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

Background brief

Purpose

This paper summarizes concerns raised by Members during the study on the gazetted regulations made under the United Nations Sanctions Ordinance (UNSO), Cap. 537, in the Third Legislative Council (LegCo).

Background

2. Prior to 1 July 1997, resolutions of 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. These sanctions are mainly economic, trade and arms embargoes. All such Orders in Council as applicable to Hong Kong lapsed at midnight on 30 June 1997. The UNSO was passed by the Provisional Legislative Council on 16 July 1997 and came into effect on 18 July 1997. The UNSO provides, inter alia, that 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. As it is also expressly provided in the UNSO that sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap. 1) shall not apply to such regulations, they are not required to be laid before LegCo and are not subject to approval or amendment by LegCo. The regulations come into effect as soon as they are gazetted.

3. In October 2004, the House Committee decided to set up a subcommittee in order to examine the current arrangement of implementing sanctions resolved by UNSC in Hong Kong, in particular the constitutional and legal aspects.

Issues of concern raised by the Subcommittee

4. In the past four years, Subcommittee members exchanged views extensively with the Administration and considered the expert views of Prof Yash GHAI, former Sir Y K PAO Professor of Public Law at the University of Hong Kong, and the comments provided by the Hong Kong Bar Association on the question of constitutionality. At the request of the Subcommittee, the Administration has, since October 2004, provided a Legislative Council Brief in respect of each regulation gazetted under the UNSO. Major issues that had been considered at length by the Subcommittee are summarized in the ensuing paragraphs.

Constitutional and legal issues

5. One of the Subcommittee's greatest concerns was that section 3(5) of the UNSO might have gone too far in completely divesting the legislature of its constitutional function and power in scrutinizing, and where necessary, amending or repealing subsidiary legislation, thereby placing legislative powers in the hands of the executive government. While noting the separation of powers as enshrined in the Basic Law, the Administration advised the Subcommittee that the Basic Law did not institute a rigid separation of powers. Similar provisions disapplying the positive or negative vetting procedures on subsidiary legislation were found in some ordinances including the Vocational Training Council Ordinance (Cap. 1130) and the English Schools Foundation Ordinance (Cap. 1117). However, the Subcommittee considered that these ordinances were of a totally different nature. The Subcommittee also found that the regulations made under the UNSO created new offences, purported to have serious penal effect and conferred vast investigation and enforcement powers, and subsidiary legislation of such a nature should normally be subject to vetting by the legislature.

6. The Subcommittee did not question that the implementation of United Nations sanctions before and after the handover in 1997 had always been a matter of foreign affairs over which the imperial or central government had sole responsibility. However, members did not subscribe to the Administration's argument that the pre-handover arrangement under which LegCo had no vetting power had applied in Hong Kong after the handover under the so-called "doctrine of continuity". The Subcommittee considered the two systems were totally different in that before the handover, the Orders in Council implementing the United Nations sanctions took effect in Hong Kong as United Kingdom legislation, whereas after the handover, regulations were made under the UNSO as domestic legislation. Members pointed out that under the Basic Law, LegCo was the only organ vested with legislative power and responsibility.

7. The Subcommittee was keenly aware of the need for the Hong Kong Special Administrative Region (HKSAR) to implement United Nations sanctions in fulfillment of the Central People's Government (CPG)'s international obligations to

the United Nations. Therefore, members attached great importance to the constitutionality of the current arrangement, as the regulations made under the UNSO could be challenged as being legally ineffective if the statutory basis on which they were made was unconstitutional. Members' main concern was whether the current form or legislative approach as provided under the UNSO was the proper and most appropriate way to implement United Nations sanctions. In this connection, the Subcommittee conducted a comparative study of four ordinances whose purpose was to implement various international obligations in the HKSAR. It was found that a variety of modalities were adopted. Among them, the UNSO was unique in that the regulations made under it were entirely excluded from LegCo's scrutiny, whether by way of the positive or negative vetting procedure.

8. According to the Administration, the instructions issued by the MFA to the CE requested the HKSAR Government to take concrete steps to effectively implement the United Nations sanctions in question. After receiving the instructions, the HKSAR Government would prepare a draft regulation under the UNSO and present it to the CPG for comments and endorsement. This might suggest a category of subsidiary legislation which was vetted by the CPG and had the effect of law in the HKSAR. The Administration's stance was that the UNSO was the predominant method for implementing United Nations sanctions and that it would only consider other options if the UNSO was inappropriate for the sanction in question. However, the Subcommittee observed that the instructions issued to the CE did not prescribe the specific vehicle to be used. The Subcommittee took the view that the Administration might still consider other legislative options, such as applying or amending existing ordinances, rather than making regulations under the UNSO over which LegCo had surrendered its vetting power.

9. Another concern of the Subcommittee was whether the regulations made under the UNSO were *ultra vires* of the primary legislation. The term "sanction" as defined under the UNSO included economic, trade and arms embargoes and other mandatory measures directed against a "place" outside the People's Republic of China. However, the Subcommittee observed that at least seven of the 26 regulations being studied were targeted at persons, undertakings or entities, and not at a place or territory. Notwithstanding the Administration's explanation that sanctions against a "place" comprehended the activities or conduct of individuals or entities in the place, the Subcommittee considered that the definition of "sanctions" would need to be suitably amended if it was to reflect such policy intent.

Timeliness of the regulations made under the UNSO

10. Despite the Administration's emphasis on the need for timely application of United Nations sanctions in Hong Kong, the Subcommittee observed long time gaps, ranging from six months to over one year, between the HKSAR's receipt of the instructions from the MFA and the gazettal of some of the regulations. After taking up the matter with the Administration, the Subcommittee observed that time gaps had become shorter. For example, since October 2007, the time gap had

consistently been less than three months. Longer time gaps had occurred for regulations which imposed sanctions on a new place.

Use of a model law

11. The Subcommittee found that the drafting approach adopted by most of the 26 regulations under study was similar, with the exception of those dealing with prohibitions relating to technologies and the transfer of nuclear-related material. This reinforced the Subcommittee's suggestion that a model law approach be adopted. This could be done by incorporating into the UNSO all the provisions on enforcement powers and other key provisions which generally applied to all United Nations sanctions; and to set out in a Schedule to the UNSO the targets and subjects of sanctions which might differ on each occasion. This approach could improve efficiency in the preparation of draft regulations and in members' scrutiny.

12. The Administration accepted the rationale behind the Subcommittee's suggestion but commented that it was difficult to devise "model clauses" under the UNSO since the specific details of the sanction measures might vary. It was also concerned that even longer time might be required for checking the extent to which new resolutions deviated from the "model clauses". The Administration responded to members' concern by endeavouring to expedite the regulation-making process through more streamlined arrangements and deploying dedicated officers in the Department of Justice on the subject.

The way forward

13. The Subcommittee shared the common view that even on the assumption that the existing arrangement under the UNSO was constitutional and consistent with the Basic Law, it was desirable to improve the existing regulation-making process so as to enhance its transparency, accountability and compliance with the due process in enacting legislation. One of the suggestions of the Subcommittee was that the Administration should provide a copy of the draft regulation to the relevant Panel for comments, if any; and to take into account such comments when finalizing the draft regulation for onward submission to the MFA. The Administration had reservation on the proposal for fear that adding further steps would result in delay. Not all members share such a view as they considered that LegCo's scrutiny did not necessarily result in delay, as evidenced in past urgent scrutiny of legislative proposals. Instead, LegCo's input would render the legislative process more accountable and compliant with the due process.

14. The Subcommittee finally recommended to put in place a mechanism for scrutiny. First of all, the Subcommittee requested the Administration to beef up the LegCo Brief currently provided by the Administration on each gazetted regulation by providing additional information. This would facilitate Members' tracking of the reason for using the UNSO as the vehicle to implement a specific United Nations sanction, the timeliness in implementing the sanctions and whether there was any matter which was different from the provisions on enforcement

powers and other key provisions which generally applied to all United Nations sanctions. The Administration agreed to consider the extent to which it could provide such information. Secondly, the Subcommittee recommended that a dedicated subcommittee be set up under the House Committee to deal with regulations made under the UNSO. Under this standing arrangement, future regulations made and gazetted under UNSO would be considered by Members at the House Committee meetings, and where necessary, the regulations would be referred to the subcommittee for scrutiny.

Latest position

15. The Subcommittee recommended in its report to the House Committee meeting on 20 June 2008 that a subcommittee be set up under the House Committee in the Fourth LegCo to deal with regulations made under section 3 of the UNSO. On 7 November 2008, the House Committee agreed in principle that a subcommittee should be set up to deal with such regulations and the matter should be further considered by House Committee in the Fourth LegCo.

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