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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 Members' concerns raised during past scrutiny of Regulations made under the United Nations Sanctions Ordinance (Cap. 537) (UNSO).

**Background**

2. During the previous term of the Legislative Council (LegCo), subcommittees have been set up under the House Committee to study the following Regulations which were made under section 3 of the UNSO :

- (a) United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002;
- (b) United Nations Sanctions (Angola)(Suspension of Operation) Regulation 2002; and
- (c) United Nations Sanctions (Liberia) Regulation 2003

Recently, the United Nations Sanctions (Iraq) (Amendment) Regulation 2004 made under section 3 of UNSO was gazetted on 9 July 2004.

3. In examining the subsidiary legislation with regard to the principal tests of lawfulness, fairness/reasonableness and clarity, members of the relevant subcommittees mentioned in paragraph 2 above have identified a number of legal and constitutional issues arising from the current arrangements of implementing United Nations sanctions in Hong Kong as provided under the UNSO. When

reporting to the House Committee on 25 June 2004, the Subcommittee on United Nations Sanctions (Liberia) Regulation 2003 recommended that as the current arrangements have far-reaching implications, the House Committee in the next term commencing in October 2004 should be invited to consider setting up a subcommittee to follow up the subject. When considering the United Nations Sanctions (Iraq) (Amendment) Regulation 2004 at the meeting on 8 October 2004, the House Committee agreed to set up a subcommittee to examine the arrangements for implementing in Hong Kong sanctions imposed through resolutions of the Security Council of the United Nations (UNSC).

### **The United Nations Sanctions Ordinance (Cap. 537)**

4. Prior to 1 July 1997, resolutions of 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. 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 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 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 the Council.

### **Issues of concern considered by Members**

#### Legislative power of the executive

5. The Regulations made under UNSO 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 and enforcement. Members have noted that similar legislation for implementing UNSC resolutions in Australia, Canada, New Zealand, Singapore and UK are subject to the scrutiny of the legislature. Members are concerned about the constitutional problem of placing the legislative power in the hands of the executive, and whether the regulation-making power under UNSO is consistent with the separation of powers between the legislature and the executive under the Basic Law.

6. With a view to ensuring that the regulation-making power under UNSO is properly exercised, the Subcommittee on United Nations Sanctions (Afghanistan)(Amendment) Regulation 2002 and United Nations Sanctions (Angola)(Suspension of Operation) Regulation 2002 has asked the

Administration to consider amending UNSO to provide for regulations made under section 3 to be subject to scrutiny by LegCo. The Administration's position is that the existing provision allows the Government to enact regulations for implementing UNSC resolutions promptly and effectively. It has informed the Subcommittee that there is no pressing need to amend the UNSO as suggested.

7. The Subcommittee on United Nations Sanctions (Liberia) Regulation 2003 has sought the views of Professor Yash GHAI of the Department of Law of the University of Hong Kong on the legal and constitutional issues arising from the existing arrangements for implementing in Hong Kong resolutions of UNSC in relation to sanctions, and whether and how UNSO should be amended. One of Professor GHAI's views is that a procedure under which LegCo divests itself of law making power, as in the case of UNSO, is unconstitutional. The provision is also in violation with the constitutional principle of separation of powers.

8. Due to the limited time available towards the end of the 2003-04 session, the Subcommittee has not been able to study in depth the issues raised by Professor GHAI. The Subcommittee has requested Professor GHAI to provide in due course an elaboration of his views and arguments on the matter.

#### Scope of the UNSO

9. In examining the United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002, members have considered that the Regulation is ultra vires. This is because "sanction" is defined in the Ordinance as "mandatory measures decided by the Security Council of the United Nations, implemented against a place outside the People's Republic of China" whereas the aforesaid Regulation imposes sanctions against "persons" instead of a place. To address the situation, members have suggested that the Administration should consider amending the Ordinance to extend its scope to cover all kinds of UN sanctions, irrespective of whether they are targeted at persons or places. The Administration has taken note of the suggestion and has indicated that it will consider the need for amendment if and when such a need arises in future.

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

10. Since the Chief Executive's power to make regulations under section 3 of UNSO is predicated upon the instruction from MFA, the Subcommittees which studied the aforesaid Regulations have urged the Administration to provide the instructions from MFA to enable members to assess whether the Regulations have given effect to the relevant instructions in full.

11. The Administration has advised that correspondences between the Central People's Government and the Government of the Hong Kong Special Administrative Region, including instructions from MFA concerning the

implementation of UNSC resolutions, are intended for internal use only. In response to members' query on the constitutional basis as to why LegCo cannot have sight of the MFA instruction, the Administration considers that the relevant MFA instruction will be protected from disclosure under the principle of public interest immunity and maintains its view that disclosure of the relevant instruction will prejudice public interest.

12. In giving his views to the Subcommittee on United Nations Sanctions (Liberia) Regulation 2003, Professor GHAI considers that the refusal of the Administration to disclose the instructions from the Central People's Government is unreasonable and unjustified in law. In his opinion, to ensure that UNSO is used legitimately for its intended purpose, LegCo and the general public need to know the scope of the UNSC resolutions and how they have been interpreted by the Central People's Government.

13. Given the Administration's stance against disclosure, the Subcommittee has requested the Administration to provide, as a practice, a formal document issued by the Chief Secretary for Administration to confirm MFA's instructions on the implementation of the UNSC resolutions with respect to all regulations to be made under UNSO in future. The Administration has agreed to do so.

#### Time gap between the instruction from MFA and the making of a regulation

14. Members have noted from the information provided by the Administration that there is usually a long time gap between receipt of the relevant instruction from MFA and the making of a regulation under UNSO. For example, MFA's instruction to implement Resolution No. 1483 was received in May 2003 while the United Nations Sanctions (Iraq) (Amendment) Regulation 2004 made to implement the said Resolution was only gazetted on 9 July 2004.

15. The Subcommittees set up to study past Regulations have expressed concern as to how Hong Kong would implement certain UNSC resolutions pending the making of the necessary regulations. The Administration has advised that during the interim period, some sanctions could be effected through existing law such as the Import and Export Ordinance (Cap. 60) and the Immigration Ordinance (Cap. 115).

#### Enforcement powers

16. In scrutinizing the Regulations listed in paragraph 2, the respective Subcommittee has raised concern about the wide enforcement power conferred on the enforcement officers and have sought the Administration's explanation. On the United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002, for example, the Administration has confirmed that according to its legal advice, the search and investigation powers provided under the Regulation are consistent with the human rights provisions in the Basic Law.

**Present position**

17. In response to the Secretariat, Professor Yash GHAI of the University of Hong Kong has kindly indicated that he will try his best to provide a more detailed submission on the subject by end October 2004. Meanwhile, the Administration has also agreed to provide its written response after studying the detailed views of Professor GHAI. The Secretariat will follow up with both parties in due course.

Council Business Division 1  
Legislative Council Secretariat  
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