

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

UNITED NATIONS SANCTIONS ORDINANCE

Purpose

This paper sets out the Administration's response to:

- (a) the Subcommittee's request for an explanation as to why the United Nations Sanctions Ordinance ("UNSO") (Cap. 537) deviates from the practice adopted in ordinances which implement international obligations in that it excludes the Legislative Council ("LegCo") altogether from vetting and amending subsidiary legislation made under the principal ordinance; and
- (b) the Subcommittee's suggestions:
 - (i) to incorporate into the primary legislation (i.e. the UNSO) all the provisions on enforcement powers and other key provisions which generally apply to all United Nations

sanctions; and to set out in a Schedule to the UNSO the targets and subjects of sanctions which may differ on each occasion; and

- (ii) to make reference to the arrangements for Hong Kong to enter into bilateral agreements with other countries as currently provided in the Fugitive Offenders Ordinance (Cap. 503) and the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), which provide LegCo a role in scrutinising the Orders made under the Ordinances.

The UNSO

2. The UNSO was enacted on 18 July 1997. Section 3(5) of the UNSO, which provides that sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap. 1) shall not apply to regulations made under the UNSO, has been included since enactment. There have been no change of circumstance since enactment of the UNSO that calls for the removal of section 3(5) of the Ordinance.

3. As explained in LC Paper No. CB(1)1934/04-05(01), from the legal point of view, the current arrangement under the UNSO, including that on section 3(5), is consistent with the Basic Law. From the policy point of view, the current provision for the Chief Executive to make regulations in consultation with the Executive Council allows the Government of the

Hong Kong Special Administrative Region (“HKSAR”) to give effect to instructions from the Ministry of Foreign Affairs (“MFA”) on implementation of resolutions of the United Nations Security Council (“UNSC”) promptly and effectively. This is necessary because many UNSC resolutions are time-limited.

4. UNSC Resolution 1596, for example, was adopted by the UNSC on 18 April 2005 and the sanctions measures therein expired on 31 July 2005, i.e. the sanctions measures have a validity period of only 3½ months. We received instructions from the MFA to implement UNSC Resolution 1596 in May and within the following month, the United Nations Sanctions (Democratic Republic of the Congo) (Amendment) Regulation 2005 (“the Amendment Regulation”) was made. The Amendment Regulation was gazetted on 8 July 2005 and came into effect on the same day.

5. If regulations under the UNSO were subject to sections 34 or 35 of Cap. 1 and given the established practice to allow the full negative vetting period (which comprises the 28-day initial vetting period plus an extension of 21 days) to run its course before bringing subsidiary legislation into force (in the case of subsidiary legislation subject to section 34 of Cap. 1) or the need to move a motion in LegCo (in the case of subsidiary legislation subject to section 35 of Cap. 1) and the minimum 20 days’ advanced notice required, it would not have been possible for the Amendment Regulation to have come into effect on 8 July 2005.

6. Although technically speaking, it is legally in order for subsidiary

legislation subject to negative vetting to take effect upon gazettal where there is proven urgency in public interest, the uncertainty surrounding the subsidiary legislation prior to expiry of the negative vetting period would not be desirable. Had sections 34 or 35 of Cap. 1 been applicable to subsidiary legislation under the UNSO and with the established practice aforementioned, the sanction measures contained in the Amendment Regulation would have expired before they could be brought into effect. Given the international obligations involved, it would clearly be in Hong Kong's interest to implement sanction measures decided by the UNSC pursuant to MFA's instructions as soon as possible.

Incorporating the general provisions into the UNSO?

7. The Subcommittee has suggested that the Administration should consider incorporating into the UNSO all the provisions on enforcement powers and other key provisions that are generally found in UNSC sanctions.

8. Although the sanction measures decided by the UNSC in respect of different countries/places may cover similar areas (e.g. embargo on provision of arms and technical advice, travel restrictions, etc.), the detailed sanction measures often vary from one UNSC resolution to another. Take the example of two UNSC resolutions recently adopted: Resolution 1556 (against Sudan) and Resolution 1572 (against Côte d'Ivoire). Both contain provisions on arms embargo and embargo against provision of technical advice. However, the detailed measures are different.

9. Paragraphs 7 and 8 of UNSC Resolution 1556 read

“7. Decides that all states shall take the necessary measures to prevent the sale or supply, to all non-governmental entities and individuals, including the Janjaweed, operating in the states of North Darfur, South Darfur and West Darfur, by their nationals or from their territories or using their flag vessels or aircraft, of arms and related material of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, whether or not originating in their territories;

8. Decides that all states shall take the necessary measures to prevent any provision to the non-governmental entities and individuals identified in paragraph 7 operating in the states of North Darfur, South Darfur and West Darfur by their nationals or from their territories of technical training or assistance related to the provision, manufacture, maintenance or use of the items listed in paragraph 7 above;”

10. Paragraph 7 of UNSC Resolution 1572 reads

“7. Decides that all states shall, for a period of thirteen months from the date of adoption of this resolution, take the necessary measures to prevent the direct or indirect supply, sale or

transfer to Côte d'Ivoire, from their territories or by their nationals or using their flag vessels or aircraft, of arms and any related material, in particular military aircraft and equipment, whether or not originating in their territories, as well as the provision of any assistance, advice or training related to military activities;”

11. It can be seen from paragraphs 9 and 10 above that although both resolutions touch on arms embargo, the targets of the sanction measures are different and the emphases on the types of arms are different. It can also be seen from paragraphs 9 and 10 above that while UNSC Resolution 1556 requires prohibition against provision of *technical training or assistance related to the provision, manufacture, maintenance or use of the items listed in paragraph 7 of the resolution*, UNSC Resolution 1572 requires prohibitions against provision of *any assistance, advice or training related to military activities*. As a result, the relevant provisions in the United Nations Sanctions (Sudan) Regulation and the United Nations Sanctions (Côte d'Ivoire) Regulation are different. The exceptions to such sanction measures (as set out in paragraph 9 of UNSC Resolution 1556 and paragraph 8 of UNSC Resolution 1572) are also entirely different. It is simply not possible to devise standard clauses for incorporation into the UNSO. Arbitrarily deciding on clauses for incorporation into the UNSO would not help to speed up implementation of UNSC resolutions in Hong Kong nor obviate the need for subsidiary legislation and may, indeed, entail amendment to the primary legislation.

12. The enforcement provisions in regulations under the UNSO are

similar, and we do not see a case to amend the UNSO simply to incorporate the enforcement provisions into the Ordinance. Moreover, it would not be logical to incorporate enforcement provisions into the UNSO in the absence of prohibition provisions.

13. That said, we are now exploring the option of working out a template for the enforcement provisions with a view to facilitating the drafting work and achieving greater consistency among the regulations.

Why does the UNSO deviate from the practice adopted in other ordinances which implement international obligations?

14. The Subcommittee has pointed out that of the four ordinances examined in LC Paper No. LS89/04-05, i.e. the Fugitive Offenders Ordinance (Cap. 503) the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575), and the UNSO, the UNSO is the only Ordinance that excludes LegCo altogether from vetting the subsidiary legislation made under the principal Ordinance. The Subcommittee has also pointed out that Cap. 503 and Cap. 525 allow for LegCo scrutiny of the Orders which implement agreements concluded by Hong Kong in relation to the surrender of fugitive offenders and mutual legal assistance in criminal matters, and considers that the same approach should be followed in respect of regulations made pursuant to the UNSO.

15. We would like to point out that in the case of Cap. 575, the original

regulation making power has been deleted by the United Nations (Anti-Terrorism Measures) (Amendment) Ordinance.

16. As regards Cap. 503 and Cap. 525 where there is LegCo scrutiny of Regulations (Orders), the circumstances relating to the making of these Regulations are quite different to those relating to the making of Regulations pursuant to the UNSO. Therefore, it is not considered appropriate to adopt the same approach in the UNSO insofar as LegCo scrutiny is concerned.

17. To elaborate, Orders pursuant to Cap. 503 and Cap. 525 are for the purpose of giving effect to Agreements which are applicable to the HKSAR. In the case of bilateral Agreements, these will be agreements which have been negotiated and signed by the Government of the HKSAR. To permit obligations in the Agreements to be implemented, Orders are required which apply the procedures in the Ordinances. LegCo has the power to repeal the Orders but may not amend them. This is because the Agreements themselves make up an integral part of the Orders and cannot be amended unilaterally by one side. They can only be amended by agreement between the Government of the HKSAR and its negotiating partner. In the event that LegCo were to repeal an Order, the effect would be that the Agreement could not be brought into force. The negotiating partner would have to be informed, and depending upon the circumstances of the repeal, the Agreement would need to be renegotiated. The repeal would not result in any breach by HKSAR of its international obligations since, as mentioned, the Agreement would not at the stage of repeal of the

Order have been brought into force.

18. The situation is quite different with regard to Regulations made pursuant to UNSO. These Regulations are to give effect to decisions of the UNSC which are binding on the People's Republic of China (including the HKSAR). There can accordingly be no question of repeal of these Regulations by LegCo. These Regulations implement the directives issued by the Central People's Government in respect of foreign affairs which are matters for which the Central People's Government, not HKSARG, is responsible.

Commerce, Industry and Technology Bureau

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