

立法會

Legislative Council

LC Paper No. LS16/04-05

Legal Service Division Paper for the Subcommittee to examine the implementation in Hong Kong of resolutions of the United Nations Security Council in relation to sanctions

United Nations Sanctions (Iraq) (Amendment) Regulation 2004

At the Subcommittee meeting on 29 October 2004, the members requested the legal adviser to the Subcommittee to examine the United Nations Sanctions (Iraq) (Amendment) Regulation 2004 (“the 2004 Regulation”) and report to the Subcommittee on any points observed.

Background to the 2004 Regulation

2. On 6 August 1990, the Security Council of the United Nations (“UNSC”) passed Resolution 661 imposing economic sanctions on Iraq, including a full trade embargo barring all imports from and exports to Iraq. The Iraq and Kuwait (United Nations Sanctions) (Dependent Territories) Order 1990 and the Iraq and Kuwait (United Nations Sanctions) Order 1990 were made by the United Kingdom Government and extended to Hong Kong. The two Orders were gazetted as L.N. 281 and 282 of 1990 on 28 August 1990. They lapsed at midnight on 30 June 1997.

3. On 16 July 1997, the United Nations Sanctions Ordinance (Cap. 537) (“the Ordinance”) was enacted empowering the Chief Executive to make regulations to give effect to United Nations sanctions on receipt of instruction from the Ministry of Foreign Affairs (“MFA”).

4. On 22 August 1997, the United Nations Sanctions (Iraq) (Control of Gold, Securities, Payments and Credits) Regulation (Cap. 537 sub. leg. A) and the United Nations Sanctions (Iraq) Regulation (Cap. 537 sub. leg. B) were made under the Ordinance.

5. On 22 May 2003, the UNSC adopted Resolution 1483 (2003) lifting trade sanctions on Iraq. However, the prohibitions related to the sale or supply to Iraq of arms and related material, except those required by the United States of America and the United Kingdom as occupying powers under unified command, shall continue to apply.

6. In May 2003, the Chief Executive received specific instruction from MFA requesting the HKSAR Government to fully implement Resolution 1483 (see Annex A).

7. The 2004 Regulation was gazetted on 9 July 2004, lifting the trade sanctions against Iraq as set out in paragraph 10 of the Resolution. An explanatory note was provided by the Administration on the 2004 Regulation (see Annex B).

The 2004 Regulation made under section 3(1) of the Ordinance

8. The 2004 Regulation is made under section 3(1) of the Ordinance. Section 3(5) provides that sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap. 1) shall not apply to regulations made under the Ordinance. On the exclusion of LegCo's power to scrutinize the regulations, the Administration has explained, among other things, that-

- (a) the regulations are enacted in accordance with the instructions from MFA which concern the foreign affairs relating to the HKSAR, for which the Central People's Government is responsible under BL 13(1) (see Annex C, in particular, paragraph 3 (b) of the Note on "Separation of powers under the Basic Law with reference to CE's power to make delegated legislation under the United Nations Sanctions Ordinance (Cap. 537)" attached to the letter from the Administration dated 19 February 2004); and
- (b) the provision allows the HKSAR Government to enact regulations for implementing UNSC resolutions promptly and effectively. This is necessary as many UNSC resolutions are time-limited. The present arrangement is appropriate. (see Annex D – letter from the Chief Secretary for Administration to the Chairman of the House Committee dated 13 November 2003.)

9. With regard to ordinances which concern foreign affairs relating to the HKSAR, it is noted that regulations made under the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) are subject to amendment by LegCo. The approach adopted by the Administration in enacting section 3(5) of the Ordinance differently from Cap. 575 which is also an Ordinance to implement United Nations decisions may need further justification.

10. On paragraph 8(b), the Administration has taken about 14 months to give effect to part of Resolution 1483 from the date of the receipt of the MFA instruction. It is not known when and whether other decisions of Resolution 1483 (for example, the decision under paragraph 7 that all Member States should prohibit the import and export of illegally removed Iraqi cultural property) are to be implemented. It seems that the Administration's objective of implementing UNSC resolutions promptly and effectively has not been achieved.

11. Incidentally, it is noted that the United Nations Sanctions (Iraq) (Control of Gold, Securities, Payments and Credits) Regulation (Cap. 537 sub. leg. A) remains on our statute book. The United Kingdom revoked the relevant Order in 2000.

The provisions in the 2004 Regulation

12. In the 2004 Regulation, new offences are created. Under the new section 3B, a person who provides false information or documents for the purpose of obtaining a licence commits an offence. He is liable on conviction to a fine and to imprisonment for 2 years or on summary conviction to a fine and to imprisonment for 6 months. Offences punishable with unlimited fine and imprisonment are serious offences. Given that this Regulation has legislative effect, members may wish to consider whether these offences should be created without LegCo scrutiny.

13. The power of search and detention prescribed in the 2004 Regulation is different from that in other ordinances, in particular from Part 4B of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) whereby court orders are required. Since both Ordinances aim at implementing United Nations decisions, the difference in enforcement power, may need to be justified.

14. The new Regulation 8A provides that a person who destroys, mutilates, defaces, secretes or removes any document or article with intent to evade any of the provisions of this Regulation commits an offence. There are provisions in the 2004 Regulation that may not be relevant to Regulation 8A, for example, the relationship of Regulation 8A with the new Regulation 11A needs clarification.

15. According to paragraph (k) of the explanatory note, section 1 of the Schedule is repealed to remove the “excessive” power to request any person to furnish information for the purpose of securing compliance with or detecting information of the Regulation. Such “excessive” power still appears in other regulations made under the Ordinance.

16. According to paragraphs (j) and (l) of the explanatory note, sections 12(1), 8(6)(d), 9 and section 2(1)(a) and 2(5)(d) of the Schedule are deleted “to avoid ultra vires implications”. Since the Administration is aware that these provisions have “ultra vires implications”, it is not known when and whether the Administration would amend similar provisions in other regulations.

Encl.

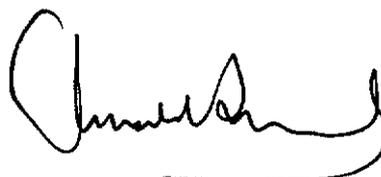
Prepared by

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1 December 2004

United Nations Sanctions Ordinance (Cap. 537)**United Nations Sanctions (Iraq) (Amendment) Regulation 2004**

This is to confirm that the Chief Executive received specific instruction from the Ministry of Foreign Affairs of the People's Republic of China in May 2003 which requested the Government of the Hong Kong Special Administrative Region to fully implement Resolution No. 1483 of the Security Council of the United Nations, and that the United Nations Sanctions (Iraq) (Amendment) Regulation 2004 was made in pursuance of that part of the instruction relating to the lifting of trade sanctions against Iraq as set out in paragraph 10 of Resolution No. 1483.

Dated this 30 day of August 2004



(Donald Tsang)
Chief Secretary for Administration

United Nations Sanctions (Iraq) (Amendment) Regulation 2004

The United Nations Sanctions (Iraq) (Amendment) Regulation 2004 seeks to implement the decision in relation to the lifting of trade sanctions against Iraq as stipulated in paragraph 10 of UNSCR 1483 by amending the United Nations Sanctions (Iraq) Regulation. The opportunity is taken to review and amend the United Nations Sanctions (Iraq) Regulation having regard to regulations made under the Ordinance since 1997 (when the United Nations Sanctions (Iraq) Regulation was made). The main amendments are as follows -

- (a) To define “authorized officer” as designated officers only and cross out CE’s power in authorizing any person to be an authorized officer.
- (b) to repeal section 2 to remove the prohibition against importation of goods from Iraq into the HKSAR;
- (c) to repeal section 3 to remove the prohibition against exportation of goods from Iraq;
- (d) to add a new section 3A to provide for the granting of licences for the supply or delivery of arms and related material in cases where exemptions provided for in UNSCR 1483 are satisfied;
- (e) to add a new section 3B to make it an offence in providing false information or documents for the purpose of obtaining licences and to provide for the penalties;
- (f) to repeal section 6 as “supply” of goods comprehends the “export” of goods;
- (g) to amend section 7 so that its scope of application is consistent with other prevailing regulations under the Ordinance;
- (h) to amend section 8 to provide for the power to search suspected vehicles and a time limit for detaining ships, aircrafts and vehicles;

- (i) to add a new section 11A to require an authorized officer to produce evidence of his identity and authority before or on exercising a power conferred by the United Nations Sanctions (Iraq) Regulation;
- (j) to repeal section 12(1) so that the United Nations (Iraq) Regulation will no longer apply to any ship, aircraft or body corporate that purports to be registered in the HKSAR to avoid ultra vires implications;
- (k) to repeal section 1 of the Schedule to remove the excessive power to request any person to furnish information for the purpose of securing compliance with or detecting evasion of the United Nations Sanctions (Iraq) Regulation; and
- (l) to delete the provisions on offences relating to customs in the United Nations Sanctions (Iraq) Regulation (i.e. sections 8(6)(d), 9 and section 2(1)(a) and 2(5)(d) of the Schedule) to avoid ultra vires implications.

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Your Ref : CB2/SS/2/03

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19 February 2004

Clerk to Subcommittee on
United Nations Sanctions (Liberia) Regulation 2003
Legislative Council
Legislative Council Building
8 Jackson Road
Hong Kong
(Attn : Mr Raymond Lam)

Dear Mr Lam,

**Subcommittee on
United Nations Sanctions (Liberia) Regulation 2003**

I refer to your letter of 16 February 2004 referring to us a submission from Mr Simon N M Young of the University of Hong Kong.

Please find attached a note setting out the Administration's response to the points raised relating to separation of powers and the Basic Law.

As regards the instruction from the Ministry of Foreign Affairs (MFA), we have pointed out previously that correspondence between the Central People's Government (CPG) and the Government of the Hong Kong Special Administrative Region (HKSARG), including instructions from the MFA concerning the implementation of United Nations Security Council Resolutions, is intended for internal use only. 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. In response to the Subcommittee's request, the Chief Secretary for Administration has already

issued a letter to the Subcommittee Chairman confirming the specific instruction we received.

Yours sincerely,

(Mrs Philomena Leung)
for Secretary for Commerce, Industry and Technology

c.c.
DoJ (Attn : Mr John Hunter)

Encl.

Separation of powers under the Basic Law
- with reference to CE's power to make delegated legislation
under the United Nations Sanctions Ordinance (Cap 537)

In *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457, Hartmann J, at para 38, made the observation that the powers of the legislature, the executive and the judiciary were separate. In terms of BL 80, judicial power is vested in those appointed to hold judicial office. That being so, he held that what the legislature could not do, consistent with the separation of powers, was to place judicial power in the hands of the executive. However, his judgment in the case can be viewed as concerning the narrow issue of the constitutionality of the Chief Executive's determination of the minimum term of detainees serving discretionary life sentences or detained at the executive's discretion prior to the commencement of section 67C of the Criminal Procedure Ordinance (Cap 221). In any event, the issue could fairly be narrowed down to one concerning separation of powers in the field of punishment of criminal offences, which has traditionally been held to fall within the purview of the judiciary. It is an area which, as a matter of principle, should not be left in the hands of the executive.

2. In *Lau Kwok Fai Bernard v Secretary for Justice*, Nos. 177 of 2002 and 180 of 2002, Hartmann J further considered the principle of separation of powers in the Basic Law. He, at para 20, expressed agreement to Professor Wade's observation in his work *Administrative Law* (7th ed, 1994), at p 860 that **there was an infinite series of graduations, with a large area of overlap, between what was plainly legislation and what was plainly administration**. He considered that the same must apply when looking to the relationship between what was plainly the function of the judiciary contrasted with the function of the legislature and the administration. At para 23, he said:

“While ... I accept that the Basic Law incorporates the principle of separation of powers (subject of course to the meaning and purpose of specific articles which may act to modify that principle), it is apparent that whether the [Public Officers Pay Adjustment] Ordinance, in respect of any individual article or in respect of the Basic Law generally, offends that Law is a matter which may only be determined by looking at the Ordinance ‘in context’. As the Privy Council said in ... [*Liyange v R* [1967] 1 AC 259]: each case must be decided in the light of its own facts and circumstances, including the *true purpose of the legislation and the situation to which it is directed*.”
(emphasis original)

3. In the case of the United Nations Sanctions Ordinance (Cap 537), the legislation was made 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, and to provide for matters incidental thereto or connected therewith. Under section 3(1), the Chief Executive is empowered and required to ("shall") make regulations for a specific purpose, namely giving effect to a relevant instruction given by the Ministry of Foreign Affairs (MFA) to him to implement, cease implementing, modify etc certain mandatory sanctions decided by the Security Council of the United Nations. Under section 3(5), these regulations are excluded from the Legislative Council's scrutiny of subsidiary legislation provided for in sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap 1). In understanding the above exclusion, it would be appropriate to have regard to the following context:

- (a) the relevant instructions given by the MFA fall within the scope of "directives issued by the Central People's Government" under BL 48(8), which the Chief Executive has a power and function to implement;
- (b) the above instructions clearly concern foreign affairs relating to the HKSAR, for which the Central People's Government is responsible under BL 13(1);
- (c) section 28(1)(b) of Cap 1 provides that no subsidiary legislation shall be inconsistent with the provisions of any Ordinance;
- (d) the provisions in Cap 1, including sections 34 and 35, apply unless a contrary intention is discerned in an Ordinance (section 2(1)). In other words, the Legislative Council may, if it sees fit, exclude certain delegated legislation from its scrutiny under sections 34 and 35. This exclusionary power predated 1 July 1997,¹ and its continuation or exercise of it after that date is unlikely to be inconsistent with the constitutional order provided for in the Basic Law, a central feature of which is the theme of continuity.

4. Given the above context, we are of the view that section 3(5) of Cap 537 does not offend the principle of separation of powers implicit in the Basic Law.

¹ As noted by Professor Simon Young in his submission to the Legislative Council dated 16 Feb 2004, section 3(15) of the Fugitive Offenders Ordinance (Cap 503) has an exclusionary provision similar to section 3(5) of Cap 537. The above provision predated the reunification.

Our Ref : CSO/ADM CR 2/5691/98

13 November 2003

The Honourable Miriam Lau Kin-ye, J.P.
Chairman of the House Committee
Legislative Council Building
8 Jackson Road, Central
Hong Kong

**Report of the Subcommittee on United Nations Sanctions
(Afghanistan)(Amendment) Regulation 2002 [the Afghanistan
(Amendment) Regulation] and United Nations Sanctions
(Angola) (Suspension of Operation) Regulation 2002**

Thank you for your letter of 6 October 2003 enclosing the report of the above Subcommittee.

Having examined the report carefully, I would like to respond to the conclusions following their sequence in the Subcommittee Report as below:

- (a) Whether the Afghanistan (Amendment) Regulation is ultra vires - The Administration remains of the view that the making of the Afghanistan (Amendment) Regulation under the United Nations Sanctions Ordinance (Cap. 537) to implement United Nations Security Council Resolution (UNSCR) 1390 is legally in order. UNSCR 1390 extended certain sanctions imposed by two previous UNSCRs, namely UNSCR 1267 and UNSCR 1333. The sanctions under these two earlier UNSCRs were directed towards individuals and

entities designated by the Committee established pursuant to UNSCR 1267 who used Afghanistan as a base for their terrorist activities. The sanctions under UNSCR 1390 are directed against the same individuals and entities. It would be too restrictive to view “place”, in the context of the United Nations Sanctions Ordinance, in isolation from the people who operate there. Sanctions against a “place” will in practice comprehend the activities or conduct of individuals or entities in that place. The Administration is satisfied that the Afghanistan (Amendment) Regulation giving effect to the relevant instruction of the Central People’s Government (CPG) is *intra vires*.

- (b) The use of administrative means - We note the view that it would have been preferable to enact a new regulation to suspend the travel restrictions against senior officials of the National Union for the Total Independence of Angola (UNITA) and their immediate family members under UNSCR 1412, rather than to use administrative means. However, it was practically impossible to introduce new legislation given the very short duration of UNSCR 1412 (the measure was valid for 90 days only). Even if we had proceeded with the drafting of a regulation upon receipt of the CPG’s instruction, UNSCR 1412 would have expired by the time we tabled the draft regulation before the Executive Council when it resumed after the summer recess. We therefore explored what action we could take to implement UNSCR 1412 and decided to adopt the administrative measure of receiving visa applications from Angolans but withholding their processing. This, we believe, has struck the right balance between complying with the United Nations Sanctions (Angola) Regulation, which was then still in force, and implementing UNSCR 1412. Although UNSCR 1412 provided for a suspension of the travel restrictions, it did not derogate the Administration from imposing visa requirements and did not require us to admit senior officials of the UNITA and their immediate family members automatically. It followed that not granting a visa to senior officials of the UNITA and their immediate family members during the period when the United Nations Sanctions (Angola) Regulation was in force would not have constituted a violation of UNSCR 1412.

- (c) Extending the scope of the United Nations Sanctions Ordinance - We are grateful for the suggestion of the Subcommittee and will consider the need to amend and extend the scope of the United Nations Sanctions Ordinance if and when such a need arises in future. The provision for the Chief Executive to make regulations in consultation with the Executive Council allows the Government of the HKSAR (HKSARG) to enact regulations for implementing UNSCRs promptly and effectively. This is necessary as many UNSCRs are time-limited. The present arrangement is, in our view, appropriate.

- (d) Provision of CPG's instructions - Correspondence between CPG and HKSARG, including the instructions from the Ministry of Foreign Affairs (MFA) concerning the implementation of UNSCRs, is intended for internal use only. 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. I also wish to assure you that the Administration has truthfully conveyed the content of MFA's instructions to the Subcommittee and therefore Members' ability to assess whether we have complied with CPG's instructions in full has in no way been compromised.

We have given very serious consideration to the Subcommittee's views throughout its five meetings and provided the requested information as far as possible. The issues raised have been thoroughly debated at the Subcommittee and re-examined again by the Administration. Although I regret to say that, having taken our own legal advice, we continue to hold divergent views, we remain nonetheless grateful for the work of the Subcommittee.

(Donald Tsang)
Chief Secretary for Administration

