

International Courts and Public Opinion: Explaining the CJEU's Role in Protecting Terror Suspects' Rights*

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Abstract

Under what conditions can regional and international courts (ICs) make decisions against their governments' preferences? To answer this much debated question, we develop a new model of state-IC relations. It posits that in cases where well-established ICs' positions are congruent with policy-specific public opinion in leading member states, ICs can rule against their governments' position. We apply our approach to a series of landmark decisions by the Court of Justice of the European Union (CJEU) regarding United Nations sanctions against terror suspects. We find that the CJEU was able to harness growing public support to strengthen terror suspects' rights, punish states for superficial compliance with its rulings and ultimately broaden the Court's judicial review powers. Our analysis suggests that ICs can be agents of legal change and advance human rights against governments' resistance, but this role is conditional on the presence of public support.

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At a time when populist and right-wing movements across Europe accuse regional and international courts (ICs) of excessive interference in states' domestic affairs, there are growing concerns about these courts' ability to protect human rights (Blauberger and Kelemen, 2017). While authoritarian tendencies remain limited to a handful of European Union (EU) countries, their ascent raises the question: Under what conditions ICs can make decisions against their member governments' positions?

International relations and legal scholars have long debated whether member states can align important IC decisions with their preferences (Conant, 2002; Martinsen, 2015; Pollack, 2003). Many scholars traditionally advocated what has been called the 'executive control thesis', the proposition that governments can effectively limit judicial discretion by using court-curbing measures (Carrubba, Gabel, and Hankla, 2008; Garrett and Weingast, 1993; Larsson and Naurin, 2016). By contrast, a growing number of studies today conceptualize ICs as 'trustees' to illustrate that member states' ability to control them is severely constrained by collective action problems (Alter, 2008; Majone, 2001; Stone Sweet and Brunell, 2012). Both the executive control and the trustee approach predict the same outcome in one important scenario: in repeated court decisions on the same case, states should have more complete information about the court's position and therefore stronger incentives to act collectively to prevent rulings against their interests. Yet the so-called *Kadi* case—a series of landmark decisions by the Court of Justice of the European Union (CJEU) on the rights of terror suspects—poses a puzzle to both schools of thought, as the judges ruled initially in line with and then repeatedly against voiced EU governments' position. Our analysis highlights that existing approaches cannot fully explain the strong variation in member states' control over ICs.

This study advances the debate by proposing a new, 'majoritarian' model of state-IC relations. We refer to this model as majoritarian because it conceptualizes ICs as institutions whose decisions take into account the popular majority's views (Friedman, 2009). Specifically, it posits that in cases where ICs' positions are congruent with policy-specific public opinion in leading member states, ICs can rule against their governments' preferences. Public opinion's influence on the strategic considerations of judges is well-documented for domestic constitutional courts (Vanberg, 2015), but has received little attention at the international level (Gibson and Caldeira, 1995; Kelemen, 2012). We assume that public support is equally important for international courts, whose authority and long-term survival depend on their popular legitimacy (Voeten, 2013). In the presence of public support, even the member states' most powerful and frequently cited mechanisms for controlling ICs will be ineffective: judges' non-reappointment; states' non-compliance with court decisions; and legislative overrides and treaty revisions to constrain court authority. Our model primarily applies to the subset of well-established international courts, which possess significant structural powers and general public support as institutions in the member states.

We employ our theory to explain the counter-intuitive variation in the CJEU decisions in the *Kadi* case. The case was groundbreaking because the CJEU became the first regional court to claim the power to review legislative acts based on United Nations Security Council (UNSC) resolutions. The CJEU had to decide

whether the EU's implementation of UN sanctions against an alleged terror suspect, Yassin Kadi, breached the plaintiff's fundamental rights, including the right to effective judicial review. Analyzing these decisions allows us to observe the effect of changes in public opinion on a well-established, globally influential IC in a policy area—counter-terrorism—where leading theories would expect member states to exert strong influence over the Court.

We find that the *Kadi* rulings were closely aligned with public opinion in EU member states. In *Kadi I*, the CJEU's lower court (the General Court, or EGC¹) ruled in 2005 against Mr. Kadi, reflecting popular support for stricter international counter-terrorism measures following the 9/11 terrorist attacks. In 2008, however, the higher court (the Court of Justice, or ECJ) leveraged growing public concern about the US-led war on terror to rule in Mr. Kadi's favour and expand its power of judicial review.² In their *Kadi II* rulings (2010 & 2013), both courts defended this new authority and developed stricter rules for protecting the human rights of terror suspects.³ This series of defeats for the EU governments is puzzling because member states made significant efforts to prevent another victory for Mr. Kadi. They promoted important changes to the UN sanctions regime and in 2012, Mr. Kadi was removed from the sanctions list. Yet even these concessions were insufficient to achieve a favourable outcome. Our analysis suggests that the CJEU can harness public opinion to evade member states' control while minimizing the risk of political backlash.

This inquiry has important implications for our understanding of European and international judicial politics. Scholars in the past classified the CJEU as a 'non-majoritarian institution' because it was seen as largely removed from public influence (Thatcher and Stone Sweet, 2002). Yet the majoritarian model proposed here appears better suited for explaining contemporary judicial politics, where IC decisions increasingly affect the mass public (Voeten, 2013, p. 413). This is particularly the case in the context of the European Union where CJEU President Koen Lenaerts openly acknowledges the importance of public opinion for his court's deliberations: 'judges live in the real world, not on the moon.'⁴ In the conclusions, we discuss other recent rulings by European courts on counter-terrorism and fundamental rights, which support our argument that ICs' ability to check executive power is conditional on public support.

Furthermore, our approach promises to be applicable across a wide range of institutions: constitutional courts, central banks, and agencies tasked with ensuring fair market competition. Conceptualizing these entities as majoritarian can advance our understanding of how independent institutions strategically harness public support to challenge governments' positions or, alternatively, are constrained by public opposition.

¹The Lisbon Treaty of 2009 renamed the EU's courts: the Court of First Instance became the General Court; the European Court of Justice became the Court of Justice; and the whole court system is now known as the CJEU, or the Court. Throughout the text, we refer to the lower court as General Court and to the higher court as Court of Justice, and use the common acronym for each court, EGC and ECJ, respectively.

²*Kadi v. Council and Commission (Kadi I, EGC)*, Case T-315/01 (2005) ECR II-3649; *Kadi and Al Barakaat International Foundation v. Council and Commission (Kadi I, ECJ)*, Joined Cases C-402/05P & 415/05P (2008) ECR I-6351.

³*Kadi v. Commission (Kadi II, EGC)*, Case T-85/09 (2010) ECR II-5177; *Commission, Council and United Kingdom v. Kadi (Kadi II, ECJ)*, Joined Cases C-584/10, C-593/10 & C-595/10 (2013).

⁴ECJ President on EU Integration, Public Opinion, Safe Harbor, Antitrust, *Wall Street Journal*, 14 October 2015, available at <http://on.wsj.com/1k745Rr>.

International Courts, Member States' Control and Public Opinion

Two dominant schools of thought make contrasting claims regarding the question of how much control states exert over ICs: executive control arguments highlight the enduring influence of member states over ICs, while trustee approaches emphasize ICs' wide-ranging independence from governments' control.

Scholars stressing executive control contend that governments can employ various measures to shape judicial decision-making and thereby limit courts' discretion. This 'executive control thesis' (Alter, 2014, p. 337) can be traced to 'separation-of-powers' theories of judicial politics (Epstein and Knight, 1998) and intergovernmentalist approaches to EU integration (Garrett and Weingast, 1993). Research points to the strong correlation between member states' positions and IC decisions, in a pattern that appears to go beyond legal merit (Larsson and Naurin, 2016). Scholars frequently cite three mechanisms used by governments to influence ICs. First, international judges are appointed by member governments which consider track records of judicial activism in the selection process (Elsig and Pollack, 2014; Voeten, 2007). Furthermore, judges' terms at ICs are comparatively short and renewable, which should discourage the judges from upsetting governments to ensure their reappointment (Stephan, 2002). Second, ICs are sensitive to threats of non-compliance with their rulings and in order to facilitate implementation, will generally avoid decisions that antagonize member governments (Carrubba, Gabel, and Hankla, 2008; Martinsen, 2015). Third, the most drastic tool for sanctioning ICs is the threat of legislative overrides or treaty revisions, often referred to as states' 'nuclear option' (Pollack, 2003, p. 172). Thus, the executive control thesis highlights the political boundaries of ICs' judicial discretion.

By contrast, trustee approaches typically question member states' ability to firmly control ICs. Scholars use the concept of trustee courts to characterize the role of increasingly influential ICs such as the CJEU (Alter, 2008; Majone, 2001; Stone Sweet and Brunell, 2013). According to Alter (2008), ICs resemble trustees if the judges a) are selected based on professional norms, b) can act on behalf of states, and c) make decisions according to their best judgment while keeping in mind citizens' interests.

From a trustee perspective, member states' control is limited mainly by two factors. First, member governments have heterogeneous preferences and can typically adopt court-curbing measures only with large majorities or unanimity, which are high bars to reach an agreement (Scharpf, 2006). Second, states delegate wide-ranging authority to trustee courts, which makes it difficult for governments to anticipate and prevent unfavourable rulings. As Pollack (2013, p. 1263) notes, CJEU judges strictly follow 'the formal and informal norm of deliberating in secret'. In addition, the more significant the case, the greater the number of judges who sit on the chamber that hears it. This limits governments' ability to use any knowledge on the position of individual judges to infer the Court's stance (Kelemen, 2012, p. 52). As a result, member states lack clear information about whether an unfavourable ruling looms, which reduces their ability to avert a negative outcome. This leads to a clear prediction by the trustee approach: in court cases with a

single interaction between member states and an IC, the combination of heterogeneous state preferences and information asymmetry makes it unlikely that governments can exert control over the court.

While executive control and trustee approaches differ in their empirical predictions for state influence on single rulings by ICs, they have similar predictions for the outcome of repeated court rulings about the same case (see Table 1). In the executive control framework, repeated interactions do not alter governments' influence over ICs, which is always strong. From a trustee perspective, member states gain a strong position because the recent ruling on the case reveals the court's position. This information makes it easier for states to anticipate whether the court's next ruling is likely to run counter to their interests. If states expect an unfavourable outcome, then their incentives to coordinate their response with other states significantly increase. The trustee approach acknowledges that judges are 'not (...) immune to state pressure' and 'can be influenced by appointment politics' and other sanctions (Alter, 2008, pp. 35, 44). Thus, both theories predict that member states should be able to exert strong control over an IC in repeated decisions on the same case.

An important weakness of existing models, however, is that they do not sufficiently account for the role of public opinion in judicial decision-making. Work on the US Supreme Court provides compelling evidence that public opinion has an independent, statistically significant effect on rulings (Casillas, Enns, and Wohlfarth, 2011; McGuire and Stimson, 2004; Vanberg, 2015). As decisions to review and annul legislation are most likely to provoke a political rebuke, judges will pay close attention to prevailing public opinion in these cases. Clark (2009) finds that when faced with public discontent and the threat of court-curbing legislation, the Supreme Court less frequently invalidates Acts of Congress.

In the European context, there is also growing evidence that both national constitutional courts and supranational institutions are responsive to public opinion. In his study of the German *Bundesverfassungsgericht*, Vanberg demonstrates that its judges take into account not only jurisprudential but also strategic considerations, including the public's view of an issue (Vanberg, 2005). A comparative study of four EU countries further finds that high courts indirectly respond to the public will by siding more often with opposition parties when public support for the current majority party is waning (Bricker and Wondreys, 2018). Scholars have only recently begun to systematically study the effect of public opinion on EU institutions because these institutions' decisions were long seen as insulated from the public mood (Hobolt and Vries, 2016). New work on the European debt crisis shows how public opinion in important member states shaped EU policies in response to this dramatic challenge (Boyle and Hasselmann, 2014). In addition, scholars are revisiting the origins and evolution of public support for the CJEU and other ICs, but how public opinion influences IC decisions remains an open question (Voeten, 2013).

A Majoritarian Model of State-IC Relations

We propose a majoritarian model of state-IC relations to explain variation in member governments' control over international courts. The model starts from the assumption that a Principal-Agent (PA) relationship is an appropriate and useful characterization of the interaction between states and ICs. Member governments face the classical problem of delegation (Hawkins et al., 2006): they want the court to use its delegated authority to interpret the law according to their interests, but the court's preferences will not automatically align with their own.

To explain patterns of control in this PA relationship, our model incorporates public opinion as a crucial external constraint for both governments and courts. ICs, such as the CJEU, were long seen as 'non-majoritarian' courts whose decisions are made without consideration of public opinion on the issue at hand (Thatcher and Stone Sweet, 2002, p. 2). However, a growing body of empirical work shows that ICs engage in judicial activism that promotes majoritarian views, particularly in the area of human rights (Helfer and Voeten, 2014, p. 106).

We assume that when seeking to advance their interpretation of the law, both member governments and ICs have incentives to take into account the public's view on the matter. From a government's perspective, especially in a democratic state, public support is essential for its ability to stay in power. For courts, the public is a crucial ally to protect judges from political backlash. ICs face significant uncertainty about member states' response to rulings against governments' preferences, including the potential use of court-curbing measures (Larsson and Naurin, 2016). Judges will therefore harness public support to advance their policy positions, while minimizing the risk of political backlash. By strategically adopting majoritarian views, courts may also increase their popular legitimacy in the long-term (Dahl, 1987; Friedman, 2009).

Courts will be able to most effectively leverage public opinion in cases where rulings have the potential to provoke a public response. While publics tend to follow IC decisions less closely than their national courts' decisions, many international rulings deal with salient domestic policy issues such as privacy rights and migration rules. There is evidence that publics are particularly 'provokable' in the area of human rights (Simmons, 2009, p. 265; Keck and Sikkink, 1998): they can be mobilized to demand either the protection of civil liberties or passage of more restrictive policies, in particular when there is a perceived threat to their safety (Hetherington and Suhay, 2011). In the case of the CJEU, for instance, social activists have leveraged rulings to engage in new litigation and advance women's rights (Cichowski, 2007).

An important scope condition of our model is that it primarily applies to well-established ICs. Courts are well-established if they meet two conditions. First, they have established compulsory jurisdiction over their governments. This is crucial because member states cannot avoid rulings by opting out. In addition, well-established ICs have the power of judicial review over various types of legislation, including acts passed by the member states and supranational bodies. Second, these courts are 'mature' in the sense that they enjoy

diffuse or, as it is alternatively called, general public support (Carrubba, 2009). Following Kelemen (2012), we measure general public support via the level of public trust in a given IC. General public support tends to be relatively stable because it partially depends on popular trust in national courts and international regimes (Lupu, 2013; Voeten, 2013).

We posit that well-established ICs can evade executive control conditional on the presence of policy-specific public support. Such support is present when an IC's position aligns with the majority of public opinion on a specific policy issue in its member states (Lax and Phillips, 2009, p. 372). As a shortcut to gauging the public mood, judges will likely concentrate on the small group of leading member states (Stone, 2011), which possess the greatest power in decision-making and typically represent a significant share of all members' total population.

Table 1 summarizes member states' expected level of control in the majoritarian model, the executive control and the trustee frameworks. In the absence of policy-specific support for the court's position, the majoritarian model assumes that governments can effectively signal their preferences to the court and have sufficient incentives at their disposal to influence the judges' decisions in their favour. In the presence of policy-specific public support for the court's position, government control weakens significantly. States now have to take into account that overriding a ruling or rebuking individual judges might provoke a negative public reaction. Judges are then largely shielded from political backlash and as a result, can satisfy their own policy or institutional preferences.

[Table 1: see end of document]

The CJEU and the *Kadi* Case

In this empirical section, we apply the majoritarian model to the relationship between EU member states and the CJEU. We first outline how the CJEU became a well-established IC. We then examine the CJEU's behaviour in the *Kadi* case. We suggest that policy-specific public support ultimately enabled the Court to promote and defend a greater protection of terror suspects' rights, despite being at odds with member states' interests.

The CJEU as a Well-Established Court

Established in 1952 by the Treaty of Paris,⁵ the six founding members of the European Communities (EC) intended the Court to focus narrowly on resolving treaty disputes between them (Calabresi and Owens, 2014, p. 100). Since then, it has attained far-reaching, albeit increasingly contested legal authority.⁶

⁵*Treaty Constituting the European Coal and Steel Community*, 18 April 1951, Chapter IV.

⁶See Article 19 TEU (*Consolidated Version of the Treaty on European Union*, Official Journal of the European Union C 326/13), Articles 251-281 TFEU (*Consolidated Version of the Treaty on the Functioning of the European Union*, Official Journal of the European Union C 326/47), and Protocol (No 3) *On the Statute of the Court of Justice of the European Union*, Official Journal of the European Union C 83/210.

The CJEU exhibits the two key characteristics of well-established ICs. First, it has expansive powers of judicial review (Alter, 2014, pp. 285–86). In addition, the CJEU’s jurisdiction is compulsory; member states must participate in the Court’s proceedings and accept its rulings. The hierarchy of the European courts means that the CJEU can, to a degree, rely on the enforcement mechanisms of the national judiciaries (Kelemen, 2016, pp. 133–37).

The CJEU also displays the second characteristic of a well-established court: general public support. Eurobarometer⁷ surveys illustrate the CJEU’s public support during the time period in which the *Kadi* trial took place. Figure 1 shows that net public trust (per cent tend to trust - per cent do not tend to trust) in the CJEU has been consistently positive and higher than trust in the EU in general and relevant national institutions.

[Figure 1: see end of document]

The Euro crisis has led only to a modest decline in public support for the Court, relative to the EU in general. As Kelemen (2012, p. 47) highlights, the CJEU’s comparatively strong general support increases the Court’s authority vis-à-vis the EU member states. At the same time, the divergence in support for the Court relative to other EU institutions indicates that publics assess the CJEU’s actions independently, which should render the judges sensitive to public opinion. In the absence of *policy-specific* public support for the CJEU’s position, the generally favourable view of the Court would likely be insufficient for shielding the judges from political backlash.

In the following, we apply our model to the *Kadi* case, illustrating that shifting European public opinion in the area of counter-terrorism provides a convincing explanation for variation in the Court’s decisions over time.

Kadi: A Play in Two Acts

The *Kadi* case was a hard-fought, decade-long court battle over a core element of the UN’s counter-terrorism policy: targeted financial sanctions against terror suspects. The UN’s 1267 regime—named after UNSC Resolution 1267—was established in the late 1990s to impose sanctions on the Taliban, Osama bin Laden, and his associates.⁸ This regime expanded in the aftermath of the September 11 terrorist attacks. A committee composed of all UNSC members blacklisted nearly 100 individuals and entities deemed to be associated with Al-Qaeda, with directions for UN member states to freeze their financial assets.⁹ The EU states supported and implemented the 1267 regime, even though the persons affected at the time had no right of

⁷Even if we assume a pro-EU bias in the Eurobarometer, this would not challenge the result that the CJEU enjoys stronger public support than the EU in general.

⁸SC Resolution 1267, 15 October 1999; see also SC Resolution 1333, 19 December 2000.

⁹UNSC Committee Concerning Afghanistan Issues, List Pursuant To Paragraph 8 (C) Of Resolution 1333 (2000), 8 October 2001, available at <http://www.un.org/press/en/2001/afg150.doc.htm>.

appeal.¹⁰ Among them was Yassin Kadi, a wealthy Saudi Arabian businessman, who was placed on the sanctions list in October 2001, reportedly upon request by the US government. In a 2004 Congressional testimony, a senior US official described Mr. Kadi as one of Saudi Arabia's 'key terrorist financiers and facilitators' (U.S. Department of the Treasury, 2004). Yet neither the US nor its European allies ever substantiated this claim with evidence.

In December 2001, Mr. Kadi, along with the Al Barakaat International Foundation ('the Foundation'), challenged the EU's decision to freeze his assets in the European court system. The plaintiffs claimed that the relevant EU regulations breached their fundamental rights, including the right to be heard, the right to judicial review, and the respect for property. The EU Commission and the member states countered that UNSC resolutions originated from a higher legal order and as a result, their implementation by the EU remained outside the scope of the CJEU's judicial review. In fact, the UN Charter's Article 103 stipulates that the Charter shall prevail over all competing international obligations, and Article 25 affirms that member states have to 'accept and carry out' Security Council decisions. In addition, the European treaties declare that the Union shall respect 'the principles of the United Nations Charter and international law'.¹¹

In 2005, the General Court dismissed the plaintiffs' challenge. The EGC held that the EU regulation faithfully implemented a UNSC resolution and that the EGC had no jurisdiction to review the lawfulness of UNSC resolutions.¹² Mr. Kadi and the Foundation appealed the decision.

In 2008, the ECJ overturned the EGC ruling. It argued that cases involving alleged encroachment of fundamental rights must be awarded full judicial review under EU law, regardless of whether the EU regulation in question implements a UNSC resolution. In order to guarantee an effective judicial review, the national authorities have to communicate the grounds on which the individual/entity was put on the sanctions list. The ECJ annulled the EU regulation to the extent it concerned Mr. Kadi and the Foundation, but granted the EU institutions three months to remedy the infringement of the plaintiff's right to due process.¹³ Many legal scholars and public commentators¹³ across Europe welcomed the judgment as a victory for the protection of human rights (Isiksel, 2010), though some voiced strong concerns about future conflicts between EU and UN law (De Búrca, 2010). The EU Commission initially made minimal efforts to comply with the ECJ ruling: it sent Mr. Kadi a one-page summary of UN reasons for the listing, gave him 19 days to comment, and then decided to keep Mr. Kadi's assets frozen (Cuyvers, 2014, p. 1762). Mr. Kadi challenged this decision again at the lower court, seeking to regain access to his reported fortune of 65 million US dollars.¹⁴

¹⁰See in particular, Regulation No 881/2002.

¹¹Treaty on European Union, Article 21(1).

¹²*Kadi I (EGC)*, supra note 2, para. 189–94, 216, 221.

¹³*Kadi I (ECJ)*, supra note 2.

¹⁴A Wealthy Saudi, Mired in Limbo over an Accusation of Terrorism, *New York Times*, 13 December 2008.

In 2010, the General Court affirmed a breach of Mr. Kadi's rights to defence and effective judicial review.¹⁵ The European Commission and multiple member states appealed the decision at the ECJ, requesting the Court to set aside its *Kadi I* judgment and dismiss Mr. Kadi's claim for annulment of the contested regulation.¹⁶ Meanwhile, the UNSC tried to address some of the concerns raised in the ECJ's *Kadi I* decision and the General Court's second ruling. It passed Resolution 1904, which created an Ombudsperson who could recommend removing individuals and entities from the list. Furthermore, the UN Sanctions Committee adopted a policy of publishing an explanation for each of its decisions. In October 2012, the Committee removed Mr. Kadi from the list, days before the oral hearing at the ECJ.

Nevertheless, the ECJ ruled in July 2013 once again in favour of the plaintiffs and annulled the relevant EU regulations. In its *Kadi II* decision, the ECJ claimed not to challenge the primacy of the Security Council and circumvented the question of legal hierarchy by dissociating the UNSC resolution from implementing EU regulations.¹⁷ The Court argued that an effective judicial review requires examining the UNSC's reasons for adopting restrictive measures against an individual. It must determine whether the reasons for listing are 'sufficiently detailed and specific', rest on a 'solid factual basis', and can be 'substantiated' by evidence, regardless of whether this evidence is confidential.¹⁸ The CJEU can request the UNSC to disclose relevant information and in the absence of such information, the Court will rely 'solely on the material which has been disclosed'.¹⁹

In sum, the *Kadi* judgments dealt with one of the cornerstones of international counter-terrorism policy and ultimately expanded the CJEU's power of judicial review, marking a defeat for EU governments. Table 2 provides an overview of the case.

[Table 2: see end of document]

Conventional Explanations

While the *Kadi* case has attracted widespread attention from legal and political science scholars, existing work focuses on the decisions' implications for the relationship between the UNSC and the EU (De Búrca, 2010; Kokott and Sobotta, 2012; Morse and Keohane, 2014). We highlight in the following an often overlooked, yet crucial aspect of the case: the *Kadi* rulings can advance our understanding of the relationship between the EU governments and the CJEU.

It is important to first clarify the preferences of the EU countries and the CJEU in the *Kadi* case. The EU governments had a clear interest in a favourable ruling: the case carries significant implications for counter-terrorism policy and makes the wider UN system of targeted sanctions vulnerable to legal challenges from

¹⁵*Kadi II (EGC)*, supra note 3, para. 121, 80–1.

¹⁶*Kadi II (ECJ)*, supra note 3.

¹⁷*Kadi II (ECJ)*, para. 67.

¹⁸*Kadi II (ECJ)*, para. 118–9.

¹⁹*Kadi II (ECJ)*, para. 123.

affected individuals across the globe.²⁰ As of 2010, the EU Commission publicly acknowledged the need to take stock of existing counter-terrorism measures and highlighted the ‘respect for fundamental rights and the rule of law’ as crucial challenge in their implementation.²¹

However, with the exception of a few liberal European countries (Morse and Keohane, 2014, p. 395), states preferred reforms on their own terms. This is clear when considering (at the time unpublished) briefs of EU governments to the CJEU (Busco, 2014): in these confidential legal opinions, a plurality of member states strongly requested that the Court in *Kadi II* revisit the 2008 judgment and take into account the changes that since had been implemented at the UN. While three countries completely rejected any review of UNSC resolutions, the majority advocated for a very limited scope of judicial review, determined by the precision of the Security Council’s resolutions.

As for the CJEU, the Court has strong incentives to promote a unified European law while simultaneously asserting itself as the highest legal authority in the EU (Skouris, 2009, p. 29). The greatest puzzle regarding the Court’s behaviour is then the EGC ruling of 2005. Prior EU case law indicates that the Court sees the European treaties as a complete system of legal remedies in which all acts of its institutions are subject to judicial review. The first EGC decision represents in this regard a ‘break with previous orthodoxy’ (Kunoy and Dawes, 2009, p. 76), suggesting that the judges were not able to realize their privately held beliefs. In fact, in a less publicized passage of the decision, the judges contend that the CJEU can review UNSC resolutions with regard to *jus cogens*, a set of overriding norms of international law including fundamental human rights from which no derogation is permissible.²² However, the EGC does not identify a conflict with such norms in the case of *Kadi*.

Taking the preferences of both sides into account, the executive control and the trustee approach offer only incomplete explanations for the *Kadi* decisions. In the case of *Kadi I*, the executive control thesis can account for the 2005 ruling in favour of the EU states, but cannot explain EU states’ apparent inability to control the Court in 2008. By contrast, the trustee model would predict the CJEU is able to realize its preferences due to states’ incomplete information: the CJEU deliberates in secret and does not publish the results of votes or dissenting opinions, which should prevent governments from targeting individual judges.²³ The 2008 ruling could then be interpreted as ‘agent slacking’ (Hawkins et al., 2006, p. 7), an independent action by the CJEU that was undesired yet unpreventable by its principals, the EU member states. However, the trustee approach provides an insufficient explanation for why the CJEU ruled in favour of the member states in 2005.

²⁰For a consolidated list of the hundreds of individuals and entities subject to UNSC sanctions, see <https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list>, accessed 30 June 2018.

²¹European Commission (2010) ‘The EU Counter-Terrorism Policy, Main Achievements and Future Challenges’. Communication from the Commission to the European Parliament and the Council, 20 July, COM(2010)386 final, p. 11.

²²*Kadi I (EGC)*, supra note 2, para. 226–32.

²³Treaty Establishing the European Coal and Steel Community, Protocol on the Statute of the Court of Justice, arts. 2, 29, 30 (April 18, 1951). The only exceptions are the ECJ’s Advocate Generals who publish their opinions and the Judge-Rapporteur who is appointed by the ECJ President to draft the ruling in a given case.

Both executive control and trustee arguments would expect rulings in favour of the EU states in *Kadi II*. The 2008 decision clearly revealed the ECJ's position, which should have enabled EU states to overcome their heterogeneous preferences and unite against the Court. By employing all the means at their disposal, governments could influence the Court. Yet the three most commonly identified control mechanisms—non-reappointment, non-compliance, legislative overrides—were not applied. Three years after the ECJ's *Kadi II* ruling, only three out of the thirteen judges involved in the decision had left the ECJ (see Table 5 in the Appendix), and in October 2015 the judges elected the Rapporteur for *Kadi II*, Koen Lenaerts, to serve as the new President of the ECJ. While the EU governments tried to implement *Kadi I* only superficially, they were rebuked for this behaviour in *Kadi II*. The member states neither pushed for new legislation nor treaty revisions. Thus, even in the face of repeated, high-profile defeats, the EU countries abjured the tools at their disposal to control the Court. This presents a puzzle to both the executive control and the trustee approach.

Applying the Majoritarian Model to the Kadi Case

Our majoritarian model posits that well-established ICs can challenge state interests conditional on policy-specific public support. There is strong evidence that public opinion and potential political backlash are generally important considerations in the CJEU's decisions. As CJEU President Lenaerts explains, 'We are all children of our background, of our societal environment, and judges are very much aware of the consequences of rulings (...) Those [political actors] who don't like the ruling will say "Ah, that awful court of justice (...) they've overstepped the line between judicial and political"'. That is the risk of life for any judge'.²⁴ Public opinion specifically mattered in the *Kadi* case because it was closely linked to a salient policy issue—counter-terrorism and its implications for fundamental human rights. The case was widely reported in the European media and leading newspapers quoted Mr. Kadi's lawyer calling the sanctions regime a 'financial Guantanamo'.²⁵ While the *Kadi* case was mainly followed by informed European elites, senior representatives of the Court describe *Kadi* as one of the CJEU's 'most visible' cases in recent years.²⁶ The case was thus clearly recognized as having the potential for mobilizing European publics.

[Figure 2: see end of document]

The EU courts' decisions were closely aligned with the shifting public opinion on the broader issue of counter-terrorism. At the time of the September 2005 EGC ruling, European publics were very concerned about terrorism, reflecting widespread fears after the September 11, 2001 attacks in New York and Washington, the March 2004 Madrid train bombings, and the July 2005 attacks in London. Figure 2 illustrates that US counter-terrorism efforts initially received very high net approval rates in the leading EU states.²⁷

²⁴ECJ President on EU Integration, *supra* note 4.

²⁵*Frankfurter Allgemeine Zeitung* (2008) 'Terrorverdächtige: Gericht verlangt Rechtsschutz bei Kontoeinfrierungen', 3 September.

²⁶For instance, Juliane Kokott, Advocate General at the ECJ since 2003, in Kokott and Sobotta, 2012, p. 1015.

²⁷We posit that Germany, France and the United Kingdom—long referred to as the E3—were the leading EU states throughout the *Kadi* trials.

By 2005, approval rates for US efforts had decreased but remained positive on average. Furthermore, Figure 3 shows that in the period from May to October 2005, 10-14 per cent of EU citizens found terrorism to be one of the two most important policy issues facing their countries.

[Figure 3: see end of document]

We assume that in situations where populations perceive significant terrorist threats, they will be more likely to support strong counter-terrorism measures. In this environment, the EGC dismissed the *Kadi* case in 2005. Yet when in September 2008 the ECJ ruled in Mr. Kadi's favour, public opinion in the EU had shifted. At the time of the ECJ's 2007 oral hearings on the appeal against the EGC judgment, publics in Britain, France, and Germany were already opposed to US counter-terrorism efforts. Support plummeted as President Bush's war on terror became associated with extralegal detention, abuse of prisoners, and chaos in post-war Iraq.²⁸ Meanwhile, the share of EU citizens who considered terrorism to be an important policy issue facing their countries declined significantly (Figure 3). Notably, the mood of the judicial elite, which the Court is more likely to pay attention to, shifted as well.²⁹

Public concerns about terrorism further decreased in the post-2008 period and had largely waned around the ECJ's *Kadi II* ruling in July 2013. When deciding on *Kadi II*, the European judges could hence expect public support for a position that further strengthened the rights of terror suspects. The General Court in 2010 rebuked the EU institutions and member states for observing Mr. Kadi's fundamental rights 'only in the most formal and superficial sense'.³⁰ The ECJ used its second judgment to widen the Court's competences in the area of counter-terrorism policy. In cases concerning restrictive measures against individuals or entities, the Court reserves the prerogative for an inquiry into the substantiality of the reasons cited. The CJEU now requires governments to send an adequate summary of reasons for listing to the concerned individuals and the European courts during the judicial review. In the event of refusal, it instructs courts to rule on the basis of the information presented by the authorities.³¹ The ECJ further imposed what can be seen as a financial penalty for attempted non-compliance: the judges ordered the losing parties to cover the full costs of the proceedings, rather than splitting costs with Mr. Kadi as in *Kadi I*.³²

In sum, through leveraging public support, the CJEU was able to demand a complete system of legal remedies for terror suspects in the EU, rebuke the European governments for superficial compliance and

²⁸We do not include surveys on European public opinion [of US counter-terrorism efforts] from the post-Bush era because European publics initially associated President Obama's counter-terrorism measures with his attempts to reverse his predecessors most controversial policies.

²⁹The President of the German Constitutional Court, Hans-Jürgen Papier, voiced concerns about the UN sanctions regime in a widely-noticed interview, see *Der Spiegel* (2008) 'Ohne Wenn und Aber', 14 January, p. 26. Given the interview's timing—two days before the ECJ Advocate General Miguel Poiares Maduro published his *Kadi* opinion—it could be argued that ECJ's 2008 decision chiefly reflected demands from national courts. However, following standard procedure at the court, the Advocate General's opinion had already been completed and submitted for translation several weeks before its publication on January 16, 2008 (Conversation with Miguel Poiares Maduro, Florence, October 2016).

³⁰*Kadi II (EGC)*, supra note 3, para. 171.

³¹*Kadi II (ECJ)*, supra note 3, para. 123.

³²*Kadi II (ECJ)*, para. 168.

strengthen its institutional authority. Our analysis suggests that the majoritarian model provides a compelling explanation for the Court's shifting position in the *Kadi* case.

There are potential alternative explanations for the Court's behaviour. An intuitive explanation might be that decisions vary depending on bench composition: the judges assigned to a case could differ with regard to their legal philosophies and as a result, their willingness to defer to executive power. However, in the context of the CJEU's *Kadi* case, bench composition would predict consistency rather than variation in rulings. This is for several reasons. First, the Court has a strong and persistent judicial culture (Vauchez, 2012). Social and professional norms have been remarkably stable over time and across the two EU courts, in part because a number of important judges first served on the lower and then on the higher court—most notably the current ECJ President Lenaerts. Second, as former ECJ President Skouris points out, chamber presidents are an important 'safeguard' to ensure coherence in case-law (Skouris, 2006, p. 23). Indeed, a micro-analysis of the bench compositions in the *Kadi* case shows that the British Judge Nicholas Forwood presided over the EGC chamber that ruled over the case both in 2005 and in 2010 (see Table 4 in the Appendix). Yet despite this consistency in leadership, the chamber reached different conclusions in *Kadi I & II*. Finally, comparing the bench composition of the EGC and the ECJ in *Kadi I*, it is remarkable that judges from a very similar set of countries and legal cultures sat on the chambers: four out of five countries on the EGC chamber—Germany, Greece, the Netherlands, and the United Kingdom—were also represented on the ECJ's chamber (see Tables 4 and 5 in the Appendix). Thus, the evidence suggests that bench composition is a less plausible explanation for the CJEU's decisions in the *Kadi* case.

Conclusions

Leading scholars remain divided over the question of whether states can effectively control ICs. As a recent study concludes, there are 'widely contradicting perceptions' of the scope of ICs' autonomy and 'little agreement on the factors and mechanisms defining its boundaries' (Larsson and Naurin, 2016, p. 27). We suggest that the majoritarian model presented here advances our understanding of government-IC relations and courts' evolving role in the international legal system.

This study's main contribution is to highlight the effect of public opinion on ICs. While strong evidence exists that domestic constitutional courts take public support into account in their rulings, previous research on ICs has paid insufficient attention to this factor. We argue that ICs' ability to rule counter to their member governments' interests is contingent on public support. In the absence of public support, ICs could face political backlash from frustrated governments, including changes to the founding treaties to restrict the court (Kassim and Menon, 2003, p. 134). In the presence of public support, however, ICs can make decisions that run counter to government interests.

Our analysis of the CJEU's landmark decisions in the *Kadi* case finds that our majoritarian model provides a convincing explanation for the CJEU's shifting role in the protection of human rights in the

fight against terrorism. In the presence of policy-specific public support, the CJEU was able to satisfy its preference for a stronger legal protection of terror suspects and strategically reshaped its relationship with the member states. In *Kadi I*, the ECJ expanded the scope of the Court's judicial review to cover EU regulations that implement UNSC resolutions. In *Kadi II*, the CJEU defended its new authority and subjected the actions of the EU members and institutions to a stringent judicial review in cases involving sanctions against terror suspects. As Table 3 illustrates, the majoritarian model offers a more complete account of the *Kadi* case than leading approaches to IC behaviour.

[Table 3: see end of document]

Other decisions by European courts on the issue of counter-terrorism and fundamental rights indicate that the *Kadi* rulings are representative for broader developments in the relationship between European states and ICs.

Several remarkable rulings on sanctions and the right to due process and defence occurred in period from 2008–14, in particularly between May 2012 and May 2014 when the number of respondents mentioning it as an important issue was on average just over two per cent in the EU (see Figure 3). The European Court of Human Rights (ECtHR), an IC that operates outside the framework of the EU, cited *Kadi I* in *Nada v. Switzerland* (2012) to argue that national courts must ensure UN sanctions' enforcement in accordance with international human rights standards.³³ In a 2013 ruling involving sanctions against Iran, the EGC declared that the same stringent standard of judicial review as established in the *Kadi* decisions must be applied to all cases concerning EU sanctions.³⁴ In the case of another blacklisted terror suspect, the EGC decided in 2014 that the Commission should no longer regard itself as being strictly bound by the findings of the UN Sanctions Committee.³⁵ With these rulings, ICs limited executive authority and provided a corrective to infringements on fundamental rights.³⁶

However, in the aftermath of the 2015–16 terrorist attacks in Paris, Brussels, Nice, and Berlin, terrorism became again an issue of great concern for European publics; in spring 2017, 19 per cent of respondents perceived it as one of the most important issues facing their countries. In this context, the ECJ in July 2017 granted governments wide discretion in retaining persons or entities on the EU's list of terrorist organizations.³⁷ It thereby overturned a 2014 General Court decision in which the judges had annulled the blacklisting of Hamas on procedural (rather than substantive) grounds because the organization's retention

³³*Nada v. Switzerland*, ECtHR Appl. No. 10593/08 (2012), para. 102.

³⁴*Iran Transfo v. Council*, Case T-392/11 (2013), para. 35.

³⁵*Yusef v. European Commission*, Case T-306/10 (2014), para. 107.

³⁶In addition, important rulings regarding the rights to privacy and personal data protection occurred, which relate but are not limited to the issue of counter-terrorism; see in particular *Digital Rights Ireland*, Case C-293/12 (2014).

³⁷*Council v. Hamas*, Case C-79/15 P (2017).

on the list was based on media reports rather than an investigation by competent authorities.³⁸ Thus, European judges' ability to safeguard due process rights might have been again constrained by public opinion.

Our findings have significant implications for the research agenda on ICs. Future studies should explore the salience of public opinion across different ICs and issue areas. They should also examine whether there is a particular subgroup of the public that ICs will likely follow. Additionally, our understanding of ICs would benefit from studying how state compliance changes if cases are repeated games rather than one-shot interactions. We conclude that public opinion is a critical variable in ICs' decision-making process and determines a court's room for strategic manoeuvre in the international legal system.

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³⁸*Hamas v. Council*, Case T-400/10 (2014).

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Table 1: Member state control over ICs: Theoretical predictions

Theory		Majoritarian Court		Executive Control		Trustee Court	
IC decision		single	repeated	single	repeated	single	repeated
Public support for IC position	absent	strong control		strong control		weak control	strong control
	present	weak control					

Table 2: The *Kadi* case

Decision		<i>Kadi I</i>	<i>Kadi II</i>
CJEU	lower court	2005: EGC rules in favour of EU Commission and states	2010: EGC now rules in favour of Mr. Kadi
	higher court	2008: ECJ rules in favour of Mr. Kadi, but EU Commission relists him	2013: ECJ dismisses appeal of EU Commission and states

Table 3: Predictions of Member State Control in *Kadi* Case: Correct (✓) and False (✗)

	Majoritarian Court		Executive Control		Trustee Court	
Decision	<i>Kadi I</i>	<i>Kadi II</i>	<i>Kadi I</i>	<i>Kadi II</i>	<i>Kadi I</i>	<i>Kadi II</i>
EGC	✓	✓	✓	✗	✗	✗
ECJ	✓	✓	✗	✗	✓	✗

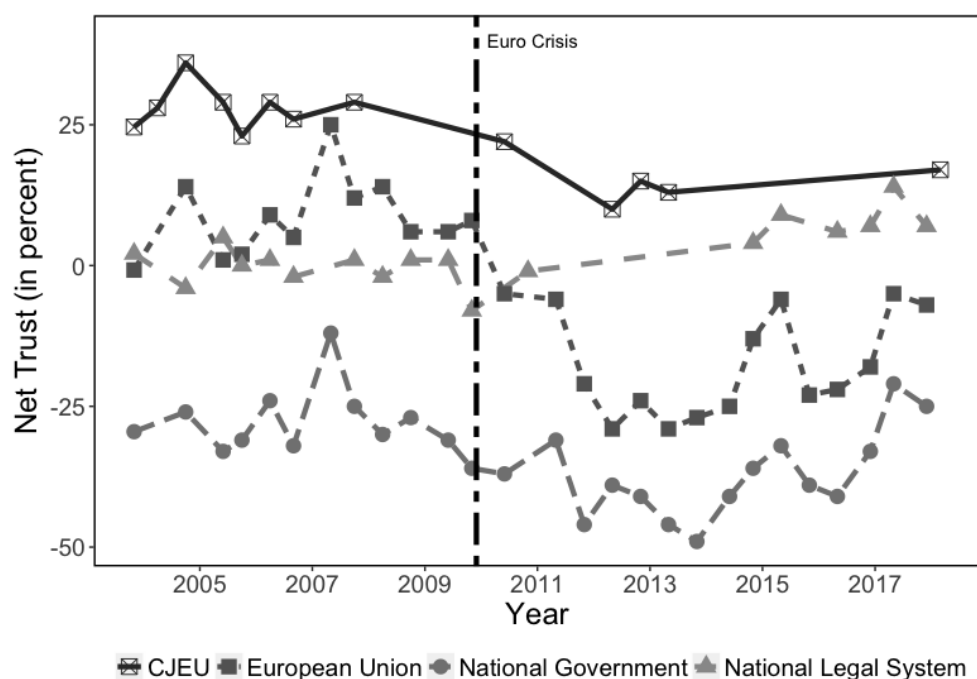


Figure 1: Trust in European and national institutions, 2003–18. Source: Eurobarometers 59–89, available at <http://ec.europa.eu/COMMFrontOffice/PublicOpinion>.

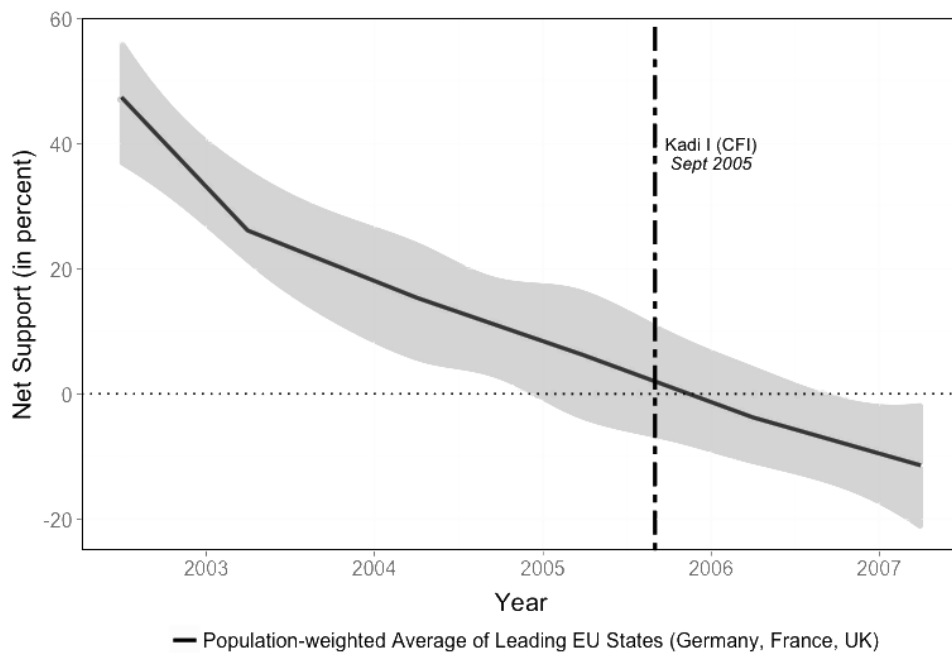


Figure 2: European public support for US-led efforts to fight terrorism, 2002—07. Source: Pew Global Attitudes Project 2007, available at <http://www.pewglobal.org>.

Note: Answer to question: ‘Which comes closer to describing your view? I favor the U.S.-led efforts to fight terrorism, OR I oppose the U.S.-led efforts to fight terrorism’. Shaded region represents 95 per cent level confidence interval using locally weighted smoothing.

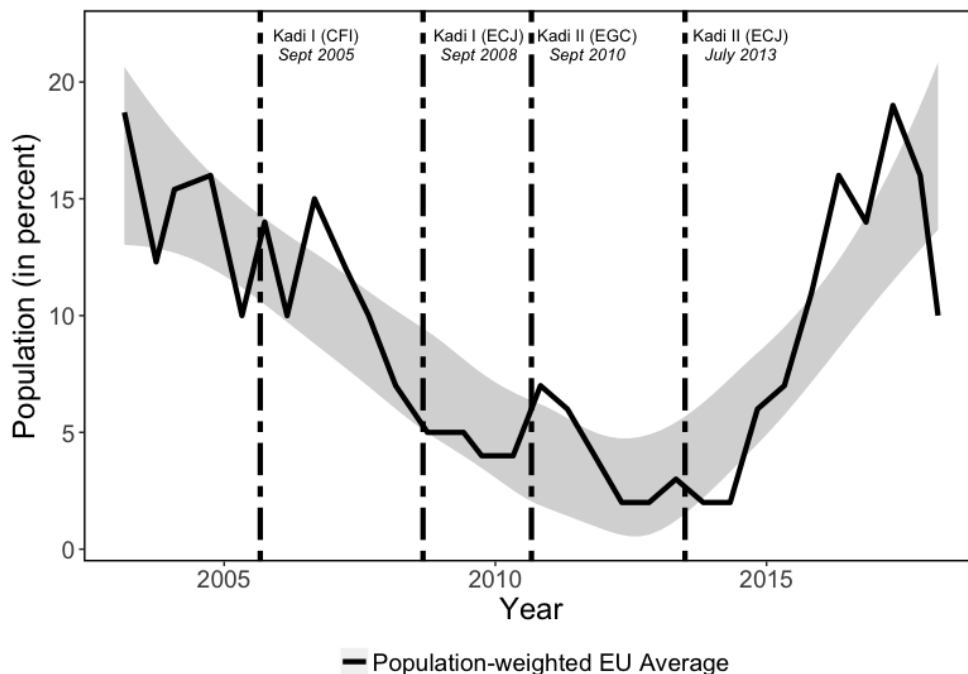


Figure 3: Public Perception of Terrorism as an Important Policy Issue, 2003–18. Source: Eurobarometers 59–89.

Note: Percentage of respondents who named ‘terrorism’ as one of up to two answers to the question ‘What do you think are the two most important issues facing [our country] at the moment’. Shaded region represents 95 per cent level confidence interval using locally weighted smoothing.

Appendix

Table 4: EGC composition in the *Kadi case*

Position	Chamber (<i>Kadi I</i>)	Nationality	Chamber (<i>Kadi II</i>)	Nationality
<i>President of Chamber</i>	Nicholas James Forwood †	United Kingdom	Nicholas James Forwood †	United Kingdom
<i>Judge</i>	Arjen W. H. Meij	Netherlands	Enzo Moavero Milanesi	Italy
<i>Judge</i>	Paolo Mengozzi	Italy	Juraj Schwarcz	Slovakia
<i>Judge</i>	Jörg Pirrung	Germany		
<i>Judge</i>	Michail Vilaras	Greece		

† Judges from *Kadi I* participating in *Kadi II*

Table 5: ECJ composition in the *Kadi case*

Position	Chamber (<i>Kadi I</i>)	Nationality	Chamber (<i>Kadi II</i>)	Nationality
<i>ECJ President</i>	Vassilios Skouris †	Greece	Vassilios Skouris †*	Greece
<i>Rapporteur</i>	Christiaan W. A. Timmermans	Netherlands	Koen Lenaerts †‡	Belgium
<i>Judge</i>	Koen Lenaerts †*	Belgium	Lars Bay Larsen *	Denmark
<i>Judge</i>	Allan Rosas *	Finland	Maria Berger *	Austria
<i>Judge</i>	Alexander Arabadjiev †	Bulgaria	Thomas von Danwitz †*	Germany
<i>Judge</i>	Jean-Claude Bonichot	France	Marko Ilešič *	Slovenia
<i>Judge</i>	Thomas von Danwitz †	Germany	Alexander Arabadjiev †	Bulgaria
<i>Judge</i>	Pranas Kūris	Lithuania	Jean-Jacques Kasel *	Luxembourg
<i>Judge</i>	Pernilla Lindh	Sweden	Egils Levits	Latvia
<i>Judge</i>	Jerzy Makarczyk	Poland	Uno Lõhmus *	Estonia
<i>Judge</i>	José Narciso da Cunha Rodrigues	Portugal	Marek Safjan	Poland
<i>Judge</i>	Konrad Hermann Theodor Schiemann	United Kingdom	Daniel Šváby	Slovakia
<i>Judge</i>	Rosario Silva de Lapuerta	Spain	Camelia Toader	Romania

† Judges from *Kadi I* participating in *Kadi II*

* President of Chamber

‡ ECJ Vice-President

* Left the ECJ within three years after *Kadi II*