

154 The Council also argues that the Court of First Instance was entitled to find that recourse to [the first sentence of Article 352(1) TFEU] as an additional legal basis for the contested regulation was justified, given that that article serves only to enable the extension of the economic and financial sanctions already provided for in [Articles 75 and 215 TFEU] to individuals and entities not sufficiently linked to any given third country.

155 Finally, the Council is of the view that the applicant's complaint concerning the efficiency and proportionality of the sanctions provided for by that regulation is irrelevant to the issue of the appropriateness of the legal basis of the regulation.

156 With regard to that second complaint, the United Kingdom too takes the view that it has no bearing on the appeal brought by Al Barakaat, given that, as held in paragraph 1 of the operative part of the judgment under appeal, the Court of First Instance found that there was no longer any need to adjudicate on the legality of Regulation No 467/2001.

157 As to the rest, the arguments raised by the Kingdom of Spain, the French Republic, the United Kingdom and the Commission, are, in substance, the same as those raised by those parties in connection with Mr Kadi's appeal.

Findings of the Court

158 With regard, first, to the challenges made by Al Barakaat to paragraphs 112, 113, 115 and 116 of *Yusuf and Al Barakaat*, it must be held that those paragraphs relate to the legal basis of Regulation No 467/2001.

159 Now, that regulation has been repealed and replaced by the contested regulation. Moreover, as indicated by the Court of First Instance in *Yusuf and Al Barakaat*, paragraph 77, without challenge from Al Barakaat in its appeal, the sole object of the action before the Court of First Instance, after Al Barakaat had adjusted its claims for relief and pleas in law to the contested regulation, was annulment of that latter regulation, in so far as it concerns that applicant.

160 In those circumstances, those claims cannot in any case lead to the setting aside of that judgment and must therefore be regarded as immaterial.

161 In any event, the considerations of *Yusuf and Al Barakaat* to which those claims relate, treated by the Court of First Instance as premisses of its reasoning with regard to the legal basis of the contested regulation, are reproduced in later paragraphs of that judgment and in *Kadi* and will be examined during the assessment of the grounds of appeal challenging those paragraphs.

162 There is, therefore, no reason to examine those heads of claim in so far as they relate to the legal basis of Regulation No 467/2001.

163 It is appropriate to rule in the second place on the merits of the principal argument put forward by the Commission, that [Articles 75 and 215 TFEU], in the light of their wording and context, are in themselves an appropriate and sufficient legal base for the contested regulation.

164 That argument is directed against paragraphs 92 to 97 of *Kadi* and paragraphs 128 to 133 of *Yusuf and Al Barakaat*, in which the Court of First Instance ruled to the contrary.

165 That argument must be rejected.

166 The Court of First Instance in fact rightly ruled that, having regard to the wording of [Articles 75 and 215 TFEU], especially to the expressions 'as regards the third countries concerned' and 'with one or more third countries' used there, those provisions concern the adoption of measures vis-à-vis

third countries, since that concept may include the rulers of such a country and also individuals and entities associated with or controlled, directly or indirectly, by them.

- 167 The restrictive measures provided for by Resolution 1390 (2002), which the contested regulation was intended to put into effect, are measures notable for the absence of any link to the governing regime of a third country. Following the collapse of the Taliban regime, those measures were aimed directly at Usama bin Laden, the Al-Qaeda network and the persons and entities associated with them, as they appear in the summary list. They do not, therefore, as such, fall within the ambit of [Articles 75 and 215 TFEU].
- 168 To accept the interpretation of [Articles 75 and 215 TFEU] proposed by the Commission, that it is enough for the restrictive measures at issue to be directed at persons or entities present in a third country or associated with one in some other way, would give those provisions an excessively broad meaning and would fail to take any account at all of the requirement, imposed by their very wording, that the measures decided on the basis of those provisions must be taken against third countries.
- 169 In addition, the essential purpose and object of the contested regulation is to combat international terrorism, in particular to cut it off from its financial resources by freezing the economic funds and resources of persons or entities suspected of involvement in activities linked to terrorism, and not to affect economic relations between the [Union] and each of the third countries where those persons or entities are, always supposing, moreover, that their place of residence is known.
- 170 The restrictive measures provided for by Resolution 1390 (2002) and put into effect by the contested regulation cannot be considered to be measures intended to reduce economic relations with each of those third countries, or, indeed, with certain Member States of the [Union], in which are to be found persons or entities whose names are included in the list reproduced in Annex I to that regulation.
- 171 Nor can the argument supported by the Commission be justified by the expression ‘in part’ appearing in [Article 215 TFEU].
- 172 In point of fact, that expression refers to the possible limitation of the scope *ratione materiae* or *personae* of the measures that might, by definition, be taken under that provision. It has, however, no effect on the necessary status of the persons to whom those measures might be addressed and cannot, therefore, warrant extending the application of the measures to such persons who are in no way linked to the governing regime of a third country and who, by the same token, do not fall within the ambit of that provision.
- 173 The Commission’s argument relating to the similarity of the words used in Article 41 of the Charter of the United Nations and in [Article 215 TFEU], from which it deduces that the latter provision constitutes a platform for the implementation by the [Union] of all measures adopted by the Security Council that call for action by the [Union], cannot succeed either.
- 174 [Article 215 TFEU] specifically refers to the interruption of economic relations ‘with one or more third countries’, whereas such an expression is not used in Article 41 of the Charter of the United Nations.
- 175 What is more, in other respects the ambit of Article 41 of the Charter of the United Nations does not coincide with that of [Article 215 TFEU], for the first provision enables the adoption of a series of measures other than those referred to by the second, including measures of a fundamentally different nature from those intended to interrupt or reduce economic relations with third countries, such as the breaking off of diplomatic relations.

- 176 The Commission's argument that [Article 215 TFEU] builds a procedural bridge between the [Union] and the European Union, so that it must be interpreted as broadly as the relevant [Union] competences, including those relating to the common commercial policy and the free movement of capital, must also be rejected.
- 177 That interpretation of [Article 215 TFEU] threatens to reduce the ambit and, therefore, the practical effect of that provision, for, having regard to its actual wording, the subject of that provision is the adoption of potentially very diverse measures affecting economic relations with third countries which, therefore, by necessary inference, must not be limited to spheres falling within other material powers of the [Union] such as those in the domain of the common commercial policy or of the free movement of capital.
- 178 Moreover, that interpretation finds no support in the wording of [Article 215 TFEU], which confers a material competence on the [Union] the scope of which is, in theory, autonomous in relation to that of other [Union] competences.
- 179 It is necessary to examine in the third place the alternative argument raised by the Commission that, if it was not possible for the contested regulation to be adopted on the sole legal basis of [Articles 75 and 215 TFEU], recourse to [the first sentence of Article 352(1) TFEU] would not be justified, for that latter provision is, in particular, applicable only if no other provision of the [Treaty on the Functioning of the European Union] confers the powers necessary to adopt the measure concerned. The restrictive measures imposed by the contested regulation fall within the [Union]'s powers of action, in particular its powers in the sphere of the common commercial policy and free movement of capital.
- 180 In this connection, the Court of First Instance held, in paragraphs 100 of *Kadi* and 136 of *Yusuf and Al Barakaat*, that no specific provision of the [Treaty on the Functioning of the European Union] provides for the adoption of measures of the kind laid down in the contested regulation relating to the campaign against international terrorism and, more particularly, to the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of international terrorism, where no connection whatsoever has been established with the governing regime of a third State, with the result that the first condition for the applicability of [Article 215 TFEU] was satisfied in the case in point.
- 181 That conclusion must be upheld.
- 182 According to the Court's settled case-law, the choice of legal basis for a [Union] measure must rest on objective factors which are amenable to judicial review, including, in particular, the aim and the content of the measure (see, inter alia, Case C-440/05 *Commission v Council* [2007] ECR I-9097, paragraph 61 and the case-law there cited).
- 183 A [Union] measure falls within the competence in the field of the common commercial policy provided for in [Article 207 TFEU] only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned (see, inter alia, Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERS A* [2005] ECR I-3785, paragraph 75 and the case-law there cited).
- 184 With regard to its essential purpose and object, as explained in paragraph 169 above, the contested regulation is intended to combat international terrorism and it provides to that end a series of restrictive measures of an economic and financial kind, such as freezing the economic funds and resources of persons or entities suspected of contributing to the funding of international terrorism.
- 185 Having regard to that purpose and object, it cannot be considered that the regulation relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade.

- 186 Furthermore, although that regulation may indeed produce effects on international trade, it is plainly not its purpose to give rise to direct and immediate effects of that nature.
- 187 The contested regulation could not, therefore, be based on the powers of the [Union] in the sphere of the common commercial policy.
- 188 On the other hand, according to the Commission, in so far as the contested regulation prohibits the transfer of economic resources to individuals in third countries, it falls within the ambit of the provisions of the [Treaty on the Functioning of the European Union] on free movement of capital and payments.
- 189 That assertion too must be rejected.
- 190 With regard, first of all, to [Article 64(2) and (3) TFEU], the restrictive measures imposed by the contested regulation do not fall within one of the categories of measures listed in that provision.
- 191 Nor can [the first paragraph of Article 75 TFEU] furnish the basis for the contested regulation, for its ambit is determined by that of [Article 215 TFEU].
- 192 As has earlier been held in paragraph 167 above, that latter provision is not concerned with the adoption of restrictive measures such as those at issue, which are notable for the absence of any link to the governing regime of a third country.
- 193 As regards, finally, Article 60(2) EC [repealed], this provision does not include any [Union] competence to that end, given that it does no more than enable the Member States to take, on certain exceptional grounds, unilateral measures against a third country with regard to capital movements and payments, subject to the power of the Council to require a Member State to amend or abolish such measures.
- 194 In the fourth place it is appropriate to examine the claims directed by Mr Kadi, in the second and third parts of his first ground of appeal, against paragraphs 122 to 135 of *Kadi*, by Al Barakaat against paragraphs 158 to 170 of *Yusuf and Al Barakaat*, and the Commission's criticisms of those same paragraphs of the judgments under appeal.
- 195 In those paragraphs, the Court of First Instance ruled that it was possible for the contested regulation to be adopted on the joint basis of [Articles 75, 215 and the first sentence of 352(1) TFEU], on the ground that, by reason of the bridge explicitly established between [Union] actions imposing economic sanctions under [Articles 75 and 215 TFEU], on the one hand, and the objectives of the EU Treaty in the sphere of external relations, on the other, recourse to [the first sentence of Article 352(1) TFEU] in the particular context envisaged by the two former articles is justified in order to attain such objectives, in this instance the objective of the CFSP pursued by the contested regulation, that is to say, the campaign against international terrorism and its funding.
- 196 In this regard it must be held that the judgments under appeal are indeed vitiated by an error of law.
- 197 In point of fact, while it is correct to consider, as did the Court of First Instance, that a bridge has been constructed between the actions of the [Union] involving economic measures under [Articles 75 and 215 TFEU] and the objectives of the EU Treaty in the sphere of external relations, including the CFSP, neither the wording of the provisions of the [Treaty on the Functioning of the European Union] nor the structure of the latter provides any foundation for the view that that bridge extends to other provisions of the [Treaty on the Functioning of the European Union], in particular to [the first sentence of Article 352(1) TFEU].

- 198 With specific regard to [the first sentence of Article 352(1) TFEU], if the position of the Court of First Instance were to be accepted, that provision would allow, in the special context of [Articles 75 and 215 TFEU], the adoption of [Union] measures concerning not one of the objectives of the [Union] but one of the objectives under the EU Treaty in the sphere of external relations, including the CFSP.
- 199 The inevitable conclusion is that such a view runs counter to the very wording of [the first sentence of Article 352(1) TFEU].
- 200 Recourse to that provision demands that the action envisaged should, on the one hand, relate to the 'operation of the common market' and, on the other, be intended to attain 'one of the objectives of the [Union]'.
- 201 That latter concept, having regard to its clear and precise wording, cannot on any view be regarded as including the objectives of the CFSP.
- 202 Furthermore, the coexistence of the Union and the [Union] as integrated but separate legal orders, and the constitutional architecture of the pillars, as intended by the framers of the Treaties now in force, referred to by the Court of First Instance in paragraphs 120 of *Kadi* and 156 of *Yusuf and Al Barakaat*, constitute considerations of an institutional kind militating against any extension of the bridge to articles of the [Treaty on the Functioning of the European Union] other than those with which it explicitly creates a link.
- 203 In addition, [the first sentence of Article 352(1) TFEU], being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of [Union] powers beyond the general framework created by the provisions of the [Treaty on the Functioning of the European Union] as a whole and, in particular, by those defining the tasks and the activities of the [Union] (Opinion 2/94, paragraph 30).
- 204 Likewise, [Article 7 TFEU and Articles 13(1) and the second paragraph of 21(3) TEU], referred to by the Court of First Instance in paragraphs 126 to 128 of *Kadi* and 162 to 164 of *Yusuf and Al Barakaat*, in particular its second paragraph, cannot supply a base for any widening of [Union] powers beyond the objects of the [Union].
- 205 The effect of that error in law on the validity of the judgments under appeal will be considered later, after the evaluation of the other claims raised against the explanations given in those judgments concerning the possibility of including [the first sentence of Article 352(1) TFEU] in the legal basis of the contested regulation jointly with [Articles 75 and 215 TFEU].
- 206 Those other claims may be divided into two categories.
- 207 The first category includes, in particular, the first part of Mr Kadi's first ground of appeal, in which he argues that the Court of First Instance erred in law when it accepted that it was possible for [the first sentence of Article 352(1) TFEU] to supplement the legal basis of the contested regulation formed by [Articles 75 and 215 TFEU]. In his submission, those two latter articles cannot form the legal basis, even in part, of the contested regulation because, according to the interpretation given by the Court of First Instance itself, measures directed against persons or entities in no way linked to the governing regime of a third country - the only persons to whom the contested regulation is addressed - do not fall within the ambit of those articles.
- 208 That criticism may be compared with that made by the Commission, to the effect that, if it were to be held that recourse to [the first sentence of Article 352(1) TFEU] could be allowed, it would have to be as the sole legal basis, and not jointly with [Articles 75 and 215 TFEU].

- 209 The second category includes the Commission's criticisms of the Court of First Instance's decision, in paragraphs 116 and 121 of *Kadi* and 152 and 157 of *Yusuf and Al Barakaat*, that, for the purposes of the application of [the first sentence of Article 352(1) TFEU], the objective of the contested regulation, namely, according to the Court of First Instance, the fight against international terrorism, and more particularly the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of terrorism, cannot be made to refer to one of the objects which the [Treaty on the Functioning of the European Union] entrusts to the [Union].
- 210 The Commission maintains in this respect that the implementing measures imposed by the contested regulation in the area of economic and financial sanctions fall, by their very nature, within the scope of the objects of the [Union], that is to say, first, the common commercial policy and, second, the free movement of capital.
- 211 With regard to that first category of claims, it is to be borne in mind that [the first sentence of Article 352(1) TFEU] is designed to fill the gap where no specific provisions of the Treaty confer on the [Union] institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the [Union] to carry out its functions with a view to attaining one of the objectives laid down by the Treaty (Opinion 2/94, paragraph 29).
- 212 The Court of First Instance correctly held that [the first sentence of Article 352(1) TFEU] could be included in the legal basis of the contested regulation, jointly with [Articles 75 and 215 TFEU].
- 213 The contested regulation, inasmuch as it imposes restrictive measures of an economic and financial nature, plainly falls within the ambit *ratione materiae* of [Articles 75 and 215 TFEU].
- 214 To that extent, the inclusion of those articles in the legal basis of the contested regulation was therefore justified.
- 215 Furthermore, those provisions are part of the extension of a practice based, before the introduction of [Articles 75 and 215 TFEU] by the Maastricht Treaty, on [Article 207 TFEU] (see, to that effect, Case C-70/94 *Werner* [1995] ECR I-3189, paragraphs 8 to 10, and Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraphs 28 and 29), which consisted of entrusting to the [Union] the implementation of actions decided on in the context of European political cooperation and involving the imposition of restrictive measures of an economic nature in respect of third countries.
- 216 Since [Articles 75 and 215 TFEU] do not, however, provide for any express or implied powers of action to impose such measures on addressees in no way linked to the governing regime of a third country such as those to whom the contested regulation applies, that lack of power, attributable to the limited ambit *ratione materiae* of those provisions, could be made good by having recourse to [the first sentence of Article 352(1) TFEU] as a legal basis for that regulation in addition to the first two provisions providing a foundation for that measure from the point of view of its material scope, provided, however, that the other conditions to which the applicability of [the first sentence of Article 352(1) TFEU] is subject had been satisfied.
- 217 The claims in that first category must therefore be rejected as unfounded.
- 218 With regard to the other conditions for the applicability of [the first sentence of Article 352(1) TFEU], the second category of claims will now be considered.
- 219 The Commission maintains that, although Common Position 2002/402, which the contested regulation is intended to put into effect, pursues the objective of the campaign against international terrorism, an objective covered by the CFSP, that regulation must be considered to lay down an implementing measure intended to impose economic and financial sanctions.

- 220 That objective falls within the scope of the objectives of the [Union] for the purpose of [the first sentence of Article 352(1) TFEU], in particular those relating to the common commercial policy and the free movement of capital.
- 221 The United Kingdom takes the view that the purely instrumental specific objective of the contested regulation, namely, the introduction of coercive economic measures, must be distinguished from the underlying CFSP objective of maintaining international peace and security. That specific objective contributes to the implicit [Union] objective underlying [Articles 75 and 215 TFEU], which is to supply effective means to put into effect, solely by coercive economic measures, acts adopted under the CFSP.
- 222 The objective pursued by the contested regulation is immediately to prevent persons associated with Usama bin Laden, the Al-Qaeda network or the Taliban from having at their disposal any financial or economic resources, in order to impede the financing of terrorist activities (Case C-117/06 *Möllendorf and Möllendorf-Niehuus* [2007] ECR I-8361, paragraph 63).
- 223 Contrary to what the Court of First Instance held in paragraphs 116 of *Kadi* and 152 of *Yusuf and Al Barakaat*, that objective can be made to refer to one of the objects which the [Treaty on the Functioning of the European Union] entrusts to the [Union]. The judgments under appeal are therefore vitiated by an error of law on this point also.
- 224 In this regard it may be recalled that, as explained in paragraph 203 above, [the first sentence of Article 352(1) TFEU], being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of [Union] powers beyond the general framework created by the provisions of the [Treaty on the Functioning of the European Union] as a whole.
- 225 The objective pursued by the contested regulation may be made to refer to one of the objectives of the [Union] for the purpose of [the first sentence of Article 352(1) TFEU], with the result that the adoption of that regulation did not amount to disregard of the scope of [Union] powers stemming from the provisions of the [Treaty on the Functioning of the European Union] as a whole.
- 226 Inasmuch as they provide for [Union] powers to impose restrictive measures of an economic nature in order to implement actions decided on under the CFSP, [Articles 75 and 215 TFEU] are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a [Union] instrument.
- 227 That objective may be regarded as constituting an objective of the [Union] for the purpose of [the first sentence of Article 352(1) TFEU].
- 228 That interpretation is supported by Article 60(2) EC [repealed]. Although the first paragraph thereof provides the power, within strict limits, for Member States to take unilateral measures against a third country with regard to capital movements and payments, that power may, as provided for by that paragraph, be exercised only so long as [Union] measures have not been taken pursuant to paragraph 1 of that article.
- 229 Implementing restrictive measures of an economic nature through the use of a [Union] instrument does not go beyond the general framework created by the provisions of the [Treaty on the Functioning of the European Union] as a whole, because such measures by their very nature offer a link to the operation of the common market, that link constituting another condition for the application of [the first sentence of Article 352(1) TFEU], as set out in paragraph 200 above.
- 230 If economic and financial measures such as those imposed by the contested regulation, consisting of the, in principle generalised, freezing of all the funds and other economic resources of the persons and entities concerned, were imposed unilaterally by every Member State, the multiplication of

those national measures might well affect the operation of the common market. Such measures could have a particular effect on trade between Member States, especially with regard to the movement of capital and payments, and on the exercise by economic operators of their right of establishment. In addition, they could create distortions of competition, because any differences between the measures unilaterally taken by the Member States could operate to the advantage or disadvantage of the competitive position of certain economic operators although there were no economic reasons for that advantage or disadvantage.

231 The Council's statement in the fourth recital in the preamble to the contested regulation that [Union] legislation was necessary 'notably with a view to avoiding distortion of competition' is shown, therefore, to be relevant in this connection.

232 At this point it is appropriate to rule on the effect of the errors of law, recorded in paragraphs 196 and 223 above, on the validity of the judgments under appeal.

233 It is to be borne in mind that, according to case-law, if the grounds of a judgment of the Court of First Instance reveal an infringement of [Union] law but its operative part appears well founded on other legal grounds the appeal must be dismissed (see, in particular, Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, paragraph 186 and the case-law cited).

234 Clearly the conclusion reached by the Court of First Instance in paragraphs 135 of *Kadi* and 158 of *Yusuf and Al Barakaat* concerning the legal basis of the contested regulation, that is to say, that the Council was competent to adopt that regulation on the joint basis of [Articles 75, 215 and the first sentence of 352(1) TFEU], appears justified on other legal grounds.

235 Although, as held in paragraphs 196 to 204 above, the inclusion of [the first sentence of Article 352(1) TFEU] in the legal basis of the contested regulation cannot be justified by the fact that that measure pursued an objective covered by the CFSP, that provision could nevertheless be held to provide a foundation for the regulation because, as shown in paragraphs 225 to 231 above, that regulation could legitimately be regarded as designed to attain an objective of the [Union] and as, furthermore, linked to the operation of the common market within the meaning of [the first sentence of Article 352(1) TFEU]. Moreover, adding [the first sentence of Article 352(1) TFEU] to the legal basis of the contested regulation enabled the European Parliament to take part in the decision-making process relating to the measures at issue which are specifically aimed at individuals whereas, under [Articles 75 and 215 TFEU], no role is provided for that institution.

236 Accordingly, the grounds of appeal directed against the judgments under appeal inasmuch as by the latter the Court of First Instance decided that [Articles 75, 215 and the first sentence of 352(1) TFEU] constituted the legal basis of the contested regulation must be dismissed in their entirety as unfounded.

Concerning the ground of appeal relating to infringement of [Article 288 TFEU]

Arguments of the parties

237 By its second ground of appeal Al Barakaat complains that the Court of First Instance held, in paragraph 188 of *Yusuf and Al Barakaat*, that the contested regulation satisfies the condition of general application laid down in [Article 288 TFEU], given that it is addressed in a general and abstract manner to all persons who might actually hold funds belonging to one or more persons mentioned in the Annex to the regulation.

238 Al Barakaat maintains that it is wrong not to consider the person whose funds are frozen as the addressee of the act concerned, because the implementation of the decision must reasonably be founded on a legal measure directed against the person in possession of the resources.

239 What is more, according to that appellant, it is contradictory to state, on the one hand, in paragraph 112 of *Yusuf and Al Barakaat*, that the measures at issue were restrictive measures directly affecting individuals or organisations and, on the other, in paragraph 188 of that judgment, that those measures were not addressed to those individuals or organisations, but rather constituted a kind of implementing measure addressed to other persons.

240 The Kingdom of Spain, the United Kingdom, the Council and the Commission broadly endorse the analysis of the Court of First Instance.

Findings of the Court

241 The Court of First Instance rightly held in paragraphs 184 to 188 of *Yusuf and Al Barakaat* that the fact that the persons and entities who are the subject of the restrictive measures imposed by the contested regulation are expressly named in Annex I thereto, so that they appear to be directly and individually concerned by it, within the meaning of the fourth paragraph of [Article 263 TFEU], does not mean that that act is not of general application within the meaning of the second paragraph of [Article 288 TFEU] or that it is not to be classified as a regulation.

242 In fact, while it is true that the contested regulation imposes restrictive measures on the persons and entities whose names appear in the exhaustive list that constitutes Annex I thereto, a list which is, moreover, regularly amended by the removal or addition of names, so that it is kept in line with the summary list, the fact remains that the persons to whom it is addressed are determined in a general and abstract manner.

243 The contested regulation, like Resolution 1390 (2002) which it is designed to put into effect, lays down a prohibition, worded exceptionally broadly, of making available funds and economic resources to those persons or entities (see, to that effect, *Möllendorf and Möllendorf-Niehuus*, paragraphs 50 to 55).

244 As the Court of First Instance quite rightly held in paragraphs 186 and 188 of *Yusuf and Al Barakaat*, that prohibition is addressed to whoever might actually hold the funds or economic resources in question.

245 That is how that prohibition falls to be applied in circumstances such as those of the case giving rise to the judgment in *Möllendorf and Möllendorf-Niehuus*, which concerned the question whether the contested regulation forbids the final registration of the transfer of ownership of real property in a land register following the conclusion of a contract of sale if one of the purchasers is a natural person appearing in the list in Annex I to the regulation.

246 In paragraph 60 of that judgment, the Court decided that a transaction such as that registration is prohibited under Article 2(3) of the contested regulation if, in consequence of that transaction, an economic resource would be made available to a person entered in that list, which would enable that person to obtain funds, goods or services.

247 In the light of the foregoing, Al Barakaat's ground of appeal relating to infringement of [Article 288 TFEU] must also be dismissed as unfounded.

Concerning the grounds of appeal relating to infringement of certain fundamental rights

The heads of claim concerning the part of the judgments under appeal relating to the limits of the review by the [Union] judicature, in the light of fundamental rights, of the internal lawfulness of the contested regulation

248 In the first part of his second ground of appeal, Mr Kadi maintains that inasmuch as the judgment in *Kadi* takes a view, first, of the relationships between the United Nations and the members of that

organisation and, second, of the procedure for the application of resolutions of the Security Council, it is vitiated by errors of law as regards the interpretation of the principles of international law concerned, which gave rise to other errors of law in the assessment of the pleas in law relating to breach of certain of the applicant's specific fundamental rights.

249 That part contains five claims.

250 By his first claim, Mr Kadi argues that in paragraphs 183 and 184 of the judgment the Court of First Instance erred in law in confusing the question of the primacy of the States' obligations under the Charter of the United Nations, enshrined in Article 103 thereof, with the related but separate question of the binding effect of decisions of the Security Council laid down in Article 25 of that Charter.

251 By his second claim, Mr Kadi complains that the Court of First Instance erred in law when, in paragraphs 217 to 225 of that judgment, it took as its premiss that, like obligations under treaty law, resolutions adopted by virtue of Chapter VII of the Charter of the United Nations must automatically form part of the sphere of law and competence of the members of the United Nations.

252 By the third claim, Mr Kadi alleges that the Court of First Instance erred in law when it held, in paragraphs 212 to 225 and 283 and 284 of that judgment, that it had no power enabling it to review the lawfulness of resolutions of the Security Council adopted by virtue of Chapter VII of the Charter of the United Nations.

253 By the fourth claim, Mr Kadi maintains that the reasoning of the Court of First Instance in paragraphs 225 to 232 of that judgment on the subject of *jus cogens* displays considerable incoherence, in so far as, if it must prevail, the principle that resolutions of the Security Council may not be the subject of judicial review and in support of this enjoy immunity from jurisdiction would have to apply generally, and the matters covered by *jus cogens* would not then constitute an exception to that principle.

254 By the fifth claim, Mr Kadi argues that the fact that the Security Council has not established an independent international court responsible for ruling, in law and on the facts, on actions brought against individual decisions taken by the Sanctions Committee, does not mean that the Member States have no lawful power, by adopting reasonable measures, to improve the finding of facts underlying the imposition of sanctions and the identification of the persons affected by them, or that the Member States are prohibited from creating an appropriate legal remedy by reason of the latitude they enjoy in the performance of their obligations.

255 In his reply, referring to *Bosphorus*, Mr Kadi maintains, in addition, that [Union] law requires all [Union] legislative measures to be subject to the judicial review carried out by the Court, which also concerns observance of fundamental rights, even if the origin of the measure in question is an act of international law such as a resolution of the Security Council.

256 So long as the law of the United Nations offers no adequate protection for those whose claim that their fundamental rights have been infringed, there must be a review of the measures adopted by the [Union] in order to give effect to resolutions of the Security Council. According to Mr Kadi, the re-examination procedure before the Sanctions Committee, based on diplomatic protection, does not afford protection of human rights equivalent to that guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), as demanded by the European Court of Human Rights in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* of 30 June 2005, *Reports of Judgments and Decisions* 2005-VI, § 155.

257 Mr Kadi submits that that line of argument, an alternative to the arguments based on international law, is raised in case the Court should hold that there is a conflict between the objectives of faithful implementation of resolutions of the Security Council and the principles of due process or judicial protection.

258 Furthermore, he states that that head of claim is not a new ground of appeal but a development of the fundamental proposition, raised in the notice of appeal, that the [Union] is bound, when it decides to act by legislative means to give effect to a resolution of the Security Council, to ensure, as a condition of the lawfulness of the legislation it intends thus to introduce, that that legislation should observe the minimum criteria in the field of human rights.

259 By the first part of its third ground of appeal, Al Barakaat criticises the Court of First Instance's preliminary observations in *Yusuf and Al Barakaat* on the relationship between the international legal order under the United Nations and the domestic legal order or the [Union] legal order and on the extent of the review of lawfulness which the Court of First Instance had to carry out.

260 A resolution of the Security Council, binding per se in public international law, can have legal effect vis-à-vis persons in a State only if it has been implemented in accordance with the law in force.

261 In this appellant's view, there are no legal grounds for inferring the existence of special treatment or of an exception with regard to implementation of resolutions of the Security Council to the effect that a [Union] regulation intended to carry out such implementation need not accord with [Union] rules on the adoption of regulations.

262 Conversely, the French Republic, the Kingdom of the Netherlands, the United Kingdom and the Council approve, in essence, the analysis made in that connection by the Court of First Instance in the judgments under appeal and endorse the conclusion drawn therefrom that, so far as concerns the internal lawfulness of the contested regulation, the latter, inasmuch as it puts into effect resolutions adopted by the Security Council pursuant to Chapter VII of the Charter of the United Nations, in principle escapes all review by the [Union] judicature, even concerning observance of fundamental rights, and so for that reason enjoys immunity from jurisdiction.

263 However, unlike the Court of First Instance, those parties take the view that no review of the internal lawfulness of resolutions of the Security Council may be carried out by the [Union] judicature. They therefore complain that the Court of First Instance decided that such review was possible in the light of jus cogens.

264 They argue that the judgments under appeal, by allowing an exception in that regard, but without identifying its legal basis, in particular under the provisions of the Treaty, are inconsistent, inasmuch as the arguments excluding in a general manner the exercise of judicial review by the [Union] judicature of resolutions of the Security Council also militate against the recognition of powers to carry out such a review solely in the light of jus cogens.

265 Further, the French Republic, the Kingdom of the Netherlands, the United Kingdom and the Commission consider that the Court of First Instance erred in law when it ruled that the fundamental rights at issue in these cases fell within the scope of jus cogens.

266 A norm may be classified as jus cogens only when no derogation from it is possible. The rights invoked in the cases in point – the right to a fair hearing and the right to respect for property – are, however, subject to limitations and exceptions.

267 The United Kingdom has brought a cross-appeal in this connection, seeking to have set aside the parts of the judgments under appeal dealing with jus cogens, viz., paragraphs 226 to 231 of *Kadi* and 277 to 281 of *Yusuf and Al Barakaat*.

- 268 For their part, the French Republic and the Kingdom of the Netherlands suggest that the Court should undertake a replacement of grounds, claiming that Mr Kadi's and Al Barakaat's pleas in law relating to jus cogens should be dismissed by reason of the absolute lack of jurisdiction of the [Union] judicature to carry out any review of resolutions of the Security Council, even in the light of jus cogens.
- 269 The Commission maintains that two reasons may justify not giving effect to an obligation to implement resolutions of the Security Council such as those at issue, whose strict terms leave the [Union] authorities no discretion in their implementation; they are, first, the case in which the resolution concerned is contrary to jus cogens and, second, the case in which that resolution falls outside the ambit of or violates the purposes and principles of the United Nations and was therefore adopted *ultra vires*.
- 270 The Commission takes the view that, given that, according to Article 24(2) of the Charter of the United Nations, the Security Council is bound by the purposes and principles of the United Nations, including, according to Article 1(3) of the Charter, the development of human rights and their promotion, an act adopted by that body in breach of human rights, including the fundamental rights of the individuals at issue, might be regarded as having been adopted *ultra vires* and, therefore, as not binding on the [Union].
- 271 In the Commission's view, however, the Court of First Instance was right to hold that the [Union] judicature cannot in principle review the validity of a resolution of the Security Council in the light of the purposes and principles of the United Nations.
- 272 If, nevertheless, the Court were to accept that it could carry out such a review, the Commission argues that the Court, as the judicature of an international organisation other than the United Nations, could express itself on this question only if the breach of human rights was particularly flagrant and glaring, referring here to *Racke*.
- 273 That is not, in the Commission's view, the case here, owing to the existence of the re-examination procedure before the Sanctions Committee and because it must be supposed that the Security Council had weighed the requirements of international security at issue against the fundamental rights concerned.
- 274 With regard to the guidance given in *Bosphorus*, the Commission maintains that, in contrast to the case giving rise to that judgment, the question of the lawfulness and possible nullity of the resolution in question could arise with regard to the contested regulation if the Court were to rule that the [Union] may not implement a binding resolution of the Security Council because the standards applied by that body in the sphere of human rights, especially in respect of the right to be heard, are insufficient.
- 275 In addition, the United Kingdom is of the view that Mr Kadi's arguments that the lawfulness of any legislation adopted by the [Union] institutions in order to give effect to a resolution of the Security Council remains subject, by virtue of [Union] law, to full review by the Court, regardless of its origin, constitute a new ground of appeal because they were put forward for the first time in that appellant's reply. That Member State submits that in accordance with Articles 42(2) and 118 of the Rules of Procedure, those arguments must therefore be rejected.
- 276 In the alternative, the United Kingdom maintains that the special status of resolutions adopted under Chapter VII of the Charter of the United Nations, as a result of the interaction of Articles 25, 48 and 103 of that Charter, recognised by [Article 347 TFEU], implies that action taken by a Member State to perform its obligations with a view to maintaining international peace and security is protected against any action founded on [Union] law. The primacy of those obligations clearly extends to principles of [Union] law of a constitutional nature.

277 That Member State maintains that, in *Bosphorus*, the Court did not declare that it had jurisdiction to determine the validity of a regulation intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, but did no more than interpret the regulation concerned for the purpose of determining whether a measure laid down by that regulation had to be applied by the authorities of a Member State in a given case. The French Republic essentially agrees with that interpretation of *Bosphorus*.

Findings of the Court

278 Before addressing the substance of the question, the Court finds it necessary to reject the objection of inadmissibility raised by the United Kingdom in respect of the line of argument put forward by Mr Kadi in his reply, to the effect that the lawfulness of any legislation adopted by the [Union] institutions, including an act intended to give effect to a resolution of the Security Council remains subject, by virtue of [Union] law, to full review by the Court, regardless of its origin.

279 In point of fact, as Mr Kadi has stated, that is an additional argument supplementing the ground of appeal set out earlier, at least implicitly, in the notice of appeal and closely connected to that ground, to the effect that the [Union], when giving effect to a resolution of the Security Council, was bound to ensure, as a condition of the lawfulness of the legislation it intended thus to introduce, that that legislation should observe the minimum criteria in the field of human rights (see, to that effect, inter alia, the order in Case C-430/00 P *Dürbeck v Commission* [2001] ECR I-8547, paragraph 17).

280 The Court will now consider the heads of claim in which the appellants complain that the Court of First Instance, in essence, held that it followed from the principles governing the relationship between the international legal order under the United Nations and the [Union] legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, could not be subject to judicial review of its internal lawfulness, save with regard to its compatibility with the norms of jus cogens, and therefore to that extent enjoyed immunity from jurisdiction.

281 In this connection it is to be borne in mind that the [Union] is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the [Treaty on the Functioning of the European Union], which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 23).

282 It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the [Union] legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by [the second sentence of Article 19(1) TEU], jurisdiction that the Court has, moreover, already held to form part of the very foundations of the [Union] (see, to that effect, Opinion 1/91 [1991] ECR I-6079, paragraphs 35 and 71, and Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 123 and case-law cited).

283 In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (see, inter alia, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 29 and case-law cited).

- 284 It is also clear from the case-law that respect for human rights is a condition of the lawfulness of [Union] acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the [Union] (Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 73 and case-law cited).
- 285 It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the [Treaty on the Functioning of the European Union], which include the principle that all [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 the Treaty.
- 286 In this regard it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the [Union] judicature applies to the [Union] act intended to give effect to the international agreement at issue, and not to the latter as such.
- 287 With more particular regard to a [Union] act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the [Union] judicature, under the exclusive jurisdiction provided for by [the second sentence of Article 19(1) TEU], to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*.
- 288 However, any judgment given by the [Union] judicature deciding that a [Union] measure intended to give effect to such a resolution is contrary to a higher rule of law in the [Union] legal order would not entail any challenge to the primacy of that resolution in international law.
- 289 The Court has thus previously annulled a decision of the Council approving an international agreement after considering the internal lawfulness of the decision in the light of the agreement in question and finding a breach of a general principle of [Union] law, in that instance the general principle of non-discrimination (Case C-122/95 *Germany v Council* [1998] ECR I-973).
- 290 It must therefore be considered whether, as the Court of First Instance held, as a result of the principles governing the relationship between the international legal order under the United Nations and the [Union] legal order, any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is in principle excluded, notwithstanding the fact that, as is clear from the decisions referred to in paragraphs 281 to 284 above, such review is a constitutional guarantee forming part of the very foundations of the [Union].
- 291 In this respect it is first to be borne in mind that the European [Union] must respect international law in the exercise of its powers (*Poulsen and Diva Navigation*, paragraph 9, and *Racke*, paragraph 45), the Court having in addition stated, in the same paragraph of the first of those judgments, that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.
- 292 Moreover, the Court has held that the powers of the [Union] provided for by [Article 21(2)(b), (d) and (e) TEU, Articles 208 to 211 TFEU] in the sphere of cooperation and development must be exercised in observance of the undertakings given in the context of the United Nations and other international organisations (Case C-91/05 *Commission v Council* [2008] ECR I-0000, paragraph 65 and case-law cited).
- 293 Observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the [Union] gives effect, by means of the adoption of [Union] measures taken on the basis of [Articles 75 and 215 TFEU],

to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

294 In the exercise of that latter power it is necessary for the [Union] to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.

295 Next, it is to be noted that the powers provided for in [Articles 75 and 215 TFEU] may be exercised only in pursuance of the adoption of a common position or joint action by virtue of the provisions of the [Treaty on the Functioning of the European Union] relating to the CFSP which provides for action by the [Union].

296 Although, because of the adoption of such an act, the [Union] is bound to take, under the [Treaty on the Functioning of the European Union], the measures necessitated by that act, that obligation means, when the object is to implement a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, that in drawing up those measures the [Union] is to take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation.

297 Furthermore, the Court has previously held that, for the purposes of the interpretation of the contested regulation, account must also be taken of the wording and purpose of Resolution 1390 (2002) which that regulation, according to the fourth recital in the preamble thereto, is designed to implement (*Möllendorf and Möllendorf-Niehuus*, paragraph 54 and case-law cited).

298 It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

299 It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.

300 What is more, such immunity from jurisdiction for a [Union] measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the [Treaty on the Functioning of the European Union].

301 Admittedly, the Court has previously recognised that [Article 351 TFEU] could, if the conditions for application have been satisfied, allow derogations even from primary law, for example from [Article 207 TFEU] on the common commercial policy (see, to that effect, *Centro-Com*, paragraphs 56 to 61).

302 It is true also that [Article 347 TFEU] implicitly permits obstacles to the operation of the common market when they are caused by measures taken by a Member State to carry out the international obligations it has accepted for the purpose of maintaining international peace and security.

- 303 Those provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in [Article 2 TEU] as a foundation of the Union.
- 304 [Article 351 TFEU] may in no circumstances permit any challenge to the principles that form part of the very foundations of the [Union] legal order, one of which is the protection of fundamental rights, including the review by the [Union] judicature of the lawfulness of [Union] measures as regards their consistency with those fundamental rights.
- 305 Nor can an immunity from jurisdiction for the contested regulation with regard to the review of its compatibility with fundamental rights, arising from the alleged absolute primacy of the resolutions of the Security Council to which that measure is designed to give effect, find any basis in the place that obligations under the Charter of the United Nations would occupy in the hierarchy of norms within the [Union] legal order if those obligations were to be classified in that hierarchy.
- 306 [Article 216(2) TFEU] provides that agreements concluded under the conditions set out in that article are to be binding on the institutions of the [Union] and on Member States.
- 307 Thus, by virtue of that provision, supposing it to be applicable to the Charter of the United Nations, the latter would have primacy over acts of secondary [Union] law (see, to that effect, Case C-308/06 *Intertanko and Others* [2008] ECR I-0000, paragraph 42 and case-law cited).
- 308 That primacy at the level of [Union] law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.
- 309 That interpretation is supported by [Article 218 (11) TFEU], which provides that an international agreement may not enter into force if the Court has delivered an adverse opinion on its compatibility with the [Treaty on the Functioning of the European Union], unless the latter has previously been amended.
- 310 It has however been maintained before the Court, in particular at the hearing, that the [Union] judicature ought, like the European Court of Human Rights, which in several recent decisions has declined jurisdiction to review the compatibility of certain measures taken in the implementing of resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, to refrain from reviewing the lawfulness of the contested regulation in the light of fundamental freedoms, because that regulation is also intended to give effect to such resolutions.
- 311 In this respect, it is to be found that, as the European Court of Human Rights itself has noted, there exists a fundamental difference between the nature of the measures concerned by those decisions, with regard to which that court declined jurisdiction to carry out a review of consistency with the ECHR, and the nature of other measures with regard to which its jurisdiction would seem to be unquestionable (see *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* of 2 May 2007, not yet published in the *Reports of Judgments and Decisions*, §151).
- 312 While, in certain cases before it the European Court of Human Rights has declined jurisdiction *ratione personae*, those cases involved actions directly attributable to the United Nations as an organisation of universal jurisdiction fulfilling its imperative collective security objective, in particular actions of a subsidiary organ of the UN created under Chapter VII of the Charter of the United Nations or actions falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter, and not actions ascribable to the respondent States before that court, those actions not, moreover, having taken place in the territory of those States and not resulting from any decision of the authorities of those States.
- 313 By contrast, in paragraph 151 of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, the European Court of Human Rights stated that in the case leading to its judgment in

Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, concerning a seizure measure carried out by the authorities of the respondent State on its territory following a decision by one of its ministers, it had recognised its competence, notably *ratione personae*, vis-à-vis the respondent State, despite the fact that the source of the contested measure was a [Union] regulation taken, in its turn, pursuant to a resolution of the Security Council.

- 314 In the instant case it must be declared that the contested regulation cannot be considered to be an act directly attributable to the United Nations as an action of one of its subsidiary organs created under Chapter VII of the Charter of the United Nations or an action falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter.
- 315 In addition and in any event, the question of the Court's jurisdiction to rule on the lawfulness of the contested regulation has arisen in fundamentally different circumstances.
- 316 As noted above in paragraphs 281 to 284, the review by the Court of the validity of any [Union] measure in the light of fundamental rights must be considered to be the expression, in a [Union] based on the rule of law, of a constitutional guarantee stemming from the [Treaty on the Functioning of the European Union] as an autonomous legal system which is not to be prejudiced by an international agreement.
- 317 The question of the Court's jurisdiction arises in the context of the internal and autonomous legal order of the [Union], within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of [Union] measures in the light of fundamental rights.
- 318 It has in addition been maintained that, having regard to the deference required of the [Union] institutions vis-à-vis the institutions of the United Nations, the Court must forgo the exercise of any review of the lawfulness of the contested regulation in the light of fundamental rights, even if such review were possible, given that, under the system of sanctions set up by the United Nations, having particular regard to the re-examination procedure which has recently been significantly improved by various resolutions of the Security Council, fundamental rights are adequately protected.
- 319 According to the Commission, so long as under that system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever.
- 320 In this connection it may be observed, first of all, that if in fact, as a result of the Security Council's adoption of various resolutions, amendments have been made to the system of restrictive measures set up by the United Nations with regard both to entry in the summary list and to removal from it [see, in particular, Resolutions 1730 (2006) of 19 December 2006, and 1735 (2006) of 22 December 2006], those amendments were made after the contested regulation had been adopted so that, in principle, they cannot be taken into consideration in these appeals.
- 321 In any event, the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction within the internal legal order of the [Union].
- 322 Indeed, such immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the [Treaty on the Functioning of the European Union], appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection.

- 323 In that regard, although it is now open to any person or entity to approach the Sanctions Committee directly, submitting a request to be removed from the summary list at what is called the 'focal' point, the fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto.
- 324 The Guidelines of the Sanctions Committee, as last amended on 12 February 2007, make it plain that an applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request.
- 325 Moreover, those Guidelines do not require the Sanctions Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information. Last, if that Committee rejects the request for removal from the list, it is under no obligation to give reasons.
- 326 It follows from the foregoing that the [Union] judicature must, in accordance with the powers conferred on it by the [Treaty on the Functioning of the European Union], 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 general principles of [Union] law, including review of [Union] measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.
- 327 The Court of First Instance erred in law, therefore, when it held, in paragraphs 212 to 231 of *Kadi* and 263 to 282 of *Yusuf and Al Barakaat*, that it followed from the principles governing the relationship between the international legal order under the United Nations and the [Union] legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, must enjoy immunity from jurisdiction so far as concerns its internal lawfulness save with regard to its compatibility with the norms of jus cogens.
- 328 The appellants' grounds of appeal are therefore well founded on that point, with the result that the judgments under appeal must be set aside in this respect.
- 329 It follows that there is no longer any need to examine the heads of claim directed against that part of the judgments under appeal relating to review of the contested regulation in the light of the rules of international law falling within the ambit of jus cogens and that it is, therefore, no longer necessary to examine the United Kingdom's cross-appeal on this point either.
- 330 Furthermore, given that in the latter part of the judgments under appeal, relating to the specific fundamental rights invoked by the appellants, the Court of First Instance confined itself to examining the lawfulness of the contested regulation in the light of those rules alone, when it was its duty to carry out an examination, in principle a full examination, in the light of the fundamental rights forming part of the general principles of [Union] law, the latter part of those judgments must also be set aside.

Concerning the actions before the Court of First Instance

- 331 As provided in the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, the latter, when it quashes the decision of the Court of First Instance, may give final judgment in the matter where the state of proceedings so permits.

- 332 In the circumstances, the Court considers that the actions for annulment of the contested regulation brought by the appellants are ready for judgment and that it is necessary to give final judgment in them.
- 333 It is appropriate to examine, first, the claims made by Mr Kadi and Al Barakaat with regard to the breach of the rights of the defence, in particular the right to be heard, and of the right to effective judicial review, caused by the measures for the freezing of funds as they were imposed on the appellants by the contested regulation.
- 334 In this regard, in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.
- 335 According to settled case-law, the principle of effective judicial protection is a general principle of [Union] law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) (see, to this effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37).
- 336 In addition, having regard to the Court's case-law in other fields (see, inter alia, Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Røroindustri and Others v Commission* [2005] ECR I-5425, paragraphs 462 and 463), it must be held in this instance that the effectiveness of judicial review, which it must be possible to apply to the lawfulness of the grounds on which, in these cases, the name of a person or entity is included in the list forming Annex I to the contested regulation and leading to the imposition on those persons or entities of a body of restrictive measures, means that the [Union] authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action.
- 337 Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the [Union] judicature (see, to that effect, *Heylens and Others*, paragraph 15), and to put the latter fully in a position in which it may carry out the review of the lawfulness of the [Union] measure in question which is its duty under the [Treaty on the Functioning of the European Union].
- 338 So far as concerns the rights of the defence, in particular the right to be heard, with regard to restrictive measures such as those imposed by the contested regulation, the [Union] authorities cannot be required to communicate those grounds before the name of a person or entity is entered in that list for the first time.
- 339 As the Court of First Instance stated in paragraph 308 of *Yusuf and Al Barakaat*, such prior communication would be liable to jeopardise the effectiveness of the freezing of funds and resources imposed by that regulation.
- 340 In order to attain the objective pursued by that regulation, such measures must, by their very nature, take advantage of a surprise effect and, as the Court has previously stated, apply with immediate effect (*Möllendorf and Möllendorf-Niehuus*, paragraph 63).
- 341 Nor were the [Union] authorities bound to hear the appellants before their names were included for the first time in the list set out in Annex I to that regulation, for reasons also connected to the

objective pursued by the contested regulation and to the effectiveness of the measures provided by the latter.

342 In addition, with regard to a [Union] measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the [Union] and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.

343 However, that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the [Union] judicature once it has been claimed that the act laying them down concerns national security and terrorism.

344 In such a case, it is none the less the task of the [Union] judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice (see, to that effect, the judgment of the European Court of Human Rights in *Chahal v. United Kingdom* of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 131).

345 In the circumstances, the inevitable conclusion is, first of all, that neither the contested regulation nor Common Position 2002/402 to which the former refers provides for a procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in Annex I to that regulation and for hearing those persons, either at the same time as that inclusion or later.

346 It has next to be pointed out that the Council at no time informed the appellants of the evidence adduced against them that allegedly justified the inclusion of their names for the first time in Annex I to the contested regulation and, consequently, the imposition of the restrictive measures laid down by the latter.

347 It is not indeed denied that no information was supplied in that connection to the appellants, whether in Regulation No 467/2001 as amended by Regulations Nos 2062/2001 and 2199/2001, their names being mentioned for the first time in a list of persons, entities or bodies to whom and to which a measure freezing funds applies, in the contested regulation or at some later stage.

348 Because the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted, the appellants were not in a position to make their point of view in that respect known to advantage. Therefore, the appellants' rights of defence, in particular the right to be heard, were not respected.

349 In addition, given the failure to inform them of the evidence adduced against them and having regard to the relationship, referred to in paragraphs 336 and 337 above, between the rights of the defence and the right to an effective legal remedy, the appellants were also unable to defend their rights with regard to that evidence in satisfactory conditions before the [Union] judicature, with the result that it must be held that their right to an effective legal remedy has also been infringed.

350 Last, it must be stated that that infringement has not been remedied in the course of these actions. Indeed, given that, according to the fundamental position adopted by the Council, no evidence of that kind may be the subject of investigation by the [Union] judicature, the Council has adduced no evidence to that effect.

- 351 The Court cannot, therefore, do other than find that it is not able to undertake the review of the lawfulness of the contested regulation in so far as it concerns the appellants, with the result that it must be held that, for that reason too, the fundamental right to an effective legal remedy which they enjoy has not, in the circumstances, been observed.
- 352 It must, therefore, be held that the contested regulation, in so far as it concerns the appellants, was adopted without any guarantee being given as to the communication of the inculpatory evidence against them or as to their being heard in that connection, so that it must be found that that regulation was adopted according to a procedure in which the appellants' rights of defence were not observed, which has had the further consequence that the principle of effective judicial protection has been infringed.
- 353 It follows from all the foregoing considerations that the pleas in law raised by Mr Kadi and Al Barakaat in support of their actions for annulment of the contested regulation and alleging breach of their rights of defence, especially the right to be heard, and of the principle of effective judicial protection, are well founded.
- 354 Second, the Court will now examine the plea raised by Mr Kadi with regard to breach of the right to respect for property entailed by the freezing measures imposed on him by virtue of the contested regulation.
- 355 According to settled case-law, the right to property is one of the general principles of [Union] law. It is not, however, absolute, but must be viewed in relation to its function in society. Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the [Union] and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed (see, in particular, *Regione autonoma Friuli-Venezia Giulia and ERSA*, paragraph 119 and case-law cited; see also, to that effect in the context of a system of restrictive measures, *Bosphorus*, paragraph 21).
- 356 In order to assess the extent of the fundamental right to respect for property, a general principle of [Union] law, account is to be taken of, in particular, Article 1 of the First Additional Protocol to the ECHR, which enshrines that right.
- 357 Next, it falls to be examined whether the freezing measure provided by the contested regulation amounts to disproportionate and intolerable interference impairing the very substance of the fundamental right to respect for the property of persons who, like Mr Kadi, are mentioned in the list set out in Annex I to that regulation.
- 358 That freezing measure constitutes a temporary precautionary measure which is not supposed to deprive those persons of their property. It does, however, undeniably entail a restriction of the exercise of Mr Kadi's right to property that must, moreover, be classified as considerable, having regard to the general application of the freezing measure and the fact that it has been applied to him since 20 October 2001.
- 359 The question therefore arises whether that restriction of the exercise of Mr Kadi's right to property can be justified.
- 360 In this respect, according to the case-law of the European Court of Human Rights, there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court must determine whether a fair balance has been struck between the demands of the public interest and the interest of the individuals concerned. In so doing, the Court recognises that the legislature enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public interest for the purpose of achieving the object of the law in question [see, to

that effect, in particular, European Court of Human Rights, judgment in *J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd. v. United Kingdom* of 30 August 2007, *Reports of Judgments and Decisions* 2007-0000, §§ 55 and 75].

361 As the Court has already held in connection with another [Union] system of restrictive measures of an economic nature also giving effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the importance of the aims pursued by a [Union] act is such as to justify negative consequences, even of a substantial nature, for some operators, including those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights (see, to that effect, *Bosphorus*, paragraphs 22 and 23).

362 In the case in point, the restrictive measures laid down by the contested regulation contribute to the implementation, at [Union] level, of the restrictive measures decided on by the Security Council against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them.

363 With reference to an objective of general interest as fundamental to the international [Union] as the fight by all means, in accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate (see, to that effect, *Bosphorus*, paragraph 26, and the judgment of the European Court of Human Rights in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, § 167).

364 On this point, it is also to be taken into consideration that the contested regulation, in the version amended by Regulation No 561/2003, adopted following Resolution 1452 (2002), provides, among other derogations and exemptions, that, on a request made by an interested person, and unless the Sanctions Committee expressly objects, the competent national authorities may declare the freezing of funds to be inapplicable to the funds necessary to cover basic expenses, including payments for foodstuffs, rent, medicines and medical treatment, taxes or public utility charges. In addition, funds necessary for any 'extraordinary expense' whatsoever may be unfrozen, on the express authorisation of the Sanctions Committee.

365 It is further to be noted that the resolutions of the Security Council to which the contested regulation is intended to give effect provide for a mechanism for the periodic re-examination of the general system of measures they enact and also for a procedure enabling the persons concerned at any time to submit their case to the Sanctions Committee for re-examination, by means of a request that may now be made direct to the Committee at what is called the 'focal' point.

366 It must therefore be found that the restrictive measures imposed by the contested regulation constitute restrictions of the right to property which might, in principle, be justified.

367 In addition, it must be considered whether, when that regulation was applied to Mr Kadi, his right to property was respected in the circumstances of the case.

368 It is to be borne in mind in this respect that the applicable procedures must also afford the person concerned a reasonable opportunity of putting his case to the competent authorities. In order to ascertain whether this condition, which constitutes a procedural requirement inherent in Article 1 of Protocol No 1 to the ECHR, has been satisfied, a comprehensive view must be taken of the applicable procedures (see, to that effect, the judgment of the European Court of Human Rights in *Jokela v. Finland* of 21 May 2002, *Reports of Judgments and Decisions* 2002-IV, § 45 and case-law cited, and § 55).

- 369 The contested regulation, in so far as it concerns Mr Kadi, was adopted without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him.
- 370 It must therefore be held that, in the circumstances of the case, the imposition of the restrictive measures laid down by the contested regulation in respect of Mr Kadi, by including him in the list contained in Annex I to that regulation, constitutes an unjustified restriction of his right to property.
- 371 The plea raised by Mr Kadi that his fundamental right to respect for property has been infringed is therefore well founded.
- 372 It follows from all the foregoing that the contested regulation, so far as it concerns the appellants, must be annulled.
- 373 However, the annulment to that extent of the contested regulation with immediate effect would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by the regulation and which the [Union] is required to implement, because in the interval preceding its replacement by a new regulation Mr Kadi and Al Barakaat might take steps seeking to prevent measures freezing funds from being applied to them again.
- 374 Furthermore, in so far as it follows from this judgment that the contested regulation must be annulled so far as concerns the appellants, by reason of breach of principles applicable in the procedure followed when the restrictive measures introduced by that regulation were adopted, it cannot be excluded that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified.
- 375 Having regard to those considerations, the effects of the contested regulation, in so far as it includes the names of the appellants in the list forming Annex I thereto, must, by virtue of [Article 264 TFEU], be maintained for a brief period to be fixed in such a way as to allow the Council to remedy the infringements found, but which also takes due account of the considerable impact of the restrictive measures concerned on the appellants' rights and freedoms.
- 376 In those circumstances, [Article 264 TFEU] will be correctly applied in maintaining the effects of the contested regulation, so far as concerns the appellants, for a period that may not exceed three months running from the date of delivery of this judgment.

Costs

- 377 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first paragraph of Article 69(4) provides that the Member States which have intervened in the proceedings are to bear their own costs.
- 378 Because Mr Kadi and Al Barakaat's appeals must be upheld and because the contested regulation must be annulled in so far as it concerns the appellants, the Council and the Commission must each be ordered to pay, in addition to their own costs, half of those incurred by Mr Kadi and Al Barakaat, both at first instance and in the present proceedings, in accordance with the forms of order sought to that effect by the appellants.

379 The United Kingdom of Great Britain and Northern Ireland is to bear its own costs both at first instance and in the appeals.

380 The Kingdom of Spain, the French Republic and the Kingdom of the Netherlands are to bear their own costs relating to the appeals.

On those grounds, the Court (Grand Chamber) hereby:

1. Sets aside the judgments of the Court of First Instance of the European [Union] of 21 September 2005 in Case T-315/01 *Kadi v Council and Commission* and Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission*;

2. Annuls 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 Council Regulation (EC) No 467/2001 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, in so far as it concerns Mr Kadi and the Al Barakaat International Foundation;

3. Orders the effects of Regulation No 881/2002 to be maintained, so far as concerns Mr Kadi and the Al Barakaat International Foundation, for a period that may not exceed three months running from the date of delivery of this judgment;

4. Orders the Council of the European Union and the Commission of the European [Union] each to pay, in addition to their own costs, half of those incurred by Mr Kadi and Al Barakaat International Foundation both at first instance and in these appeals;

5. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs both at first instance and in these appeals;

6. Orders the Kingdom of Spain, the French Republic and the Kingdom of the Netherlands to bear their own costs.

Signatures