Memorandum to the Subcommittee on UN Sanctions on The United Nations Sanctions Ordinance: the legislative process

The Background

1. The Subcommittee of the Legislative Council ('Subcommittee') has been considering for some time the method whereby effect is given to the sanctions required by resolutions of the Security Council of the United Nations. Security Council resolutions under Chapter 7 of the UN Charter (under which sanctions are imposed by the UN) are binding on all members of the UN. These members are required to give effect to the resolutions in their domestic law. During the colonial period such sanctions were imposed by an Order in Council issued under the United Nations Act, 1946. This procedure was reviewed by the Attorney General's Office as part of the adaptation of laws exercise before June 1997. No agreement was reached between the UK and the PRC on an Ordinance to replace the British arrangements. The matter was taken up by the HKSAR Administration and the LegCo immediately after the transfer of sovereignty and resulted in the enactment of the United Nations Sanctions Ordinance (Cap. 537) ('UNSO') on 16 July 1997.

2. Under the Basic Law, responsibility for foreign affairs is vested in the Central People's Government ('CPG') (BL13). However, this responsibility is not discharged directly by the CPG in the HKSAR. Instead the primary responsibility for the discharge of functions in relation to foreign affairs is placed on the Chief Executive, acting in accordance with instructions from the CPG (BL48(8) and (9)).

3. Laws that may be necessary to implement foreign affairs objectives in Hong Kong are not applied directly as part of national legislation, as is the case in most autonomous or federal systems. Only a few national laws apply (Annex III), but even they have to be enacted or promulgated locally. The general scheme of the Basic Law is that Mainland laws or valid instructions from the CPG that require legislation are to be integrated into Hong Kong's laws and legal system (so that, for example, any penalties for breach of the law would be determined by HKSAR courts and administered by the HKSAR administration) (BL18). The Basic Law therefore provides a somewhat complicated scheme for the management of foreign affairs that recognizes both the ultimate responsibility of the CPG and its administration by the HKSAR. So it is not surprising that confusion about limits of authority and jurisdiction can arise. A careful reading of the Basic Law and the principles underlying is required to clear this confusion. I make some attempt at this after setting out the problems identified by the Subcommittee.

UNSO

4. UNSO is brief. Its purpose is to 'provide for the imposition of sanctions against places outside the People's Republic of China arising from Chapter 7 of the Charter of the United Nations'. Resolutions of the UN and international sanctions are matters relating to foreign affairs, and fall within the authority of the CPG under the Basic Law (Article 13 (1)). The scheme of the Ordinance, which recognises the PRC's responsibility for foreign affairs, is as follows. When the Security Council makes a resolution regarding

sanctions, and calls on the PRC to apply those sanctions, the Ministry of Foreign Affairs of the PRC ('MFA') may issue instructions to the Chief Executive as to the implementation of the sanctions specified in the instructions ('relevant instructions'). Once the instructions have been received, the Chief Executive has to give effect to them by making regulations (s. 3(1)). Regulations may prescribe penalties for breach of the regulations, subject to maximum penalties specified in the Ordinance (s. 3(3)). The Chief Executive has authority to provide exclusions from the application of the regulations. The Ordinance disapplies Sections 34 and 35 of the Interpretations and General Clauses Ordinance (Cap. 1) to regulations made under the UNSO.

5. Sections 34 and 35 concern LegCo's role in respect of subsidiary legislation (an expression which would include regulations under an Ordinance). The general rule is stated in s. 34 that requires all subsidiary legislation to be placed before the LegCo, at its first sitting after the making of the regulations. The LegCo has authority to amend the subsidiary legislation by resolution within 28 days (without prejudice to anything that may have been done under the regulations). Section 35 deals with the situation where an Ordinance provides that subsidiary legislation is subject to LegCo's approval, so that it does not come into effect without that approval.

Concerns of the Subcommittee

6. In its paper to the House Committee 25 May 2004, the Subcommittee stated its views on the UNSO. It expressed members' concern 'that legal and constitutional problems may have arisen in these arrangements under the UNSO'. One set of concerns arises from the way the Ordinance has been used (summarized in section A, below), the other from the status of the instructions from the MFA (section B)..

A

(a) The Subcommittee is concerned that s. 34 of Cap. 1 has been disapplied so that the LegCo has no opportunity to scrutinize the regulations, to consider their validity, clarity, reasonableness, etc. The exclusion of the LegCo may be considered to encroach upon its primary responsibility for making laws for HKSAR and to violate the principle of the separation of powers.

(b) A second issue concerns the revocation of sanctions. Under the Ordinance revocation takes place only when another regulation is enacted (on instructions from the MFA). In some countries, they terminate automatically when the Security Council revokes them.

(c) Derogations from rights under the regulations go well beyond those permitted in some Ordinances (e.g., UN (Anti-Terrorism Measures) Ordinance, where powers of search and detention require a court order, but this is not so under UNSO).

(d) Regulations purport to have serious penal effect.

(e) Regulations confer vast powers of investigation on unspecified 'authorised' officers to stop, search, seize, detain goods, ships, aircraft, and vehicles and compel individuals to

provide information and materials which exceed the general powers of the Police and Customs officers.

(f) The Administration has by-passed the UNSO in at least one case. Sanctions have been implemented through the UNSO, other primary legislation and administratively, so that there is no consistent approach.

(g) There have been long delays between Security Council resolutions and the enactment of regulations.

(h) Some regulations have been ultra vires (those dealing with individuals and groups rather than with 'place', which seems to defines the scope of the UNSO).

B.
The concern about the status of the instructions, is that the LegCo is not allowed access to the instructions from the Ministry of Foreign Affairs to the Chief Executive (and accordingly the LegCo cannot verify that the regulations conform to the instructions, or that instructions have in fact been given). The exclusion of the LegCo from this important communication undermines its ability to supervise the administration in accordance with the Basic Law.

Response of the HKSAR Administration
7. The HKSAR Administration has responded to these concerns in the following manner.

A issues:
(i) The matter concerns foreign affairs which is the responsibility of the CPG and presumably not appropriate for discussion by the LegCo.

(ii) The CE is required to follow directives issued by the CPG (Art. 48(8)).

(iii) s. 28(1)(b) of Cap. 1 provides that no subsidiary legislation shall be inconsistent with the provisions of any Ordinance (so any such inconsistency could be challenged by an affected person)

(iii) Section 2(1) of Cap. 1 says that provisions of that Ordinance apply unless there is a contrary intention in the relevant Ordinance, so the exemption from s. 34 in UNSO is valid.

(iv) The argument of continuity—the Administration says that the Fugitive Offenders Ordinance (Cap. 503) has a similar exempting provision (s. 3(15)), which is pre-unification, therefore it is alright to have it in UNSO, since the purpose of the Basic Law is to maintain continuity.

(v) Security Council resolutions have to be implemented promptly (because the sanctions are time limited).

(vi) Regulations targeting individuals and groups are not *ultra vires* since the notion of 'place' covers persons residing there.

(vii) The consequences of the principle of separation of powers have to be examined in the context of a particular case; here the context indicates that the exclusion of the LegCo from the scrutiny of the regulations is justified.

B issue
(i) MFA instructions are intended for internal use only [what does that mean?]. 'We consider it inappropriate to release internal correspondence to persons outside the Administration. This is an established practice governing the handling of HKSARG's correspondence with CPG and all other governments' (letter dated 19 February 2004) to Clerk to the Subcommittee).

(ii) Non-disclosure is protected under the common law doctrine of public interest immunity. Moreover BL48(11) enables the CE to withhold evidence by public servants for specified reasons. The Administration says (as stated in the Subcommittee's paper to the House Committee), 'When BL48(11) is construed in the common law context, this provision would be wide enough to cover those documents that would be withheld from disclosure under the common law doctrine of public interest immunity'.

(iii) Administration has agreed to issue a certificate that it has received instructions in respect of a regulation.

(iv) Administration says that it has truthfully conveyed the contents of MFA's instructions (Donald Tsang's letter to Miriam Lau, Chair of the House Committee, dated 13 November 2003).

Principles of the Basic Law
8. I consider that the following principles of the Basic Law are essential to resolving the conflicting views of the LegCo and the Administration, and that the Administration has paid insufficient attention to them.

A *On separation of powers*:
The principle of the separation of powers is that the principal powers of the state (legislative, executive and judicial) should be separate and vested in different bodies. To an extent the separation of powers is a matter of degree (e.g., constitutions of several European civil law systems which are more committed to the separation of powers than England give limited powers of law making to the executive). Some constitutions also have mechanisms of mutual control or supervision—known as checks and balances, which do not affect the general principle of the separation of powers (as in the US). The degree of the separation of powers and its consequences can only be established by an examination of the provisions of the constitution. An examination of the Basic Law demonstrates that it is based on a separation of powers.

Article 2 recognizes the existence of three specific forms of power (executive, legislative and 'independent' judicial power). In the Chapter on Political Structure, a distinction is made between the Chief Executive, the Legislature and the Judiciary. Articles 16, 17, and 19 vest separately executive, legislative, and judicial powers in the HKSAR. Although, as is usual in most constitutional systems, there is interaction between the executive and the legislature, each has its own institutional autonomy.

The law making power
The power to make laws is granted under the Basic Law to the LegCo. BL17 gives legislative powers to the legislature of the HKSAR, but does not define the legislature, this is done by BL66 which makes the LegCo the legislature; BL73 (1) defines the legislative function of the LegCo as 'to enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures'. This provision can be read as 'vesting' the legislative function in the LegCo. The CE is not member of the legislature; ExCo is not drawn from nor sits in the legislature, although individual members may be.

The Basic Law gives no power to make laws to the Chief Executive, although it gives a considerable role to the CE in the legislative process (e.g., signing, veto, on bills, BL62(5); 'to draft and introduce bills, motions, and subordinate legislation'; priority is to be given to government bills by the President of the LegCo (BL72(2)); CE's permission is required for private members bills on public expenditure or political structure or the operation of the government; signing of Bills (BL48(3), 49-50, BL76).

Method for the application of national laws in the HKSAR
The only national laws to be applied in the HKSAR are listed in Annex III (BL18), and they apply as part of Hong Kong laws ('applied locally by way of promulgation or legislation by the Region') (the only exception is when the Mainland can apply a national law directly if there is a state of emergency beyond the control of the HKSAR (BL18(4)). Such laws can be reviewed in Hong Kong courts. This method is in sharp contrast to the application of national laws in autonomous areas/federation where laws are directly applicable. This different method is chosen for the HKSAR because the intention is to maintain the integrity and coherence of the Hong Kong legal system based on the common law The implication is that all the normal processes of law making must be adhered to, including that relating to subsidiary legislation (which would be covered in the BL under the term 'law'). I would argue that this task of integrating MFA instructions into the Hong Kong laws and legal system is particularly critical as the instructions (like the Security Council resolutions on which they are based) are presumably formulated in general terms, as objectives, but say little about the method of implementation, and that the implementation touches on fundamental rights.

LegCo scrutiny of subsidiary legislation
It follows from the preceding analysis that the Basic Law vests the LegCo, as the legislative arm of the HKSAR, with the authority and the responsibility to keep control over subsidiary legislation. It has plenary law making powers (73(1)); and the draft of subsidiary legislation has to be introduced to the LegCo (BL62(5)). *An Ordinance that takes away from the LegCo the ultimate control over the enactment of subsidiary*

legislation would therefore be unconstitutional. The LegCo has been given its legislative responsibilities by the NPC and it cannot divest itself of that power (‘*delegatus non potest delegare’*).

This conclusion is reinforced by considerations of the functions of legislature’s scrutiny of subsidiary legislation as well as specific provisions of the BL. As to the former, it is LegCo’s role to ensure that subsidiary legislation is consistent with the parent Ordinance, that it violates no provision of the Basic Law (BL11) (particularly those relating to the affairs within the responsibility of the Central Authorities, or the relationship between the Central Authorities and the HKSAR, BL17(2)), or the fundamental principles of the common law, and that it is clear and reasonable. The Administration seems to recognise that regulations can be *ultra vires* (and challengeable on this point in judicial review proceedings). It expects it can monitor conformity with the law exclusively by itself. But papers before the Subcommittee seem to indicate that it may not have been very successful. So LegCo’s scrutiny is necessary.

The LegCo may debate any issue concerning public interest (BL 73(6))—review of subsidiary legislation, especially if they deal with fundamental issues of human rights, and trade, is a way to discharge that function. It has the responsibility to raise questions on the work of the government BL73(5)—subsidiary legislation is, for the most part, the ‘work of the government’.

Conclusion

9. I conclude from the above discussion that:

(a) the principle of the separation of powers underlies the Basic Law;

(b) the power to scrutinize and if necessary, amend subsidiary legislation is vested in the LegCo.; and

(c) an Ordinance which takes away the power of the LegCo to vet or amend subsidiary legislation is void.

In view of the above conclusions, I turn to the issues that have been referred to me for my opinion by the Subcommittee.

10. It is my opinion that the exclusion by UNSO of sections 34 and 35 is unconstitutional (for reasons given above).

11. Even if the exclusion were not unconstitutional, it would seem desirable to provide for LegCo’s scrutiny. In normal circumstances, the regulations could be described as ‘draconian’ (one hesitates to use that expression only because the regulations seek to implement a Security Council resolution). As a reasonable institution, the LegCo would understand that it would be inappropriate to overturn the objectives of sanctions, but it is responsible to the people of Hong Kong to ensure that laws are not unduly unreasonable or oppressive, and whether objectives could be achieved in less drastic ways.

12. I also consider that UNSO might be deficient in another respect. It does not give the CE sufficient guidance on how the CE may exercise his or her powers under the Ordinance. It is, if I can put it this way, an absolute license to legislate once the conditions justifying the making of regulations are satisfied (i.e., instructions from the MFA following a Security Council Resolution on sanctions). The only restriction is on the maximum penalties that may be imposed for the breach of regulations. There is considerable case law (especially in jurisdictions with a constitution, unlike the UK) on the extent of delegation of law making powers. As a general rule, if the delegation is in very broad terms and without guidance on how the power is to be exercised, the delegation is unlawful. Courts have varied in the degree of tolerance in this regard. Since the Subcommittee has raised various queries about the Ordinance and the regulations (*ultra vires* matters, lack of legal safeguards, punitive nature of penalties, and a lack of legal policy about the implementation of sanctions), it would be advisable that the Administration in consultation with the Subcommittee should be asked to review the Ordinance with the a view to providing more guidance to the Administration. I do not make any recommendations on these changes as others in the Subcommittee and the Administrations are better qualified for this task.

13. The need for the review of UNSO and the regulations is reinforced by the consideration that the courts might rule some aspects of the regulations unconstitutional (I have not had time to study the regulations from this point of view). In countries with an enforceable Bill of Rights, courts are inclined to scrutinize regulations closely to protect rights. It would be unfortunate if judicial review of regulations were to appear as if the HKSAR courts are challenging the authority of the CPG.

14. It is pertinent to say something about the respective roles of the CPG and the HKSAR authorities, particularly the LegCo., in the implementation of UN sanctions. These roles are delineated by the Basic Law itself. The CPG (through the MFA) has the responsibility, under international law, for implementing UN resolutions. The actual implementation has been left to the HKSAR institutions, following MFA instructions to the CE. This seems also to be acknowledged in UNSO which refers to instructions 'to *implement* the sanctions' (s.2(2) (emphasis supplied). That there is this flexibility has also been acknowledged by the Administration which has said that some sanctions have been implemented purely by administrative means (as in the case of control against the entry of Angolans through directives to the Immigration Department) and some through specific primary legislation. And a clause excluding section 34 of Cap. 1 in International Organisations (Privileges and Immunities) Bill was dropped after objections in the Bills Committee. Moreover the UN (Anti-Terrorism Measures) Ordinance (Cap. 575), implementing UN resolutions, does not have a similar exclusionary clause. (So why is it necessary in UNSO?).

The instructions have not been released for public examination, so the point I am about to make cannot be verified. It is likely that the instructions are of a general nature, listing the objectives of the sanctions, and probably using the language of the Resolutions. It is evident from a perusal of the Resolutions that they state the objectives and scope of sanctions in a general way, leaving the modalities of implementation to the national

authorities. This is a sensible approach, as constitutional and legal frameworks for implementation vary from state to state. It therefore follows that very considerable discretion is given to the HKSAR authorities on the method of implementation, the restrictions that can lawfully be imposed on rights, the scale of penalties, powers of investigations, etc. Under the BL these matters cannot be left entirely to the Administration, with an ex post facto review by courts in case of a challenge. It is clearly in the interests of the Administration that these the LegCo participates in these decisions. Such participation in no way diminishes either the role or the authority of the CPG.

15. The argument of the Administration that because at least one pre-unification Ordinance (the Fugitive Offenders Ordinance) excluded s. 34 of Cap. 1, it is legal to do the same here, because the Basic Law was intended to ensure continuity. It is not possible to say in general terms what the intention of the Basic Law was. In some respects it certainly was continuity. In others it was change (as with political structures, commitment to universal franchise, changed relationships between Hong Kong and the 'sovereign'). The Administration's way of arguing is unsound and liable to lead to serious errors. These matters are best resolved by a close examination of the BL provisions.

16. Nor is the Administration's argument that section 34 of Cap. 1 has been excluded to ensure prompt implementation convincing. This argument might have some force if it referred to section 35 which requires the prior approval of the LegCo in respect of subsidiary legislation. It cannot have any relevance to a procedure which comes into force only after the coming into force of the regulations.

17. I now come to the question of the non-disclosure of the instructions from the MFA. In my opinion, the Administration has provided no convincing argument in favour of non-disclosure. It is not sufficient to say it is long established policy not to disclose such communication. It is highly doubtful whether the broad provisions of BL48(11) (which gives the CE authority 'to decide in the light of security and vital public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before the Legislative Council or its committees') would pass the common law test for non-disclosure under public interest immunity. The Administration recognizes that the *ultra vires* principle applies to the regulations, and therefore that they are subject to judicial review. If in these proceedings the question of the nature of the instructions or their correct implementation arises, admissibility would be governed by the common law rules of public interest immunity.

Public interest immunity can be claimed by the government for the non-disclosure of documents which are confidential, on the grounds that disclosure would be 'injurious to the public interest'. It is important to be clear what the Administration is claiming in this case. It is saying that all communications between the CPG and the HKSAR CE are immune from disclosure under this rule. In other words, it is claiming a blanket immunity for a class of documents. The common law does not (except perhaps exceptionally) allow immunity for a class of documents. It is for the courts to decide whether in the particular case non-disclosure is justified. (*Conway v. Rimmer* [1968] AC 910; *Burmah Oil Company v. Bank of England* [1980] AC 1090. Whether the communications between

CPG and the CE would be granted on the grounds that disclosure would harm the public interest is hard to say in the absence of inspection of the communications. But *prima facie*, it is unlikely that the transmission of the UN Resolutions with a covering note will damage the public interest. Courts tend to lean in favour of disclosure when human rights are involved (*R. v. Davis [1993*] 2 All ER 643). It is of interest to note that in a recent case in Hong Kong, following British practice, the court allowed, with the consent of parties, the appointment of a 'special advocate' to inspect documents for which immunity was claimed (*PV v. Director of Immigration* HCAL 45/2004). It is usual for courts to inspect a document for which immunity is claimed.

18. Quite apart from this legal issue, it is desirable that communications between the CPG and the CE should be made public. These communications are not of a diplomatic, and therefore possibly, of a sensitive nature. They concern significant issues in Hong Kong's public law and have a major impact on the lives of the people. Principles of accountability which are emphasised in the BL, an understanding of the complexities of the relationship between the PRC and HKSAR, and public participation and debates will be enhanced by public knowledge of these communications.

19. For reasons which are obvious from this memorandum, I do not consider that a certificate from the CE that he has received instructions from the CFA and that the regulations are intended to implement them is sufficient substitute for the scrutiny by LegCo of the regulations.

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