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**Paper for the House Committee meeting on 28 May 2004**

**Interim Report of the Subcommittee on  
United Nations Sanctions (Liberia) Regulation 2003**

**Purpose**

This paper reports on the deliberations of the Subcommittee on United Nations Sanctions (Liberia) Regulation 2003 up to the meeting on 3 May 2004.

**Background**

2. The Regulation is made under section 3 of the United Nations Sanctions Ordinance (Cap. 537) (UNSO) by the Chief Executive (CE) on the instruction of the Ministry of Foreign Affairs (MFA) of the People's Republic of China (PRC) and after consultation with the Executive Council. Section 3(5) of the Ordinance provides that sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap. 1) shall not apply to regulations so made. As a result, the Regulation is not required to be laid before the Legislative Council (LegCo) and is not subject to approval or amendment by the Council.

**The Regulation**

3. The Regulation implements a decision of the Security Council of the United Nations (UNSC) in Resolution 1478 of 6 May 2003 -

- (a) to extend certain sanctions, i.e. the prohibitions against importation of rough diamonds exported from Liberia, entry or transit by senior members of Government of Liberia and certain other persons, supply or delivery of arms and related materials to Liberia and provision of related technical

advice, assistance or training to Liberia, imposed by UNSC in Resolution 1343 (2001) until 6 May 2003 for a further period of 12 months; and

- (b) to impose other sanctions, i.e. sanctions against the importation of round logs and timber products originating in Liberia, and entry or transit by persons who supply or deliver arms and related materials, or who provide related technical advice, assistance or training, to Liberia.

4. The Regulation came into operation upon its gazettal on 7 November 2003 and ceases to have effect after 6 May 2004.

### **The Subcommittee**

5. At the House Committee meeting on 14 November 2003, Members formed a subcommittee to study the Regulation. The membership list of the Subcommittee is in **Appendix**.

6. Under the chairmanship of Hon Margaret NG, the Subcommittee has so far held four meetings with the Administration. The Subcommittee has received submissions from the Hong Kong Bar Association, Mr Simon N M YOUNG, Associate Professor of the Faculty of Law of The University of Hong Kong and Dr TING Wai, Associate Professor of the Department of Government and International Studies of the Hong Kong Baptist University.

### **Deliberations of the Subcommittee**

#### Arrangements for implementing resolutions of the United Nations Security Council in relation to sanctions in Hong Kong

##### *Arrangements before and after reunification*

7. In considering the Regulation, members of the Subcommittee are particularly concerned about the arrangements for the implementation of UNSC resolutions in relation to sanctions in Hong Kong. Prior to 1 July 1997, the implementation of such resolutions was by way of Orders in Council in the United Kingdom (UK) which extended to Hong Kong as a dependent territory. According to the Administration, the Foreign and Commonwealth Office of the UK Government would prepare Order in Council, and thereafter the Hong Kong Government would publish the Order in the Gazette and issue a press release to announce the implementation of sanctions. No legal or constitutional problem arose from this arrangement given Hong Kong's then status. After 1 July 1997, regulations for implementing resolutions of UNSC in relation to sanctions in Hong Kong are made by CE under UNSO on the instruction of MFA of

PRC. Members are concerned that legal and constitutional problems may have arisen in these arrangements under UNSO.

8. Members have pointed out that such regulations are subsidiary legislation. However, LegCo has no power to approve or amend the subsidiary legislation, even though they purport to have serious penal effect, and to 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 the Customs Officers. Members note that similar legislation for implementing UNSC resolutions in Australia, Canada, New Zealand, Singapore and UK are subject to scrutiny by the legislature.

*Instructions received from the Ministry of Foreign Affairs*

9. Regarding the source of power for making the regulations, members consider that since CE's power to make regulations is predicated upon instruction from MFA of PRC, the MFA instruction should be provided to LegCo as a standard procedure to enable Members to assess whether the regulation has given effect to the relevant instruction in full.

10. The Administration has advised that correspondence between the Central People's Government (CPG) and the Government of the Hong Kong Special Administrative Region (HKSARG), including instructions from MFA concerning the implementation of UNSC resolutions, is intended for internal use only. The Administration considers it inappropriate to release internal correspondence to persons outside the Administration. This is an established practice governing the handling of the HKSARG's correspondence with CPG and all other governments.

11. When asked about the constitutional basis as to why LegCo cannot have sight of the MFA instruction, the Administration explains that the relevant instruction would be protected under the common law doctrine of public interest immunity. Similarly, the relevant instruction would be protected from disclosure to LegCo under Article 48(11) of the Basic Law (BL48(11)) which entrusts CE with the power and function 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 LegCo or its committees." When BL48(11) is construed in the common law context, this provision would be wide enough to cover those documents that could be withheld from disclosure under the common law doctrine of public interest immunity.

12. Members are unconvinced by the Administration's explanations and have requested the Administration to provide further justifications as to why it is inappropriate to disclose the MFA instruction.

13. As the Administration has refused to disclose the MFA instruction, members have requested that a certificate or a formal document should at least be provided by CE or the Chief Secretary for Administration (CS) confirming the MFA instruction regarding the implementation of UNSC Resolution 1478. Members are of the view that the provision of such a document to LegCo should be adopted as a practice for any regulation to be made under UNSO. Members have pointed out that the provision of such a certificate or formal document is only a compromise since the Administration refuses to disclose the MFA instruction.

14. The Administration has subsequently provided a letter signed by CS for the purpose of the Regulation. Members consider that the letter signed by CS is not a formal document. The Legal Adviser of LegCo has been asked to discuss with the Department of Justice regarding the desired format of the formal document to be issued by CS. The Administration has subsequently provided a document adopting the format proposed by the Legal Adviser signed by CS.

#### *Making of regulations under the United Nations Sanctions Ordinance*

15. Regarding the CE's obligation to make regulation under section 3(1) of UNSO, members have asked whether CE must implement a resolution of UNSC relating to sanction by way of making a regulation under UNSO and whether a self-contained regulation must be made for each UNSC resolution relating to sanction.

16. The Administration has advised that CE has a statutory obligation under section 3(1) of UNSO to make regulations to give effect to a relevant instruction. The following pre-conditions must exist before regulations can be made -

- (a) UNSC must have called on the PRC to apply a measure to give effect to one of its decisions;
- (b) that measure must involve the implementation of sanction as defined in section 2(1) of UNSO; and
- (c) MFA of PRC must have instructed CE to implement the sanctions or to take action pursuant to section 2(2)(b) of UNSO.

17. The Administration is of the view that if these pre-conditions exist, CE is obliged to make regulations unless the sanctions can already be implemented through existing subsidiary legislation under UNSO.

18. The Administration has further advised that section 2(2)(b) of UNSO deals with relevant instructions which cease or modify existing sanctions or replace them with others. In such cases, an amendment regulation would be appropriate and a self-contained regulation is not necessary.

19. Members note that decisions of UNSC have been implemented in the HKSAR by way of regulations made under UNSO, primary legislation and administrative means. According to the information provided by the Administration, since the enactment of UNSO, subsidiary legislation under UNSO has been made in all but two cases to give effect to UNSC resolutions relating to sanctions following receipt of instructions from MFA. The two UNSC resolutions involved were UNSC Resolutions 1373 and 1412.

20. The Administration has explained that UNSC Resolution 1373 was essentially directed at combating terrorist financing. The requirements therein do not fall under the definition of "sanction" in UNSO, as it is not implemented against a place outside PRC. The United Nations (Anti-Terrorism Measures) Ordinance has been enacted to give effect to UNSC Resolution 1373. UNSC Resolution 1412 required the suspension of travel restrictions against certain Angolans. Given the very short duration of the suspension, which was 90 days, it was practically impossible to make a regulation before its expiry.

21. Members have pointed out that in the case of the United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002 made under UNSO to give effect to UNSC Resolution 1390, the sanctions in the Resolution are targeted at the relevant persons rather than at Afghanistan. The Administration has explained that UNSC Resolution 1390 extended certain sanctions imposed by previous UNSC Resolutions which were directed against individuals and entities who used Afghanistan as the base and therefore the Amendment Regulation is *intra vires*.

22. Members also note that there is usually a long time gap before a regulation is made under UNSO. In respect of each regulation made since the enactment of UNSO, the Subcommittee has requested the Administration to provide detailed information on the date when the relevant instruction was received from MFA, the date when the regulation came into force, and how the MFA instruction was implemented in the period between the two dates.

#### *Legislative power of the executive*

23. Section 3(1) of UNSO provides that CE shall make regulations to give effect to a relevant instruction given by MFA. However, under section 3(5), LegCo has no power to approve or amend the regulations. Members are of the view that this is tantamount to conferring CE a power to enact laws. Members are concerned about the constitutional problem to place the legislative power in the hands of the executive, and whether the provision is consistent with the separation of powers between the legislature and the executive under the Basic Law. As such, they are of the view that there is a need to amend UNSO. Although the Administration has explained why it considers that section 3(5) of UNSO does not offend the principle of separation of powers implicit in the Basic Law, members are not convinced.

24. The Subcommittee is seeking expert's views on the legal and constitutional issues arising from the existing arrangements for implementing resolutions of UNSC in relation to sanction in Hong Kong, and whether and how UNSO should be amended.

### Provisions in the Regulation

#### *Power of prohibition against entry or transit*

25. Sections 11 and 12 of the Regulation provide that certain persons connected with Liberia shall not enter or transit through Hong Kong. Any person who contravenes the provisions commits an offence, and is liable on conviction to a fine of \$500,000 and to imprisonment for two years. Members have queried why these provisions are necessary, as under the Immigration Ordinance (Cap. 115) (IO), the Director of Immigration (D of Imm) already has the power to prohibit entry of certain persons.

26. The Administration has responded that the provisions are necessary as existing legislation cannot be relied on to fully implement UNSC Resolution 1478. The Administration has explained that paragraph 10 of UNSC Resolution 1478 extends the measures imposed by paragraphs 5 to 7 of UNSC Resolution 1343 which calls for all States to, inter alia, take necessary measures to prevent the entry into or transit through their territories of certain persons connected with Liberia. Section 38 of IO provides that certain persons may not land in Hong Kong, or having landed in Hong Kong unlawfully, remains in Hong Kong without the authority of D of Imm. According to legal advice, while the Administration may rely on section 38 of IO to implement the prohibition in respect of entering Hong Kong, however, the provision would not cover persons in transit through Hong Kong. Instead of limiting sections 11 and 12 of the Regulation to the transit situation and relying on section 38 of IO to cover the entry situation, the Administration is of the view that it would be clearer and more transparent for the sanctions against a particular place to be dealt with in the Regulation, even though, as a result, there is some overlap with other legislation.

27. Members remain of the view that the provisions in sections 11 and 12 of the Regulation are not necessary, having regard to the fact that prohibition against transit through Hong Kong can be done by means of administrative instructions.

#### *Enforcement powers and penalty levels under the Regulation and some other ordinances*

28. Sections 17 to 25 of the Regulation deal with enforcement powers. The Administration has stated that there are comparable enforcement powers in other Hong Kong Ordinances. Upon members' request, the Administration has provided information on similar provisions in other Hong Kong Ordinances. However, members note that the enforcement powers of an authorised officer under the Regulation are apparently wider than the general power of a customs officer under the Customs Ordinance and the specific enforcement powers under some Ordinances cited by the

Administration. The penalty levels prescribed in the Regulation are generally higher than those prescribed in other statutes.

29. For instance, under section 17, an authorised officer may request a person who is to leave Hong Kong to declare whether he has any prohibited goods (i.e. arms and related materials) for Liberia. Under section 18, an authorised officer may request a person who is to enter Hong Kong whether he has any rough diamonds, round logs, timber products from Liberia and to produce such goods. A person who refuses to make a declaration is liable on conviction to a fine of \$100,000. A person who knowingly makes a false declaration is liable on conviction on indictment to a fine and to imprisonment for two years or on summary conviction to a fine of \$100,000. Similar provision is found in section 34A of the Dutiable Commodities Ordinance (Cap. 109), which states that a person entering Hong Kong at an entry point shall declare to a customs officer whether he has dutiable commodities. A person who fails to declare whether he has dutiable commodities or who makes a false declaration is liable to a fine of \$2,000. The penalty level prescribed in the Regulation is higher than that in the Dutiable Commodities Ordinance.

30. Under section 25 of the Regulation, an authorised person may request a person in the HKSAR to provide to him any information, or to produce to him any document he may require for the purposes of securing compliance with or detecting evasion of the Regulation. A person who without reasonable excuse refuses or fails to comply with an authorised officer's request is liable on conviction to a fine of \$100,000 and to imprisonment for six months. Members note that the power to request information under the Regulation is wider than in similar provisions in the Water Pollution Control Ordinance (Cap. 358), the Air Pollution Control Ordinance (Cap. 311) and the Insurance Companies Ordinance (Cap. 41) cited by the Administration. The penalty level prescribed in the Regulation is higher than that in the Water Pollution Control Ordinance and the Air Pollution Control Ordinance, but lower than that in the Insurance Companies Ordinance.

### **Way forward**

31. The Regulation has ceased to have effect after 6 May 2004. As there are still issues that needed to be further discussed, the Subcommittee will meet again when the expert's views and information from the Administration are received (paragraphs 12, 22 and 24 above refers). The Subcommittee will make a further report to the House Committee when it has concluded its deliberations.

## **Advice Sought**

32. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2  
Legislative Council Secretariat  
25 May 2004



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

**Membership list**

**Chairman** Hon Margaret NG

**Members** Hon Cyd HO Sau-lan  
Hon Andrew WONG Wang-fat, JP  
Hon Audrey EU Yuet-mee, SC, JP

**Total:** 4 Members

**Clerk** Mrs Sharon TONG LEE Yin-ping

**Legal Adviser** Miss Anita HO

**Date** 11 December 2003