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**Paper for the Subcommittee to Examine
the Implementation in Hong Kong of Resolutions of the
United Nations Security Council in relation to Sanctions**

Meeting on 3 April 2008

The Subcommittee's Further Views on the Proposed Way Forward

Purpose

This paper reports on the major views shared by members of the Subcommittee on possible improvements to the existing arrangement under the United Nations Sanctions Ordinance (Cap. 537) ("UNSO") for implementing sanctions resolved by the Security Council of the United Nations (UNSC).

The Subcommittee's deliberations

2. Since October 2004, the Subcommittee has been studying the legal, constitutional and operational issues arising from the current arrangement under UNSO for implementing UN sanctions in Hong Kong. It has also formulated views and submitted a report to the House Committee on 18 May 2007 with suggestions on how the existing arrangement can be improved¹.

3. When considering the proposed way forward as set out in LC Paper CB(1)532/07-08 at its meeting held on 1 February 2008, members reaffirmed the need for the Hong Kong Special Administrative Region (HKSAR) to implement UN sanctions in fulfilment of the Central People's Government (CPG)'s international obligations to UN. While agreeing that UN sanctions are within the purview of foreign affairs over which CPG has sole responsibility, members shared the consensus that the existing arrangement of implementing UN sanctions as

¹ The Subcommittee's report is at LC Paper No. CB(1)1587/06-07 and the Summary of Key Issues Raised in the Report is at CB(1)1586/06-07.

provided under UNSO² is problematic and should be improved with a view to enhancing accountability and compliance with the due process in enacting legislation.

The question of constitutionality

4. The Subcommittee has examined whether the regulation-making process provided under UNSO is constitutional and consistent with the separation of powers enshrined in the Basic Law. In doing so, it has made reference to the advice given by Dr Yash GHAI, former Sir YK Pao Professor of Public Law at the University of Hong Kong, and the views submitted by the Hong Kong Bar Association. In exchanging views with the Subcommittee, the Administration maintains its view that the current arrangement of implementing UN sanctions in Hong Kong is in accordance with the normal legal procedure of enactment of legislation in the HKSAR under the Basic Law and Article 48(8) of the Basic Law whereby CE is under a constitutional duty to implement the directives of CPG.

5. In this connection, the Subcommittee has, at an earlier stage, examined the option of seeking clarification on the constitutionality of section 3(5) of UNSO through the judicial channel, and set out its observations in the report submitted to the House Committee on 18 May 2007³.

The question of "vires"

6. On the definition of "sanction" under section 2(1) of UNSO, the Subcommittee notes the Administration's view that it would be too restrictive to view sanctions against a place in isolation from the persons/entities operating there or having a connection with that place. To better ensure that the regulations, some of which were in fact targeted at persons and not a place, are not ultra vires of the primary legislation, members note that if necessary and subject to certain conditions, they may consider proposing an amendment to the definition of "sanction" under UNSO by way of a Member's Bill⁴.

Specific suggestions for improvement

7. It is the Subcommittee's common view that even on the assumption that the arrangement under UNSO is legal and constitutional, it is still necessary to

² Pursuant to section 3(1) of UNSO, the Chief Executive shall make regulations to give effect to a relevant instruction issued by the Ministry of Foreign Affairs of the People's Republic of China to implement sanctions decided by UNSC. Section 3(5) further stipulates that sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap.1) shall not apply to these regulations. In other words, the regulations are not subject to the approval or negative vetting by LegCo.

³ See paragraphs 44 to 46 of LC Paper No. CB(1)1587/06-07.

⁴ See paragraph 23 of LC Paper No. CB(1)532/07-08 – "The Subcommittee's proposed way forward" considered at the meeting held on 1 February 2008.

improve the existing regulation-making process to achieve greater transparency and accountability. For this purpose, the Administration should engage the Legislative Council (LegCo) in the process by taking the following steps:

- (a) The Administration should consult the appropriate LegCo Panel⁵ before deciding whether the implementation of a UN resolution should be by way of an independent bill or by making regulations under UNSO. If the Administration decides that the latter option is to be taken, it should provide a copy of the draft regulation to the Panel on Commerce and Industry and seek Members' views thereon⁶. When finalizing the draft regulation for onward submission to the Office of the Commissioner of the Ministry for Foreign Affairs in HKSAR, the Administration should take into account the views and concerns expressed by LegCo Members.
- (b) If a regulation is to be made under UNSO, after gazettal, it will be considered by the House Committee in accordance with the normal procedure of dealing with subsidiary legislation, under which members may decide to set up a subcommittee to examine the regulation in question.

For ease of reference, the proposed improvements above have been added to the existing "Flow-chart of the Major Steps in the Sanctions Regulation-making Process" under UNSO at the **Appendix**.

8. The Subcommittee is fully aware of the time-critical nature of UN sanctions and the need for their prompt implementation. In principle, members consider that consultation with the relevant LegCo Panel on the draft regulations will not necessarily result in delay of the legislative process. On the contrary, LegCo's intervention so far has proved to be beneficial to the speed of the regulation-making process and the quality of the outcome. LegCo's proper involvement will render the process more accountable and compliant with the due process of enacting legislation. It was also at the request of the Subcommittee in April 2005 that the Administration has been issuing a detailed information paper comparable to a LegCo Brief on each of the regulations gazetted since then. Previously, no written information on the gazetted regulations was available for scrutiny.

9. To facilitate consideration and expedite the scrutiny of the draft and gazetted regulations under UNSO, members are of the view that the Administration

⁵ In deciding which Panel is the appropriate forum, due regard should be given to the subject matter of the UN resolution and the existing terms of reference of LegCo Panels.

⁶ The policy bureau responsible for UNSO is the Commerce, Industry and Tourism Branch of the Commerce and Economic Development Bureau and hence, the corresponding LegCo Panel should be the Panel on Commerce and Industry. In line with the existing practice, all other non-Panel Members are also invited to attend briefings on legislative proposals.

should critically re-examine the following suggestions raised by the Subcommittee:

- (a) adopting a model law approach by incorporating into the primary legislation (i.e. UNSO) all the provisions on enforcement powers and other key provisions which generally apply to all UN sanctions; and to set out in a Schedule to UNSO the targets and subjects of sanctions which may differ on each occasion; and
- (b) making reference to the arrangements provided under other Ordinances⁷ which also implement international obligations in Hong Kong and at the same time providing LegCo a role in the legislative process. One notable example is the making of orders under section 3 of the Fugitive Offenders Ordinance (Cap. 503) (FOO)⁸.

Advice sought

10. Members are invited to note the Subcommittee's key observations, and the common views shared by members of the Subcommittee on proposed improvements as set out in paragraphs 7, 8, 9 and the **Appendix**.

Council Business Division 1
Legislative Council Secretariat
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⁷ The Subcommittee has studied three Ordinances, namely, the Fugitive Offenders Ordinance (Cap. 503), Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) and United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575). See paragraphs 36 to 41 of LC Paper No. CB(1)1587/06-07.

⁸ According to section 3(9) of FOO, the Chief Executive in Council shall not make an order under FOO unless the arrangements for the surrender of fugitive offenders to which the order relates are substantially in conformity with the provisions of FOO. Under section 3(2) to (7) of FOO, such an order is subject to negative vetting by LegCo under which LegCo has the power only to repeal the order.

**Flow-chart of the Major Steps
in the Sanctions Regulation-making Process under UNSO
(with proposed improvements)**

