

Project on Best Practices Guides for Chairpersons and members of sanctions committees,
and UN sanctions monitoring experts and their coordinators
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Importance of due process for effective implementation of sanctions

Intervention by Paul Rietjens, Director General for Legal Affairs, Belgium

Excellencies,
Ladies and gentlemen,

- Due process in the decision on and in the implementation of targeted sanctions is, of course, a question of principle, but it is also – and importantly so – a question of efficiency of the targeted sanctions system itself.
- Sanctions are adopted by the UN Security Council. But, to receive an effect, they have to be implemented by all the Members States of the United Nations. Each person that has been targeted by sanctions can challenge these sanctions in front of national or regional courts and tribunals. If the decisions on or the implementations of these sanctions do not meet due process standards, they will be squashed at the end of this judiciary review. Which they are, quite often.
- My country has learned this the hard way, as we've been condemned for a listing made fifteen years ago that was subsequently rightly challenged for a lack of motivation and fact-checking.
- A huge portion of the judicial challenges of sanctions (or 'restrictive measures', as we call them in the EU) at the Court of Justice of the European Union ends with the annulment of the regulation implementing the UN Security Council sanction. And we are not talking about one case out of ten, but about something closer to 50 pc of the cases.
- We see here, concretely, how the lack of due process is undermining the efficiency of the targeted sanctions system.
- My country, as many others, considers that targeted sanctions are an important tool at the disposal of the UN Security Council in exercising its responsibility of maintaining the international peace and security.
- The UN Security Council, over the years, has made this tool evolve in a significant and positive manner, towards fairer and clearer procedures. The most significant of these improvements is the creation of the ombudsperson position and administration, which is a key contribution to the accuracy and legitimacy of the Daesh/Al Qaida sanctions regime and to its effectiveness.
- Despite these progresses, considerable due process concerns still persist and legal challenges have been filed in national jurisdictions around the world. Because the institution of the ombudsperson pertains only to one sanctions regime, but also because even this regime, the Daesh/Al-Qaida sanctions regime, still comes short to ensuring sufficiently fair and clear procedure.

- In Europe, both the European Court of Human Rights, lately, in 2016, with the Al-Dulimi decision, as well as the Court of Justice of the EU confirmed in their judgments that in the implementation of UN measures, actions of Member States remain subject to full judicial review as to their conformity with fundamental norms of due process.
- Those fundamental norms include, among others, respect for the right to be heard and other rights of the defense (right to have access to the file, subject to legitimate interests in maintaining confidentiality; right to ascertain the reasons of a decision) and the right to an effective remedy. It is possible to limit those rights, subject to the condition that this limitation pursues a legitimate aim, respects the principle of proportionality (including with regard to the duration of the measures) and does not infringe on the essence of the right in question.
- Other national courts, in the world, are charged with sanctions cases or have already rendered decision pointing at the lack of due process of the UN Security Council Sanctions system.
- The United Nations University, in cooperation with the Swiss Confederation, has issued this year a study called *Fairly Clear Risks : Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures'*, which I encourage you to read. One of the findings of the study is that, because of the lack of sufficiently fair and clear procedures, the implementation of UN sanctions regime may be at risk, *'especially in the almost 50 Member States that fall within the jurisdiction of courts that have already ruled on these concerns'*¹.
- Aside of the analysis of the situation, the study makes several recommendations to UN Member States, especially those sitting at the Security Council. Among those :
 - to respect the independence of the Ombudsperson, including in drafting reasons letters;
 - to strengthen statements of reasons and narrative summaries;
 - to better use open source material during listing processes;
 - to press for preventive action through debates in the Security Council.
- The project to create Best Practice Guides is a very useful initiative. It will help the chairpersons and delegations of the UN sanctions committee, but also the UN sanctions monitoring experts and their coordinators, to take into account these useful recommendations, but also to take account of useful recommendations from:
 - the Compendium of the High Level Review of UN Sanctions;
 - the Assessment of the HLR report;
 - the input paper of the like-minded States on targeted sanctions, entitled 'Improving fair and clear procedures for a more effective UN sanctions system'.
- As an incoming member of the Security Council, Belgium is therefore particularly happy to be actively involved in this endeavor, together with Australia, the Netherlands, Sweden and, of course, 'Compliance & Capacity Skills International'.

¹ COCKAYNE, James, BURBAKER, Rebecca, and JAYAKODY, Nadeshda, [Fairly Clear Risks : Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures](#), United Nations University, 2018.