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BEST PRACTICES GUIDE

for

CHAIRPERSONS AND MEMBERS OF UN SANCTIONS COMMITTEES

AND

UN SANCTIONS MONITORING EXPERT GROUPS AND THEIR COORDINATORS

Briefing paper on Due Process in UN Sanctions

CCSI
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Overview

Ensuring fair and clear procedures in UN sanctions should be a self-evident responsibility for the members of the Security Council. It is one of the ways that UN member states can give importance to the UN's core mandate to protect and advance human rights and international human rights law. Yet, the call for fair and clear procedures in UN sanctions has been raised since the 1990's, and none of the due process improvements have been implemented across the board of the UN sanctions system.

The introduction of standardized statements of cases for listings that are used by some sanctions committees, as well as guidance that the sanctions branch has developed on how to build a statement of case, are practical due process enhancements of the UN sanctions system. Equally laudable were, at the time of their introduction, other incremental achievements such as the creation of the Office of the Ombudsperson for the ISIL (Daesh) Al Qaeda regime, or the limited mandate of the Focal Point for De-listing. The spottiness of these improvements may also be a testimony to how selective and therefore unreliable the UN sanctions system appears to be in the adoption of comprehensive due process procedures.

The consultations for the development of Best Practices Guides is considered by the sponsors, Australia, Belgium, Canada, Germany, the Netherlands and Sweden as an opportunity to approach this issue with fresh eyes. Belgium has taken the initiative to support a detailed inquiry into how due process can be applied throughout all the steps required for the effective implementation of UN sanctions. This briefing paper will serve this purpose.

It will summarize and organize a number of proposals and concepts made over the past several years, in particular those recorded in the Note by the President of the Security Council, (S/2017/507), the Compendium of the High Level Review of UN Sanctions, (A/69/941–S/2015/432), and the Assessment of the HLR Compendium (A/71/943-S/2017/534), as well as in the foundational report of the Informal Working Group on General Issues of Sanctions, (S/2006/997).

The consultations on due process practices will be integrated into the ongoing schedule of consultations for the Best Practices Guides, and will also be pursued by inviting delegations that have expressed an interest in this subject, as well as sanctions monitoring and legal experts, members of SCAD, and other interested individuals, to express their views and recommendations. This process will commence in March and will last until early June.

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The evolution of due process in UN sanctions

The legitimacy of the UN sanctions system depends to a large degree on how closely the mechanism lives up to the UN's standards of human rights and international humanitarian laws. Perhaps for fear of entangling the UN sanctions system in legal booby traps, what this aspiration should entail in practical terms has never been defined in a manner that the Security Council could adopt. In June 2006, Secretary-General Kofi Annan demanded respect for four "rights" to ensure that the UN sanctions are "clear and fair procedures":

- The right of a person against whom measures have been taken to be informed of the accusations raised;
- The right of such a person to be given an opportunity to respond to the accusations;
- The right to a review of accusations and responses by an effective review mechanism;
- The right to a periodical review of the continued justification for maintaining applied sanctions restrictions and measures.

IWG recommendations

A few months later, in December 2006, the Security Council's Informal Working Group on General Issues of Sanctions, chaired at the time by Greece, released its report after a one-year effort "to develop general recommendations on how to improve the effectiveness of United Nations sanctions". The report recommended, among many other suggestions, that sanctions be designed to:

- Clearly define the scope of the sanctions, as well as the conditions and criteria for their easing or lifting;
- Standardize humanitarian and other exemptions to all targeted measures, including arms embargoes, travel restrictions, aviation bans and financial sanctions;
- Encourage committees to draw up guidelines to ensure that the selection of individuals and entities for listing is based on fair and clear procedures.
- Encourage committees to conduct regular reviews of names on the list; to ensure, to the degree possible, maximum specificity in identifying individuals and entities to be targeted; and to adopt guidelines based on fair and clear procedures for delisting early in a sanctions regime.

In regards to the working methods of sanctions monitoring expert groups, the report recommended the establishment of "clear guidelines for expert groups to consult in order to ensure that, while these groups maintain their independence, their inquiries and findings meet appropriately high standards (including reliability of sources; validity of information; identifying names; and right of reply to individuals, entities and States). The guidelines would be based on best practices, drafted in consultation with monitoring experts and possibly other relevant

parties, including Member States, and take into consideration the distinct nature of Security Council sanctions regimes and mandates".

Furthermore, the report also recommended that experts "Write to States where an individual or State authority is alleged to have violated sanctions, requesting a prompt response and corrective action and follow-up as the Committee deems necessary."

It also observed under paragraph 18, that "The methodological standards used by monitoring mechanisms have evolved with experience gained through their fact-finding work. Insufficiently supported allegations of non-compliance and sanctions violations publicized in a United Nations report could call into question the integrity of the entire report. For this reason, there is room for further improvement of, as well as agreement on, methodological standards for sanctions monitoring mechanisms."

The report further stressed transparency in the sourcing of information, corroboration by independent verifiable sources, all grounded in "their methodological standards (stated) at the outset of each report and adhere to those standards". The key recommendation that would from then on be repeated by many other authors was, however, that:

> Monitoring mechanisms should emphasize impartiality and fairness during the report drafting process, and make available to relevant parties (State authorities, entities or individuals), if appropriate, any evidence of wrongdoing for their review, comment and response, within a specified deadline. Rebutals, with an assessment of their credibility, and corrections regarding already published allegations, should be included in subsequent reports

Incremental advances

Kofi Annan's initiative, and proponents of others that followed in his footsteps, particularly the principle that anyone alleged to have violated UN sanctions enjoys a "Right to Reply", has resonated with some state delegations. To some extent, they may be driven by the wish to preserve a preventive remedy against expert reports casting doubts, or citing third party allegations of their wrongdoing. While such justifications may be understandable, states' interests should not be confused with the often dire consequences if expert reports and sanctions decisions are either not justified by facts, convey misguided political calculations, or simply ignore basic human rights that should be afforded to any individual (and even companies or other entities) and by implication, their dependents.

To give institutional attention to this obligation, almost to the day when the Informal Working Group released its report, the Security Council adopted with resolution 1730 (2006) the appointment of the Focal Point for De-listing. The focal Point has a mandate to receive from any designated individual, company or entity, that is not designated under the ISIL (Da'esh) and Al-Qaida (ISIL/AQT) sanctions provisions, a de-listing request. For the first time, the UN sanctions system now had a process established to terminate sanctions once they were no longer justified.

Institutionally, the initiative of Denmark that succeeded with the adoption of resolution 1904 (2009), that mandated the establishment of the Office of the Ombudsperson for the ISIL/AQT sanctions, is perhaps an even more significant adjustment of the UN sanctions system to due process demands. The Ombudsperson's mandate provides for a far stronger role in determining the justifications for targeted sanctions. This improvement came in the midst of lawsuits that some that were designated under the 1267 terrorism sanctions regime brought against the European Union (EU) and some of its member states. The ripple effects of decisions handed down, particularly by the High Court of the EU, for example, with its Kadi II ruling, provoked considerable rethinking among the stakeholders of the UN sanctions system.

It also opened the door for the sustained campaign by the Like-Minded States[i] that promotes an expansion of the Ombudsperson's mandate to other sanctions beyond the ISIL/AQT regime and the possible substantive expansion of the mandate for the Focal Point on UN Sanctions.

While many of these improvements provide for some relief from a seemingly omnipotent political process, they do not comply with the letter or the spirit of actual due process procedures common to most judicial systems around the world. There has also never been a discussion of how to integrate the application of due process throughout the delivery of all sanctions implementation steps. The notable exception may be briefings that legal experts from the Office of Legal Affairs provides to incoming members of sanctions monitoring groups. However, judging by the reporting and designation recommendations of many expert groups, doubt seems justified as to how strongly due process practices are being integrated into their work as well as the deliberations of sanctions committees.

Consultations that were held over the past few years with many delegations of member states and other sanctions system stakeholders, for example for the High Level Review of Sanctions and for the follow-on Assessment Report, the contours of a fuller application of due processes and each of its individual implementation steps have come into clearer view.

New challenges

Profound discomfort with designations under the UN counter-terrorism sanctions triggered challenges in national courts and especially in the Court of Justice of the European Union, as well as a move towards "fair and clear procedures", more than a decade ago. A recent UN University study shows that the UN sanctions system continues to be under attack with currently at least 39 judicial due process challenges to counterterrorism designations, and six cases related to armed conflict sanctions.

The absence of due process court claims by those designated under the UN's nonproliferation sanctions is perhaps the most foreboding fact and may, in the words of the authors of the UN University study, "signal the start of a third round, and the opening of a new front in these debates".

A CCSI study analyzing the reported circumstances that led to the listing of the currently 150 individuals, companies and entities under the DPRK assets freeze or travel ban brings to mind the early days of counterterrorism sanctions designations. The published designation information falls far below the evidentiary standards observed in other sanctions regimes. Because no, or very scant, information is made available, is an indication that no due process could have been granted. Most likely it is only a matter of time until those designated under the DPRK sanctions file judicial challenges somewhere in a jurisdiction with a track record of taking due process in UN sanctions implementation seriously.

Elements of comprehensive due process

This Briefing Paper attempts to integrate due process practices in a structured and systematic approach addressing opportunities that typically occur in a sanctions implementation cycle. This approach is intended as a basis for discussion and to stimulate consultees to express their views about whether and how due process in UN sanctions can be amplified and strengthened.

These opportunities also offer perspectives to effectively advance due process practices, largely by modifying current implementation practices by members of sanctions committees and expert groups. The opportunities are:

1. Start of mandate
2. Evaluation of prima face evidence to justify the initiation of a specific monitoring / investigative effort
3. Monitoring or investigations of specific situations or allegations
4. Reporting of findings by the expert group
5. Considerations of expert group to publicly report or preserve evidence in confidential annexes
6. Designation decision by sanctions committee
7. Post-designation procedures

8. Applications for exemptions to Focal Point, Ombudsperson or member states
9. Delisting

As a general rule, experts and sanctions committees should err on the side of caution in the absence of satisfying a clearly defined standard. It is the subject of these consultations to determine whether that standard should be ”Beyond a reasonable doubt”, “Preponderance of evidence”, or “Balance of probabilities” in support of allegations of a sanctions violations. In situations where any of these standards are not met, experts and sanctions committees have in most cases opportunities to develop more substantial information to prove the veracity of an allegation with each mandate renewal.

If an emergency exists, for example, because an individual, company or organization is in the process of committing an atrocity, executing a violent act, or commiting a particularly grievous violation of nonproliferation sanctions, experts can always submit to the committee a brief report describing the emergency and recommending a referral to law enforcement, other governmental authorities or to individual states who can mobilize the full emergency responses of the Security Council.

Start of mandate

At the beginning of each sanctions regime, the political resolve expressed in a sanctions resolution is often the only force that counters the uncertainties, unpredictabilities and lawlessness inherent in conflict situations. It also means that sanctions often represent the only framework to help distinguish between the innocent and those responsible for conflict, violence or atrocities.

Sanctions committees have an important role in protecting the credibility of the UN sanctions system by questioning experts and verifying that in fact they have developed and agreed to adhere to a well-developed methodology, including fair evidentiary standards and defined procedures for engagement with negative actors.

There is no point in initiating monitoring or investigations without expert groups having spelled out a detailed methodology. There is also no point in establishing a methodology without ensuring that all members of an expert group have a common understanding about the practical meaning and implications of provisions contained in the sanctions resolutions; and that all experts must collaborate with one another to successfully secure sanctions-relevant information and identify potential violators, and violations.

Evaluation of prima face evidence to justify the initiation of a specific monitoring / investigative effort

In order to avoid unjust and rumor-based investigations, experts' methodology should define minimal information requirements that justify opening a monitoring or investigative effort. The definition of what such initial information requirements may be, could include that important aspects of allegations can be supported with at least one of the following:

- some documentary support, such as invoices, receipts, or commercial or military orders;
- detailed technical explanations by credible eyewitnesses, representatives of government or competent institutions;
- explanations by directly involved or implicated participants;
- photographic or video records;
- circumstantial evidence in the form of forensic research results;
- detailed and well-researched media or civil society reporting;
- situational outcomes that suggest that the allegations could be true.

The decision to initiate an investigation or monitoring effort should at a minimum be supported by the majority of experts of a group. The decision to proceed should also trigger an obligation for the lead expert to assume a range of responsibilities, such as to ensure that:

- during all interviews with critical informants or witnesses at least one other member of the expert group is present, including participation in conference calls;
- all interactions are memorialized contemporaneously,
- all accused parties will have an opportunity to reply to all allegations.

If logistics or security constraints exist, for example because conference calling facilities are not available to UN experts, notes and memos cannot be stored safely, or interlocutors are deemed to be too much of a risk to experts to be given an opportunity to reply – experts have to be resourceful enough to find professional and safe solutions.

Monitoring of potential sanctions violations

Due process, such as granting the accused an opportunity to reply, cannot be practiced until facts are assembled that reasonably support an allegation. Once the expert group has decided to proceed with a monitoring effort, the lead experts should focus as a highest priority to engage with all directly involved or implicated actors, companies or organizations.

In many cases, access to primary witnesses may be difficult because of general security conditions that limit experts' range of travel, or because specific individuals or organizations could be a threat to the physical safety of an expert.

For situations where direct interactions with interlocutors is impeded for any reason, experts must develop safe work-around solutions, such as initiating contacts by phone, email or other forms of virtual exchanges. These initial approaches allow at a minimum to establish basic facts, identities of all directly involved, ascertaining their geographical whereabouts when the alleged sanctions violation occurred, and obtaining the general outlines of the events connected with the allegations. It is also an opportunity to collect exculpatory information that could lead to additional research, or to exclude misleading or erroneous claims.

Once the outlines of alleged sanctions violations are established and alternative explanations have been disproven, the experts should memorialize the information in a summary of allegations. Excluding any information that could endanger witnesses, victims or any other innocent party, that could lead to the destruction of vital evidence, or the disappearance of assets, a selection of pertinent alleged facts should be framed in questions and presented in writing to those implicated in wrong doing.

Established and submitted a written record of allegations along with a realistic deadline for answers, opens the door to discuss a safe and practical venue for meeting with two or more experts.

Any face-to-face discussion has to be preceded by a clear declaration of the authority and purpose that enables experts to pursue the subject of the meeting. The interview should not be used to intimidate, or to threaten the interlocutor in order to extort an admission.

A written record of the interaction can be provided to the interlocutor for review and further comments. Corrections should be admitted only to the extent that they are provided together with incontrovertible supporting evidence. An attempt to falsify an already made statement should of course be added to the list of pertinent and reportable facts.

Reporting of findings by expert groups

Experts have a mandate to report facts that must be related to sanctions violations. They are not mandated to report allegations or rumors, nor are they expected to report situations where they cannot amongst themselves agree on whether the gathered information amounts to an objective and reportable set of facts.

Their interim and final reports should not only detail findings about sanctions violations, but also include mitigating or extenuating circumstances.

Where one or several experts disagree or appear to counteract the work of the rest of the group because of professional shortcomings, such as political or personal biases, lack of technical expertise or professional independence, or neglect and inattention to the work completed, the coordinator together with the cooperative experts should consider remedies. They can include personal mediation or the intervention of the secretary of the sanctions committee and ultimately any action the Secretariat may deem necessary, including dismissal from the expert group.

Expert groups should, however, ensure that as much as possible they accommodate differing views by compromising and charting investigative strategies that will resolve internal disagreements. After all, the final product of the experts' mandate is a report that must pass the internal peer-review test and that all members agree to sign voluntarily.

Considerations of expert Group to publicly report or preserve evidence in confidential annexes

Whether experts consider keeping certain information reserved for the confidential annex or whether they publish all findings in the public report, can have significant due process implications. On the one hand, the process of applying targeted sanctions should be as transparent as possible. On the other hand, the release of inculpating information can result in unjustifiable, long-term harm.

For example, the release of bank account information, the brand of certain products, and specifically the identify of employees, suppliers or other stakeholders who are not recommended for targeted sanctions, can trigger unintended consequences for innocent third parties, such as other employees, shareholders, or suppliers.

Designation decision by sanctions committee

Chairpersons and members of sanctions committees should not rely on expert groups' claims of having adhered to due process practices, but should verify that they were observed for each of the reported allegations and recommended designations. It means that committee members in critical situations must be prepared to question individual experts concerning how they implemented their investigative methodology, and demand proof, including specific communications.

It is helpful that experts tend to present with their recommendations formalized Statement of Cases Forms that require a detailed account of important information. The form does however not require experts to explain how an investigation originated. Was the initial and the subsequently developed information researched in a manner consistent with the methodology and the due process practices the expert groups has agreed on?

The form also does not require experts to divulge the nature and sources of inculpatory and exculpatory information.

Sanctions committees have, therefore, no ability to evaluate whether due process was applied unless they individually make detailed inquiries with the experts during briefings. The same lack of transparency can apply to any other recommendation for designation that is presented to sanctions committees by Special Representatives of the Secretary- General, and particularly by member states.

Justifications for designations are supposed to be publicly available on the sanctions committee's webpages under Narrative Summaries of Reasons for Listing. The published information is almost in all cases far too general to provide any meaningful justification for a sanctions designation. Sometimes these justifications do not even summarize facts that expert groups have published in their public reports. The narratives may also provide no indication whether sanctions committees have considered any exculpatory information or the reasons why none were available at the time of the designation.

Post-designation procedures

Due process rights remain intact for individuals, companies or entities even after they are under sanctions. Sanctions committees have an obligation to ensure that due process remains available to them in a tangible and substantive manner.

It means that every person or entity under sanctions has an effective remedy, by appealing the designation when circumstances have changed and perhaps the imposition of sanctions measures is no longer justified. Such remedies cannot be restricted to the Focal Point for De-Listing processes, but should be integrated into committees and expert groups' practices.

Experts and committee members can demonstrate their commitment to due process by regularly reviewing each case under sanctions, including by questioning individuals, companies and entities under sanctions about the underlying actions that led to sanctions. Independently, they should also probe new information about their behavior, and where necessary, restate the justifications for listings, or argue for delistings.

It should not be an unusual occurrence, as is now the case, that expert groups recommend not only listings, but also de-listings. The practice that began under the old AQT regime, to mandate full reviews of the justifications for all designations, should be extended to all sanctions

Applications for exemptions to Focal Point, Ombudsperson or member states

A process exists with the appointment of the Focal Point for De-Listing, for exemptions to the assets freeze and travel ban measures for those designated under the ISIL (Da'esh) and Al-Qaida and for the 1988 (Taliban) sanctions list.

However, for anybody else, exemptions must be addressed to the chairperson of the relevant sanctions committee through the government or the Permanent Representative of the applicant's nation or country of residence. A listed individual may also direct an exemption request to the chairperson through a United Nations office.

Petitions for de-listings

Similar, to exemption applications, petitions for de-listings are facilitated by the Focal Point for Delisting for all individuals, companies or entities subject to UN sanctions. Only those designated under the ISIL (Da'esh) and Al-Qaida and the 1988 (Taliban) sanctions can direct their requests to the Office of the Ombudsperson.

While these processes currently represent the gold standard for due process in UN sanctions, an effective due process integration into the UN sanctions system would be the desirable solution. Strict observance of due process opportunities during the previous stages of the sanctions cycles would likely minimize the importance or remove the need for the Ombudsperson or the Focal Point for De-Listing.

De-Listings

While the decision to delist someone is a well-established process, implementing these decisions is far from certain to provide effective and quick relief to those being delisted. The necessary global communication to governments, the travel or the financial industry, and to all companies that distribute and sell compliance databanks turns out to be far more complex. Cases are known of delisted persons who were unable to get access to their assets for months or even years after they were delisted because of slow and inadequate communication to the travel and financial industry.

An additional complexity is that once a designation is announced, information remains on the Internet as the primary source for many who cannot afford professional compliance advisory services. Neither sanctions committees, nor expert groups, nor the UN secretariat, have the means to convey the delisting decisions to all companies around the world who offer internet browser services and compel them to delete all previous information.

Consequently, the UN sanctions system has to contend with the significant legacy of a due process deficit.

[i] Austria, Belgium, Chile, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland,