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Paper for the House Committee meeting on 18 May 2007

Summary of Key Issues Raised in the Report of the Subcommittee to Examine the Implementation in Hong Kong of Resolutions of the United Nations Security Council in relation to Sanctions

BACKGROUND

Prior to 1 July 1997, resolutions of the Security Council of the United Nations (UNSC) in relation to sanctions were implemented in Hong Kong by way of Orders in Council which were made by the United Kingdom Government and extended to Hong Kong. On 16 July 1997, the Provisional Legislative Council passed the United Nations Sanctions Ordinance (Cap. 537) (UNSO). Pursuant to section 3(1) of UNSO, the Chief Executive (CE) shall make regulations to give effect to the instructions of the Ministry of Foreign Affairs (MFA) of the People's Republic of China in relation to the implementation of sanctions as decided by UNSC. Section 3(5) of UNSO also expressly provides that sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap.1) (IGCO) shall not apply to such regulations. They are therefore not required to be laid before the Legislative Council (LegCo) and are not subject to its approval or amendment.

KEY ISSUES DELIBERATED BY THE SUBCOMMITTEE

2. The Subcommittee has exchanged views with the Administration, as well as considered the expert advice provided by Professor Yash GHAI of the University of Hong Kong on legal and constitutional issues.

Legal and constitutional issues

Scope of UNSO

3. While "sanction" is defined under section 2(1) of UNSO as including embargoes and other mandatory measures decided by UNSC implemented against a place outside the People's Republic of China, the Subcommittee has noted that some of the Regulations made under section 3(1) were directed at persons,

undertakings or entities, and not at a place or territory. Concern has been raised as to whether such Regulations are ultra vires of the primary legislation.

Giving effect to MFA's instructions

4. To assess whether the Regulations made under section 3(1) of UNSO have given effect to the relevant MFA instructions in full, the Administration has been requested to consider providing the relevant instructions for Members' reference, instead of merely a formal document signed by the Chief Secretary for Administration (CS) confirming MFA's instructions.

5. Notwithstanding that the Central People's Government (CPG) has the responsibility to implement UN sanctions in Hong Kong, the Subcommittee notes that the actual method of implementation is a decision for the Hong Kong Special Administrative Region (HKSAR) Government.

LegCo's constitutional role

6. The Subcommittee notes Professor Yash GHAI's view that the power to scrutinize and if necessary, amend subsidiary legislation is vested with LegCo; and that an Ordinance which takes away such power of LegCo is void. Members are gravely concerned about the constitutionality of the current arrangement because the regulations made under UNSO to fulfil Hong Kong's international obligations may be challenged as being legally ineffective if the statutory basis on which they have been made is unconstitutional. The Administration's view is that the Basic Law does not institute a rigid separation of executive, legislative and judicial powers and this is consistent with the systems before the handover in 1997.

Delegation of legislative power

7. The Subcommittee has considered Professor GHAI's opinion that LegCo cannot divest itself of the regulation-making power delegated to it by the Basic Law and is concerned that section 3(5) of UNSO may have in effect placed legislative power in the hands of the executive government. The Administration however has submitted that the Basic Law does not prohibit the delegation of law-making power to other bodies. As the regulations made under UNSO relate to UN sanctions which are matters of foreign affairs, the Administration considers it lawful and constitutional for LegCo to authorize the executive government to make them without any vetting requirement.

Desirability of the current implementation arrangement

8. The Subcommittee has observed that there have been long time gaps between the passing of the relevant UNSC resolutions and the gazettal of some Regulations. To address the concern, the Administration has taken steps to expedite the legislative work, resulting in shorter time gaps for some recently gazetted Regulations. The Subcommittee is also concerned about whether and

how Hong Kong can fulfil its international obligation to implement the relevant UN sanctions before the enactment of the Regulations.

Alternative approaches for improvement

9. To improve the current arrangement, the Subcommittee has studied relevant provisions of the Fugitive Offenders Ordinance (Cap. 503) (FOO), Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (MLACMO) and United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (UN(ATM)O), and put forward the following suggestions for the Administration's consideration :

- (a) to incorporate 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) to make reference to the arrangements for Hong Kong to enter into bilateral agreements with other countries as currently provided in FOO and MLACMO, which provide LegCo a role in scrutinizing the Orders made under the Ordinances.

10. As details of UN sanctions vary, the Administration has considered it not possible to include standard clauses and general enforcement provisions into UNSO. Unlike FOO and MLACMO under which LegCo has the power to repeal the Orders but may not amend them, there can be no question of repeal of the Regulations made under section 3(1) as their purpose is to implement instructions by MFA which are foreign affairs under the responsibility of CPG.

THE WAY FORWARD

To report to the House Committee

11. Since the Administration has not provided the Subcommittee with a substantive response after considering the matter for more than one year, the Subcommittee has agreed to make a report to the House Committee and seek its views on the way forward.

To consider seeking clarification through the judicial channel

12. With a view to resolving the doubt about the constitutionality of section 3(5) of UNSO, the Subcommittee has discussed the possibility of taking legal proceedings to clarify the issue by way of an application for judicial review to seek a court declaration. It is also noted that at present, there is no clear judicial authority for LegCo's capacity or the lack of capacity to sue and be sued. The Subcommittee also agrees that should legal action be contemplated, it would be

desirable to first seek independent counsel's advice on the merits of the case.

RECOMMENDATIONS

13. The Subcommittee recommends that :
 - (a) the Chairman of the House Committee be invited to convey the Subcommittee's deliberations and proposed way forward to CS and request CS to critically re-examine the matter in consultation with the Secretary for Justice; and
 - (b) the House Committee to give its views on the need or otherwise to seek the court's clarification on the constitutionality of section 3(5) of UNSO, if the Administration maintains its stance against any change to the existing arrangement for implementing UN sanctions.

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