

**立法會**  
***Legislative Council***

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**Paper for the House Committee meeting on 25 June 2004**

**Further report of the Subcommittee on  
United Nations Sanctions (Liberia) Regulation 2003**

**Purpose**

This paper reports on the further deliberations of the Subcommittee on United Nations Sanctions (Liberia) Regulation 2003.

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

3. At the House Committee meeting on 14 November 2003, Members formed a subcommittee to study the Regulation. The Subcommittee made an interim report to the House Committee on 28 May 2004 after it held four meetings with the Administration. The Subcommittee informed the House Committee that the Regulation had ceased to have effect after 6 May 2004. As the Subcommittee was seeking expert's views on the legal and constitutional issues arising from the existing arrangements for implementing resolutions of UNSC in relation to sanctions in Hong Kong, and whether and how UNSO should be amended, and requesting additional information from the Administration, the Subcommittee would make a further report to the House Committee when it had concluded its deliberations. The Subcommittee's interim report is in LC Paper No. CB(2) 2507/03-04.

## **The Subcommittee**

4. Further to the interim report made, under the chairmanship of Hon Margaret NG, the Subcommittee held a meeting on 21 June 2004. The Subcommittee has received a submission from Professor Yash GHAI from the Department of Law of The University of Hong Kong.

5. The membership list of the Subcommittee is in the **Appendix**.

## **Deliberations of the Subcommittee**

### Additional information provided by the Administration

#### *Instructions received from the Ministry of Foreign Affairs*

6. The Administration has, at the request of the Subcommittee, provided further justifications as to why it considers that it is inappropriate to disclose the MFA instruction.

7. According to the Administration, the relevant MFA instruction would be protected from disclosure under the principle of public interest immunity. It is ultimately for the court to decide, by balancing the competing interests of the parties, whether the public interest requires the withholding from disclosure of the relevant document. The Administration remains of the view that the disclosure of the relevant instruction would prejudice the public interest. Since each and every piece of the regulation made under section 3 of UNSO would be submitted to the Central People's Government (CPG) for scrutiny, and the Administration has, in respect of the Regulation, produced a formal document from the Chief Secretary for Administration (CS) confirming the relevant instruction from MFA, the need for the Subcommittee to scrutinise the relevant instruction would not be so substantial that it would override the public interest against disclosure.

8. The Subcommittee is of view that since the Administration refuses to disclose the MFA instruction, as a compromise, a formal document signed by CS confirming the MFA instruction regarding the implementation of UNSC resolution should be provided to LegCo as a practice for any regulation to be made under UNSO in future. In response to the Subcommittee's request, the Administration has agreed to do so in future.

#### *Implementation of instructions from the Ministry of Foreign Affairs in relation to the United Nations Security Council resolutions*

9. At the request of the Subcommittee, the Administration has, in respect of each regulation made since the enactment of UNSO, provided 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.

10. According to the Administration, there will inevitably be a time gap between the receipt of MFA's instruction and the making of regulations under UNSO. In the interim, some of the sanctions under the various UNSC resolutions could be effected through existing law. However, not all the sanctions could be so implemented. For instance, in the case of UNSC Resolution 1478, some of the sanctions were effected through the existing law during the interim period. The Administration explains that UNSC Resolution 1478 imposes the following sanctions against Liberia -

- (a) prohibition of the supply of arms and related materials to Liberia;
- (b) prohibition of the provision of military training or assistance to Liberia;
- (c) prohibition of the import of all rough diamonds from Liberia unless they are controlled under the Certificate of Origin regime;
- (d) prohibition of the import of all round logs and timber products originating in Liberia; and
- (e) preventing of the entry into or transit through the HKSAR by certain individuals designated by the UN Committee.

11. In respect of the sanction referred to in paragraph 10(a) above, Regulation 2 of the Import and Export (Strategic Commodities) Regulations (Cap. 60G) provides that no one should import or export an article specified in Schedule 1 to the Regulations except under and in accordance with an import or export licence issued by the Director-General of Trade and Industry. The Trade and Industry Department maintains import and export control on strategic commodities, including munitions items, chemical and biological weapons and their precursors, nuclear materials and equipment, and dual-use goods that are capable to be developed into weapons of mass destruction.

12. Regarding the sanction referred to in paragraph 10(c) above, section 6C(1) of the Import and Export Ordinance (Cap. 60) and First Schedule to the Import and Export (General) Regulations (Cap. 60A) provides that a licence under section 3 of the Ordinance is required for importing rough diamonds into Hong Kong.

13. As regards the prevention of entering into Hong Kong referred to in paragraph 10(e) above, section 7 of the Immigration Ordinance (Cap. 115) provides that a person may not land in Hong Kong without the permission of an immigration officer or immigration assistant unless he enjoys the right of abode or has the right to land in Hong Kong, or the special provisions in the Ordinance relating to members of an aircraft crew or servicemen apply.

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

*Expert's views*

14. The Subcommittee has sought the views of Professor Yash GHAI from the Department of Law of The University of Hong Kong on the legal and constitutional issues arising from the existing arrangements for implementing resolutions of UNSC in relation to sanctions in Hong Kong, and whether and how UNSO should be amended. Under the existing arrangements, regulations for implementing resolutions of UNSC in relation to sanctions in Hong Kong are made by CE under UNSO on the instruction of MFA. Such regulations are subsidiary legislation, however, the Legislative Council (LegCo) has no power to approve or amend the subsidiary legislation.

15. Professor GHAI is of the view that there are major problems in the existing arrangements for implementing such UNSC resolutions in Hong Kong. Professor GHAI has pointed out that under general principles of national and international law, as reflected in Article 39(2) of the Basic Law, restrictions on human rights and freedom must be "prescribed by law". In the context of UNSO, it is doubtful whether regulation made under it would qualify as "law". The reason that the rule requires "law" to limit rights is that restrictions must undergo proper scrutiny by the legislature in an open, transparent and deliberative manner. To have restrictions on rights, as in some regulations under UNSO, by the directive of the executive without any public scrutiny or possibility of amendment will seriously derogate from this important principle of human rights law.

16. Professor GHAI has further pointed out that the provision in UNSO that regulation made is not required to be laid before LegCo and is therefore not subject to approval or amendment by LegCo has violated another important constitutional principle of separation of powers. In his view, a procedure under which LegCo divests itself of law making power, as in the case of UNSO, is unconstitutional. LegCo cannot divest itself of power and responsibilities to enact laws which are provided under the Basic Law.

17. Professor GHAI considers that the refusal of the Administration to disclose the instructions from CPG is unreasonable and unjustified in law. Professor GHAI has pointed out that the scope of regulations made under UNSO is specific, which is to give effect to UNSC resolutions on sanctions. To ensure that UNSO is used legitimately only for this purpose, LegCo and the general public need to know the scope of the UNSC resolutions and how they have been interpreted by CPG. This is a matter of public interest. If the Administration takes the view that all instructions from CPG that result in regulations to be made under UNSO are protected under Article 48(11) of the Basic Law, this will be an abuse of power on the part of the executive. A general rule that all instructions from CPG on matters in relation to implementation of UNSC resolutions are confidential is overly broad and unreasonable.

### *The Subcommittee's conclusion*

18. As Professor GHAI's submission was received on 18 June 2004, the Administration has not been able to provide a written response when his views were considered by the Subcommittee at its meeting on 21 June 2004. The Subcommittee is of the view that as pointed out by Professor GHAI, the existing arrangements for implementing UNSC resolutions in relation to sanctions in Hong Kong have far-reaching implications, the matter should be further discussed when the Administration's response is received. However, given the limited time available in the current term, the Subcommittee will not be able to study in depth the issues raised by Professor GHAI. As such, the Subcommittee considers that the matter should be followed up in the next legislative term. The Subcommittee has also requested Professor GHAI to provide an elaboration of his views and arguments on the matter.

### Resolution 1521 of the United Nations Security Council

19. Members note that on 22 December 2003, UNSC adopted a new resolution, Resolution 1521, having regard to the changed circumstances in Liberia, in particular the departure of its former President and the formation of the National Transitional Government of Liberia. UNSC Resolution 1521, which terminates certain prohibitions imposed by UNSC in Resolution 1343 in 2001 and Resolution 1478, will have effect for 12 months until 22 December 2004. As a result, Resolution 1478 has in fact ceased to have effect on 22 December 2003.

### **Follow-up action to be taken by the Administration**

20. The Administration has undertaken to provide to LegCo a formal document issued by CS confirming the MFA instruction regarding the implementation of UNSC resolution in respect of all regulations to be made under UNSO in future (paragraph 8 above refers).

### **Recommendation**

21. Given the limited time available in the current term, the Subcommittee recommends that a subcommittee under the House Committee be formed in the next legislative term to follow up the arrangements for implementing UNSC resolutions in relation to sanctions in Hong Kong.

## **Advice Sought**

22. Members are invited to support the Subcommittee's recommendation in paragraph 21 above.

Council Business Division 2  
Legislative Council Secretariat  
24 June 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