

## COUNTERING TERRORISM THROUGH DOMESTIC AND INTERNATIONAL TARGETED SANCTIONS: A RULE OF LAW PERSPECTIVE

Sponsored by American University Washington College of Law  
and The Government of Liechtenstein  
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### INFORMAL SUMMARY\*

The seminar addressed counter-terrorism targeted sanctions regimes in place in the United States, the European Union and the United Nations, with a particular emphasis on listing and review mechanisms and the legal challenges presented against them. In essence, these listings trigger assets freezes aimed at disrupting terrorist activities, in particular terrorist financing. They constitute a central element in the global fight against terrorism.

#### The listing process

In the **United States**, potential “Specially Designated Nationals” (SDN’s) are identified by an inter-agency group chaired by the National Security Council. Subsequently, the Treasury assembles relevant evidence and information, followed by an inter-agency legal review. The “Office on Foreign Assets Control” (OFAC) takes the final decision on the designation and prepares the statement of case, which usually requires the de-classification of information. In a separate but similar procedure, the State Department, in consultation with the Attorney General and the Treasury, designates “Foreign Terrorist Organizations” (FTO’s).

The **European Union** implements sanctions through Community regulations which are directly applicable to all domestic authorities of all 27 Member States. In addition to implementing UN sanctions and listing decisions, which until recently have simply been incorporated without further review, the EU applies autonomous sanctions in a number of situations, notably in implementation of UNSC 1373 (under which no listing decision is taken at UN level). In the latter, the so-called “CP 931 Working Party” prepares the listing decisions of the Council of the European Union, based on proposals by Member States or third States. The listing decisions are accompanied by a statement of reasons and are automatically reviewed every six months.

Since the early 1990’s, the **UN Security Council** has used sanctions in numerous conflict situations and refined this tool from comprehensive to targeted sanctions. Resolution 1267 (1999) originally established sanctions against the Taliban in Afghanistan, but was subsequently extended to cover persons and entities associated with the Taliban or Al Qaida worldwide. Listings can be proposed by any Council member and are accepted by the 1267 Sanctions Committee in the absence of an objection by any other member. Recent resolutions have improved the listing procedure, and require in particular notification of the target and a statement of case.

#### Review mechanisms and legal challenges

In the **United States**, persons or entities designated by OFAC can request an administrative review of the listing decision, and challenge that review or their designation in Federal District Court. The courts, though not the applicant, have full access to the evidence on which the designation was based, including classified information.

So far, all OFAC designations challenged in US courts have been upheld. It was pointed out, however, that the courts only examine whether the designation had a “reasonable basis”, thus protecting mainly against arbitrary designations rather than making their own full and independent assessment of the designation’s justification. Applicants have also not been successful with constitutional challenges. The courts have held, for example, that the right to property was not violated when assets were frozen, given that the assets are only blocked and not forfeited.

In the **European Union**, listed persons, groups and entities listed under the 1373 regime can request delisting via the CP 931 Working Party, and subsequently challenge the decision at the Court of First Instance, followed by the European Court of Justice. Applicants have access to full judicial review with respect to the autonomous sanctions, and following the recent ECJ judgment in the “Kadi” case also enjoy “in principle full judicial review” of the EU’s implementation of the 1267 sanctions. In contrast to the United States, no court cases have yet included an examination of the actual evidence on which a listing decision was based. Other recent court cases have addressed procedural issues and led to improvements in the listing and review mechanism of the autonomous sanctions regime.

Persons and entities on the **UN Security Council’s** 1267 sanctions list can submit delisting requests through the Focal Point in the UN Secretariat. Provided that at least one Council member actively supports the request, a delisting decision is taken in the absence of objections by any Council member. Mainly due to the absence of an independent review mechanism at UN level, at least 27 legal challenges have been brought in different jurisdictions against the implementation of the 1267 sanctions. Most recently, the ECJ held in the “Kadi” case that the rights of the defence, in particular the right to be heard and to effective judicial review, were “patently not respected”. A few weeks before that judgment, SC resolution 1822 brought some further improvements to the listing procedure, and decided that the Committee shall review all 497 entries on the list within the next two years. It was pointed out that some of the listings made in the immediate aftermath of 9/11 were probably based on poor evidence and might have to be reconsidered.

### **Due process and intelligence information**

Despite being tools of prevention rather than punishment, the various sanctions regimes have expanded in scope and time and have come to look more like mechanisms of criminal law, thus raising questions of procedural fairness and applicable standards of due process. Listing decisions are usually to a great degree based on intelligence information that remains at least in part classified and is thus difficult for the applicant to confront. It was held that the secretive nature of the process makes it difficult to evaluate whether the designation process conducted by government authorities is as thorough and fair as claimed. Short of judicial review, one remedy suggested was to define and explain more clearly the nature of the “link” or “association” required for a listing, and to provide fuller statements of fact that go into one or two more degrees of detail.

The use and review of intelligence information in courts provides particular challenges. While the US system provides applicants with at least an indirect review of intelligence information via the courts *ex parte* and *in camera*, no such independent review is currently available in the context of UN sanctions listings. The difficulty for a UN organ to interface with national intelligence services was cited as an obstacle for such a review, though it was also pointed out that sub-organs of the Security Council had in the past received classified information (ICTY, UNMOVIC). In the EU, the degree to which intelligence information must be disclosed either to the courts or to the applicants is not adjudicated yet. The “Kadi” judgment gives rise to expectations that such disclosure requirements could potentially reach very far.

### **The way forward**

The various sanctions regimes referred to during the seminar continue to be challenged and to evolve. The discussion on the way forward focused on the **Security Council’s 1267 sanctions regime**. The “Kadi” judgment shows that the 1267 sanctions remain particularly problematic under a rule of law perspective. Future reforms of that system will have to balance the Security Council’s self-perception as a political body and the increased human rights scrutiny of sanctions implementation. It was pointed out that the proposal to establish an expert panel to advise the 1267 Sanctions Committee on delisting requests was intended to achieve that balance. It was argued that there was no impediment to establishing an independent review mechanism if the Security

Council wanted to do so. However, the point was also made that UN bodies were political in nature and therefore could not provide judicial review. In any event, discussions on the improvement of procedural fairness should not detract from taking other measures that are necessary to make sanctions a more effective tool. The question was raised whether half-hearted measures could really achieve that goal, or whether entirely new tools were needed. Some participants warned not to endanger the use of sanctions as a crucial tool in the fight against terrorism, stressing that the 1267 sanctions regime was among the most successful efforts in this area. Others suggested that the reform proposals had the ultimate goal of strengthening the effectiveness of the sanctions, and that the perception of a lack of due process was a real problem that the Security Council needed to confront.

## PROGRAMME

- 9:45 am                    **Opening Remarks**  
**Claudio Grossman**, Dean, American University Washington College of Law  
**Christian Wenaweser**, Permanent Mission of Liechtenstein to the United Nations
- 10:00 am -11:30 am    **Session 1: Domestic and international targeted sanctions regimes – a comparison**  
**Moderator:**  
**Prof. Robert Goldman**, American University Washington College of Law
- Presenters:**  
***The terrorist designation process in the United States:***  
**Adam J. Szubin**, Office of Foreign Assets Control (OFAC)  
***The EU legal framework for counter-terrorism targeted sanction:***  
**Stephan Marquardt**, Council of the European Union – Liaison Office to the United Nations  
***Targeted sanctions imposed by the UN Security Council:***  
**Joanna Weschler**, Security Council Report  
Discussion
- 2:00 pm – 3:30 pm     **Session 2: Legal challenges to counter-terrorism sanctions regimes - administrative law, criminal law, and human rights**  
**Moderator:** Jonathan Winer, APCO Worldwide  
**Presenters:**  
***The role of intelligence information:***  
**Patrick Radden Keefe**, writer  
***Court cases regarding domestic listing regimes:***  
**Ori Lev**, Office of Foreign Assets Control (OFAC)  
***Court cases regarding international listing regimes:***  
**Christopher Michaelson**, Fellow, Faculty of Law, University of New South Wales, Sydney  
Discussion
- 4:00 pm – 5:30 pm     **Session 3: Effective review of listing decisions – the way forward**  
**Moderator:**  
**Eric Rosand**, Center for Global Counter-Terrorism Cooperation  
***“Fair and clear procedures” in UN sanctions listing – an outside perspective:***  
**Christian Wenaweser**, Permanent Mission of Liechtenstein to the United Nations  
***“Fair and clear procedures” in UN sanctions listing – an inside perspective:***  
**Richard Barrett**, United Nations Al-Qaida/Taliban Monitoring Team  
***The way towards a compromise:***  
**Sue Eckert**, Watson Institute, Brown University  
Discussion

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\* Informal summary prepared for reference purposes only by the Permanent Mission of Liechtenstein to the United Nations.