at least one court has rejected a similar argument... Accordingly, this vagueness challenge fails as well.....

The US authorities have taken enforcement action against a number of banks with respect to sanctions-busting activities. For example, in December 2012 the Federal Reserve announced "the issuance of a consent order to cease and desist and a civil money penalty assessment of $100 million against **Standard Chartered PLC**, London, Standard Chartered Bank, London, and the bank's branch in New York." The consent order related to Standard Chartered's compliance failures with respect to economic sanctions and anti-money-laundering requirements and failures to respond to bank examiner questions.[9] The order required the bank to improve its compliance program. At the same time, Standard Chartered entered into deferred prosecution agreements

[9] Federal Reserve Press Release (Dec. 10, 2012) at http://www.federalreserve.gov/newsevents/press/enforcement/20121210a.htm.

with the DOJ and the District Attorney for New York County,[10] and a settlement agreement with the Treasury's Office of Foreign Assets Control.[11] Links to these materials are available on the course blog (together with material relating to RBS).[12]

On 21 March 2013 John Peace, the Chairman of Standard Chartered made the following statement:

On 5 March 2013, I, together with Chief Executive Officer Peter Sands and Group Finance Director Richard Meddings, representing Standard Chartered Bank (the "Group"), held a press conference where certain questions were asked concerning individual employee conduct and compensation in light of the deferred prosecution agreements made with the US Department of Justice and the New York County District Attorney's Office in December 2012. During that press conference, which took place via phone, I made certain statements that I very much regret and that were at best inaccurate.
In particular, I made the following statements in reference to a question regarding the reduction of bonuses for SCB executives:
We had no willful act to avoid sanctions; you know, mistakes are made - clerical errors - and we talked about last year a number of transactions which clearly were clerical errors or mistakes that were made…
My statement that SCB "had no willful act to avoid sanctions" was wrong, and directly contradicts SCB's acceptance of responsibility in the deferred prosecution agreement and accompanying factual statement. Standard Chartered Bank, together with me, Mr. Peter Sands and Mr. Richard Meddings, who jointly hosted the press conference, retract the comment I made as both legally and factually incorrect. To be clear, Standard Chartered Bank unequivocally acknowledges and accepts responsibility, on behalf of the Bank and its employees, for past knowing and willful criminal conduct in violating US economic sanctions laws and regulations, and related New York criminal laws, as set out in the deferred prosecution agreement. I, Mr. Sands, Mr. Meddings, and Standard Chartered Bank apologize for the statements I made to the contrary.[13]

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[10] Department of Justice, Standard Chartered Bank Agrees to Forfeit $227 Million for Illegal Transactions with Iran, Sudan, Libya, and Burma (Dec. 10, 2012) at http://www.justice.gov/opa/pr/2012/December/12-crm-1467.html .

[11] The settlement agreement is at http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121210_SCB_Settlement.pdf.

[12] See http://blenderlaw.umlaw.net/international-finance/spring-2014-materials/

[13] *See* http://investors.standardchartered.com/en/releasedetail.cfm?ReleaseID=750004