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

Comments on the report to
the House Committee prepared by the Subcommittee

This note sets out the Administration's response to the issues raised in the report to the House Committee prepared by the Subcommittee.

Constitutionality of the UNSO

2. The Subcommittee has been particularly concerned whether section 3(5) of the United Nations Sanctions Ordinance, Cap.537 (UNSO), which excludes scrutiny by LegCo of any regulations made under it, in accordance with sections 34 or 35 of the Interpretation and General Clauses Ordinance, Cap. 1, (the disapplication provision), is ultra vires the Basic Law.

3. We have further considered this issue in depth and SJ has personally studied it. The Administration is of the opinion that, as a matter of law, the disapplication provision is constitutional.

Implementation of UN sanctions in the HKSAR is a matter of PRC's foreign affairs

4. Foreign affairs are the sole responsibility of the Central People's Government (CPG) (Article 13 of the Basic Law).

5. Ensuring the implementation of UN sanctions by the CPG in the HKSAR is a matter of discharging the People's Republic of China's (PRC) international obligation owed by the sovereign state to the UN.

6. LegCo's powers are derived from and conferred by the Basic Law. Article 73 of the Basic Law has not conferred any power on the Government of the HKSAR or LegCo to override, curtail or regulate the CPG's sovereign power in respect of her dealings in foreign affairs affecting the HKSAR.

7. Although the CPG as the sovereign is responsible for foreign affairs relating to the HKSAR, where matters relating to foreign affairs have to be implemented in the HKSAR as "law", it has to be achieved by means of application of national laws under Article 18 and Annex III of the Basic Law or

legislation which has domestic application in the HKSAR, in accordance with the Basic Law.

8. The enactment of the UNSO was an instance of the enactment of laws relating to foreign affairs by the HKSAR legislature in accordance with the Basic Law and with the agreement of the CPG.

9. Responsibility for implementation of UN sanctions in Hong Kong is, and has always been, considered to be a matter of foreign affairs. Such matters were not the subject of LegCo's vetting before the Reunification as a matter of foreign affairs for which the UK Government was responsible. In view of the above, the doctrine of continuity and the legislative history of the UNSO, upon resuming sovereignty in 1997 (and agreeing to the enactment of the UNSO) the CPG would not have forgone that important sovereign power to maintain the ultimate responsibility for the implementation of UN sanctions in the HKSAR.

10. Application of a national law of the PRC to the HKSAR via Annex III of the Basic Law is not the only means for the CPG to implement matters of foreign affairs in the HKSAR. Implementation of UN sanctions may be time-limited and will generally require speedy action. A uniform national law to implement a UN sanction may not be appropriate for application to both the Mainland and the HKSAR. Moreover, the CPG may decide to enforce a UN sanction in the HKSAR first without concurrently enacting any laws which have application in the Mainland.

11. Implementation of UN sanctions is by primary legislation in the form of the UNSO and by the Chief Executive (CE) making regulations under section 3(1) of the UNSO upon receiving instructions from the CPG. This is in accordance with the normal legal procedure of enactment of legislation in the HKSAR under the Basic Law and Article 48(8) of the Basic Law whereby the CE is under a constitutional duty to implement the directives of the CPG.

Removal of vetting by LegCo of subsidiary legislation is permissible under Cap. 1 and common law

12. Disapplication of sections 34 and 35 of Cap. 1 had always been permissible under Hong Kong's local law before 1997 (e.g. Hong Kong Institute of Education Ordinance Cap. 444, Vocational Training Council Ordinance Cap. 1130 and section 3(15) of the Fugitive Offenders Ordinance, Cap. 503) and at common law (see e.g. English Schools Foundation v. Bird [1997] 3HKC 434.)

13. Articles 17 and 18 of the Basic Law have not changed this position under Cap. 1 or common law.

14. The UNSO was enacted by the Hong Kong Provisional Legislative Council in 1997 as a piece of local legislation. There is nothing in the UNSO which makes it immune from "disapplication" of sections 34 and 35 of Cap. 1.

15. Before 1997, UN sanctions were implemented by the UK Government in Hong Kong by Orders in Council over which LegCo did not have any vetting power.

16. Implementation details of UN sanctions e.g. offences, penalties and investigation powers are important and determine how effective the sanctions are. The CPG must have the final say over the regulations thereby retaining her sovereign power to ensure effective discharge of her international obligation under the UN Charter. The arrangement under section 3(1) and section 3(5) of the UNSO is consistent with this approach. With the agreement of the CPG, the UNSO has prescribed a number of parameters and safeguards within which the CE can effectively make subsidiary legislation to implement the sanctions.

The instruction given by the CPG to the CE to implement UN sanctions includes the instruction to the CE to make regulations in accordance with the entire set of draft regulations (including the provisions on offences, penalties and investigation powers) submitted to and approved by the CPG

17. There is no distinction between the so-called basic terms of a UN sanction and its implementation details. The entire set of draft regulations (including implementation details) has to be submitted to the CPG for approval before the legislative process under section 3 (1) of the UNSO commences.

18. Even if negative vetting is allowed under section 34 of Cap. 1, amendment cannot be inconsistent with the power to make such subsidiary legislation. Given that the entire set of the relevant regulation is part and parcel of the instruction given by the CPG, there is no room for amendment by LegCo, even if vetting were to be permitted under section 34(2) of Cap. 1.

Other issues raised by the Subcommittee

19. As regards other matters raised by the Subcommittee, the Administration does not intend to repeat but will rely on the representations made previously. It is however useful to highlight the following:

Disclosure of MFA's instructions

20. We have looked again into the question of disclosure of instructions from the Ministry of Foreign Affairs (MFA) and remain of the view that such instructions are internal documents and should not be disclosed. At present, the Chief Secretary for Administration would issue a formal document confirming MFA's instructions and we believe this arrangement has worked well.

Timeliness of implementation

21. We note concerns on the need for timely implementation of UN sanctions. As the Subcommittee has noted, some effort to expedite legislative work is discernible in that recently gazetted Regulations of average complexity (or below) have a much shorter time gap of one to two months between the receipt of the MFA instructions and the gazettal of the Regulations. In addition, we have recently instituted a new system with more streamlined arrangements and dedicated officers in the Department of Justice to deal with this subject. We believe this should be able to further expedite the process.

**Commerce and Economic Development Bureau
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