立法會
Legislative Council

LC Paper No. CB(1)1587/06-07

Ref : CB1/HS/1/04

Paper for the House Committee meeting on 18 May 2007

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

PURPOSE

This paper reports on the Subcommittee's deliberations on the constitutional and legal issues arising from the operation of the United Nations Sanctions Ordinance (Cap. 537) (UNSO); and seeks the House Committee's views on the way forward.

BACKGROUND

Implementation of UN sanctions

2. Prior to 1 July 1997, resolutions of the Security Council of the United Nations (UNSC) in relation to sanctions were implemented in Hong Kong by way of Orders in Council which were made by the United Kingdom (UK) Government and extended to Hong Kong. All such Orders in Council as applicable to Hong Kong lapsed at midnight on 30 June 1997. To put in place a mechanism to ensure the continued application and enforcement of UN sanctions in the Hong Kong Special Administrative Region (HKSAR), the UNSO was passed by the Provisional Legislative Council on 16 July 1997 and came into effect on 18 July 1997.

3. Pursuant to section 3(1) of UNSO, the Chief Executive (CE) 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. It is also expressly provided in section 3(5) of UNSO that sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap.1) (IGCO) shall not apply to such regulations. As such, they are not required to be laid before the Legislative Council (LegCo) and are not subject to its approval or amendment.

4. The current mechanism is that when UNSC makes a resolution regarding sanctions, and calls on the People's Republic of China to apply those sanctions, MFA may issue instructions to CE as to the implementation of the sanctions specified in the resolutions and CE has to make regulations to give effect to such instructions. The regulations may prescribe penalties for breaches of provisions therein subject to the maximum limits prescribed in section 3(3) of UNSO. CE may also provide exclusions from the application of the regulations. Such regulations come into effect on the date of gazettal.

Problems identified in the course of scrutiny by LegCo

5. Members are aware that under section 3(5) of UNSO, LegCo has no power to approve or amend the regulations. However, Members have considered it necessary to study the regulations and their implications. During the 2000-04 LegCo term, two Subcommittees have been set up under the House Committee to study three Regulations made under section 3(1) of UNSO[1]. In the course of scrutiny, the Subcommittees concerned have identified a number of problems arising from the current arrangement of implementing UN sanctions in Hong Kong :

(a) As sections 34 and 35 of IGCO do not apply to the Regulations made under section 3(1) of UNSO, the Regulations are not subject to vetting by the legislature and hence, LegCo cannot exercise its monitoring role over subsidiary legislation.

(b) The exclusion of LegCo's scrutiny is not appropriate because the Regulations purport to have serious penal effect and confer vast investigation and enforcement powers.

(c) As LegCo has not been provided with the instructions issued by MFA, Members are not able to assess whether the relevant instructions have been given effect in full by the Regulations made by CE.

(d) There are long time gaps between the receipt of MFA's instructions and the making of the Regulations.

(e) It is doubtful whether the scope of UNSO can cover all kinds of UN sanctions, irrespective of whether they are targeted at persons or places.

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[1] The three regulations are the United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002, United Nations Sanctions (Angola) (Suspension of Operation) Regulation 2002 and United Nations Sanctions (Liberia) Regulation 2003.

6. In October 2003, following the reporting by one of the Subcommittees, the Chairman of the House Committee has conveyed Members' views to the Administration in writing requesting the latter to, inter alia, suitably amend UNSO so as to address the above problems. In his reply in November 2003, the Chief Secretary for Administration (CS) has stated the Administration's position that it will consider the need to amend the UNSO if and when such a need arises in future. However, it is of the view that the present arrangement is appropriate. Members nevertheless have considered that as the issues identified by the two Subcommittees may have implications on constitutional propriety and the rule of law, they should be further examined.

THE SUBCOMMITTEE

7. At the meeting held on 8 October 2004, the House Committee agreed that a subcommittee should be set up to examine the current arrangement for implementing in Hong Kong the sanctions imposed through resolutions of the UNSC. Hon Margaret NG has been elected Chairman of the Subcommittee and its membership list and Terms of Reference are at **Appendix I**.

8. Since October 2004, the House Committee has referred to the Subcommittee a total of 18 Regulations (listed in **Appendix II**) made under section 3(1) of UNSO and gazetted since July 2004. In response to the request of the Subcommittee, the Administration has provided an explanatory brief in respect of each of these Regulations to provide more background information and will continue to do so in future.

9. Up to end April 2007, the Subcommittee has held seven meetings with the Administration. The main focus of the study during this period is on the legal and constitutional issues arising from the current mechanism. Apart from exchanging views with the Administration, the Subcommittee has also invited Professor Yash GHAI of the University of Hong Kong to give his expert advice on these issues and the Administration to provide its written response. A copy of Professor GHAI's paper and the Administration's response thereto are at **Appendix III** and **Appendix IV** respectively.

SCOPE OF STUDY

10. The Subcommittee has studied a number of legal and constitutional issues relating to the current arrangement of implementing UN sanctions in Hong Kong, including :

(a) the scope of the principal ordinance;

(b) the constitutional basis of the current regulation-making power conferred on CE to give effect to MFA's instructions;

(c) LegCo's constitutional role or the absence of such a role under UNSO; and

(d) certain practical problems in implementing UN sanctions under the current arrangement.

The Subcommittee's deliberation of key issues, as well as its consideration of alternative approaches to implement UN sanctions in Hong Kong, are set out in the ensuing paragraphs. In the course of its study, the Subcommittee has made broad reference to the Regulations gazetted since July 2004.

Legal and constitutional issues

Implementation of UN sanctions before and after reunification

11. Prior to 1 July 1997, the making of Orders in Council to implement UN sanctions and the application of such Orders to Hong Kong was governed by the United Nations Act 1946 of the UK. The text of a relevant Order in Council was prepared in UK and Hong Kong was required to publish the Order in the Gazette. A paper (LS36/03-04) outlining the relevant arrangements before and after reunification prepared by the Legal Service Division is at **Appendix V**. The Subcommittee notes certain observations in the paper which are relevant to subsequent consideration of key issues, notably :

(a) the UK Act does not specify that measures are to be implemented against a "place" while the UNSO stipulates that sanctions are to be imposed against a "place" outside the People's Republic of China[2]; and

(b) under section 1(4) of the UK Act, an Order in Council made under the Act will have to be laid before Parliament before its coming into force; whereas the regulations made under section 3(1) of UNSO are not required to be laid on the table of LegCo pursuant to section 3(5) of the Ordinance.

Scope of UNSO

12. Members note that the former Subcommittee which studied the United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002 has questioned the coverage of the term "sanction" as defined under section 2(1) of UNSO. While it is stipulated that sanctions are mandatory measures to be implemented

[2] See section 2(1) of UNSO in which "sanction" is defined as including "complete or partial economic and trade embargoes, arms embargoes, and other mandatory measures decided by the Security Council of the United Nations, implemented against a place outside the People's Republic of China".

against a "place" outside the People's Republic of China, the targets of sanction under the aforesaid Amendment Regulation are "persons, undertakings or entities" (such as Usama bin Laden, the Al-Qaida Organization and the Taliban) and not a place or territory. As such, the former Subcommittee was of the view that the Amendment Regulation made under section 3 of UNSO is ultra vires and therefore void.

13. In coming to this view, members of the former Subcommittee has also taken note of the Administration's advice at a meeting of the Panel on Administration of Justice and Legal Services on 30 November 2001 in connection with its proposal to introduce a bill to implement anti-terrorism measures. According to the Administration, if the UN sanctions were not directed at a place, they could not be implemented through the making of a regulation under section 3(1) of UNSO. An amendment to UNSO would be necessary before the regulation could be made.

14. It is noted that out of the 18 Regulations listed in **Appendix II,** seven[3] of them were targeted at a "relevant entity" or a "relevant person" as specified by CE in accordance with the relevant provisions of the Regulations in question. As the "relevant entity" or the "relevant person" may or may not be within the place specified in the Regulation concerned, there is a possibility that the sanctions may go beyond the place as specified.

Whether the regulations are within the scope of MFA's instructions

15. Members note that the Subcommittees which studied the three Regulations in the last LegCo term have urged the Administration to provide MFA's instructions so as to assess whether the Regulations have given effect to the relevant instructions in full.

16. The Administration's view is that correspondences between CPG and the HKSAR Government, including instructions from MFA concerning the implementation of UNSC resolutions, are intended for internal use only. Such instructions would be protected from disclosure under the principle of public interest immunity. Nevertheless, in response to Members' request, the Administration has agreed to provide, in respect of each regulation to be made under UNSO, a formal document issued by CS confirming MFA's instructions on the implementation of the relevant UNSC resolution(s). For illustration, a copy of the formal document issued by CS in respect of the United Nations Sanctions (Democratic Republic of the Congo) Regulation 2005 gazetted on 28 October 2005

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[3] They are the United Nations Sanctions (Côte d'Ivoire) Regulation (L.N. 122 of 2005); United Nations Sanctions (Democratic Republic of the Congo) (Amendment) Regulation 2005 (L.N. 123 of 2005); United Nations Sanctions (Sudan) (Amendment) Regulation 2005 (L.N. 124 of 2005); United Nations Sanctions (Democratic Republic of the Congo) Regulation 2005 (L.N. 192 of 2005); United Nations Sanctions (Côte d'Ivoire) Regulation 2006 (L.N. 59 of 2006); and United Nations Sanctions (Democratic Republic of the Congo) Regulation 2006 (L.N. 257 of 2006) and United Nations Sanctions (Côte d'Ivoire) Regulation 2007 (L.N. 64 of 2007).

is at **Appendix VI**.

17. In his submission to the Subcommittee, Professor Yash GHAI has pointed out that public interest immunity can be claimed by the Government on the grounds that disclosure of the document(s) in question is injurious to the public interest. As regards the instructions from MFA, Professor GHAI considers that *prima facie*, it is unlikely that the transmission of the UNSC resolutions with a covering note will damage the public interest. In Professor GHAI's view, the provision of the formal document in lieu of MFA's instruction *per se* is not a sufficient substitute for LegCo's scrutiny of the regulations made under section 3 of UNSO.

18. The Subcommittee has asked the Administration to re-consider its stance in the light of Professor GHAI's view.

CE's obligation to give effect to MFA's instructions in relation to UN sanctions

19. Under Article 48(8) of the Basic Law (BL 48(8)), CE shall implement directives issued by CPG in respect of relevant matters provided for in the Basic Law. These matters include foreign affairs, which in turn cover UN sanctions. As advised by the Administration, the decision to apply in HKSAR sanctions imposed by resolutions of UNSC is within the ambit of foreign affairs over which HKSAR has no autonomy. Notwithstanding, members consider that while CPG has the responsibility to implement international obligations, the actual method of implementation is a decision for the HKSAR Government. In fact, a comparative study of four Ordinances enacted to implement international obligations as set out in **Appendix VII** reveals a variety of modalities being adopted. UNSO is unique in that its subsidiary legislation is entirely excluded from LegCo's scrutiny. The Subcommittee also notes the pre-1997 arrangement that Orders in Council made under the UK Act were required to be laid before Parliament.

20. Members also note that the regulations made under section 3(1) of UNSO may contain provisions of a local nature as section 3(2) provides, inter alia, that regulations made under this section may create offences and impose penalties not exceeding certain limits. As pointed out in Professor Yash GHAI's submission, these matters cannot be left entirely to the Administration and there should be participation by LegCo in the legislative process.

LegCo's constitutional role as the law-making body in HKSAR

21. The Subcommittee is gravely concerned that section 3(5) of UNSO may have deprived LegCo of its constitutional role in scrutinizing and, where necessary, amending subsidiary legislation, thereby placing the legislative powers in the hands of the executive government. As the purpose of the regulations made under section 3(1) is to fulfil Hong Kong's international obligations to implement UN sanctions, members are keen to ascertain the constitutionality of the current arrangement, lest the regulations made under UNSO may be challenged as being

legally ineffective if the statutory basis on which they have been made is unconstitutional.

22. In considering the constitutional role of LegCo, members have made reference to BL 16, 17 and 19 on the separation of the executive, legislative and judicial powers respectively; as well as BL 73 which defines the function of LegCo "to enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures". The Subcommittee also notes Professor GHAI's view that while there is interaction between the executive and the legislature, each has its own institutional autonomy and that the principle of the separation of powers underlies the Basic Law. His conclusion is that the power to scrutinize and if necessary, amend subsidiary legislation is vested with LegCo; and an Ordinance which takes away the power of LegCo to vet or amend subsidiary legislation is void.

23. In its written response to the Subcommittee, the Administration agrees that there is a division of powers and functions among various organs of the HKSAR under the Basic Law, but takes the view that the Basic Law does not institute a rigid separation of powers[4]. It has submitted to the Subcommittee that before the reunification on 1 July 1997, neither the British nor the Hong Kong systems were based on a rigid separation of powers. The absence of a rigid separation of powers in the Basic Law is therefore consistent with the theme of continuity to ensure a smooth transition. The Administration has referred to the Court of Appeal decision in *HKSAR v David Ma* [1997] HKLRD 761 in which it has been highlighted, inter alia, that both the Joint Declaration and the Basic Law carried the overwhelming theme of a seamless transition.

Delegation of legislative power and scrutiny of subsidiary legislation

24. Another issue of concern pursued by the Subcommittee is whether it is proper for LegCo to delegate the regulation-making power to the executive government and to exclude itself from the vetting of subsidiary legislation made under UNSO. In this respect, members note Professor GHAI's view that the power to make laws is granted to LegCo and that "[T]he Basic Law gives no power to make laws to CE, although it gives a considerable role to the CE in the legislative process" such as the signing or veto on bills. In fact, those national laws as listed in Annex III of the Basic Law are to be applied locally by way of promulgation or legislation, not by direct application. In short, he considers that the intention for adopting this method is to "maintain the integrity and coherence of the Hong Kong legal system based on the common law. The implication is that all the normal processes of law making must be adhered to, including that relating to subsidiary legislation".

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[4] The Administration has referred to *Lau Kwok Fai Bernard v Secretary for Justice*, HCAL Nos. 177 of 2002 and 180 of 2002 in which Hartmann J expressed agreement to Professor Wade's observation in his work *Administrative Law* (7th ed, 1994) that there was an infinite series of graduations, with a large area of overlap, between what was plainly legislation and what was plainly administration.

25. As the Basic Law vests LegCo with the authority and the responsibility to keep control over subsidiary legislation, Professor GHAI has advised that "[A]n Ordinance that takes away from the LegCo the ultimate control over the enactment of subsidiary legislation would therefore be unconstitutional. The LegCo has been given its legislative responsibilities by the National People's Congress and it cannot divest itself of that power ('delegatus non potest delegare'[5])". He is of the opinion that "the exclusion by UNSO of sections 34 and 35 [of IGCO] is unconstitutional".

26. The Administration has however highlighted that while LegCo is entrusted with the power and function to enact laws, the Basic Law does not prohibit the delegation of law-making power/function to other bodies or persons to make subsidiary legislation. This exclusionary power predated 1 July 1997, as evidenced in section 3(15) of the Fugitive Offenders Ordinance (Cap. 503) which is similar to section 3(5) of UNSO. According to the Administration, the continuation or exercise of such exclusionary power after reunification is considered to be in line with the theme of continuity under the Basic Law.

27. Another argument put forward by the Administration is that since the regulations made under UNSO are to implement MFA instructions in respect of UN sanctions which are foreign affairs for which CPG is responsible under BL 13(1), "it must be lawful and constitutional for LegCo to authorize the HKSAR Government to make subsidiary legislation without any vetting requirement". In the Administration's view, this also reflects the fact that although legislative authority derives from LegCo, the subject matter is outside the high degree of autonomy conferred on HKSAR.

28. Summing up its legal arguments, the Administration has come to the view that in line with the theme of continuity in the Basic Law and section 2(1) of IGCO, LegCo may disapply section 34 and section 35 of IGCO in relation to subsidiary legislation made by CE under section 3(1) of UNSO to give effect to the relevant CPG directive and implement the relevant UN sanction. The Administration's conclusion is that the current arrangement under UNSO is consistent with the Basic Law and should be maintained.

29. On whether the current arrangement will affect LegCo's constitutional role in exercising its powers and functions under BL 73(5) and (6) (namely, to raise questions on the work of the Government and to debate any issue concerning public interests), the Administration considers that LegCo is at liberty to raise questions on, or debate, subsidiary legislation made under UNSO even if it has no power to vet it.

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[5] Under the principle of 'delegatus non potest delegare', a person to whom powers have been delegated cannot delegate them to another person.

30. Some members remain doubtful as to whether it is proper to exclude from scrutiny by LegCo the subsidiary legislation in question. They remain deeply concerned about the legal and constitutional basis of section 3(5) of UNSO which may have in effect placed the legislative power in the hands of the executive government, thereby depriving LegCo of its role as the law-making body in HKSAR.

Desirability of the current arrangement

Timeliness of implementing UN sanctions

31. One of the reasons put forward by the Administration in favour of the current arrangement under section 3(1) and (5) of UNSO is that it ensures prompt implementation of UNSC sanctions, many of which are time-limited. It has referred to UNSC Resolution 1596 adopted by UNSC on 18 April 2005 containing sanctions which would expire on 31 July 2005. The United Nations Sanctions (Democratic Republic of the Congo) (Amendment) Regulation 2005 was made after receiving MFA's instruction in May 2005 and the Amendment Regulation (L.N.123 of 2005) was gazetted and took effect on 8 July 2005. The Administration has pointed out that if section 34 or section 35 of IGCO would apply and the existing practice is to be followed (i.e. a full negative vetting period of 49 days is allowed to run its course, or if a motion under the positive vetting procedure is to be moved in LegCo with a minimum of 20 days' advanced notice), then, it would not have been possible for the Amendment Regulation to come into effect on 8 July 2005.

32. Having considered the timeframe of the making of the 18 Regulations gazetted so far, the Subcommittee does not subscribe to the Administration's explanation. As seen in **Appendix II,** even when LegCo's scrutiny is excluded under the current arrangement, there have been long time gaps between the passing of the relevant UNSC resolutions and the gazettal of some Regulations. For example, Resolution 1483 was passed by UNSC on 22 May 2003 and the instruction of MFA was received in May 2003. Nevertheless, the United Nations Sanctions (Iraq) (Amendment) Regulation 2004 was only gazetted on 9 July 2004 (L.N. 132 of 2004). Resolution 1572, which was passed by UNSC on 15 November 2004, had a validity period up to 14 December 2005. After receipt of the MFA instruction in December 2004, the United Nations Sanctions (Côte d'Ivoire) Regulation was gazetted some seven months later on 8 July 2005 (L.N. 122 of 2005).

33. In this connection, the Administration has advised that it will work out a template for those statutory provisions on enforcement so as to facilitate the drafting work and achieve greater consistency among various regulations. Meanwhile, some effort to expedite legislative work is discernible in that recently gazetted Regulations (namely, L.N. 123, L.N. 124, L.N. 192 and L.N. 193 of 2005) had a much shorter time gap of one to two months between the receipt of the MFA

instructions and the gazettal of the Regulations.

Measures during the time gaps

34. One of members' concerns arising from the aforesaid time gaps is whether Hong Kong could fulfil its international obligation to implement the relevant UN sanctions pending the enactment of the Regulations.

35. The Administration has advised that between receipt of MFA's instructions and gazettal of the Regulations, some of the sanctions could be effected through existing laws, mostly subsidiary legislation under the Import and Export Ordinance (Cap. 60). According to the Administration, the sanctions in respect of arms and related material could be implemented through Regulation 2 of the Import and Export (Strategic Commodities) Regulations (Cap. 60, sub. leg. G) which provides that no one shall 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 munition 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. As regards prohibition against entry into Hong Kong, the Administration has advised that this can be dealt with by sections 7 and 4 of the Immigration Ordinance (Cap. 115) relating to permission to land in Hong Kong and the authority of an immigration officer or immigration assistant to examine a person. The Subcommittee nevertheless notes from the information provided by the Administration that certain sanctions cannot be implemented through existing laws. An example is UNSC resolution 1532[6] adopted on 12 March 2004 which could not be implemented prior to the making of the United Nations Sanctions (Liberia) Regulation 2005 (L.N. 94 of 2005). Given these practical problems, some members maintain their reservation on the existing arrangements.

Alternative approaches for improvement

Findings of a comparative study

36. In view of the various problems identified, the Subcommittee has actively explored alternative approaches to improve the current system with a view to implementing the sanctions in a more expeditious manner and with the involvement of LegCo in the legislative process. For this purpose, members have

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[6] UNSC resolution 1532 stipulates, inter alia, that all States in which there are funds, other financial assets and economic resources owned or controlled directly or indirectly by certain individuals including the former Liberian President Charles Taylor, shall freeze without delay all such funds, other financial assets and economic resources, and shall ensure that neither of these are made available, by their nationals or by any persons within their territory, directly or indirectly, to or for the benefit of the aforesaid individuals.

studied three other Ordinances which also implement international obligations vis-a-vis the UNSO to see whether any useful reference can be drawn. A table summarizing the key features of the Fugitive Offenders Ordinance (Cap. 503) (FOO), Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (MLACMO), UNSO and United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (UN(ATM)O) is at **Appendix VII**. As for other Ordinances enacted since 1997 to implement in Hong Kong international conventions and agreements, the Subcommittee notes that the negative vetting procedure under section 34 of IGCO applies to the subsidiary legislation made under these Ordinances.

37. The Subcommittee notes that section 34 of IGCO does apply to regulations made under FOO and MLACMO. As for the exclusionary provision in section 3(15) of FOO which the Administration has considered similar to section 3(1) of UNSO and which predated 1 July 1997, members observe that the power conferred on CE to make a Notice under FOO is highly limited as the Notice seeks merely to reflect any changes of the parties to the relevant convention, whereas UNSO confers vast regulation-making powers on CE. As such, members do not agree entirely that the disapplication of section 34 of IGCO is appropriate for regulations made under section 3(1) of UNSO. In this connection, the Subcommittee is also aware that a clause excluding the application of section 34 of IGCO to an Order made by the CE in Council was deleted by way of a Committee Stage amendment (CSA) when the International Organizations (Privileges and Immunities) Bill was debated at the Council meeting on 1 March 2000, in response to Members' criticism that it was a retrogressive step to deprive LegCo of its right to scrutinize subsidiary legislation.

38. Both UN(ATM)O and UNSO are to give effect to sanctions decided by UNSC. Members note that in UN(ATM)O, provisions that may affect the rights of citizens such as provisions on powers on investigation, seizure and detention are provided in the primary legislation. However, in UNSO, these provisions are provided in the regulations which are not subject to scrutiny or amendment by LegCo.

<u>The Subcommittee's suggestions and the Administration's response</u>

39. Having regard to the aforesaid observations, the Subcommittee has asked the Administration to consider revising the current mechanism along the following lines:

(a) to incorporate into the primary legislation (i.e. UNSO) all the provisions on enforcement powers and other key provisions which generally apply to all UN sanctions; and to set out in a Schedule to UNSO the targets and subjects of sanctions which may differ on each occasion; and

(b) to make reference to the arrangements for Hong Kong to enter into bilateral agreements with other countries as currently provided in FOO

and MLACMO, which provide LegCo a role in scrutinizing the Orders made under the Ordinances.

40. In its response, the Administration has referred to the examples of UNSC resolution 1556 and resolution 1572 adopted against Sudan and Côte d'Ivoire respectively and explained that although the sanction measures decided by 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 vary. The Administration therefore considers it not possible to devise standard clauses for incorporation into UNSO. Similarly, it has also advised against incorporating general enforcement provisions into the primary legislation in the absence of prohibition provisions.

41. On the arrangements of making Orders under FOO and MLACMO, the Administration has advised that it is stipulated in these two Ordinances that LegCo has the power to repeal the Orders but may not amend them. This is because the bilateral Agreements themselves make up an integral part of the Orders and cannot be amended unilaterally by one side. In the event that an Order is repealed by LegCo, the effect would be that the Agreement cannot be brought into force and will need to be re-negotiated with the other partner. However, the Administration has highlighted that in the case of UNSO, there can be no question of repeal of the regulations made under section 3(1) as their purpose is to implement the directives issued by CPG in respect of foreign affairs which are the responsibility of CPG. Given the difference in the objectives of the Ordinances, the Administration does not consider it appropriate to adopt the approaches in FOO and MLACMO to provide LegCo a role in the legislative process.

The way forward

42. The Subcommittee has carefully examined the legal, constitutional and operational aspects of the current mechanism for implementing UN sanctions as provided under section 3 of UNSO; and has come to the view that the current arrangement should be reviewed and improved. It has set out its views and suggestions in a draft form of this report and forwarded it to the Administration on 9 February 2006 for response. The Subcommittee has also requested that the matter be brought to the personal attention of the Secretary for Justice. So far, the Subcommittee has not received a substantive response from the Administration on the issues raised and has agreed to pursue the following courses of action:

<u>To report to the House Committee</u>

43. Members have agreed that the Subcommittee should report its deliberations so far and recommendations to the House Committee and seek its views on the way forward.

To consider seeking clarification on the constitutionality of section 3(5) of UNSO through the judicial channel

44. The Subcommittee notes the Administration's position that the current arrangement under UNSO is consistent with the Basic Law and Professor Yash GHAI's query on its constitutionality. Having regard to the pre-unification arrangement (in which Orders in Council made under the UK Act are required to be laid before Parliament), LegCo's constitutional role as HKSAR's law-making body and the nature of the Regulations made under UNSO many of which purport to have serious penal effect, the Subcommittee is not fully convinced that the current arrangement is constitutional as put forward by the Administration. With a view to resolving the doubt, the Subcommittee has discussed the possibility of taking legal proceedings to clarify the constitutionality of section 3(5) of UNSO with reference to the paper provided by the Legal Service Division setting out the issues for consideration (LC Paper No. LS2/05-06 at **Appendix VIII**).

45. In principle, members consider that if it is finally decided that the constitutionality of section 3(5) of UNSO is to be clarified through the judicial channel, the appropriate legal proceedings that can be taken is to seek a court declaration by way of an application for judicial review under section 21K of the High Court Ordinance (Cap. 4) and Order 53 of the Rules of the High Court (Cap. 4, sub.leg. A). Regarding the question of the capacity of LegCo or the Subcommittee to sue, members note that there appears to be no precedent cases in which LegCo or other legislatures in major Commonwealth jurisdictions have applied for judicial review of the constitutionality of a piece of primary legislation. There is at present no clear judicial authority for LegCo's capacity or the lack of capacity to sue and be sued. As a solution to overcome the uncertainty over LegCo's capacity to sue, it has been pointed out in the paper that one or more of the Members may act as parties acting on their own behalf and on behalf of all other Members in an action. Some Subcommittee members are inclined to think that if legal proceedings are to be taken, the issue of who should act as the plaintiff in the application for judicial review may be resolved by one or a few LegCo Member(s) applying in his/her personal capacity. For example, one option is that members of the Subcommittee be individually named as plaintiffs. The Subcommittee has not deliberated on the issue of funding.

46. While Professor Yash GHAI has provided his expert advice from a constitutional and analytical perspective, for which the Subcommittee is grateful, some members have pointed out that should legal action be contemplated, it would be desirable to first seek independent counsel's advice on the merits of the case.

RECOMMENDATIONS

47. The Subcommittee recommends that –

(a) the Chairman of the House Committee be invited to convey the Subcommittee's deliberations and proposed way forward to CS and request CS to critically re-examine the matter in consultation with the Secretary for Justice; and

(b) the House Committee to give its views on the need or otherwise to seek the court's clarification on the constitutionality of section 3(5) of UNSO with regard to paragraphs 44, 45 and 46, if the Administration maintains its stance against any change to the existing arrangement for implementing UN sanctions.

ADVICE SOUGHT

48. Members are invited to consider the Subcommittee's recommendations in the preceding paragraph.

Council Business Division 1
Legislative Council Secretariat
16 May 2007

Appendix I

**Subcommittee to Examine
the Implementation in Hong Kong of Resolutions of the
United Nations Security Council in Relation to Sanctions**

Membership list

Chairman	Hon Margaret NG
Members	Hon Martin LEE Chu-ming, SC, JP
	Dr Hon LUI Ming-wah, SBS, JP
	Hon LAU Kong-wah, JP
	(Total : 4 Members)
Clerk	Miss Polly YEUNG
Legal Adviser	Mr Kelvin LEE
Date	April 2007

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

Terms of Reference

To examine the legal and constitutional issues arising from the current arrangements for implementing in Hong Kong resolutions of the United Nations Security Council in relation to sanctions as provided under the United Nations Sanctions Ordinance (Cap. 537) with reference to Regulations made under section 3 of the Ordinance.

Regulations made under section 3 of the United Nations Sanctions Ordinance (Cap. 537) (From July 2004 to April 2007)

Regulation	**Date of gazettal**	**Date of receipt of instruction from the Ministry of Foreign Affairs**	**Resolution of the United Nations Security Council** ***[Date of expiry]***
1. United Nations Sanctions (Iraq) (Amendment) Regulation 2004	9 July 2004 (L.N. 132 of 2004)	May 2003	Resolution 1483 of 22 May 2003
2. United Nations Sanctions (Liberia) Regulation 2004	3 December 2004 (L.N. 198 of 2004)	July 2004	Resolution 1521 of 22 December 2003 *[21 December 2004]*
3. United Nations Sanctions (Democratic Republic of the Congo) Regulation	4 March 2005 (L.N. 27 of 2005)	August 2004	Resolution 1552 of 27 July 2004 *[31 July 2005]* and Resolution 1493 of 28 July 2003 *[27 July 2004]*
4. United Nations Sanctions (Sudan) Regulation	1 April 2005 (L.N. 45 of 2005)	August 2004	Resolution 1556 of 30 July 2004
5. United Nations Sanctions (Liberia) Regulation 2005	10 June 2005 (L.N. 94 of 2005)	July 2004 for Resolution 1532 and January 2005 for Resolution 1579	Resolution 1532 of 12 March 2004 and Resolution 1579 of 21 December 2004 *[Section 10 expired on 20 June 2005, sections 3, 4, 5, 6, 7, 11, 12, 13, 14, 15 and part 5 expired on 20 December 2005]*
6. United Nations Sanctions (Côte d'Ivoire) Regulation	8 July 2005 (L.N. 122 of 2005)	December 2004	Resolution 1572 of 15 November 2004 *[14 December 2005]*
7. United Nations Sanctions (Democratic Republic of the Congo) (Amendment) Regulation 2005	8 July 2005 (L.N. 123 of 2005)	May 2005	Resolution 1596 of 18 April 2005

Regulation	**Date of gazettal**	**Date of receipt of instruction from the Ministry of Foreign Affairs**	**Resolution of the United Nations Security Council *[Date of expiry]***
8. United Nations Sanctions (Sudan) (Amendment) Regulation 2005	8 July 2005 (L.N. 124 of 2005)	May 2005	Resolution 1591 of 29 March 2005
9. United Nations Sanctions (Democratic Republic of the Congo) Regulation 2005	28 October 2005 (L.N. 192 of 2005)	September 2005	Resolution 1616 of 29 July 2005 *[31 July 2006]*
10. United Nations Sanctions (Liberia) Regulation 2005 (Amendment) Regulation 2005	28 October 2005 (L.N. 193 of 2005)	September 2005	Resolution 1607 of 21 June 2005 *[20 December 2005]*
11. United Nations Sanctions (Liberia) Regulation 2005 (Amendment) Regulation 2006	17 March 2006 (L.N. 58 of 2006)	January 2006	Resolution 1647 of 20 December 2005 and resolution 1521 of 22 December 2003 *[Sections 10B and 11A of the United Nations Sanctions (Liberia) Regulation 2005 (Amendment) Regulation 2006 expire at midnight on 19 June 2006; and the following provisions expire at midnight on 19 December 2006 : the definitions of "commander", "Commissioner", "master", "operator", "owner", "person connected with Liberia" and "prohibited goods" in section 2; paragraphs (a) and (b) of the definition of "licence" in section 2; sections 3A,4A,5A,6A,7A,12A,13A, 14A and 15A; Part 5A; the Schedule]*

Regulation	**Date of gazettal**	**Date of receipt of instruction from the Ministry of Foreign Affairs**	**Resolution of the United Nations Security Council** ***[Date of expiry]***
12. United Nations Sanctions (Côte d'Ivoire) Regulation 2006	17 March 2006 (L.N. 59 of 2006)	January 2006	Resolution 1643 of 15 December 2005 and resolution 1572 of 15 November 2004 *[The definitions in section 2 of the Regulation, other than the definitions of "authorized officer", "Security Council" and "ship", sections 3,4,5,6,7,8,10 and 11, parts 3,4,and 5 and sections 36(2) and 37 expire at midnight on 15 December 2006]*
13. United Nations Sanctions (Liberia) Regulation 2005 (Amendment) (No.2) Regulation 2006	15 September 2006 (L.N. 188 of 2006)	July 2006	Resolution 1683 of 13 June 2006 and resolution 1689 of 20 June 2006 *[Section 10C of the Regulation expires on 19 December 2006]*
14. United Nations Sanctions (Democratic Republic of the Congo) Regulation 2006	17 November 2006 (L.N. 257 of 2006)	August 2006	Resolution 1698 of 31 July 2006 *[31 July 2007]*
15. United Nations Sanctions (Lebanon) Regulation	19 January 2007 (L.N. 8 of 2007)	August 2006	Resolution 1701 of 11 August 2006
16. United Nations Sanctions (Côte d'Ivoire) Regulation 2007	27 April 2007 (L.N. 64 of 2007)	March 2007	Resolution 1727 of 15 December 2006 *[31 October 2007]*
17. United Nations Sanctions (Côte d'Ivoire) Regulation 2006 (Repeal) Regulation	27 April 2007 (L.N. 65 of 2007)	--	--

Regulation	**Date of gazettal**	**Date of receipt of instruction from the Ministry of Foreign Affairs**	**Resolution of the United Nations Security Council *[Date of expiry]***
18. United Nations Sanctions (Liberia) Regulation 2005 (Amendment) Regulation 2007	27 April 2007 (L.N. 66 of 2007)	March 2007	Resolution 1731 of 20 December 2006 *[Section 10D of the United Nations Sanctions (Liberia) Regulation 2005 expires at midnight on 19 June 2007; and the following provisions expire at midnight on 19 December 2007 : the definitions of "arms and related material", "commander", "Commissioner", "master", "operator", "person connected with Liberia", "prohibited goods" and "Resolution 1731" in section 2; paragraphs (a) and (b) of the definition of "licence" in section 2; sections 3B, 5B, 7B, 12B, 13B, 14B and 15B; Part 5B]*

Council Business Division 1
Legislative Council Secretariat
3 May 2007

Appendix III

CB(1)1665/04-05(01)

Memorandum to the Subcommittee on UN Sanctions on The United Nations Sanctions Ordinance: the legislative process

The Background

1. The Subcommittee of the Legislative Council ('Subcommittee') has been considering for some time the method whereby effect is given to the sanctions required by resolutions of the Security Council of the United Nations. Security Council resolutions under Chapter 7 of the UN Charter (under which sanctions are imposed by the UN) are binding on all members of the UN. These members are required to give effect to the resolutions in their domestic law. During the colonial period such sanctions were imposed by an Order in Council issued under the United Nations Act, 1946. This procedure was reviewed by the Attorney General's Office as part of the adaptation of laws exercise before June 1997. No agreement was reached between the UK and the PRC on an Ordinance to replace the British arrangements. The matter was taken up by the HKSAR Administration and the LegCo immediately after the transfer of sovereignty and resulted in the enactment of the United Nations Sanctions Ordinance (Cap. 537) ('UNSO') on 16 July 1997.

2. Under the Basic Law, responsibility for foreign affairs is vested in the Central People's Government ('CPG') (BL13). However, this responsibility is not discharged directly by the CPG in the HKSAR. Instead the primary responsibility for the discharge of functions in relation to foreign affairs is placed on the Chief Executive, acting in accordance with instructions from the CPG (BL48(8) and (9)).

3. Laws that may be necessary to implement foreign affairs objectives in Hong Kong are not applied directly as part of national legislation, as is the case in most autonomous or federal systems. Only a few national laws apply (Annex III), but even they have to be enacted or promulgated locally. The general scheme of the Basic Law is that Mainland laws or valid instructions from the CPG that require legislation are to be integrated into Hong Kong's laws and legal system (so that, for example, any penalties for breach of the law would be determined by HKSAR courts and administered by the HKSAR administration) (BL18). The Basic Law therefore provides a somewhat complicated scheme for the management of foreign affairs that recognizes both the ultimate responsibility of the CPG and its administration by the HKSAR. So it is not surprising that confusion about limits of authority and jurisdiction can arise. A careful reading of the Basic Law and the principles underlying is required to clear this confusion. I make some attempt at this after setting out the problems identified by the Subcommittee.

UNSO

4. UNSO is brief. Its purpose is to 'provide for the imposition of sanctions against places outside the People's Republic of China arising from Chapter 7 of the Charter of the United Nations'. Resolutions of the UN and international sanctions are matters relating to foreign affairs, and fall within the authority of the CPG under the Basic Law (Article 13 (1)). The scheme of the Ordinance, which recognises the PRC's responsibility for foreign affairs, is as follows. When the Security Council makes a resolution regarding

sanctions, and calls on the PRC to apply those sanctions, the Ministry of Foreign Affairs of the PRC ('MFA') may issue instructions to the Chief Executive as to the implementation of the sanctions specified in the instructions ('relevant instructions'). Once the instructions have been received, the Chief Executive has to give effect to them by making regulations (s. 3(1)). Regulations may prescribe penalties for breach of the regulations, subject to maximum penalties specified in the Ordinance (s. 3(3)). The Chief Executive has authority to provide exclusions from the application of the regulations. The Ordinance disapplies Sections 34 and 35 of the Interpretations and General Clauses Ordinance (Cap. 1) to regulations made under the UNSO.

5. Sections 34 and 35 concern LegCo's role in respect of subsidiary legislation (an expression which would include regulations under an Ordinance). The general rule is stated in s. 34 that requires all subsidiary legislation to be placed before the LegCo, at its first sitting after the making of the regulations. The LegCo has authority to amend the subsidiary legislation by resolution within 28 days (without prejudice to anything that may have been done under the regulations). Section 35 deals with the situation where an Ordinance provides that subsidiary legislation is subject to LegCo's approval, so that it does not come into effect without that approval.

Concerns of the Subcommittee

6. In its paper to the House Committee 25 May 2004, the Subcommittee stated its views on the UNSO. It expressed members' concern 'that legal and constitutional problems may have arisen in these arrangements under the UNSO'. One set of concerns arises from the way the Ordinance has been used (summarized in section A, below), the other from the status of the instructions from the MFA (section B)..

A

(a) The Subcommittee is concerned that s. 34 of Cap. 1 has been disapplied so that the LegCo has no opportunity to scrutinize the regulations, to consider their validity, clarity, reasonableness, etc. The exclusion of the LegCo may be considered to encroach upon its primary responsibility for making laws for HKSAR and to violate the principle of the separation of powers.

(b) A second issue concerns the revocation of sanctions. Under the Ordinance revocation takes place only when another regulation is enacted (on instructions from the MFA). In some countries, they terminate automatically when the Security Council revokes them.

(c) Derogations from rights under the regulations go well beyond those permitted in some Ordinances (e.g., UN (Anti-Terrorism Measures) Ordinance, where powers of search and detention require a court order, but this is not so under UNSO).

(d) Regulations purport to have serious penal effect.

(e) Regulations 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 Customs officers.

(f) The Administration has by-passed the UNSO in at least one case. Sanctions have been implemented through the UNSO, other primary legislation and administratively, so that there is no consistent approach.

(g) There have been long delays between Security Council resolutions and the enactment of regulations.

(h) Some regulations have been ultra vires (those dealing with individuals and groups rather than with 'place', which seems to defines the scope of the UNSO).

B.
The concern about the status of the instructions, is that the LegCo is not allowed access to the instructions from the Ministry of Foreign Affairs to the Chief Executive (and accordingly the LegCo cannot verify that the regulations conform to the instructions, or that instructions have in fact been given). The exclusion of the LegCo from this important communication undermines its ability to supervise the administration in accordance with the Basic Law.

Response of the HKSAR Administration
7. The HKSAR Administration has responded to these concerns in the following manner.

A issues:
(i) The matter concerns foreign affairs which is the responsibility of the CPG and presumably not appropriate for discussion by the LegCo.

(ii) The CE is required to follow directives issued by the CPG (Art. 48(8)).

(iii) s. 28(1)(b) of Cap. 1 provides that no subsidiary legislation shall be inconsistent with the provisions of any Ordinance (so any such inconsistency could be challenged by an affected person)

(iii) Section 2(1) of Cap. 1 says that provisions of that Ordinance apply unless there is a contrary intention in the relevant Ordinance, so the exemption from s. 34 in UNSO is valid.

(iv) The argument of continuity—the Administration says that the Fugitive Offenders Ordinance (Cap. 503) has a similar exempting provision (s. 3(15)), which is pre-unification, therefore it is alright to have it in UNSO, since the purpose of the Basic Law is to maintain continuity.

(v) Security Council resolutions have to be implemented promptly (because the sanctions are time limited).

(vi) Regulations targeting individuals and groups are not *ultra vires* since the notion of 'place' covers persons residing there.

(vii) The consequences of the principle of separation of powers have to be examined in the context of a particular case; here the context indicates that the exclusion of the LegCo from the scrutiny of the regulations is justified.

B issue
(i) MFA instructions are intended for internal use only [what does that mean?]. 'We consider it inappropriate to release internal correspondence to persons outside the Administration. This is an established practice governing the handling of HKSARG's correspondence with CPG and all other governments' (letter dated 19 February 2004) to Clerk to the Subcommittee).

(ii) Non-disclosure is protected under the common law doctrine of public interest immunity. Moreover BL48(11) enables the CE to withhold evidence by public servants for specified reasons. The Administration says (as stated in the Subcommittee's paper to the House Committee), 'When BL48(11) is construed in the common law context, this provision would be wide enough to cover those documents that would be withheld from disclosure under the common law doctrine of public interest immunity'.

(iii) Administration has agreed to issue a certificate that it has received instructions in respect of a regulation.

(iv) Administration says that it has truthfully conveyed the contents of MFA's instructions (Donald Tsang's letter to Miriam Lau, Chair of the House Committee, dated 13 November 2003).

Principles of the Basic Law
8. I consider that the following principles of the Basic Law are essential to resolving the conflicting views of the LegCo and the Administration, and that the Administration has paid insufficient attention to them.

A *On separation of powers*:
The principle of the separation of powers is that the principal powers of the state (legislative, executive and judicial) should be separate and vested in different bodies. To an extent the separation of powers is a matter of degree (e.g., constitutions of several European civil law systems which are more committed to the separation of powers than England give limited powers of law making to the executive). Some constitutions also have mechanisms of mutual control or supervision—known as checks and balances, which do not affect the general principle of the separation of powers (as in the US). The degree of the separation of powers and its consequences can only be established by an examination of the provisions of the constitution. An examination of the Basic Law demonstrates that it is based on a separation of powers.

Article 2 recognizes the existence of three specific forms of power (executive, legislative and 'independent' judicial power). In the Chapter on Political Structure, a distinction is made between the Chief Executive, the Legislature and the Judiciary. Articles 16, 17, and 19 vest separately executive, legislative, and judicial powers in the HKSAR. Although, as is usual in most constitutional systems, there is interaction between the executive and the legislature, each has its own institutional autonomy.

The law making power
The power to make laws is granted under the Basic Law to the LegCo. BL17 gives legislative powers to the legislature of the HKSAR, but does not define the legislature, this is done by BL66 which makes the LegCo the legislature; BL73 (1) defines the legislative function of the LegCo as 'to enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures'. This provision can be read as 'vesting' the legislative function in the LegCo. The CE is not member of the legislature; ExCo is not drawn from nor sits in the legislature, although individual members may be.

The Basic Law gives no power to make laws to the Chief Executive, although it gives a considerable role to the CE in the legislative process (e.g., signing, veto, on bills, BL62(5); 'to draft and introduce bills, motions, and subordinate legislation'; priority is to be given to government bills by the President of the LegCo (BL72(2)); CE's permission is required for private members bills on public expenditure or political structure or the operation of the government; signing of Bills (BL48(3), 49-50, BL76).

Method for the application of national laws in the HKSAR
The only national laws to be applied in the HKSAR are listed in Annex III (BL18), and they apply as part of Hong Kong laws ('applied locally by way of promulgation or legislation by the Region') (the only exception is when the Mainland can apply a national law directly if there is a state of emergency beyond the control of the HKSAR (BL18(4)). Such laws can be reviewed in Hong Kong courts. This method is in sharp contrast to the application of national laws in autonomous areas/federation where laws are directly applicable. This different method is chosen for the HKSAR because the intention is to maintain the integrity and coherence of the Hong Kong legal system based on the common law The implication is that all the normal processes of law making must be adhered to, including that relating to subsidiary legislation (which would be covered in the BL under the term 'law'). I would argue that this task of integrating MFA instructions into the Hong Kong laws and legal system is particularly critical as the instructions (like the Security Council resolutions on which they are based) are presumably formulated in general terms, as objectives, but say little about the method of implementation, and that the implementation touches on fundamental rights.

LegCo scrutiny of subsidiary legislation
It follows from the preceding analysis that the Basic Law vests the LegCo, as the legislative arm of the HKSAR, with the authority and the responsibility to keep control over subsidiary legislation. It has plenary law making powers (73(1)); and the draft of subsidiary legislation has to be introduced to the LegCo (BL62(5)). *An Ordinance that takes away from the LegCo the ultimate control over the enactment of subsidiary*

legislation would therefore be unconstitutional. The LegCo has been given its legislative responsibilities by the NPC and it cannot divest itself of that power (‘*delegatus non potest delegare’*).

This conclusion is reinforced by considerations of the functions of legislature’s scrutiny of subsidiary legislation as well as specific provisions of the BL. As to the former, it is LegCo’s role to ensure that subsidiary legislation is consistent with the parent Ordinance, that it violates no provision of the Basic Law (BL11) (particularly those relating to the affairs within the responsibility of the Central Authorities, or the relationship between the Central Authorities and the HKSAR, BL17(2)), or the fundamental principles of the common law, and that it is clear and reasonable. The Administration seems to recognise that regulations can be *ultra vires* (and challengeable on this point in judicial review proceedings). It expects it can monitor conformity with the law exclusively by itself. But papers before the Subcommittee seem to indicate that it may not have been very successful. So LegCo’s scrutiny is necessary.

The LegCo may debate any issue concerning public interest (BL 73(6))—review of subsidiary legislation, especially if they deal with fundamental issues of human rights, and trade, is a way to discharge that function. It has the responsibility to raise questions on the work of the government BL73(5)—subsidiary legislation is, for the most part, the ‘work of the government’.

Conclusion

9. I conclude from the above discussion that:

(a) the principle of the separation of powers underlies the Basic Law;

(b) the power to scrutinize and if necessary, amend subsidiary legislation is vested in the LegCo.; and

(c) an Ordinance which takes away the power of the LegCo to vet or amend subsidiary legislation is void.

In view of the above conclusions, I turn to the issues that have been referred to me for my opinion by the Subcommittee.

10. It is my opinion that the exclusion by UNSO of sections 34 and 35 is unconstitutional (for reasons given above).

11. Even if the exclusion were not unconstitutional, it would seem desirable to provide for LegCo’s scrutiny. In normal circumstances, the regulations could be described as ‘draconian’ (one hesitates to use that expression only because the regulations seek to implement a Security Council resolution). As a reasonable institution, the LegCo would understand that it would be inappropriate to overturn the objectives of sanctions, but it is responsible to the people of Hong Kong to ensure that laws are not unduly unreasonable or oppressive, and whether objectives could be achieved in less drastic ways.

12. I also consider that UNSO might be deficient in another respect. It does not give the CE sufficient guidance on how the CE may exercise his or her powers under the Ordinance. It is, if I can put it this way, an absolute license to legislate once the conditions justifying the making of regulations are satisfied (i.e., instructions from the MFA following a Security Council Resolution on sanctions). The only restriction is on the maximum penalties that may be imposed for the breach of regulations. There is considerable case law (especially in jurisdictions with a constitution, unlike the UK) on the extent of delegation of law making powers. As a general rule, if the delegation is in very broad terms and without guidance on how the power is to be exercised, the delegation is unlawful. Courts have varied in the degree of tolerance in this regard. Since the Subcommittee has raised various queries about the Ordinance and the regulations (*ultra vires* matters, lack of legal safeguards, punitive nature of penalties, and a lack of legal policy about the implementation of sanctions), it would be advisable that the Administration in consultation with the Subcommittee should be asked to review the Ordinance with the a view to providing more guidance to the Administration. I do not make any recommendations on these changes as others in the Subcommittee and the Administrations are better qualified for this task.

13. The need for the review of UNSO and the regulations is reinforced by the consideration that the courts might rule some aspects of the regulations unconstitutional (I have not had time to study the regulations from this point of view). In countries with an enforceable Bill of Rights, courts are inclined to scrutinize regulations closely to protect rights. It would be unfortunate if judicial review of regulations were to appear as if the HKSAR courts are challenging the authority of the CPG.

14. It is pertinent to say something about the respective roles of the CPG and the HKSAR authorities, particularly the LegCo., in the implementation of UN sanctions. These roles are delineated by the Basic Law itself. The CPG (through the MFA) has the responsibility, under international law, for implementing UN resolutions. The actual implementation has been left to the HKSAR institutions, following MFA instructions to the CE. This seems also to be acknowledged in UNSO which refers to instructions 'to *implement* the sanctions' (s.2(2) (emphasis supplied). That there is this flexibility has also been acknowledged by the Administration which has said that some sanctions have been implemented purely by administrative means (as in the case of control against the entry of Angolans through directives to the Immigration Department) and some through specific primary legislation. And a clause excluding section 34 of Cap. 1 in International Organisations (Privileges and Immunities) Bill was dropped after objections in the Bills Committee. Moreover the UN (Anti-Terrorism Measures) Ordinance (Cap. 575), implementing UN resolutions, does not have a similar exclusionary clause. (So why is it necessary in UNSO?).

The instructions have not been released for public examination, so the point I am about to make cannot be verified. It is likely that the instructions are of a general nature, listing the objectives of the sanctions, and probably using the language of the Resolutions. It is evident from a perusal of the Resolutions that they state the objectives and scope of sanctions in a general way, leaving the modalities of implementation to the national

authorities. This is a sensible approach, as constitutional and legal frameworks for implementation vary from state to state. It therefore follows that very considerable discretion is given to the HKSAR authorities on the method of implementation, the restrictions that can lawfully be imposed on rights, the scale of penalties, powers of investigations, etc. Under the BL these matters cannot be left entirely to the Administration, with an ex post facto review by courts in case of a challenge. It is clearly in the interests of the Administration that these the LegCo participates in these decisions. Such participation in no way diminishes either the role or the authority of the CPG.

15. The argument of the Administration that because at least one pre-unification Ordinance (the Fugitive Offenders Ordinance) excluded s. 34 of Cap. 1, it is legal to do the same here, because the Basic Law was intended to ensure continuity. It is not possible to say in general terms what the intention of the Basic Law was. In some respects it certainly was continuity. In others it was change (as with political structures, commitment to universal franchise, changed relationships between Hong Kong and the 'sovereign'). The Administration's way of arguing is unsound and liable to lead to serious errors. These matters are best resolved by a close examination of the BL provisions.

16. Nor is the Administration's argument that section 34 of Cap. 1 has been excluded to ensure prompt implementation convincing. This argument might have some force if it referred to section 35 which requires the prior approval of the LegCo in respect of subsidiary legislation. It cannot have any relevance to a procedure which comes into force only after the coming into force of the regulations.

17. I now come to the question of the non-disclosure of the instructions from the MFA. In my opinion, the Administration has provided no convincing argument in favour of non-disclosure. It is not sufficient to say it is long established policy not to disclose such communication. It is highly doubtful whether the broad provisions of BL48(11) (which gives the CE authority '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 the Legislative Council or its committees') would pass the common law test for non-disclosure under public interest immunity. The Administration recognizes that the *ultra vires* principle applies to the regulations, and therefore that they are subject to judicial review. If in these proceedings the question of the nature of the instructions or their correct implementation arises, admissibility would be governed by the common law rules of public interest immunity.

Public interest immunity can be claimed by the government for the non-disclosure of documents which are confidential, on the grounds that disclosure would be 'injurious to the public interest'. It is important to be clear what the Administration is claiming in this case. It is saying that all communications between the CPG and the HKSAR CE are immune from disclosure under this rule. In other words, it is claiming a blanket immunity for a class of documents. The common law does not (except perhaps exceptionally) allow immunity for a class of documents. It is for the courts to decide whether in the particular case non-disclosure is justified. (*Conway v. Rimmer* [1968] AC 910; *Burmah Oil Company v. Bank of England* [1980] AC 1090. Whether the communications between

CPG and the CE would be granted on the grounds that disclosure would harm the public interest is hard to say in the absence of inspection of the communications. But *prima facie*, it is unlikely that the transmission of the UN Resolutions with a covering note will damage the public interest. Courts tend to lean in favour of disclosure when human rights are involved (*R. v. Davis [1993*] 2 All ER 643). It is of interest to note that in a recent case in Hong Kong, following British practice, the court allowed, with the consent of parties, the appointment of a 'special advocate' to inspect documents for which immunity was claimed (*PV v. Director of Immigration* HCAL 45/2004). It is usual for courts to inspect a document for which immunity is claimed.

18. Quite apart from this legal issue, it is desirable that communications between the CPG and the CE should be made public. These communications are not of a diplomatic, and therefore possibly, of a sensitive nature. They concern significant issues in Hong Kong's public law and have a major impact on the lives of the people. Principles of accountability which are emphasised in the BL, an understanding of the complexities of the relationship between the PRC and HKSAR, and public participation and debates will be enhanced by public knowledge of these communications.

19. For reasons which are obvious from this memorandum, I do not consider that a certificate from the CE that he has received instructions from the CFA and that the regulations are intended to implement them is sufficient substitute for the scrutiny by LegCo of the regulations.

Yash Ghai
Sir YK Pao Professor of Public Law
University of Hong Kong
12 May 2005

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CB(1)1934/04-05(01)

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

Comments on the Submission from Professor Yash Ghai on the United Nations Sanctions Ordinance (Cap 537) ("UNSO")

This note sets out the Administration's comments on the captioned submission, with specific reference to the fundamental question of whether the disapplication of ss 34 and 35 of the Interpretation and General Clauses Ordinance (Cap 1) in respect of regulations made by the Chief Executive ("CE") under the UNSO is constitutional under the Basic Law.

Conclusion of Professor Ghai's Submission

2. Professor Ghai has concluded in paragraphs 9 and 10 of his submission as follows:

> "[para 9] I conclude from the above discussion that:
> (a) the principle of the separation of powers underlies the Basic Law;
> (b) the power to scrutinize and if necessary, amend subsidiary legislation is vested in the LegCo; and
> (c) an Ordinance which takes away the power of the LegCo to vet or amend subsidiary legislation is void.
>
> In view of the above conclusions, I turn to the issues that have been referred to me for my opinion by the Subcommittee.
>
> [para 10] It is my opinion that the exclusion by UNSO of sections 34 and 35 is unconstitutional (for reasons given above).
>
> [para 11] Even if the exclusion were not unconstitutional, it would seem desirable to provide for LegCo's scrutiny. …
>
> [para 12] I also consider that UNSO might be deficient in another respect. It does not give the CE sufficient guidance on how the

CE may exercise his or her powers under the Ordinance. …"

Overview

3. The UNSO was enacted to provide for the imposition of sanctions against places outside the People's Republic of China ("PRC") arising from Chapter 7 of the Charter of the United Nations, and to provide for matters incidental thereto or connected therewith. Under section 3(1), CE is empowered and required to ("shall") make regulations for a specific purpose, namely giving effect to a relevant instruction given by the Ministry of Foreign Affairs ("MFA") to him to implement, cease implementing, modify etc certain mandatory sanctions decided by the Security Council of the United Nations ("UNSC"). Under section 3(5), these regulations are excluded from the Legislative Council ("LegCo")'s scrutiny of subordinate/subsidiary legislation ("sub-leg") provided for in ss 34 and 35 of Cap 1.

4. For the detailed reasons set out below, we consider that s 3(5) of the UNSO is not inconsistent with the Basic Law. In brief:-

(a) While there is division of powers and functions among various organs of the Hong Kong Special Administrative Region ("HKSAR") under the Basic Law, the Basic Law does not institute a rigid separation of powers.

(b) Therefore, while LegCo is entrusted with the power and function to enact laws, the Basic Law does not prohibit the delegation of law-making power/function to other bodies or persons to make sub-leg, which is clearly contemplated by BL 56(2), BL 62(5), BL 8 and BL 18.

(c) In line with the theme of continuity of the Basic Law and s 2(1) of Cap 1, LegCo may disapply s 34 (negative vetting procedure) and s 35 (positive vetting procedure) of Cap 1 in relation to sub-leg made by the CE under and in accordance with s 3 of the UNSO to give effect to the relevant directive of the Central People's Government ("CPG") and implement the relevant UNSC sanction.

(d) It is considered that sufficient guidance is laid down in the

UNSO as to how the CE may exercise his powers/functions under the UNSO.

5. In assessing the constitutionality of s 3(5) of the UNSO, it is important to have regard to the relevant constitutional and statutory context.

Division of powers and functions under the Basic Law

6. Firstly, while there is a division of powers and functions among various organs of the HKSAR under the Basic Law, the Basic Law does not institute a rigid separation of powers.

7. As explained in the Administration's paper dated 19 February 2004 to the LegCo Subcommittee on United Nations Sanctions (Liberia) Regulation 2003, the Basic Law does not embody a strict doctrine of separation of powers. In *Lau Kwok Fai Bernard v Secretary for Justice*, HCAL Nos. 177 of 2002 and 180 of 2002, Hartmann J further considered the principle of separation of powers in the Basic Law. He, at para 20, expressed agreement to Professor Wade's observation in his work *Administrative Law* (7th ed, 1994), at p 860 that there was an infinite series of graduations, with a large area of overlap, between what was plainly legislation and what was plainly administration. He considered that the same must apply when looking to the relationship between what was plainly the function of the judiciary contrasted with the function of the legislature and the administration. At para 23, he said:

> "While … I accept that the Basic Law incorporates the principle of separation of powers (subject of course to the meaning and purpose of specific articles which may act to modify that principle), it is apparent that whether the [Public Officers Pay Adjustment] Ordinance, in respect of any individual article or in respect of the Basic Law generally, offends that Law is a matter which may only be determined by looking at the Ordinance 'in context'. As the Privy Council said in … [*Liyanage v R* [1967] 1 AC 259]: each case must be decided in the light of its own facts and circumstances, including the *true purpose of the legislation*

and the situation to which it is directed." (emphasis original)

8. While Professor Ghai has taken the view that the Basic Law is based on a separation of powers, he has pointed out as part of his argument that the separation of powers is "a matter of degree" (para 8 at p 4).

9. The Basic Law provides for division of powers and functions among various organs of the HKSAR (see Chapter IV of the Basic Law which prescribes, inter alia, the powers and functions of the CE, the executive authorities, the legislature, the judiciary etc). However, the Basic Law does not follow a rigid separation of powers. For example, the delegation of law-making power/function to other bodies/persons by LegCo is clearly contemplated in the Basic Law. BL 56(2) provides for the making of subordinate legislation by CE in consultation with the Executive Council. BL 62(5) entrusts the HKSAR Government ("HKSARG") with various powers/functions, including "[t]o draft and introduce bills, motions and subordinate legislation". In addition, BL 8 and BL 18 maintain subordinate legislation as a source of law of the HKSAR.

10. The absence of a rigid separation of powers under the Basic Law is consistent with the theme of continuity under the Basic Law. Before the reunification, neither the British nor the Hong Kong systems were based on a rigid separation of powers. The introduction of such a rigid system would radically change many established features of our political and legal system, and there is no indication that this was the intention. If a rigid system of separation were adopted by the Basic Law, it would mean that even legislative amendments by way of a LegCo resolution would be unconstitutional (See Wesley-Smith, "The Separation of Powers" in Wesley-Smith (ed) *Hong Kong's Basic Law - Problems & Prospects* (1990), p 75 where it is argued, on the assumption that a rigid separation of powers were provided for in the Basic Law, that "[w]hile delegation of legislative authority to the executive branch is permissible, provided a genuine limitation is imposed by the statute, ordinances empowering the Legislative Council to act by resolution may well conflict with the Basic Law".) Such a radical position could not have

been the intention of the Basic Law which, contrary to Professor's Ghai's view (para 15 of the Submission), carries the overwhelming theme of seamless transition and continuity. See the Court of Appeal decision in *HKSAR v David Ma* [1997] HKLRD 761 which is summarised below:

> "Ma Wai Kwan, David and the others ("Defendants") argued, among other things, that the common law had not survived the Reunification and therefore prosecutions brought against them before the Reunification for a common law offence were no longer valid, since under the Basic Law it was necessary to have a positive act of adoption (which was missing as contended by the Defendants) before laws previously in force in Hong Kong became laws of the HKSAR. They also challenged the legality of the Provisional Legislative Council ("PLC") and the Hong Kong Reunification Ordinance ("Reunification Ordinance") passed by it to preserve the continuity of prosecutions.
>
> The Court of Appeal held that the common law had survived the Reunification. Continuity after the Reunification was of vital importance. Both the Joint Declaration and the Basic Law carried the overwhelming theme of a seamless transition. The effect of BL 8 was that the common law continued and that it did so under BL 8 and 18 (rather than BL 160). BL 160, whether construed by itself or in conjunction with BL 8, 18, 19, 81 and 87, did not have the effect of requiring the laws previously in force to be formally adopted in order to be effective after 30 June 1997. The use of the word "shall" in these articles could only be used in the mandatory and declaratory sense, otherwise anomalous results would occur.
>
> The indictments against the Defendants survived the Reunification and the pending proceedings continued. In the light of the predominant theme of a seamless transition, the expression "documents", "rights" and "obligations" under BL 160(2) covered indictments, the right of the Government to prosecute offenders and the obligation of an accused to answer to the allegations made against him respectively. The HKSAR courts stood established by the imperative words of BL 81(1). By virtue of BL 8, 18, 19, 81(2) and 87, the legal and judicial systems continued after the Reunification."

Delegation of Legislative Powers/Functions and LegCo's Scrutiny of Subsidiary Legislation

11. In the light of the above, it is considered that while LegCo is entrusted with the power and function to enact laws, in line with the theme of continuity, the Basic Law does not prohibit the delegation of law-making power/function to other bodies or persons to make sub-leg, which is clearly contemplated by BL 56(2), BL 62(5), BL 8 and BL 18.

12. In this regard, Professor Ghai has argued (under para 8, at bottom of p 5 and top of p 6 of the submission) that "[a]n Ordinance which takes away from LegCo the ultimate control over the enactment of subsidiary legislation would therefore be unconstitutional. The LegCo has been given its legislative responsibilities by the NPC and it cannot divest itself of that power ('*delegatus non potest delegare*')." Reading this argument in the light of para 9 of his submission (set out in para 2 above), Professor Ghai does not appear to rely literally on the principle of '*delegatus non potest delegare*' [a delegate cannot delegate – ie "a person to whom powers have been delegated cannot delegate them to another" – see *Osborn's Concise Law Dictionary* (9th ed, 2001) p 129)]. There was no doubt that, under the former system, the pre-1997 legislature (although itself a delegate) could authorize others to make delegated legislation (see the Privy Council decision in *Hodge v The Queen* (1883) 9 App Cas 117 as discussed in Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (2nd ed, 1994) p 188). There is similarly no doubt that the Basic Law envisages that subordinate legislation will be made (see BL56(2) and BL 62(5) cited above).

13. It appears that Professor Ghai's focus is on the disapplication of the negative vetting procedure under section 34 of Cap 1 to sub-leg. However, the provisions in Cap 1, including sections 34 and 35, apply unless a contrary intention is discerned in an Ordinance (section 2(1)). In other words, the LegCo may, if it sees fit, exclude certain delegated legislation from its scrutiny under sections 34 and 35. This exclusionary power predated 1 July 1997, and its continuation or exercise of it after that date is unlikely to be inconsistent with the constitutional order

provided for in the Basic Law, a central feature of which is the theme of continuity. For example, section 3(15) of the Fugitive Offenders Ordinance (Cap 503) has an exclusionary provision similar to section 3(5) of Cap 537. The above provision predated the reunification.

14. Similarly, it has been held by the court in *English Schools Foundation v Bird* [1997] 3 HKC 434 that regulations made under s 10 of the English Schools Foundation Ordinance (Cap 1117) are subsidiary legislation despite a provision to the effect that it is not necessary to publish them or lay them on the table of the LegCo. (The issue was discussed in the context of Government's policy on subsidiary legislation by the LegCo Panel on Administration of Justice and Legal Services on 24 January 2005.)

15. It is also relevant to note that under the UK Parliamentary system, it is common practice for subsidiary legislation to remain entirely unvetted by Parliament. See *Griffith & Ryle on Parliament* (2nd ed, 2003), paras 6 – 162 & 3:

> "Under the Statutory Instruments Act 1946, the great majority of (these) forms of delegated legislation are defined as statutory instruments….. The parent Act defines the way, and by whom, a statutory instrument may be made and the nature of parliamentary control, if any, to which it is subject.
>
> *Some statutory instruments…. are not laid before Parliament at all; some are not even printed.* Other less important instruments are laid before Parliament, *but are not subject to any parliamentary proceedings*….." (emphasis added)

16. Professor Ghai's reference (para 8, top of p 6 of his submission) to LegCo's role in checking the vires of sub-leg does not detract from the above position. This is one of its functions when it does vet sub-leg, but that does not mean that it may not give up the task of vetting it in the light of s 2(1) of Cap 1.

17. Professor Ghai's reference (para 8, top of p 6) to LegCo's constitutional powers/functions under BL 73(6) and (5) also does not

detract from the Administration's position in respect of the UNSO. LegCo can continue to raise questions on, or debate, UNSO sub-leg even if it has no power to vet it.

18. Another provision relied on by Professor Ghai is BL 62(5) (para 8, bottom of p 5). According to Professor Ghai, "the draft of subsidiary legislation has to be introduced to the LegCo (BL 62(5))". However, BL 62(5) does not say that it requires the draft of sub-leg to be introduced to LegCo. BL 62 relates to the powers and functions of the HKSARG, one of which is "[t]o draft and introduce bills, motions and subordinate legislation". There is no reason to read into this provision a requirement that all sub-leg must be introduced into LegCo. In the light of the theme of continuity of the Basic Law and s 2(1) of Cap 1, BL 62(5) could and should be read as providing that, where sub-leg needs to be introduced into LegCo, the HKSARG may/shall do so.

19. In passing, it is noted that Professor Yash Ghai (para 8, middle of p 5 of the submission) has made the following remark: "**CE's permission is required** for private members bills on public expenditure or political structure or the operation of the government" (emphasis added). To clarify, BL 74 provides that "[m]embers of the LegCo of the HKSAR may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council". The constitutional prohibition against members' introduction of bills relating to "public expenditure, political structure or the operation of the government" reflects the constitutional principle of executive-led government in the Basic Law (See Mr Li Fei's "Explanatory Note on the Draft Interpretation by the NPSCS of Article 7 of Annex I and Article III of Annex II to the Basic law of the HKSAR of the PRC" delivered to the NPCSC on 2 April 2004: "In the political structure established by the Hong Kong Basic Law, the HKSAR is executive-led. The CE is the head of the HKSAR. He represents the HKSAR and is accountable to the CPG and the HKSAR. At the same time, Article 74 of the Hong Kong Basic Law also provides that 'members of the LegCo of the HKSAR may introduce bills in accordance with the provisions of this Law and legal procedures. Bills

which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council' …").

20. In addition to the principle of executive-led government, the following aspects are also relevant when the captioned matter is considered in its constitutional and statutory context:

(a) Section 28(1)(b) of Cap 1 provides that no subsidiary legislation shall be inconsistent with the provisions of any Ordinance.

(b) The delegation of law-making power by LegCo is not without constitutional limits. Under the doctrine of effacement applicable LegCo before the Reunification, as pointed out in Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (2nd ed, 1994), pp 204-5, "while the legislature of Hong Kong may freely delegate its legislative powers, the delegation must not be total or complete. The legislature may not abolish or extinguish or 'efface' itself. To do so would be to amend or conflict with the Letters Patent, which deposit legislative authority in the Governor as advised by LegCo. A delegate must always remain under the control of the legislature, and its powers must always remain less than the legislature's powers (or so it seems from the strong hint given by the Judicial Committee in [*Re the Initiative and Referendum Act* [1919] AC 935, at 945]: 'it does not follow that [the Manitoba legislature] can create and endow with its own capacity a legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise'). The constitutional limit imposed by the doctrine of effacement is likely to be applicable to LegCo under the Basic Law given its theme of continuity and the authorisation by the National People's Congress to the HKSAR to exercise, inter alia, legislative power (BL 2 and BL 17).

(c) The relevant instructions given by the MFA fall within the scope of "directives issued by the Central People's Government" under BL 48(8), which CE has a power and function to implement. The above instructions clearly concern foreign affairs relating to the HKSAR, for which the CPG is responsible under BL 13(1). In the case of sub-leg implementing MFA directions in respect of foreign affairs, it must be lawful and constitutional for LegCo to authorize the HKSARG to make the sub-leg without any vetting requirement. This reflects the fact that, although legislative authority derives from LegCo, the subject matter is outside the high degree of autonomy conferred on the HKSAR.

Guidance

21. Professor Ghai (para 12 of his submission) states that the UNSO might be deficient because section 3 confers on CE too general the power to make regulations for giving effect to MFA's instructions: "As a general rule, if the delegation is in very broad terms and without guidance on how the power is to be exercised, the delegation is unlawful."

22. We do not agree that the UNSO is deficient in the above respect, since sufficient parameters have been laid down in that ordinance to enable CE to exercise his power/function of making regulation under section 3(1). The exercise of such a power/function is limited by the terms of an MFA's instruction which is made to adopt UNSC resolutions about imposing sanctions against any places outside PRC (see s 2(2) read with s 3(1)). The maximum penalties that may be imposed for contravention or breach of the regulations are also prescribed (see s 3(3)).

Desirability

23. One of the HKSARG's arguments in favour of the current arrangement is that it ensures prompt implementation. In paragraph 16 of his submission, Professor Ghai rejects this on the basis that negative vetting takes place only after the coming into force of the regulations. This overlooks the standing arrangement, requested by LegCo, that

sub-leg should not come into operation until after the negative vetting period has expired. Even if it is suggested that the standing arrangement with LegCo should be disapplied in case the negative vetting procedure is applied to the UNSO, it is considered that the current arrangement under the UNSO should be maintained for the reasons set out above.

Conclusion

24. In line with the theme of continuity in the Basic Law and s 2(1) of Cap 1, it is considered that LegCo may disapply s 34 (negative vetting procedure) and s 35 (positive vetting procedure) of Cap 1 in relation to sub-leg made by the CE under and in accordance with s 3 of the UNSO to give effect to the relevant CPG directive and implement the relevant UN sanction. In short, it is considered that the current arrangement under UNSO is consistent with the Basic Law and should be maintained.

21 June 2005

立法會
Legislative Council

LC Paper No. LS36/03-04

Paper for the Subcommittee on
United Nations Sanctions (Liberia) Regulation 2003

Implementation of resolutions of the Security Council of the United Nations in relation to sanctions in Hong Kong

Background

At the Subcommittee meeting on 11 December 2003, members asked the Legislative Council Secretariat to research on how resolutions of the Security Council of the United Nations in relation to sanctions (U.N. resolutions) had been implemented in Hong Kong prior to 1997 so as to facilitate discussion on the implementation of such resolutions under the United Nations Sanctions Ordinance (Cap. 537) ("the Ordinance").

Orders in Council prior to 1 July 1997

2. The United Nations Act 1946 of the United Kingdom provides that if the Security Council of the United Nations has called upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, "His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied". These Orders in Council may extend to any part of His Majesty's dominions and to any other territory under His jurisdiction. A copy of the Act is enclosed at **Annex A**.

3. From 1990 to 30 June 1997, more than 20 such Orders in Council were made and extended to Hong Kong. A list of these Orders in Council is enclosed at **Annex B**. An example of one of these Orders, i.e. The United Nations Arms Embargoes (Dependent Territories) Order 1995 (L.N. 249 of 1995), which is an Order to give effect to decisions of the Security Council in relation to Liberia, Somalia, the former Yugoslavia and Rwanda is enclosed at **Annex C**. The Order was made by Her Majesty in Council on 11 April 1995. It was laid before Parliament on 25 April 1995 and came into force on 16 May 1995. The relevant Order was published in the Hong Kong Gazette on 16 June 1995.

4. As to how U.N. resolutions were implemented in Hong Kong before 1 July 1997, Members may refer to the letter from the Administration to the Clerk to this Subcommittee dated 9 January 2004 (LC Paper No. CB(2)966/03-04(01)). According to the Administration, after the Foreign and Commonwealth Office of the United Kingdom Government had prepared the final draft Order in Council, the Hong Kong Government would publish the Order in the Gazette and issue a press release to announce the implementation of sanctions.

5. All such Orders in Council as applicable to Hong Kong lapsed at midnight on 30 June 1997.

Regulations under the United Nations Sanctions Ordinance from 1 July 1997

6. To avoid the legal vacuum arising from the lapse of the Orders in Council, the Ordinance was urgently passed on 16 July 1997 by the Legislative Council and came into effect on 18 July 1997 (see **Annex D**). Regulations made by the Chief Executive on the instruction of the Ministry of Foreign Affairs of the People's Republic of China ("MFA of PRC") to continue implementing United Nations sanctions against Iraq, Libya, Liberia, Somalia, Rwanda and Angola in Hong Kong were published in the Gazette (L.N. 419 - 424 of 1997) and came into effect on 22 August 1997. A list of Regulations made after 1 July 1997 up to the present is enclosed at **Annex E**. For ease of comparison, the United Nations Sanctions (Arms Embargoes) Regulation (L.N. 423 of 1997) is enclosed at **Annex F**.

Observations

7. On reviewing the Orders in Council, the regulations made under the Ordinance and other related legislation, it is observed that :

(a) Prior to 1 July 1997, the text of a relevant Order in Council was prepared in the United Kingdom. Hong Kong was required to publish the Order in the Gazette. After 1 July 1997, the regulation concerned is made by the Chief Executive to give effect to a relevant instruction from the MFA of PRC. The text is prepared in Hong Kong.

(b) The U.K. Act does not specify that measures are to be implemented against a "place". The Ordinance stipulates that sanctions are to be imposed against a "place" outside the People's Republic of China. It has been pointed out in the report of the Subcommittee on United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002 that the amending regulation may not be within the scope of the Ordinance.

(c) Under section 1(4) of the U.K. Act, an Order in Council made under the Act will have to be laid before Parliament before its coming into force. Whereas in Hong Kong, 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 made by the Chief Executive under the Ordinance. The regulations are therefore not required to be laid on the table of the Legislative Council.

(d) Clause 3(2) of the International Organizations (Privileges and Immunities) Bill stated that section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) shall not apply to an Order made by the Chief Executive in Council. After members of that Bills Committee had expressed concern that it would deprive LegCo of the right to scrutinize such order as subsidiary legislation, the Administration deleted that clause during Committee Stage.

(e) Prior to 1 July 1997, Orders in Council giving effect to U. N. sanctions were made quite promptly. In paragraph (c) of the letter to the Chairman of the House Committee dated 13 November 2003 (see CB(2)338/03-04 issued on 14 November 2003 by the Clerk to the House Committee), the Chief Secretary for Administration stated that the U. N. resolutions are "time-limited".

Nonetheless, there is usually a long time gap before a regulation is made in Hong Kong. For instance, the U.N. Resolution 1343 (2001) against Liberia was adopted by the Security Council on 7 March 2001. The United Nations Sanctions (Liberia) Regulation 2001 (L.N. 280 of 2001) was enacted in Hong Kong on 14 December 2001 and expired on 5 May 2002. Another U.N. Resolution 1408 to extend the duration of sanctions for a further period of 12 months against Liberia was adopted by the Security Council on 6 May 2002. "The HKSARG was instructed in May by the MFA of PRC to give effect to Resolution 1408 in the HKSAR" (see the paragraph under the heading - UN Security Council 1408 in the Administration's letter to the Assistant Legal Adviser of the Legal Service Division dated 8 October 2002 enclosed at **Annex G**). The United Nations Sanctions (Liberia) Regulation 2002 (L.N. 141 of 2002) was not enacted in Hong Kong until 4 October 2002. On 6 May 2003, the Security Council adopted Resolution 1478, which extended the duration of sanctions against Liberia for another 12 months. Again, the United Nations Sanctions (Liberia) Regulation 2003 (L.N. 245 of 2003) was not enacted in Hong Kong until some time later, i.e. on 7 November 2003. As a result, there have been long time gaps when the relevant sanctions were not implemented by local legislation.

(f) In comparing **Annex C** with **Annex F,** which give effect pre-1997 and post-1997 to the same U. N. resolutions on arms embargoes, they are substantially similar to each other except that:

(i) there are a preamble and a Schedule 1 to the Order in Council;

(ii) terms such as the Governor, the British citizen, Her Majesty's Government in the United Kingdom which appear in the Order in Council have been adapted in the Regulation; and

(iii) definitions on "authorized officer", "customs officer" have been added to the interpretation section in the Regulation.

(g) The text of the 2001 Liberia Regulation is modelled largely on the 1995 Order in Council on arms embargoes. But some changes are introduced in the 2002 and 2003 United Nations Sanctions (Liberia) Regulations. For example, the 2003 Regulation is now divided into different Parts. Sections 3, 4, 5, 16, 17, 22 and 30 of the Regulation are sections not found in the U.K. Order in Council. Most of these sections relate to the exercise of the Chief Executive's powers such as in granting licences, or in authorizing persons to be authorized officers.

(h) In the Regulations made under the Ordinance, law enforcement agencies are empowered to request any person to furnish information or produce materials, or to seize property in the absence of a court order. This differs from the enabling powers stipulated in the Organized and Serious Crimes Ordinance (Cap. 455), Dangerous Drugs Ordinance (Cap. 134) and Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 whereby court orders are required.

Encl.

Prepared by
Legal Service Division
Legislative Council Secretariat
12 January 2004

Annex A

UNITED NATIONS ACT 1946

(9 & 10 Geo 6 c 45)

An Act to enable effect to be given to certain provisions of the Charter of the United Nations [15 April 1946]

Northern Ireland This Act applies.

1 Measures under Article 41

(1) If, under Article forty-one of the Charter of the United Nations signed at San Francisco on the twenty-sixth day of June, nineteen hundred and forty-five, (being the Article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order.

(2) Orders in Council made under this section may be so made as to extend to any part of His Majesty's dominions (other than Dominions within the meaning of the Statute of Westminster 1931 territories administered by the Government of any such Dominion, . . . , . . .) and, to the extent that His Majesty has jurisdiction therein, to any other territory in which His Majesty has from time to time jurisdiction (other than territories which are being administered by the Government of such a Dominion as aforesaid, . . .).

(3) Any Order in Council made under this section may be varied or revoked by a subsequent Order in Council.

(4) Every Order in Council made under this section shall [forthwith after it is made be laid—.

(a) before Parliament; and

(b) if any provision made by the Order would, if it were included in an Act of the Scottish Parliament, be within the legislative competence of that Parliament, before that Parliament] . . .

(5) Any expenses incurred by His Majesty's Government in the United Kingdom in applying any such measures as are mentioned in this section shall be defrayed out of moneys provided by Parliament.

2 Short title

This Act may be cited as the United Nations Act 1946.

Annex B

Before 1.7.1997

Item	Legal Notice No.	Orders in Council	Date of Gazette
1.	281 of 1990	The Iraq and Kuwait (United Nations Sanctions)(Dependent Territories) Order 1990	28.8.1990
2.	282 of 1990	The Iraq and Kuwait (United Nations Sanctions) Order 1990	28.8.1990
3.	120 of 1992	The Libya (United Nations Prohibition of Flights)(Dependent Territories) Order 1992	1.5.1992
4.	121 of 1992	The Libya (United Nations Sanctions)(Dependent Territories) Order 1992	1.5.1992
5.	208 of 1992	The Serbia and Montenegro (United Nations Prohibition of Flights)(Dependent Territories) Order 1992	26.6.1992
6.	209 of 1992	The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1992	26.6.1992
7.	168 of 1993	The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1993	21.5.1993
8.	186 of 1993	The Iraq (United Nations)(Sequestration of Assets)(Dependent Territories) Order 1993	28.5.1993
9.	322 of 1993	The Haiti (United Nations Sanctions)(Dependent Territories) Order 1993	6.8.1993
10.	391 of 1993	The Angola (United Nations Sanctions)(Dependent Territories) Order 1993	8.10.1993
11.	462 of 1993	The Libya (United Nations Sanctions)(Dependent Territories) Order 1993	3.12.1993
12.	404 of 1994	The Haiti (United Nations Sanctions)(Dependent Territories) Order 1994	1.7.1994
13.	432 of 1994	The South Africa (United Nations Arms Embargo)(Prohibited Transactions) Revocations Order 1994	15.7.1994
14.	550 of 1994	The Haiti (United Nations Sanctions)(Dependent Territories) Order 1994 (S.I.1994/1324)	21.10.1994
15.	574 of 1994	The Former Yugoslavia (United Nations Sanctions)(Dependent Territories) Order 1994	4.11.1994

Item	Legal Notice No.	Orders in Council	Date of Gazette
16.	575 of 1994	The Serbia and Montenegro (United Nations Prohibition of Flights)(Dependent Territories) Order 1992 (L.N.208 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1992 (L.N.209 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1993 (L.N.168 of 1993) —— (Suspension) Order 1994	4.11.1994
17.	29 of 1995	The Serbia and Montenegro (United Nations Prohibition of Flights)(Dependent Territories) Order 1992 (L.N.208 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1992 (L.N.209 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1993 (L.N.168 of 1993) —— (Suspension) Order 1995	27.1.1995
18.	183 of 1995	The Serbia and Montenegro (United Nations Prohibition of Flights)(Dependent Territories) Order 1992 (L.N.208 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1992 (L.N.209 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1993 (L.N.168 of 1993) —— (Suspension)(No.2) Notice 1995	19.5.1995
19.	249 of 1995	The United Nations Arms Embargoes (Dependent Territories) Order 1995	16.6.1995
20.	446 of 1995	The Serbia and Montenegro (United Nations Prohibition of Flights)(Dependent Territories) Order 1992 (L.N.208 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1992 (L.N.209 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1993 (L.N.168 of 1993) —— (Suspension)(No.3) Notice 1995	29.9.1995
21.	22 of 1996	The Serbia and Montenegro (United Nations Prohibition of Flights)(Dependent Territories) Order 1992 (L.N.208 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1992 (L.N.209 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1993 (L.N.168 of 1993);The Former Yugoslavia (United Nations Sanctions) (Dependent Territories) Order 1994 (L.N.574 of 1994) —— (Suspension) Notice 1996	5.1.1996
22.	138 of 1996	The Serbia and Montenegro (United Nations Prohibition of Flights)(Dependent Territories) Order 1992 (L.N.208 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1992 (L.N.209 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1993 (L.N.168 of 1993);The Former Yugoslavia (United Nations Sanctions) (Dependent Territories) Order 1994 (L.N.574 of 1994) —— (Suspension)(No.2) Notice 1996	15.3.1996
23.	451 of 1996	The Serbia and Montenegro (United Nations Prohibition of Flights)(Dependent Territories) Order 1992 (L.N.208 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1992 (L.N.209 of 1992); The Serbia and Montenegro (United Nations Sanctions)(Dependent Territories) Order 1993 (L.N.168 of 1993);The Former Yugoslavia (United Nations Sanctions) (Dependent Territories) Order 1994 (L.N.574 of 1994) —— (Cancellation) Notice 1996	25.10.1996

L.N. 249 of 1995

The following Order is published for general information—

1995 No. 1032

UNITED NATIONS

THE UNITED NATIONS ARMS EMBARGOES (DEPENDENT TERRITORIES) ORDER 1995

Made - - - - - - - -	*11th April 1995*
Laid before Parliament - - - -	*25th April 1995*
Coming into force - - - - - -	*16th May 1995*

At the Court at Windsor Castle, the 11th day of April 1995

Present,

The Queen's Most Excellent Majesty in Council

Whereas under Article 41 of the Charter of the United Nations the Security Council of the United Nations has, by certain resolutions adopted on 25th September 1991, 23rd January 1992, 19th November 1992 and 17th May 1994, called upon Her Majesty's Government in the United Kingdom and all other States to apply certain measures to give effect to decisions of that Council in relation to Liberia, Somalia, the former Yugoslavia and Rwanda:

Now, therefore, Her Majesty, in exercise of the powers conferred on Her by section 1 of the United Nations Act 1946(a), is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:

1. Citation, commencement and extent

(1) This Order may be cited as the United Nations Arms Embargoes (Dependent Territories) Order 1995 and shall come into force on 16th May 1995.

(2) If, after the making of this Order, the Security Council of the United Nations takes a decision which has the effect of cancelling or suspending in whole or in part the operation of any of the resolutions adopted by it on 25th September 1991, 23rd January 1992, 19th November 1992 or 17th May 1994,

(a) 1946 c. 45.

this Order shall cease to have effect or its operation shall be suspended, as the case may be, in accordance with that decision; and particulars of that decision shall be published by the Governor in a notice in the Gazette.

(3) (*a*) This Order shall extend, as part of the law thereof, to each of the territories listed in Schedule 1 to this Order.

(*b*) In this application of this Order to any of the said territories the expression "the Territory" in this Order means that territory.

2. Interpretation

In this Order the following expressions have the meanings hereby respectively assigned to them, that is to say—

"commander", in relation to an aircraft, means the member of the flight crew designated as commander of the aircraft by the operator thereof, or, failing such a person, the person who is for the time being in charge or command of the aircraft;

"export" includes shipment as stores and, in relation to any vessel, submersible vehicle or aircraft, includes the taking out of the Territory of the vessel, submersible vehicle or aircraft notwithstanding that it is conveying goods or passengers and whether or not it is moving under its own power; and cognate expressions shall be construed accordingly;

"the former Yugoslavia" means all territories which Her Majesty's Government in the United Kingdom recognise as having been comprised within the Socialist Federal Republic of Yugoslavia on 25th September 1991, and a certificate issued by or on behalf of the Governor shall be conclusive evidence as to whether any territory was so comprised on that date;

"Gazette" means the official Gazette of the Territory;

"Governor" means the Governor or other officer administering the Government of the Territory;

"master", in relation to a ship, includes any person (other than a pilot) for the time being in charge of the ship;

"operator", in relation to an aircraft or vehicle, means the person for the time being having the management of the aircraft or vehicle;

"owner", where the owner of a ship is not the operator, means the operator and any person to whom it is chartered;

"person connected with a prohibited destination" means—

(i) the Government of any territory comprised within a prohibited destination;

(ii) any other person in, or resident in, a prohibited destination;

(iii) any body incorporated or constituted under the law of any part of a prohibited destination;

(iv) any body, wherever incorporated or constituted, which is controlled by the Government of any territory comprised within a

prohibited destination, any other person in, or resident in, a prohibited destination, or any body incorporated in or constituted under the law of any part of a prohibited destination; and

(v) any person acting on behalf of any of the above mentioned persons;

"prohibited destination" means Liberia, Somalia, the former Yugoslavia or Rwanda;

"ship" has the meaning it bears in section 742 of the Merchant Shipping Act 1894(a);

"shipment" includes loading into an aircraft.

3. Deliveries and supplies of certain goods to a prohibited destination

(1) Except under the authority of a licence granted by the Governor under this article, the Serbia and Montenegro (United Nations Sanctions) (Dependent Territories) Order 1992(b), the Serbia and Montenegro (United Nations Sanctions) (Dependent Territories) Order 1993(c) or the Former Yugoslavia (United Nations Sanctions) (Dependent Territories) Order 1994(d), no person shall

(*a*) supply or deliver;

(*b*) agree to supply or deliver; or

(*c*) do any act likely to promote the supply or delivery of,

any goods specified in Schedule 2 to this Order to a prohibited destination, or to, or to the order of, a person connected with a prohibited destination, or to any destination for the purpose of delivery, directly or indirectly, to a prohibited destination or to, or to the order of, any person connected with a prohibited destination.

(2) The provisions of this article shall apply to any person within the Territory and to any person elsewhere who—

(*a*) is a British citizen, a British Dependent Territories citizen, a British Overseas citizen, a British subject or a British protected person, and is ordinarily resident in the Territory;

(*b*) is a body incorporated or constituted under the law of the Territory.

(3) Subject to the provisions of paragraph (4) of this article, any person specified in paragraph (2) of this article who contravenes the provisions of paragraph (1) of this article shall be guilty of an offence under this Order.

(a) 1894 c. 60.
(b) S.I. 1992/1303.
(c) S.I. 1993/1195.
(d) S.I. 1994/2674.

(4) In the case of proceedings for an offence in contravention of paragraph (1) of this article it shall be a defence for the accused person to prove, (i) that he did not know and had no reason to suppose that the goods in question were prohibited goods, or (ii) that he did not know and had no reason to suppose that the goods were to be delivered or supplied to a prohibited destination or to, or to the order of, a person connected with a prohibited destination.

(5) Paragraph (1) of this article shall not apply to goods delivered or supplied to a prohibited destination by or on behalf of the United Nations, the United Nations Protection Force, the European Community Monitor Mission, the International Conference on the Former Yugoslavia or the peacekeeping forces of the Economic Community of West African States.

(6) Nothing in paragraph (1)(*b*) or (*c*) of this article shall apply where the supply or delivery of the goods to the person concerned is authorised by a licence granted by the Governor under this article.

4. Exportation of certain goods to a prohibited destination

Except under the authority of a licence granted by the Governor under this article, the Serbia and Montenegro (United Nations Sanctions) (Dependent Territories) Order 1992, the Serbia and Montenegro (United Nations Sanctions) (Dependent Territories) Order 1993 or the Former Yugoslavia (United Nations Sanctions) (Dependent Territories) Order 1994, the goods specified in Schedule 2 to this Order are prohibited to be exported from the Territory to any prohibited destination or to any destination for the purpose of delivery, directly or indirectly, to any prohibited destination or to, or to the order of, any person connected with a prohibited destination.

5. Powers to demand evidence of destination which goods reach

Any exporter or any shipper of goods specified in Schedule 2 to this Order which have been exported from the Territory shall, if so required by the Governor, furnish within such time as he may allow proof to his satisfaction that the goods have reached either—

(i) a destination to which they were authorised to be supplied or delivered by a licence granted under this Order; or

(ii) a destination to which their supply or delivery was not prohibited by this Order,

and, if he fails to do so, he shall be liable to a customs penalty not exceeding £5,000 or its equivalent unless he proves that he did not consent to or connive at the goods reaching any destination other than such a destination as aforesaid.

6. Offences in connection with applications for licences, conditions attaching to licences, etc.

(1) If for the purpose of obtaining any licence under this Order any person makes any statement or furnishes any document or information which to his knowledge is false in a material particular or recklessly makes any statement or furnishes any document or information which is false in a material particular he shall be guilty of an offence under this Order.

(2) Any person who has done any act under the authority of a licence granted by the Governor under this Order and who fails to comply with any condition attaching to that licence shall be guilty of an offence under this Order:

Provided that no person shall be guilty of an offence under this paragraph where he proves that the condition with which he failed to comply was modified, otherwise than with his consent, by the Governor after the doing of the act authorised by the licence.

7. Declaration as to goods: powers of search

(1) Any person who is about to leave the Territory shall if he is required to do so by an officer authorised for the purpose by the Governor—

(*a*) declare whether or not he has with him any goods specified in Schedule 2 to this Order; and

(*b*) produce any goods specified in Schedule 2 to this Order which he has with him,

and such officer, and any person acting under his directions, may search that person for the purpose of ascertaining whether he has with him any such goods as aforesaid:

Provided that no person shall be searched in pursuance of this paragraph except by a person of the same sex.

(2) Any person who without reasonable excuse refuses to make a declaration, fails to produce any goods or refuses to allow himself to be searched in accordance with the foregoing provisions of this article shall be guilty of an offence.

(3) Any person who under the provisions of this article makes a declaration which to his knowledge is false in a material particular or recklessly makes any declaration which is false in a material particular shall be guilty of an offence under this Order.

8. Carriage of certain goods destined for a prohibited destination

(1) Except under the authority of a licence granted by the Governor under this article, and without prejudice to the generality of article 3 of this Order, no ship or aircraft to which this article applies, and no vehicle within the Territory, shall be used for the carriage of goods specified in Schedule 2 to this Order if the carriage is or forms part of carriage from any place outside a prohibited destination to any place therein, or to, or to the order of, a person connected with a prohibited destination.

(2) This article applies to ships registered in the Territory, to aircraft so registered and to any other ship or aircraft that is for the time being chartered to any person who is—

(*a*) a British citizen, a British Dependent Territories citizen, a British Overseas citizen, a British subject, or a British protected person, and is ordinarily resident in the Territory; or

(*b*) a body incorporated or constituted under the law of the Territory.

(3) If any ship, aircraft or vehicle is used in contravention of paragraph (1) of this article, then—

(*a*) in the case of a ship registered in the Territory or any aircraft so registered, the owner and the master of the ship or, as the case may be, the operator and the commander of the aircraft; or

(*b*) in the case of any other ship or aircraft, the person to whom the ship or aircraft is for the time being chartered and, if he is such a person as is referred to in sub-paragraph (*a*) or sub-paragraph (*b*) of paragraph (2) of this article, the master of the ship or, as the case may be, the operator and the commander of the aircraft; or

(*c*) in the case of a vehicle, the operator of the vehicle,

shall be guilty of an offence under this Order unless he proves that he did not know and had no reason to suppose that the carriage of the goods in question was, or formed part of, carriage from any place outside a prohibited destination to any place therein or to, or to the order of, any person connected with a prohibited destination.

(4) In the case of proceedings for an offence in contravention of paragraph (3) above, it shall be a defence for the accused person to prove that he did not know and had no reason to suppose that the goods in question were goods specified in Schedule 2 to this Order.

(5) Nothing in this article shall be construed so as to prejudice any other provision of law prohibited or restricting the use of ships, aircraft or vehicles.

(6) Nothing in this article shall apply where the supply or delivery of the goods to the person concerned is authorised by a licence granted by the Governor as referred to in paragraph (1) of article 3 of this Order.

9. Investigation, etc. of suspected ships, aircraft and vehicles

(1) Where any authorised officer, that is to say, any such officer as is referred to in section 692(1) of the Merchant Shipping Act 1894(a), has reason to suspect that any ship in the Territory has been or is being or is about to be used in contravention of paragraph (1) of article 8 of this Order, he may (either alone or accompanied and assisted by persons under his authority) board the ship and search her and, for that purpose, may use or authorise the use of reasonable force, and he may request the master of the ship to furnish such information relating to the ship and her cargo and produce for his inspection such documents so relating and such cargo as he may specify; and an authorised officer (either there and then or upon consideration of any information furnished or document or cargo produced in pursuance of such a request) may, in the case of a ship that is reasonably suspected of being or of being about to be used in contravention of article 8 of this Order, exercise the following further powers with a view to the prevention of the commission (or the continued commission) of such contravention or in order that enquiries into the matter may be pursued, that is to say, he may either direct the master to refrain, except with the consent of an authorised officer, from landing at any port specified by the officer any part of the ship's cargo that is so specified or request the master to take any one or more of the following steps—

(*a*) to cause the ship not to proceed with the voyage on which she is then engaged or about to engage until the master is notified by any authorised officer that the ship may so proceed;

(*b*) if the ship is then in a port in the Territory to cause her to remain there until the master is notified by any authorised officer that the ship may depart;

(*c*) if the ship is then in any other place, to take her to any such port specified by the officer and to cause her to remain there until the master is notified as mentioned in sub-paragraph (*b*) of this paragraph; and

(*d*) to take her to any other destination that may be specified by the officer in agreement with the master,

and the master shall comply with any such request or direction.

(2) Without prejudice to the provisions of paragraph (10) of this article, where a master refuses or fails to comply with a request made under this article that his ship shall or shall not proceed to or from any place or where an authorised officer otherwise has reason to suspect that such a request that has been so made may not be complied with, any such officer may take such steps as appear to him to be necessary to secure compliance with that request and, without prejudice to the generality of the foregoing, may for that purpose enter upon, or authorise entry upon, that ship and use, or authorise the use of, reasonable force.

(3) Where the Governor or any person authorised by him for that purpose either generally or in a particular case has reason to suspect that any aircraft in the Territory has been or is being or is about to be used in contravention of paragraph (1) of article 8 of this Order, the Governor or that authorised person may request the charterer, the operator and the commander of the aircraft or any of them to furnish such information relating to the aircraft and its cargo and produce for his inspection such documents so relating and such cargo as he may specify, and the Governor or that authorised person may (either alone or accompanied and assisted by persons under his authority) board the aircraft and search it and, for that purpose, may use or authorise the use of reasonable force; and, if the aircraft is then in the Territory, the Governor or any such authorised person (either there and then or upon consideration of any information furnished or document or cargo produced in pursuance of such a request) may further request the charterer, operator and the commander or any of them to cause the aircraft to remain in the Territory until notified that the aircraft may depart; and the charterer, the operator and the commander shall comply with any such request.

(4) Without prejudice to the provisions of paragraph (10) of this article, where any person authorised as aforesaid has reason to suspect that any request that an aircraft should remain in the Territory that has been made under paragraph (3) of this article may not be complied with, that authorised person may take such steps as appear to him to be necessary to secure compliance with that request and, without prejudice to the generality of the foregoing, may for that purpose—

(*a*) enter, or authorise entry, upon any land and upon that aircraft;

(*b*) detain, or authorise the detention of, that aircraft; and

(*c*) use, or authorise the use of, reasonable force.

(5) Where the Governor or any person authorised by him for that purpose either generally or in a particular case has reason to suspect that any vehicle in the Territory has been or is being or is about to be used in contravention of paragraph (1) of article 8 of this Order, the Governor or that authorised person may request the operator and driver of the vehicle or either of them to furnish such information relating to the vehicle and any goods contained in it and produce for his inspection such documents so relating and such goods as he may specify, and the Governor or that authorised person may (either alone or accompanied and assisted by persons under his authority) board the vehicle and search it and, for that purpose, may use or authorise the use of reasonable force; and the Governor or any such authorised person (either there and then or upon consideration of any information furnished or document or goods produced in pursuance of such a request) may further require the operator or driver to cause the vehicle to remain in the Territory until notified that the vehicle may depart; and the operator and the driver shall comply with any such request.

(a) 1894 c. 60.

(6) Without prejudice to the provisions of paragraph (10) of this article, where the Governor or any person authorised as aforesaid has reason to suspect that any request that a vehicle should remain in the Territory that has been made under paragraph (5) of this article may not be complied with, the Governor or that authorised person may take such steps as appear to him to be necessary to secure compliance with that request and, without prejudice to the generality of the foregoing, may for that purpose—

(*a*) enter, or authorise entry, upon any land and upon that vehicle;

(*b*) detain, or authorise the detention of, that vehicle; and

(*c*) use, or authorise the use of, reasonable force.

(7) Before or on exercising any power conferred by paragraph (3), (4), (5) or (6) of this article, such an authorised person as is referred to in paragraph (3) or (5) shall, if requested so to do, produce evidence of his authority.

(8) No information furnished or document produced by any person in pursuance of a request made under this article shall be disclosed except—

(*a*) with the consent of the person by whom the information was furnished or the document was produced:

Provided that a person who has obtained information or is in possession of a document only in his capacity as servant or agent of another person may not give consent for the purposes of this sub-paragraph but such consent may instead be given by any person who is entitled to that information or to the possession of that document in his own right;

(*b*) to any person who would have been empowered under this article to request that it be furnished or produced or to any person holding or acting in any office under or in the service of the Crown in respect of the Government of the United Kingdom or under or in the service of the Government of any territory to which this Order extends;

(*c*) on the authority of the Secretary of State, to any organ of the United Nations or to any person in the service of the United Nations or to the Government of any other country for the purpose of assisting the United Nations or that Government in securing compliance with or detecting evasion of measures in relation to Liberia, Somalia, the former Yugoslavia or Rwanda decided upon the Security Council of the United Nations; or

(*d*) with a view to the institution of, or otherwise for the purposes of, any proceedings for an offence under this Order or, with respect to any of the matters regulated by this Order, for an offence against any enactment relating to customs or for an offence against any provision of law with respect to similar matters that is for the time being in force in the Territory.

(9) Any power conferred by this article to request the furnishing of information or the production of a document or of cargo for inspection shall include a power to specify whether the information should be furnished orally or in writing and in what form and to specify the time by which and the place in which the information should be furnished or the document or cargo produced for inspection.

(10) Each of the following persons shall be guilty of an offence under this Order, that is to say—

(*a*) a master of ship who disobeys any direction given under paragraph (1) of this article with respect to the landing of any cargo;

(*b*) a master of a ship or a charterer or an operator or a commander of an aircraft or an operator or a driver of a vehicle who—

(i) without reasonable excuse, refuses or fails within a reasonable time to comply with any request made under this article by any person empowered to make it; or

(ii) wilfully furnishes false information or produces false documents to such a person in response to such a request;

(*c*) a master or a member of a crew of a ship or a charterer or an operator or a commander or a member of a crew of an aircraft or an operator or a driver of a vehicle who wilfully obstructs any such person (or any person acting under the authority of any such person) in the exercise of his powers under this article.

(11) Nothing in this article shall be construed so as to prejudice any other provision of law conferring powers or imposing restrictions or enabling restrictions to be imposed with respect to ships, aircraft or vehicles.

10. Obtaining of evidence and information

The provisions of Schedule 3 to the Order shall have effect in order to facilitate the obtaining, by or on behalf of the Governor, of evidence and information for the purpose of securing compliance with or detecting evasion of this Order and in order to facilitate the obtaining, by or on behalf of the Governor, of evidence of the commission of an offence under this Order or, with respect to any of the matters regulated by this Order, of an offence relating to customs.

11. Penalties and proceedings

(1) Any person guilty of an offence under article 3(3) or article 8(3) of this Order shall be liable—

(*a*) on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both; or

(*b*) on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £5,000 or its equivalent or to both.

(2) Any person guilty of an offence under article 9(10)(*b*)(ii) of this Order or paragraph 5(*b*) or (*d*) of Schedule 3 to this Order shall be liable—

(*a*) on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both;

(*b*) on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £5,000 or its equivalent or to both.

(3) Any person guilty of an offence under article 6(1) or (2) or article 7(3) of this Order shall be liable—

(*a*) on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both;

(*b*) on summary conviction to a fine not exceeding £5,000 or its equivalent.

(4) Any person guilty of an offence under article 7(2) of this Order shall be liable on summary conviction to a fine not exceeding £5,000 or its equivalent.

(5) Any person guilty of an offence under article 9(10)(*a*), (*b*)(i) or (*c*) of this Order or paragraph 5(*a*) or (*c*) of Schedule 3 to this Order shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £5,000 or its equivalent or to both.

(6) Where any body corporate is guilty of an offence under this Order, and that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.

(7) Summary proceedings for an offence under this Order, being an offence alleged to have been committed outside the Territory, may be commenced at any time not later than twelve months from the date on which the person charged first enters the Territory after committing the offence.

(8) Proceedings against any person for an offence under this Order may be taken before the appropriate court in the Territory having jurisdiction in the place where that person is for the time being.

(9) No proceedings for an offence under this Order shall be instituted in the Territory except by or with the consent of the principal public officer of the Territory having responsibility for criminal prosecutions:

Provided that this paragraph shall not prevent the arrest, or the issue or execution of a warrant for the arrest, of any person in respect of such an offence, or the remand in custody or on bail of any person charged with such an offence, notwithstanding that the necessary consent to the institution of proceedings for the offence has not been obtained.

12. Exercise of powers of the Governor

(1) The Governor may, to such extent and subject to such restrictions and conditions as he may think proper, delegate or authorise the delegation of any of his powers under this Order (other than the power to give authority under Schedule 3 to this Order to apply for a search warrant) to any person, or class or description of persons, approved by him, and references in this Order to the Governor shall be construed accordingly.

(2) Any licences granted under this Order may be either general or special, may be subject to or without conditions, may be limited so as to expire on a specified date unless renewed and may be varied or revoked by the authority that granted them.

13. Miscellaneous

(1) Any provision of this Order which prohibits the doing of a thing except under the authority of a licence granted by the Governor shall not have effect in relation to any such thing done anywhere other than the Territory provided that it is duly authorised.

(2) A thing is duly authorised for the purpose of paragraph (1) of this article if it is done under the authority of a licence granted in accordance with any law in force in the place where it is done (being a law substantially corresponding to the relevant provisions of this Order) by the authority competent in that behalf under that law.

N. H. NICHOLLS,
Clerk of the Privy Council.

SCHEDULE 1 Article 1(3)

TERRITORIES TO WHICH THE ORDER EXTENDS

Anguilla
Bermuda
British Antarctic Territory
British Indian Ocean Territory
Cayman Islands

Falkland Islands
Gibraltar
Hong Kong
Montserrat
Pitcairn, Henderson, Ducie and Oeno Islands
St. Helena and its Dependencies
South Georgia and South Sandwich Islands
Sovereign Base Areas of Akrotiri and Dhekelia
Turks and Caicos Islands
Virgin Islands

SCHEDULE 2

Articles 3 to 8

PROHIBITED GOODS

PART A

(1) Any arms and related material (including weapons, ammunition, military vehicles, military equipment and paramilitary police equipment).

(2) Any component for any goods specified in paragraph (1) of this Part of this Schedule.

(3) Any goods specially designed or prepared for use, or normally used, in the manufacture or maintenance of any goods specified in paragraph (1) or (2) of this Part of this Schedule.

PART B

In relation to Bosnia-Hercegovina, Croatia and the former Yugoslav Republic of Macedonia:

(1) All wheel drive utility vehicles capable of off road use that have a ground clearance of greater than 175 millimetres;

(2) Heavy duty recovery vehicles capable of towing suspended a load of more than 6 tonnes or winching a load of more than 10 tonnes;

(3) Drop sided trucks that have a load carrying capacity of more than 5 tonnes.

SCHEDULE 3

Article 10

EVIDENCE AND INFORMATION

1. (1) Without prejudice to any other provision of this Order, or any provision of any other law, the Governor (or any person authorised by him for that purpose either generally or in a particular case) may request any person in or resident in the Territory to furnish to him (or to that authorised person) any information in his possession or control, or to produce to him (or to that authorised person) any document in his possession or control, which he (or that authorised person) may require for the purpose of securing compliance with or detecting evasion of this Order, and any person to whom such a request is made shall comply with it within such time and in such manner as may be specified in the request.

(2) Nothing in the foregoing sub-paragraph shall be taken to require any person who has acted as counsel or solicitor for any person to disclose any privileged communication made to him in that capacity.

(3) Where a person is convicted of failing to furnish information or produce a document when requested so to do under this paragraph, the court may make an order requiring him, within such period as may be specified in the order, to furnish the information or produce the document.

(4) The power conferred by this paragraph to request any person to produce documents shall include power to take copies of or extracts from any documents so produced and to request that person, or, where that person is a body corporate, any other person who is a present or past officer of, or is employed by, the body corporate, to provide an explanation of any of them.

2. (1) If any justice of the peace is satisfied by information on oath given by any police officer, customs officer or person authorised by the Governor to act for the purposes of this paragraph either generally or in a particular case—

(*a*) that there is reasonable ground for suspecting that an offence under this Order or, with respect to any of the matters regulated by this Order, an offence under any enactment relating to customs has been or is being committed and that evidence of the commission of the offence is to be found on any premises specified in the information, or in any vehicle, ship or aircraft so specified; or

(*b*) that any documents which ought to have been produced under paragraph 1 of this Schedule and have not been produced are to be found on any such premises or in any such vehicle, ship or aircraft,

he may grant a search warrant authorising any police officer or customs officer, together with any other persons named in the warrant and any other police officers, to enter the premises specified in the information or, as the case may be, any premises upon which the vehicle, ship or aircraft so specified may be, at any time within one month from the date of the warrant and to search the premises, or, as the case may be, the vehicle, ship or aircraft.

(2) A person authorised by any such warrant as aforesaid to search any premises or any vehicle, ship or aircraft may search every person who is found in, or whom he has reasonable ground to believe to have recently left or to be about to enter, those premises or that vehicle, ship or aircraft and may seize any document or article found on the premises or in the vehicle, ship or aircraft or on such person which he has reasonable ground to believe to be evidence of the commission of any such offence as aforesaid or any documents which he has reasonable ground to believe ought to have been produced under paragraph 1 of this Schedule or to take in relation to any such article or document any other steps which may appear necessary for preserving it and preventing interference with it:

Provided that no person shall, in pursuance of any warrant issued under this paragraph, be searched except by a person of the same sex.

(3) Where, by virtue of this paragraph, a person is empowered to enter any premises, vehicle, ship or aircraft he may use such force as is reasonably necessary for that purpose.

(4) Any document or article of which possession is taken under this paragraph may be retained for a period of three months or, if within that period there are commenced any proceedings for such an offence as aforesaid to which it is relevant, until the conclusion of those proceedings.

3. A person authorised by the Governor to exercise any power for the purposes of this Schedule shall, if requested to do so, produce evidence of his authority before or on exercising that power.

4. No information furnished or document produced (including any copy of or extract made of any document produced) by any person in pursuance of a request made under this Schedule and no document seized under paragraph 2(2) of this Schedule shall be disclosed except—

(*a*) with the consent of the person by whom the information was furnished or the document was produced or the person from whom the document was seized:

Provided that a person who has obtained information or is in possession of a document only in his capacity as a servant or agent of another person may not given consent for the purposes of this sub-paragraph but such consent may instead be given by any person who is entitled to that information or to the possession of that document in his own right; or

(*b*) to any person who would have been empowered under this Schedule to request that it be furnished or produced or to any person holding or acting in any office under or in the service of the Crown in respect of the Government of the United Kingdom or under or in the service of the Government of any territory to which this Order extends; or

(*c*) on the authority of the Secretary of State, to any organ of the United Nations or to any person in the service of the United Nations or to the Government of any other country for the purpose of assisting the United Nations or that Government in securing compliance with or detecting evasion of measures in relation to Liberia, Somalia, the former Yugoslavia or Rwanda decided upon by the Security Council of the United Nations; or

(*d*) with a view to the institution of, or otherwise for the purposes of, any proceedings for an offence under this Order or, with respect to any of the matters regulated by this Order, for an offence against any enactment relating to customs or for an offence against any provision of law with respect to similar matters that is for the time being in force in the Territory.

5. Any person who—

(*a*) without reasonable excuse, refuses or fails within the time and in the manner specified (or, if no time has been specified, within a reasonable time) to comply with any request made under this Schedule by any person who is empowered to make it; or

(*b*) wilfully furnishes false information or a false explanation to any person exercising his powers under this Schedule; or

(*c*) otherwise wilfully obstructs any person in the exercise of his powers under this Schedule; or

(*d*) with intent to evade the provisions of this Schedule, destroys, multilates, defaces, secretes or removes any document,

shall be guilty of an offence under this Order.

Explanatory Note

(This note is not part of the Order)

This Order, made under the United Nations Act 1946, applies to each of the territories specified in Schedule 1. It imposes restrictions pursuant to decisions of the Security Council of the United Nations in resolution 713 (1991) of 25th September 1991, which provided for States to "implement a general and complete embargo on all deliveries of weapons and military equipment" to the former Yugoslavia, and in resolution 733 (1992) of 23rd January 1992, resolution 788 (1992) of 19th November 1992 and resolution 918 (1994) of 17th May 1994, which made similar provision in relation to Somalia, Liberia and Rwanda respectively.

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第 537 章

聯合國制裁條例

本條例旨在就《聯合國憲章》第七章所引起而對中華人民共和國以外地方施加制裁而訂定條文，並就其附帶或與其有關連的事宜訂定條文。

[1997 年 7 月 18 日]

1. 簡稱

本條例可引稱為《聯合國制裁條例》。

2. 釋義

(1) 在本條例中，除文意另有所指外——

"作出指示的機關" (instructing authority) 指中華人民共和國外交部；

"制裁" (sanction) 包括由聯合國安全理事會決定針對中華人民共和國以外地方而實施的全面或局部經濟及貿易禁運、武器禁運以及其他強制性措施。

(2) 凡根據《聯合國憲章》第七章，聯合國安全理事會已決定須採取某項措施以執行其任何決定，而聯合國安全理事會亦已要求中華人民共和國實行該項措施，則以下由作出指示的機關向行政長官所作的指示就本條例而言屬有關指示——

(*a*) 為中華人民共和國香港特別行政區實行該項措施的目的而針對中華人民共和國以外地方實施制裁的指示 (該地方和制裁為該指示所指明者)；或

(*b*) 在該等制裁已實施的情況下採取以下行動的指示——

(i) 停止實施該等制裁；

CHAPTER 537

UNITED NATIONS SANCTIONS

An Ordinance to provide for the imposition of sanctions against places outside the People's Republic of China arising from Chapter 7 of the Charter of the United Nations, and to provide for matters incidental thereto or connected therewith.

[18 July 1997]

1. Short title

This Ordinance may be cited as the United Nations Sanctions Ordinance.

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires—

"instructing authority" (作出指示的機關) means the Ministry of Foreign Affairs of the People's Republic of China;

"sanction" (制裁) includes complete or partial economic and trade embargoes, arms embargoes, and other mandatory measures decided by the Security Council of the United Nations, implemented against a place outside the People's Republic of China.

(2) Where, under Chapter 7 of the Charter of the United Nations, the Security Council of the United Nations has decided on a measure to be employed to give effect to any of its decisions and has called on the People's Republic of China to apply the measure, then any instruction given by the instructing authority to the Chief Executive—

(*a*) to implement the sanctions specified in the instruction against the place outside the People's Republic of China specified in the instruction for the purposes of the Hong Kong Special Administrative Region of the People's Republic of China applying that measure; or

(*b*) where such sanctions have been so implemented—

(i) to cease implementing such sanctions;

(ii) 按指示所指明修改該等制裁或該等制裁的實施；或
(iii) 以該指示所指明的其他制裁完全或局部取代該等制裁。

3. 規例須使有關指示得以執行

(1) 行政長官須訂立規例，以執行有關指示。

(2) 除第 (3) 款另有規定外，根據本條訂立的規例可規定違反任何該等規例即屬犯罪，並可就此訂明罰則。

(3) 根據本條訂立的規例可訂明凡違反或觸犯該等規例——

(*a*) 一經循簡易程序定罪，可處不超過 $500,000 的罰款及不超過 2 年的監禁；

(*b*) 一經循公訴程序定罪，可處無限額的罰款及不超過 7 年的監禁。

(4) 根據本條訂立的規例可將任何或任何類別的人、財產、物品、技術資料、服務、交易、船舶、鐵路列車或飛機摒除於該等規例的適用範圍之外。

(5) 《釋義及通則條例》(第 1 章) 第 34 及 35 條不適用於根據本條訂立的規例。

(6) 為免生疑問，現宣布凡由某項有關指示引起並根據本條而訂立的規例已停止有效，則即使有另一項有關指示作出，而該有關指示的條款與首述的指示的條款相同，該規例亦不恢復生效。

經可記冊版，由香港特別行政區政府印務局局長印刷及發行

(ii) to modify such sanctions, or the implementation of such sanctions, as are specified in the instruction; or
(iii) to replace such sanctions (whether in whole or in part) with other sanctions specified in the instruction,

is a relevant instruction for the purposes of this Ordinance.

3. Regulations shall give effect to relevant instructions

(1) The Chief Executive shall make regulations to give effect to a relevant instruction.

(2) Subject to subsection (3), regulations made under this section may provide that a contravention of any such regulation shall be an offence and may prescribe penalties therefor.

(3) Regulations made under this section may prescribe that a contravention or breach thereof shall be punishable—

(*a*) on summary conviction by a fine not exceeding $500,000 and imprisonment for a term not exceeding 2 years;

(*b*) on conviction on indictment by an unlimited fine and imprisonment for a term not exceeding 7 years.

(4) Any regulations made under this section may exclude any person, property, goods, technical data, services, transaction, ship, train or aircraft or any class thereof from the application of the regulations.

(5) Sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap. 1) shall not apply to regulations made under this section.

(6) For the avoidance of doubt, it is hereby declared that any regulations made under this section do not revive, after they have ceased to have effect, if a relevant instruction is given in the same terms as the relevant instruction which gave rise to those regulations.

Authorized Loose-leaf Edition, Printed and Published by the Government Printer, Hong Kong Special Administrative Region

Annex E

After 1.7.1997

Item	Legal Notice No.	Regulations	Date of Gazette
1.	419 of 1997	United Nations Sanctions (Iraq)(Control of Gold, Securities, Payments and Credits) Regulation	22.8.1997
2.	420 of 1997	United Nations Sanctions (Iraq) Regulation	22.8.1997
3.	421 of 1997	United Nations Sanctions (Libya) Regulation	22.8.1997
4.	422 of 1997	United Nations Sanctions (Libya)(Prohibition of Flights) Regulation	22.8.1997
5.	423 of 1997	United Nations Sanctions (Arms Embargoes) Regulation	22.8.1997
6.	424 of 1997	United Nations Sanctions (Angola) Regulation	22.8.1997
7.	314 of 1998	United Nations Sanctions (Angola)(Amendment) Regulation 1998	18.9.1998
8.	365 of 1998	United Nations Sanctions (Sierra Leone)(Immigration Control) Regulation	4.12.1998
9.	366 of 1998	United Nations Sanctions (Federal Republic of Yugoslavia)(Prohibition on Terrorist Activity) Regulation	4.12.1998
10.	367 of 1998	United Nations Sanctions (Arms Embargoes)(Amendment) Regulation 1998	4.12.1998
11.	166 of 1999	United Nations Sanctions (Angola)(Amendment) Regulation 1999	25.6.1999
12.	173 of 1999	United Nations Sanctions (Libya)(Suspension of Operation) Regulation 1999	2.7.1999
13.	174 of 1999	United Nations Sanctions (Libya)(Prohibition of Flights)(Suspension of Operation) Regulation 1999	2.7.1999
14.	229 of 2000	United Nations Sanctions (Afghanistan) Regulation	23.6.2000

Item	Legal Notice No.	Regulations	Date of Gazette
15.	68 of 2001	United Nations Sanctions (Eritrea and Ethiopia) Regulation	16.3.2001
16.	194 of 2001	United Nations Sanctions (Sierra Leone)(Prohibition Against Importation of Diamonds) Regulation	28.9.2001
17.	211 of 2001	United Nations Sanctions (Afghanistan)(Arms Embargoes) Regulation	12.10.2001
18.	280 of 2001	United Nations Sanctions (Liberia) Regulation	14.12.2001
19.	281 of 2001	United Nations Sanctions (Arms Embargoes)(Amendment) Regulation	14.12.2001
20.	64 of 2002	United Nations Sanctions (Sierra Leone)(Prohibition Against Importation of Diamonds) Regulation	10.5.2002
21.	134 of 2002	United Nations Sanctions (Afghanistan)(Amendment) Regulation 2002	19.7. 2002
22.	137 of 2002	United Nations (Anti-Terrorism Measures) Ordinance (27 of 2002)(Commencement) Notice 2002	23.8.2002
23.	141 of 2002	United Nations Sanctions (Liberia) Regulation 2002	4.10.2002
24.	151 of 2002	United Nations Sanctions (Angola)(Suspension of Operation) Regulation 2002	18.10.2002
25.	95 of 2003	United Nations Sanctions (Angola)(Repeal) Regulation 2003	4.4.2003
26.	96 of 2003	United Nations Sanctions (Sierra Leone)(Prohibition Against Importation of Diamonds) Regulation 2003	4.4.2003
27.	245 of 2003	United Nations Sanctions (Liberia) Regulation 2003	7.11.2003

1997 年第 423 號法律公告

聯合國制裁(武器禁運)規例

目錄

L.N. 423 of 1997

UNITED NATIONS SANCTIONS (ARMS EMBARGOES) REGULATION

CONTENTS

聯合國制裁(武器禁運)規例

(由行政長官按中華人民共和國外交部的指示並根據《聯合國制裁條例》(1997 年第 125 號)第 3 條訂立)

1. 釋義及適用範圍

(1) 在本規例中,除文意另有所指外——

"出口" (export) 包括補給品付運及就任何船隻、可潛航載具或飛機而言,包括將該船隻、可潛航載具或飛機帶出特區,儘管該船隻、載具或飛機正在運送物品或乘客、亦不論是否以其本身動力推動;

"付運" (shipment) 包括裝上飛機;

"受禁制目的地" (prohibited destination) 指利比利亞、索馬里或盧旺達;

"特區" (HKSAR) 指中華人民共和國香港特別行政區;

"海關人員" (customs officer) 指出任《香港海關條例》(第 342 章)附表 1 內指明職位的香港海關人員;

"船長" (master) 就船舶而言,包括在當其時掌管該船舶的人(領港員除外);

"船舶" (ship) 包括並非由槳驅動的、用於航行的船隻;

"與受禁制目的地有關連的人" (person connected with a prohibited destination) 指——

(*a*) 組成受禁制目的地的任何地區的政府;

(*b*) 在受禁制目的地內或通常居於該目的地內的任何其他人;

(*c*) 根據受禁制目的地內任何地方的法律而成立為法團或組成的團體;

(*d*) 任何團體(不論該團體是在何處成立為法團或組成的)而該團體是由組成受禁制目的地的任何地區的政府、在受禁制目的地內或通常居於該目的地的任何其他人、或根據受禁制目的地內任何地方的法律而成立為法團或組成的團體所控制的;

(*e*) 代任何以上所述的人行事的人;

"擁有人" (owner),(如船舶的擁有人並非營運人)指營運人及租用有關船舶的人;

"機長" (commander) 就飛機而言,指由有關飛機的營運人指定為該飛機的機長的空勤人員,或如無該人,則指當其時掌管或指揮該飛機的機師的人;

UNITED NATIONS SANCTIONS (ARMS EMBARGOES) REGULATION

(Made under section 3 of the United Nations Sanctions Ordinance (125 of 1997) by the Chief Executive on the instruction of the Ministry of Foreign Affairs of the People's Republic of China)

1. Interpretation and application

(1) In this Regulation, unless the context otherwise requires—

"authorized officer" (獲授權人員) means a person authorized in writing by the Chief Executive for the purposes of this Regulation;

"commander" (機長), in relation to an aircraft, means the member of the flight crew designated as commander of the aircraft by the operator thereof, or, failing such a person, the person who is for the time being in charge or command of the aircraft;

"customs officer" (海關人員) means any member of the Customs and Excise Service holding an office specified in Schedule 1 to the Customs and Excise Service Ordinance (Cap. 342);

"export" (出口) includes shipment as stores and, in relation to any vessel, submersible vehicle or aircraft, includes the taking out of the HKSAR of the vessel, submersible vehicle or aircraft notwithstanding that it is conveying goods or passengers and whether or not it is moving under its own power;

"HKSAR" (特區) means the Hong Kong Special Administrative Region of the People's Republic of China;

"master" (船長), in relation to a ship, includes any person (other than a pilot) for the time being in charge of the ship;

"operator" (營運人), in relation to an aircraft or vehicle, means the person for the time being having the management of the aircraft or vehicle;

"owner" (擁有人), where the owner of a ship is not the operator, means the operator and any person to whom it is chartered;

"person connected with a prohibited destination" (與受禁制目的地有關連的人) means—

(*a*) the Government of any territory comprised within a prohibited destination;

(*b*) any other person in, or resident in, a prohibited destination;

(*c*) any body incorporated or constituted under the law of any part of a prohibited destination;

(*d*) any body, wherever incorporated or constituted, which is controlled by the Government of any territory comprised within a prohibited destination, any other person in, or resident in, a

"獲授權人員" (authorized officer) 指由行政長官為施行本規例而以書面授權的人；
"營運人" (operator) 就飛機或陸上運輸載具而言，指在當其時管理有關飛機或載具的人。

(2) 除獲作出指示的機關就一般情況或個別情況給予的批准外，不得根據本規例批予任何特許。

(3) 在本規例對盧旺達及就盧旺達適用的範圍內，本規例不適用於盧旺達政府，而本規例的條文須據此解釋。

2. 向受禁制目的地交付及供應某些物品

(1) 除根據行政長官根據本條批予的特許的授權外，任何人不得——

(*a*) 供應或交付附表 1 指明的物品；

(*b*) 同意供應或交付附表 1 指明的物品；或

(*c*) 作出任何作為，而該作為相當可能會促進附表 1 指明的物品的供應或交付，

而該等供應或交付——

(i) 是向受禁制目的地作出的；

(ii) 是向與受禁制目的地有關連的人，或按該人的要求而作出的；

(iii) 是向任何目的地作出的，以將該等物品直接或間接交付至受禁制目的地或交付任何與受禁制目的地有關連的人，或以將該等物品直接或間接地按該人的要求而交付；

(iv) 是向在布隆迪、坦桑尼亞、烏干達或扎伊爾的人作出的，而作出該供應或交付的人知道或懷疑所涉物品是擬在盧旺達使用的；或

(v) 是向任何目的地作出的，以將該等物品直接或間接交付在布隆迪、坦桑尼亞、烏干達或扎伊爾的人，而作出該供應或交付的人知道或懷疑所涉物品是擬在盧旺達使用的。

(2) 本條適用於——

(*a*) 在特區的人；或

(*b*) 根據特區的法律成立為法團或組成的團體。

(3) 除第 (4) 款另有規定外，第 (2) 款指明的人如違反第 (1) 款的條文，即屬犯罪。

prohibited destination, or any body incorporated or constituted under the law of any part of a prohibited destination;

(*e*) any person acting on behalf of any of the above mentioned persons;

"prohibited destination" (受禁制目的地) means Liberia, Somalia or Rwanda;
"ship" (船舶) includes every description of vessel used in navigation not propelled by oars;
"shipment" (付運) includes loading into an aircraft.

(2) No licence shall be granted under this Regulation except with the approval of the instructing authority given generally or in a particular case.

(3) To the extent that this Regulation applies to and in relation to Rwanda, it shall not apply to the Government of Rwanda, and the provisions of this Regulation shall be construed accordingly.

2. Supplies and deliveries of certain goods to a prohibited destination

(1) Except under the authority of a licence granted by the Chief Executive under this section, no person shall—

(*a*) supply or deliver;

(*b*) agree to supply or deliver; or

(*c*) do any act likely to promote the supply or delivery of,

any goods specified in Schedule 1—

(i) to a prohibited destination;

(ii) to or to the order of, any person connected with a prohibited destination;

(iii) to any destination for the purpose of delivery, directly or indirectly, to a prohibited destination or to, or to the order of, any person connected with a prohibited destination;

(iv) to any person in Burundi, Tanzania, Uganda or Zaire, knowing or suspecting that the goods in question are intended for use within Rwanda; or

(v) to any destination for the purpose of delivery, directly or indirectly, to any person in Burundi, Tanzania, Uganda or Zaire, knowing or suspecting that the goods in question are intended for use within Rwanda.

(2) The provisions of this section shall apply to any person who is—

(*a*) within the HKSAR; or

(*b*) a body incorporated or constituted under the law of the HKSAR.

(3) Subject to the provisions of subsection (4), any person specified in subsection (2) who contravenes the provisions of subsection (1) shall be guilty of an offence.

(4) 就關違反第 (1) 款的罪行而進行的法律程序而言，被控人如證明其本人既不知道亦無理由假定——

(*a*) 有關物品是禁制物品；或

(*b*) 有關物品是擬交付或供應至受禁制目的地或予與受禁制目的地有關連的人的，或是按與受禁制目的地有關連的人的要求而交付或供應的，

即可作為免責辯護。

(5) 第 (1) 款不適用於由聯合國或代聯合國交付或供應至受禁制目的地的物品。

(6) 如向有關的人供應或交付物品是由行政長官根據本條批予的特許所授權的，則第 (1)(*b*) 或 (*c*) 款並不適用。

3. 輸出某些物品至受禁制目的地

除根據行政長官根據本條所批予的特許的授權外，附表 1 指明的物品——

(*a*) 均被禁止自特區出口至受禁制目的地；

(*b*) 均被禁止自特區出口予與受禁制目的地有關連的人，或按該人的要求而自特區出口；

(*c*) 均被禁止自特區出口至任何目的地，以將該等物品直接或間接交付至受禁制目的地或交付予任何與受禁制目的地有關連的人，或以將該等物品直接或間接地按該人的要求而交付；

(*d*) 均被禁止在知道或懷疑有關物品是擬在盧旺達使用的情況下自特區出口予在布隆迪、坦桑尼亞、烏干達或扎伊爾的人；或

(*e*) 均被禁止自特區出口至任何目的地，以將該等物品直接或間接交付予在布隆迪、坦桑尼亞、烏干達或扎伊爾的人，而供應或交付該等物品的人知道或懷疑有關物品是擬在盧旺達使用的。

4. 索取有關物品所抵達的目的地的證據的權力

已自特區出口的附表 1 指明的物品的出口人或付運人，在行政長官要求下，須在行政長官所容許的時限內，提供令其信納的證明，證明有關物品已抵達下述目的地——

(4) In the case of proceedings for an offence in contravention of subsection (1) it shall be a defence for the accused person to prove—

(*a*) that he did not know and had no reason to suppose that the goods in question were prohibited goods; or

(*b*) that he did not know and had no reason to suppose that the goods were to be supplied or delivered to a prohibited destination or to, or to the order of, a person connected with a prohibited destination.

(5) Subsection (1) shall not apply to goods supplied or delivered to a prohibited destination by or on behalf of the United Nations.

(6) Nothing in subsection (1)(*b*) or (*c*) shall apply where the supply or delivery of the goods to the person concerned is authorized by a licence granted by the Chief Executive under this section.

3. Exportation of certain goods to a prohibited destination

Except under the authority of a licence granted by the Chief Executive under this section, the goods specified in Schedule 1 are prohibited to be exported from the HKSAR—

(*a*) to a prohibited destination;

(*b*) to, or to the order of, any person connected with a prohibited destination;

(*c*) to any destination for the purpose of delivery, directly or indirectly, to a prohibited destination or to, or to the order of, any person connected with a prohibited destination;

(*d*) to any person in Burundi, Tanzania, Uganda or Zaire in the knowledge or suspicion that the goods in question are intended for use within Rwanda; or

(*e*) to any destination for the purpose of delivery, directly or indirectly, to any person in Burundi, Tanzania, Uganda or Zaire in the knowledge or suspicion that the goods in question are intended for use within Rwanda.

4. Powers to demand evidence of destination which goods reach

Any exporter or any shipper of goods specified in Schedule 1 which have been exported from the HKSAR shall, if so required by the Chief Executive, furnish within such time as he may allow proof to his satisfaction that the goods have reached—

(*a*) 有關物品是根據本規例批予的特許而獲准供應或交付的目的地；或

(*b*) 本規例並不禁止有關物品予以供應或交付的目的地，

如該人沒有如此遵行，即屬犯罪，並可處第6級罰款，除非他證明他並沒有同意或縱容該等物品抵達(*a*)或(*b*)段所述的目的地以外的目的地。

5. 與特許的申請、附加於特許的條件等有關連的罪行

(1) 任何人如為了取得在本規例下的特許，作出他知道在要項上屬虛假的陳述或提供他知悉在要項上屬虛假的文件或資料，或罔顧後果地作出在要項上屬虛假的陳述或提供在要項上屬虛假的文件或資料，即屬犯罪。

(2) 任何人根據行政長官根據本規例批予的特許的授權而作出了任何作為，而該人沒有遵從附加於該特許的條件，即屬犯罪：

但如該人證明他所沒有遵從的條件，是在他作出經上述特許授權的作為後，在未經他同意下被行政長官修改，則不屬犯本款所訂的罪行。

6. 有關物品的聲明：搜查的權力

(1) 任何即將離開特區的人須應獲授權人員的要求——

(*a*) 聲明他是否攜有附表1指明的物品；

(*b*) 交出他所攜有的附表1指明的物品，

而該獲授權人員及在他指示下行事的人可搜查該人，以確定該人是否攜有任何該等物品：

但依據本款對任何人作搜查，只可由與該人性別相同的人進行。

(2) 任何人無合理辯解而拒絕按照本條的條文作出聲明，或沒有按照本條的條文交出物品，或拒絕按照本條的條文容許對他作搜查，即屬犯罪。

(*a*) a destination to which they were authorized to be supplied or delivered by a licence granted under this Regulation; or

(*b*) a destination to which their supply or delivery was not prohibited by this Regulation,

and, if he fails to do so, he shall be guilty of an offence and liable to a fine at level 6 unless he proves that he did not consent to or connive at the goods reaching any destination other than such a destination mentioned in paragraph (*a*) or (*b*).

5. Offences in connection with applications for licences, conditions attaching to licences, etc.

(1) If for the purpose of obtaining any licence under this Regulation any person makes any statement or furnishes any document or information which to his knowledge is false in a material particular or recklessly makes any statement or furnishes any document or information which is false in a material particular he shall be guilty of an offence.

(2) Any person who has done any act under the authority of a licence granted by the Chief Executive under this Regulation and who fails to comply with any condition attaching to that licence shall be guilty of an offence:

Provided that no person shall be guilty of an offence under this subsection where he proves that the condition with which he failed to comply was modified, otherwise than with his consent, by the Chief Executive after the doing of the act authorized by the licence.

6. Declaration as to goods: powers of search

(1) Any person who is about to leave the HKSAR shall if he is required to do so by an authorized officer——

(*a*) declare whether or not he has with him any goods specified in Schedule 1;

(*b*) produce any goods specified in Schedule 1 which he has with him,

and such officer, and any person acting under his directions, may search that person for the purpose of ascertaining whether he has with him any such goods:

Provided that no person shall be searched in pursuance of this subsection except by a person of the same sex.

(2) Any person who without reasonable excuse refuses to make a declaration, fails to produce any goods or refuses to allow himself to be searched in accordance with the provisions of this section shall be guilty of an offence.

(3) 任何人根據本條的條文作出他知道在要項上屬虛假的聲明或罔顧後果地作出在要項上屬虛假的聲明，即屬犯罪。

7. 以受禁制目的地為目的地的某些物品的載運

(1) 除根據行政長官根據本條批予的特許的授權外，以及在不損害第 2 條的一般性的原則下，本條適用的船舶或飛機不得用以作下述情況的附表 1 指明的物品的載運：自受禁制目的地以外的地方至受禁制目的地內的任何地方的，或是構成該載運的部分的，或是向與受禁制目的地有關連的人或按該人的要求而作出的，或構成該載運的部分的。

(2) 除根據行政長官根據本條批予的特許的授權外，且在不損害第 2 條的一般性的原則下，如就任何本條適用的船舶或飛機或任何在特區的載具而在第 (4)(*a*)、(*b*) 或 (*c*) 款中指明的人知道或懷疑該船舶、飛機或載具所進行的載運是從布隆迪、坦桑尼亞、烏干達或扎伊爾以外任何地方向在該等國家的任何人載運的或構成該載運的部分，且有關物品是擬在盧旺達使用的，則該船舶、飛機或載具不得被用作載運附表 1 指明的物品。

(3) 本條適用於在特區註冊的船舶及飛機，以及任何在當其時租予下述的人的其他船舶或飛機——

(*a*) 在特區的人；或

(*b*) 根據特區的法律成立為法團或組成的團體。

(4) 如在違反第 (1) 款的情況下使用任何船舶、飛機或載具，下述的人即屬犯罪——

(*a*) 如屬在特區註冊的船舶或飛機，有關船舶的擁有人及船長或有關飛機的營運人及機長 (視屬何情況而定)；

(*b*) 如屬任何其他船舶或飛機，在當其時租用船舶或飛機的人，及 (如他屬第 (3)(*a*) 或 (*b*) 款提述的人) 有關船舶的船長或有關飛機的營運人及機長 (視屬何情況而定)；或

(*c*) 如屬載具，有關載具的營運人，

(3) Any person who under the provisions of this section makes a declaration which to his knowledge is false in a material particular or recklessly makes any declaration which is false in a material particular shall be guilty of an offence.

7. Carriage of certain goods destined for a prohibited destination

(1) Except under the authority of a licence granted by the Chief Executive under this section, and without prejudice to the generality of section 2, no ship or aircraft to which this section applies, and no vehicle within the HKSAR, shall be used for the carriage of goods specified in Schedule 1 if the carriage is or forms part of carriage from any place outside a prohibited destination to any place therein, or to, or to the order of, a person connected with a prohibited destination.

(2) Except under the authority of a licence granted by the Chief Executive under this section, and without prejudice to the generality of section 2, no ship or aircraft to which this section applies, and no vehicle within the HKSAR, shall be used for the carriage of goods specified in Schedule 1 if the person specified in subsection (4)(*a*), (*b*) or (*c*) in relation to the ship, aircraft or vehicle in question knows or suspects that the carriage is or forms part of carriage from any place outside Burundi, Tanzania, Uganda or Zaire to any person therein and that the goods in question are intended for use within Rwanda.

(3) This section applies to ships registered in the HKSAR, to aircraft so registered and to any other ship or aircraft that is for the time being chartered to any person who is—

(*a*) within the HKSAR; or

(*b*) a body incorporated or constituted under the law of the HKSAR.

(4) If any ship, aircraft or vehicle is used in contravention of subsection (1), then—

(*a*) in the case of a ship registered in the HKSAR or any aircraft so registered, the owner and the master of the ship or, as the case may be, the operator and the commander of the aircraft;

(*b*) in the case of any other ship or aircraft, the person to whom the ship or aircraft is for the time being chartered and, if he is such a person as is referred to in subsection (3)(*a*) or (*b*), the master of the ship or, as the case may be, the operator and the commander of the aircraft; or

(*c*) in the case of a vehicle, the operator of the vehicle,

除非他證明他既不知道亦無理由假定有關物品是自受禁制的目的地以外任何地方載運至受禁制目的地的任何地方的或是構成該等載運的部分的。

(5) 如船舶、飛機或載具在違反第 (2) 款的情況下被使用，在第 (4)(*a*)、(*b*) 或 (*c*) 款中就有關船舶、飛機或載具而指明的人即屬犯罪。

(6) 就屬違反第 (4) 款的罪行的法律程序而言，被控人如證明他不知道亦無理由假定有關物品屬附表 1 指明的貨品，即可作為免責辯護。

(7) 本條不得解釋為損害禁制或限制使用船舶、飛機或載具的其他法律的條文。

(8) 如向有關的人供應或交付物品是第 2(1) 條所述由行政長官批予的特許所授權的，則本條並不適用。

8. 調查可疑船舶、飛機及載具等

(1) 如獲授權人員有理由懷疑在特區的船舶已經、正在或行將在違反第 7(1) 或 (2) 條的情況下被使用，他可單獨或在由他授權的人陪同及協助下，登上並搜查有關船舶，並且可為上述目的而使用或授權使用合理武力，獲授權人員亦可要求有關船舶的船長提供他所指明的與該船舶及其貨物有關的資料，和提交他所指明的與此有關的文件以及交出他所指明的貨物，以供其檢查；而獲授權人員 (在當場及當時，或經考慮依據有關要求提供的資料或提交的文件或交出的貨物) 可就合理懷疑正在或行將在違反第 7 條的情況下被使用的船舶，為了防止犯 (或繼續犯) 任何該等違反事項或就上述事宜進行調查而行使進一步權力，即他可指示船長除非取得獲授權人員的同意，否則不得於獲授權人員指明的港口卸下指明的屬有關船舶的任何部分貨物，或要求船長採取下述任何一項或多於一項步驟——

(*a*) 促使有關船舶不繼續該船舶在當時已進行或行將進行的航程，直至船長獲得獲授權人員通知該船舶可如此航行；

shall be guilty of an offence unless he proves that he did not know and had no reason to suppose that the carriage of the goods in question was, or formed part of, carriage from any place outside a prohibited destination to any place therein or to, or to the order of, any person connected with a prohibited destination.

(5) If any ship, aircraft or vehicle is used in contravention of subsection (2), the person specified in subsection (4)(*a*), (*b*) or (*c*) in relation to the ship, aircraft or vehicle in question shall be guilty of an offence.

(6) In the case of proceedings for an offence in contravention of subsection (4), it shall be a defence for the accused person to prove that he did not know and had no reason to suppose that the goods in question were goods specified in Schedule 1.

(7) Nothing in this section shall be construed so as to prejudice any other provision of law prohibiting or restricting the use of ships, aircraft or vehicles.

(8) Nothing in this section shall apply where the supply or delivery of the goods to the person concerned is authorized by a licence granted by the Chief Executive as referred to in section 2(1).

8. Investigation, etc. of suspected ships, aircraft and vehicles

(1) Where any authorized officer has reason to suspect that any ship in the HKSAR has been or is being or is about to be used in contravention of section 7(1) or (2), he may (either alone or accompanied and assisted by persons under his authority) board the ship and search it and, for that purpose, may use or authorize the use of reasonable force, and he may request the master of the ship to furnish such information relating to the ship and its cargo and produce for his inspection such documents so relating and such cargo as he may specify; and an authorized officer (either there and then or upon consideration of any information furnished or document or cargo produced in pursuance of such a request) may, in the case of a ship that is reasonably suspected of being or of being about to be used in contravention of section 7, exercise the following further powers with a view to the prevention of the commission (or the continued commission) of such contravention or in order that inquiries into the matter may be pursued, that is to say, he may either direct the master to refrain, except with the consent of an authorized officer, from landing at any port specified by the officer any part of the ship's cargo that is so specified or request the master to take any one or more of the following steps—

(*a*) to cause the ship not to proceed with the voyage on which it is then engaged or about to engage until the master is notified by any authorized officer that the ship may so proceed;

(*b*) (如有關船舶當時在特區境內) 促使該船舶逗留在特區，直至船長獲得獲授權人員通知該船舶可離境；

(*c*) (如有關船舶當時在其他地方) 將該船舶開往該人員指明的任何該等港口和促使該船舶逗留在該港口，直至船長獲得 (*b*) 段所述的通知；

(*d*) 將該船舶開往該人員在與船長協議下所指明的任何其他目的地，

而船長須遵從該等要求或指示。

(2) 在不損害第 (10) 款的條文下，如有關的船長拒絕或沒有遵從根據本條作出的其船舶須或不得開往任何地方或自任何地方啟航的要求，或獲授權人員在其他方面有理由懷疑已作的上述要求可能不會獲遵從，該人員可採取他認為為確保該要求獲遵從而屬必要的步驟；在不損害上述的一般性的原則下，獲授權人員可為上述目的登上，或授權登上有關船舶，並可使用或授權使用合理武力。

(3) 如行政長官或獲授權人員有理由懷疑在特區的任何飛機已經、正在或行將在違反第 7(1) 或 (2) 條的情況下被使用，行政長官或有關的獲授權人員可要求該飛機的出租人、營運人及機長、或他們任何一人提供他所指明的與該飛機及其貨物有關的資料，和提交他所指明的與此有關的文件以及交出他所指明的貨物，以供其檢查；而行政長官或該獲授權人員可單獨或在由他授權的人陪同及協助下，登上並搜查有關飛機，並且可為上述目的而使用或授權使用合理武力；而如飛機在當時在特區境內，行政長官或該獲授權人員 (在當場及當時，或經考慮依據有關要求提供的資料或提交的文件或交出的貨物) 可進一步要求出租人、營運人及機長或他們任何一人促使飛機逗留在特區境內，直至獲通知有關飛機可離境，而出租人、營運人及機長須遵從該等要求。

(4) 在不損害第 (10) 款的條文下，如獲授權人員有理由懷疑已根據本條作出的某飛機須逗留在特區境內的要求可能不會獲遵從，該獲授權人員可採取他認為為確保該要求獲遵從而屬必要的步驟；在不損害上述的一般性的原則下，獲授權人員可為上述目的——

(*a*) 進入或授權進入任何土地，以及登上或授權登上該飛機；

(*b*) 扣留或授權扣留該飛機；及

(*b*) if the ship is then in the HKSAR to cause it to remain there until the master is notified by any authorized officer that the ship may depart;

(*c*) if the ship is then in any other place, to take it to any such port specified by the officer and to cause it to remain there until the master is notified as mentioned in paragraph (*b*);

(*d*) to take it to any other destination that may be specified by the officer in agreement with the master,

and the master shall comply with any such request or direction.

(2) Without prejudice to the provisions of subsection (10), where a master refuses or fails to comply with a request made under this section that his ship shall or shall not proceed to or from any place or where an authorized officer otherwise has reason to suspect that such a request that has been so made may not be complied with, any such officer may take such steps as appear to him to be necessary to secure compliance with that request and, without prejudice to the generality of the foregoing, may for that purpose enter upon, or authorize entry upon, that ship and use, or authorize the use of, reasonable force.

(3) Where the Chief Executive or any authorized officer has reason to suspect that any aircraft in the HKSAR has been or is being or is about to be used in contravention of section 7(1) or (2), the Chief Executive or that authorized officer may request the charterer, the operator and the commander of the aircraft or any of them to furnish such information relating to the aircraft and its cargo and produce for his inspection such documents so relating and such cargo as he may specify, and the Chief Executive or that authorized officer may (either alone or accompanied and assisted by persons under his authority) board the aircraft and search it and, for that purpose, may use or authorize the use of reasonable force; and, if the aircraft is then in the HKSAR, the Chief Executive or any such authorized officer (either there and then or upon consideration of any information furnished or document or cargo produced in pursuance of such a request) may further request the charterer, the operator and the commander or any of them to cause the aircraft to remain in the HKSAR until notified that the aircraft may depart; and the charterer, the operator and the commander shall comply with any such request.

(4) Without prejudice to the provisions of subsection (10), where any authorized officer has reason to suspect that any request that an aircraft should remain in the HKSAR that has been made under this section may not be complied with, that authorized officer may take such steps as appear to him to be necessary to secure compliance with that request and, without prejudice to the generality of the foregoing, may for that purpose—

(*a*) enter, or authorize entry, upon any land and upon that aircraft;

(*b*) detain, or authorize the detention of, that aircraft; and

(c) 使用或授權使用合理武力。

(5) 如行政長官或獲授權人員有理由懷疑在特區境內的任何載具已經、正在或行將在違反第 7(1) 或 (2) 條的情況下被使用，行政長官或有關的獲授權人員可要求該載具的營運人及其駕駛人或他們其中一人提供他所指明的與該載具及其所載的物品有關的資料，和提交他所指明的與此有關的文件以及交出他所指明的物品，以供其檢查；而行政長官或該獲授權人員可單獨或在由他授權的人陪同及協助下，登上並搜查有關載具，並且可為上述目的而使用或授權使用合理武力；而行政長官或該獲授權人員(在當場及當時，或經考慮依據有關要求提供的資料或提交的文件或交出的物品)可進一步要求營運人或駕駛人促使有關載具逗留在特區境內，直至獲通知該載具可離境；而營運人及駕駛人須遵從該等要求。

(6) 在不損害第 (10) 款的條文下，如行政長官或獲授權人員有理由懷疑已根據本條作出的某載具逗留在特區境內的要求可能不會獲遵從，行政長官或該獲授權人員可採取他認為為確保該要求獲遵從而屬必要的步驟；在不損害上述的一般性的原則下，獲授權人員可為上述目的——

(a) 進入或授權進入任何土地，以及登上或授權登上該載具；

(b) 扣留或授權扣留該載具；

(c) 使用或授權使用合理武力。

(7) 獲授權人員在根據第 (1)、(2)、(3)、(4)、(5) 或 (6) 款行使任何權力前，須應要求提供他已獲授權的證據。

(8) 任何人依據根據本條提出的要求而提供的資料或提交的文件，不得予以披露，但以下情況下則除外——

(a) 在提供有關資料或提交有關文件的人同意下作出披露：

但僅以另一人的受僱人或代理人的身分取得資料或管有文件的人不得給予本段所指的同意，但該項同意卻可由本身有權享有該資料或管有該文件的人給予；

(b) 向任何本可根據本條獲賦權要求該資料或文件向其提供或提交的人作出披露；

(c) use, or authorize the use of, reasonable force.

(5) Where the Chief Executive or any authorized officer has reason to suspect that any vehicle in the HKSAR has been or is being or is about to be used in contravention of section 7(1) or (2), the Chief Executive or that authorized officer may request the operator and driver of the vehicle or either of them to furnish such information relating to the vehicle and any goods contained in it and produce for his inspection such documents so relating and such goods as he may specify, and the Chief Executive or that authorized officer may (either alone or accompanied and assisted by persons under his authority) board the vehicle and search it and, for the purpose, may use or authorize the use of reasonable force; and the Chief Executive or any such authorized officer (either there and then or upon consideration of any information furnished or document or goods produced in pursuance of such a request) may further require the operator or driver to cause the vehicle to remain in the HKSAR until notified that the vehicle may depart; and the operator and the driver shall comply with any such request.

(6) Without prejudice to the provisions of subsection (10), where the Chief Executive or any authorized officer has reason to suspect that any request that a vehicle should remain in the HKSAR that has been made under this section may not be complied with, the Chief Executive or that authorized officer may take such steps as appear to him to be necessary to secure compliance with that request and, without prejudice to the generality of the foregoing, may for that purpose—

(a) enter, or authorize entry, upon any land and upon that vehicle;

(b) detain, or authorize the detention of, that vehicle;

(c) use, or authorize the use of, reasonable force.

(7) Before or on exercising any power conferred by subsection (1), (2), (3), (4), (5) or (6), an authorized officer shall, if requested so to do, produce evidence of his authority.

(8) No information furnished or document produced by any person in pursuance of a request made under this section shall be disclosed except—

(a) with the consent of the person by whom the information was furnished or the document was produced:

Provided that a person who has obtained information or is in possession of a document only in his capacity as servant or agent of another person may not give consent for the purposes of this paragraph but such consent may instead be given by any person who is entitled to that information or to the possession of that document in his own right;

(b) to any person who would have been empowered under this section to request that it be furnished or produced;

(c) 在行政長官授權下向聯合國的任何機關或向任何任職於聯合國的人或向中華人民共和國以外任何地方的政府作出披露，而目的是協助聯合國或該政府確保由聯合國安全理事會就利比利亞、索馬里或盧旺達而決定的措施獲遵從或偵查與遵該等措施的情況，但該資料或文件須是在獲作出指示的機關批准的情況下經由作出指示的機關轉交的；或

(d) 為了就本規例所訂的罪行、或在本規例規管的任何事宜方面就任何與海關有關的成文法則所訂的罪行，而提起任何法律程序而作出披露，或為了該等法律程序的目的而作出披露。

(9) 本條所賦予就要求提供資料或提交文件或交出貨物以作檢查的權力，包括以下權力：指明有關資料是否須以口頭或書面提供並須以何種表格或格式提供的權力，指明須提供資料、提交文件或交出貨物以供檢查的時間及地點的權力。

(10) 下述的每一人均屬犯罪——

(a) 不服從就貨物的卸下而根據第 (1) 款作出的指示的船舶船長；

(b) 船舶船長、或飛機的出租人、營運人或機長，或載具的營運人或駕駛人，而該人——

(i) 在沒有合理辯解下，拒絕或沒有在合理時間內遵從由獲賦權根據本條作出要求的人根據本條作出的要求；或

(ii) 在對有關要求作出回應時蓄意向作出要求的人提供虛假資料或提交虛假文件；

(c) 蓄意妨礙任何該等人 (或獲任何該等人授權行事的人) 行使其在本條下的權力的船舶船長或船員，或飛機的出租人、營運人、機長或機員，或載具的營運人或駕駛人。

(11) 本條不得解釋為損害任何就船舶、飛機或載具而賦予權力或施加限制或使限制得以施加的其他法律條文。

(c) on the authority of the Chief Executive, subject to the information or document being transmitted through and with the approval of the instructing authority, to any organ of the United Nations or to any person in the service of the United Nations or to the Government of any place outside the People's Republic of China for the purpose of assisting the United Nations or that Government in securing compliance with or detecting evasion of measures in relation to Liberia, Somalia or Rwanda decided upon by the Security Council of the United Nations; or

(d) with a view to the institution of, or otherwise for the purposes of, any proceedings for an offence under this Regulation or, with respect to any of the matters regulated by this Regulation, for an offence against any enactment relating to customs.

(9) Any power conferred by this section to request the furnishing of information or the production of a document or of cargo for inspection shall include a power to specify whether the information should be furnished orally or in writing and in what form and to specify the time by which and the place in which the information should furnished or the document or cargo produced for inspection.

(10) Each of the following persons shall be guilty of an offence, that is to say—

(a) a master of a ship who disobeys any direction given under subsection (1) with respect to the landing of any cargo;

(b) a master of a ship or charterer or an operator or a commander of an aircraft or an operator or a driver of a vehicle who—

(i) without reasonable excuse, refuses or fails within a reasonable time to comply with any request made under this section by any person empowered to make it; or

(ii) intentionally furnishes false information or produces false documents to such a person in response to such a request;

(c) a master or a member of a crew of a ship or a charterer or an operator or a commander or a member of a crew of an aircraft or an operator or a driver of a vehicle who intentionally obstructs any such person (or any person acting under the authority of any such person) in the exercise of his powers under this section.

(11) Nothing in this section shall be construed so as to prejudice any other provision of law conferring powers or imposing restrictions or enabling restrictions to be imposed with respect to ships, aircraft or vehicles.

9. 證據及資料的取得

附表 2 的條文須為便利由行政長官或由他人代表行政長官取得證據及資料而具有效力，以確保本規例獲遵從或偵查規避本規例的情況，該等條文亦須為便利由行政長官或他人代表行政長官取得任何人犯本規例所訂的罪行的證據，或為就本規例所規管的任何事宜而言，取得任何人犯關乎海關的罪行的證據而具有效力。

10. 罰則及法律程序

(1) 任何人犯第 2(3) 或 7(4) 或 (5) 條所訂的罪行——

(*a*) 一經循公訴程序定罪，可處罰款及監禁 7 年；

(*b*) 一經循簡易程序定罪，可處第 6 級罰款及監禁 6 個月。

(2) 任何人犯第 8(10)(*b*)(ii) 條或附表 2 第 3(*b*) 或 (*d*) 條所訂的罪行——

(*a*) 一經循公訴程序定罪，可處罰款及監禁 2 年；

(*b*) 一經循簡易程序定罪，可處第 6 級罰款及監禁 6 個月。

(3) 任何人犯第 5(1) 或 (2) 或 6(3) 條所訂的罪行——

(*a*) 一經循公訴程序定罪，可處罰款及監禁 2 年；

(*b*) 一經循簡易程序定罪，可處第 6 級罰款。

(4) 任何人犯第 6(2) 條所訂的罪行，一經循簡易程序定罪，可處第 6 級罰款。

(5) 任何人犯第 8(10)(*a*)、(*b*)(i) 或 (*c*) 條或附表 2 第 3(*a*) 或 (*c*) 條所訂的罪行，一經循簡易程序定罪，可處第 6 級罰款及監禁 6 個月。

(6) 凡任何法人團體犯本規例所訂的罪行，而該罪行經證明是在該法人團體的任何董事、經理、秘書或其他相類似職位的高級人員或看來是以任何該等身分行事的人的同意或縱容下所犯的，或是可歸因於任何上述的人本身的疏忽的，則該人以及該法人團體均屬犯該罪行，並可據此而被起訴和受懲罰。

9. Obtaining of evidence and information

The provisions of Schedule 2 shall have effect in order to facilitate the obtaining, by or on behalf of the Chief Executive, of evidence and information for the purpose of securing compliance with or detecting evasion of this Regulation and in order to facilitate the obtaining, by or on behalf of the Chief Executive, of evidence of the commission of an offence under this Regulation or, with respect to any of the matters regulated by this Regulation, of an offence relating to customs.

10. Penalties and proceedings

(1) Any person guilty of an offence under section 2(3) or 7(4) or (5) shall be liable —

(*a*) on conviction on indictment to a fine and to imprisonment for 7 years;

(*b*) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(2) Any person guilty of an offence under section 8(10)(*b*)(ii), or section 3(*b*) or (*d*) of Schedule 2, shall be liable—

(*a*) on conviction on indictment to a fine and to imprisonment for 2 years;

(*b*) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(3) Any person guilty of an offence under section 5(1) or (2) or 6(3) shall be liable—

(*a*) on conviction on indictment to a fine and to imprisonment for 2 years;

(*b*) on summary conviction to a fine at level 6.

(4) Any person guilty of an offence under section 6(2) shall be liable on summary conviction to a fine at level 6.

(5) Any person guilty of an offence under section 8(10)(*a*), (*b*)(i) or (*c*), or section 3(*a*) or (*c*) of Schedule 2, shall be liable on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(6) Where any body corporate is guilty of an offence under this Regulation, and that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.

(7) 本規例所訂的罪行如被指稱是在特區以外所犯的，則就該罪行而進行的簡易法律程序，可自被控該罪行的人在犯該罪行後首次進入特區的日期起計不遲於 12 個月的任何時間展開。

(8) 除非由律政司司長提起或在律政司司長同意下提起，否則不得在特區就本規例所訂的罪行提起法律程序。

11. 行政長官的權力的行使

(1) 行政長官可按其認為適當的範圍及在其認為適當的限制及條件的規限下，將他根據本規例所具有的任何權力、轉授或授權轉授予獲他批准的人，或獲他批准的類別或種類的人，而本規例中對行政長官的提述須據此解釋。

(2) 根據本規例批予的特許可屬一般特許或特別特許，可附加或不附加條件，可予以限制使具有效期若非獲得續期則會在指明日期屆滿，並可由行政長官更改或撤銷。

12. 雜項

(1) 本規例規定除獲行政長官批予的特許的授權外禁止作出某事情的有關條文，就任何獲妥為授權而在特區以外的地方作出的該等事情而言，並不具有效力。

(2) 就第 (1) 款而言，如該等事情是有關地方的有效法律所訂明的在有關方面的主管當局根據該等法律 (該等法律須實質上與本規例的有關條文相應) 批予的特許所授權的，有關事情即屬獲妥為授權。

附表 1 [第 2、3、4、6 及 7 條]

禁制物品

(1) 任何武器及相關的物料 (包括軍械、彈藥、軍事載具、軍事設備及准軍事警察設備)。
(2) 第 (1) 款指明的物品的任何元件。
(3) 經特別設計或製備以供用於或通常用於製造或維修第 (1) 或 (2) 款指明的物品的物品。

(7) Summary proceedings for an offence under this Regulation, being an offence alleged to have been committed outside the HKSAR, may be commenced at any time not later than 12 months from the date on which the person charged first enters the HKSAR after committing the offence.

(8) No proceedings for an offence under this Regulation shall be instituted in the HKSAR except by or with the consent of the Secretary for Justice.

11. Exercise of powers of the Chief Executive

(1) The Chief Executive may, to such extent and subject to such restrictions and conditions as he may think proper, delegate or authorize the delegation of any of his powers under this Regulation to any person, or class or description of persons, approved by him, and references in this Regulation to the Chief Executive shall be construed accordingly.

(2) Any licences granted under this Regulation may be general or special, may be subject to or without conditions, may be limited so as to expire on a specified date unless renewed and may be varied or revoked by the Chief Executive.

12. Miscellaneous

(1) Any provision of this Regulation which prohibits the doing of a thing except under the authority of a licence granted by the Chief Executive shall not have effect in relation to any such thing done in a place outside the HKSAR provided that it is duly authorized.

(2) A thing is duly authorized for the purpose of subsection (1) if it is done under the authority of a licence granted in accordance with any law in force in the place where it is done (being a law substantially corresponding to the relevant provisions of this Regulation) by the authority competent in that behalf under that law.

SCHEDULE 1 [ss. 2, 3, 4, 6 & 7]

PROHIBITED GOODS

(1) Any arms and related material (including weapons, ammunition, military vehicles, military equipment and paramilitary police equipment).
(2) Any component for any goods specified in subsection (1).
(3) Any goods specially designed or prepared for use, or normally used, in the manufacture or maintenance of any goods specified in subsection (1) or (2).

附表2 [第9及10條]

證據及資料

1. (1) 在不損害本規例其他條文或其他法律的條文的原則下，行政長官(或獲授權人員)可要求任何在特區或居於特區的人，向行政長官(或該獲授權人員)提供他管有或控制的任何資料、或向行政長官(或該獲授權人員)提交他管有或控制的任何文件，而上述資料或文件是行政長官(或該獲授權人員)為確保本規例獲遵從或為值查規避本規例的情況而需要的，而被要求的人須在該要求所指明的時間內及按該要求所指明的方式遵從該要求。

(2) 第(1)款不得視為規定代表任何人的大律師或律師將其以該身分所獲得的享有特權的通訊披露。

(3) 凡任何人沒有根據本條應要求提供資料或提交文件而被定罪，裁判官或法庭可作出命令，規定該人在命令中指明的期間內提供有關資料或提交有關文件。

(4) 本條所賦予要求任何人提交文件的權力，包括對如此提交的文件取得副本或摘錄的權力，以及要求該人(如該人是法人團體，則要求是該法人團體的現任或已卸任的高級人員或正受僱於該法人團體的其他人)就任何上述文件提供解釋的權力。

2. (1) 如任何裁判官或法官根據任何警務人員、海關人員或獲授權人員經宣誓而作的告發而信納——

(a) 有合理理由懷疑有人已經或正在犯本規例所訂的罪行，或就本規例所規管的任何事宜而言，犯任何有關海關的成文法則所訂的罪行，以及有合理理由懷疑犯該罪行的證據，可在有關告發所指明的處所或在如此指明的任何載具、船舶或飛機中發現；或

(b) 任何須根據第1條提交但尚未被提交的文件，可在任何上述處所或在任何上述載具、船舶或飛機中發現，

則他可批出搜查令授權任何警務人員或海關人員，連同任何其他在搜查令中指名的人及其他警務人員或海關人員，於下令簽發日期起計1個月內，隨時進入有關告發中指明的處所或如此指明的載具、船舶或飛機所在的處所(視屬何情況而定)，以及搜查上述處所或載具、船舶或飛機(視屬何情況而定)。

(2) 任何藉上述手令獲授權搜查處所或載具、船舶或飛機的人，可搜查在有關處所或載具、船舶或飛機中發現的人，或他有合理理由相信不久前曾離開或即將進入該處所或載具、船舶或飛機的人，並可檢取該處所或載具、船舶或飛機中或在有關的人身上發現，而他有合理理由相信是犯任何前述罪行的證據的文件或物件，或他有合理理由相信是根據第1條理應已提交的文件，或就上述文件或物件採取看來是必需的其他步驟，以保存上述文件或物件和防止其被干擾：

但依據任何根據本條發出的手令對任何人作搜查，只可由與該人性別相同的人進行。

(3) 任何人憑藉本條獲賦權進入任何處所、載具、船舶或飛機，可為此目的而使用合理所需的武力。

(4) 根據本條管有的文件或物件，可予保留3個月；如在該段期間內就上述罪行有任何與該等文件或物件有關的法律程序展開，則可保留至該等法律程序結束為止。

(5) 任何人依據本附表所指的要求而提供的資料或交出的文件(包括所提交的文件的副本或摘錄)，以及根據第(2)款檢取的文件，不得予以披露，但在以下情況則除外——

(a) 在提供有關資料或提交有關文件或被檢取有關文件的人的同意下；

SCHEDULE 2 [ss. 9 & 10]

EVIDENCE AND INFORMATION

1. (1) Without prejudice to any other provision of this Regulation, or any provision of any other law, the Chief Executive (or an authorized officer) may request any person in or resident in the HKSAR to furnish to him (or to that authorized officer) any information in his possession or control, or to produce to him (or to that authorized officer) any document in his possession or control, which he (or that authorized officer) may require for the purpose of securing compliance with or detecting evasion of this Regulation, and any person to whom such a request is made shall comply with it within such time and in such manner as may be specified in the request.

(2) Nothing in subsection (1) shall be taken to require any person who has acted as counsel or solicitor for any person to disclose any privileged communication made to him in that capacity.

(3) Where a person is convicted of failing to furnish information or produce a document when requested so to do under this section, the magistrate or court may make an order requiring him, within such period as may be specified in the order, to furnish the information or produce the document.

(4) The power conferred by this section to request any person to produce documents shall include power to take copies of or extracts from any documents so produced and to request that person, or, where that person is a body corporate, any other person who is a present or past officer of, or is employed by, the body corporate, to provide an explanation of any of them.

2. (1) If any magistrate or judge is satisfied by information on oath given by any police officer, customs officer or authorized officer—

(a) that there is reasonable ground for suspecting that an offence under this Regulation or, with respect to any of the matters regulated by this Regulation, an offence under any enactment relating to customs has been or is being committed and that evidence of the commission of the offence is to be found on any premises specified in the information, or in any vehicle, ship or aircraft so specified; or

(b) that any documents which ought to have been produced under section 1 and have not been produced are to be found on any such premises or in any such vehicle, ship or aircraft,

he may grant a search warrant authorizing any police or customs officer, together with any other persons named in the warrant and any other police or customs officers, to enter the premises specified in the information or, as the case may be, any premises upon which the vehicle, ship or aircraft so specified may be, at any time within one month from the date of the warrant and to search the premises, or, as the case may be, the vehicle, ship or aircraft.

(2) A person authorized by any such warrant to search any premises or any vehicle, ship or aircraft may search every person who is found in, or whom he has reasonable ground to believe to have recently left or to be about to enter, those premises or that vehicle, ship or aircraft and may seize any document or article found on the premises or in the vehicle, ship or aircraft or on such person which he has reasonable ground to believe to be evidence of the commission of any such offence as aforesaid, or any documents which he has reasonable ground to believe ought to have been produced under section 1, or to take in relation to any such document or article any other steps which may appear necessary for preserving it and preventing interference with it:

Provided that no person shall in pursuance of any warrant issued under this section be searched except by a person of the same sex.

(3) Where, by virtue of this section, a person is empowered to enter any premises, vehicle, ship or aircraft he may use such force as is reasonably necessary for that purpose.

(4) Any document or article of which possession is taken under this section may be retained for a period of 3 months or, if within that period there are commenced any proceedings for such an offence as aforesaid to which it is relevant, until the conclusion of those proceedings.

(5) No information furnished or document produced (including any copy of or extract made of any document produced) by any person in pursuance of a request made under this Schedule, and no document seized under subsection (2), shall be disclosed except—

(a) with the consent of the person by whom the information was furnished or the document was produced or the person from whom the document was seized;

但僅以另一人的受僱人或代理人的身分取得資料或管有文件的人不得給予本段所指的同意，但該項同意都可由本身有權享有該資料或管有該文件的人給予；

(b) 向任何本可根據本附表獲賦權要求該資料或文件向其提供或提交的人作出披露；

(c) 在行政長官授權下向聯合國的任何機關或向任何任職於聯合國的人或向中華人民共和國以外任何地方的政府作出披露，而目的是協助聯合國或該政府確使由聯合國安全理事會就利比利亞、索馬里或盧旺達而決定的措施獲遵從或偵查規避該等措施的情況，但該資料或文件須是在獲作出指示的機關批准的情況下經由作出指示的機關轉交的；或

(d) 為了就本規例所訂的罪行，或就本規例規管的任何事宜方面就任何與海關有關的成文法則所訂的罪行而提起任何法律程序而作出披露，或為了該等法律程序的目的而作出披露。

3. 任何人——

(a) 如無合理辯解而拒絕或沒有在指定的時間內(或如無指定時間，則在一段合理時間內)按指定的方式遵從由任何獲賦權根據本附表提出要求的人所提出的要求；

(b) 故意向根據本附表行使其權力的人提供虛假資料或虛假解釋；

(c) 在其他方面故意妨礙任何根據本附表行使其權力的人；或

(d) 意圖規避本附表的條文而銷毀、破損、毀損、隱藏或移去任何文件，

即屬犯罪。

行政長官
董建華

1997 年 8 月 21 日

註 釋

本規例乃根據《聯合國制裁條例》(1997 年第 125 號)訂立。本規例依據在 1992 年 1 月 23 日通過的《聯合國安全理事會第 733 號(1992 年)決議》、在 1992 年 11 月 19 日通過的《聯合國安全理事會第 788 號(1992 年)決議》及在 1994 年 5 月 17 日通過的《聯合國安全理事會第 918 號(1994 年)決議》所作出的決定而施加限制，該等決議分別對索馬里、利比利亞及盧旺達實施全面的武器及軍事裝備禁運。本規例亦執行聯合國安全理事會在 1995 年 6 月 9 日通過的《聯合國安全理事會第 997 號(1995 年)決議》及在 1995 年 8 月 16 日通過的《聯合國安全理事會第 1011 號(1995 年)決議》中的決定。該等決議規定如向在毗鄰盧旺達的國家的人出售或供應軍火及相關物料，是為供非政府部隊在盧旺達境內使用的，則各國須禁止向該等人士出售或供應該等軍火或物料。

Provided that a person who has obtained information or is in possession of a document only in his capacity as a servant or agent of another person may not give consent for the purposes of this paragraph but such consent may instead be given by any person who is entitled to that information or to the possession of that document in his own right;

(b) to any person who would have been empowered under this Schedule to request that it be furnished or produced;

(c) on the authority of the Chief Executive, subject to the information or document being transmitted through and with the approval of the instructing authority, to any organ of the United Nations or to any person in the service of the United Nations or to the Government of any place outside the People's Republic of China for the purpose of assisting the United Nations or that Government in securing compliance with or detecting evasion of measures in relation to Liberia, Somalia or Rwanda decided upon by the Security Council of the United Nations; or

(d) with a view to the institution of, or otherwise for the purposes of, any proceedings for an offence under this Regulation or, with respect to any of the matters regulated by this Regulation, for an offence against any enactment relating to customs.

3. Any person who—

(a) without reasonable excuse, refuses or fails within the time and in the manner specified (or, if no time has been specified, within a reasonable time) to comply with any request made under this Schedule by any person who is empowered to make it;

(b) intentionally furnishes false information or a false explanation to any person exercising his powers under this Schedule;

(c) otherwise intentionally obstructs any person in the exercise of his powers under this Schedule; or

(d) with intent to evade the provisions of this Schedule, destroys, mutilates, defaces, secretes or removes any document,

shall be guilty of an offence.

TUNG Chee-hwa
Chief Executive

21 August 1997

Explanatory Note

This Regulation is made under the United Nations Sanctions Ordinance (125 of 1997). It imposes restrictions pursuant to decisions of the Security Council of the United Nations in Resolution 733 (1992) of 23 January 1992, Resolution 788 (1992) of 19 November 1992 and Resolution 918 (1994) of 17 May 1994, which made provision for an embargo on all deliveries of weapons and military equipment to Liberia, Somalia and Rwanda respectively. It also gives effect to decisions of the Security Council in Resolution 997 (1995) of 9 June 1995 and 1011 (1995) of 16 August 1995 which provided for States to prohibit the sale and supply of arms and related material to persons in the States neighboring Rwanda, if such sale or supply is for the purpose of the use of such arms or material by non-governmental forces within Rwanda.

Annex G

Our Ref : CIB CR/104/53/1 VI

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8 October 2002

Ms Kitty Cheng
Assistant Legal Adviser
Legislative Council Secretariat
Legal Services Division
Legislative Council Building
8 Jackson Road, Central
(Fax No : 2877 5029)

Dear Ms Cheng,

United Nations Sanctions (Liberia) Regulation 2002

I refer to your letter of 8 October 2002 concerning the captioned subject. As requested, I attach below some background information on the captioned Regulation for your reference, please.

Background

Under section 3 of the United Nations Sanctions Ordinance (Cap 537), the Chief Executive is required to make regulations to give effect to an instruction by the Central People's Government to implement sanctions imposed by United Nations (UN) Security Council resolutions.

UN Security Council Resolution 1343 and UN Sanctions (Liberia) Regulation

The UN Security Council adopted Resolution 1343 in March 2001 (**Annex A**) imposing sanctions on Liberia for its active support to armed rebel groups in neighbouring countries and its provision of assistance to the transit of illicit diamond trade that constitutes a threat to international peace and security in the region. The sanctions included the prohibition on the sale or supply to Liberia of arms and related

materials, the provision of military training or assistance, the importation of all rough diamonds from Liberia, as well as the prevention of the entry or transit through the Member Sates of senior members of the Government of Liberia, its armed forces and other related persons. The sanctions were established for an initial period of 12 or 14 months respectively. Under an instruction from the Ministry of Foreign Affairs (MFA) of the People's Republic of China (PRC), the HKSAR Government gave effect to Resolution 1343 through the enactment of the UN Sanctions (Liberia) Regulation, which came into operation on 14 December 2001. The Regulation subsequently expired on 6 May 2002, in line with Resolution 1343.

UN Security Council 1408

Determining that the active support provided by the Government of Liberia to armed rebel groups in the region still constitutes a threat to international peace and security in the region, and noting that the Government of Liberia has not complied fully with the requirements laid down in Resolution 1343, the UN Security Council in May 2002 passed Resolution 1408 (**Annex B**) to extend the sanctions imposed by Resolution 1343 for a further period of 12 months, with an exception provided to the effect that the rough diamonds controlled by the Government of Liberia through the Certificate of Origin regime shall be exempt from the prohibition of importation of rough diamonds exported from the country when a report has been made to the UN Security Council in accordance with paragraph 8 of Resolution 1408. The HKSARG was instructed in May by the MFA of PRC to give effect to Resolution 1408 in the HKSAR.

UN Sanctions (Liberia) Regulation 2002

The UN Sanctions (Liberia) Regulation 2002 seeks to implement Resolution 1408, which extends the duration of sanctions as stipulated in Resolution 1343 as follows:

(a) **Sections 4 and 5** prohibit any person within the HKSAR and any person acting elsewhere who is both a Hong Kong permanent resident and a Chinese national, or a body incorporated or constituted under the law of the HKSAR (HKSAR persons and bodies), from supplying, delivering or exporting to Liberia of arms and related materials including weapons, ammunition, military vehicles and equipment, paramilitary equipment, and components for the aforementioned (prohibited goods);

(b) **Section 6** prohibits HKSAR persons and bodies from providing to a person connected with Liberia any technical advice, assistance, or training related to the supply, delivery, manufacture, maintenance or use of any prohibited goods;

(c) **Section 7** prohibits any rough diamonds exported directly or indirectly from Liberia from being imported into the HKSAR, unless they are controlled by the Government of Liberia through the Certificate of Origin regime that may be established pursuant to paragraphs 7 and 8 of Resolution 1408 and a report has been made to the Security Council of UN in accordance with paragraph 8 of Resolution 1408; and

(d) **Section 8** prohibits senior members of the Government of Liberia, senior members of the armed forces of Liberia and the spouses of the above persons, and any individuals providing financial and military support to armed rebel groups in countries neighbouring Liberia, in particular the Revolutionary United Front in Sierra Leone, as designated by the Committee established pursuant to Resolution 1343, from entering or transiting through the HKSAR.

As Resolution 1408 mainly extends the duration of the sanctions of the Resolution 1343, the UN Sanctions (Liberia) Regulation 2002 is largely modelled on the expired UN Sanctions (Liberia) Regulation. In line with Resolution 1408, the new Regulation will expire on 6 May 2003.

I hope the above is helpful. Please do not hesitate to contact me or my colleague Mr Jeffrey Chan (2918 7506) if we can be of further assistance.

Yours sincerely,

(Anita Chan)
for Secretary for Commerce, Industry and Technology

United Nations Sanctions Ordinance (Cap. 537)

United Nations Sanctions (Democratic Republic of the Congo) Regulation 2005

This is to confirm that the Chief Executive received specific instruction from the Ministry of Foreign Affairs of the People's Republic of China in September 2005 which requested the Government of the Hong Kong Special Administrative Region to fully implement Resolution No. 1616 of the Security Council of the United Nations, and that the United Nations Sanctions (Democratic Republic of the Congo) Regulation 2005 was made in pursuance of that instruction.

Dated this 31st day of October 2005

(Rafael S. Y. HUI)
Chief Secretary for Administration

Appendix VII

A comparison of four Ordinances implementing international obligations

	Fugitive Offenders Ordinance (Cap. 503)	Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)	United Nations Sanctions Ordinance (Cap. 537)	United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)
1. International obligations to be implemented	Bilateral agreements in relation to surrender of fugitive offenders	Bilateral agreements in relation to mutual assistance in criminal matters	Resolutions of UNSC in relation to sanctions	A UNSC resolution and recommendations from the Financial Action Task Force on Money Laundering
2. Date of passage in LegCo	19 March 1997	23 June 1997	16 July 1997	12 July 2002
3. Scrutiny by Bills Committee	Yes	Yes	No	Yes
4. CSAs to proposed provisions in the Bill on LegCo's power over sub. leg.	Amending a subclause to provide for an extension of scrutiny period at the end of a LegCo session.	Amending a clause so that Orders made under the Ordinance will first be subject to approval by LegCo and not by negative vetting.	None	Repealing a clause on sub. leg. making power so that all enforcement and penalty provisions will be in the primary legislation and no sub.leg. need to be made.
5. Domestic matters, e.g.				
(i) Enforcement provisions on investigation power, search and seizure	Provided in the Ordinance	Provided in the Ordinance	Provided in the Regulations made under the Ordinance	Provided in the Ordinance
(ii) Offences and penalty provision	No such provisions	No such provisions	Provided in the Regulations made under the Ordinance	Provided in the Ordinance

	Fugitive Offenders Ordinance (Cap. 503)	Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)	United Nations Sanctions Ordinance (Cap. 537)	United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)
6. Power of LegCo over types of sub.leg. made-				
(i) Scrutiny and amendment of Regulations	- Regulations made under section 26 are subject to scrutiny and amendment by LegCo.	- Regulations made under section 33 are subject to scrutiny and amendment by LegCo.	- Regulations made under section 3(1) are <u>not</u> subject to scrutiny or amendment by LegCo.	Not applicable
(ii) Scrutiny and amendment of Orders	- Orders made under section 3(1) annexing agreements with other jurisdictions are subject to LegCo's scrutiny. LegCo can repeal but cannot amend the Orders.	- Orders made under section 4(1) annexing agreements with other jurisdictions are subject to positive vetting by LegCo and after gazettal are subject to repeal but not amendment by LegCo.	Not applicable	Not applicable
	- Sri Lanka Order was repealed to allow LegCo more time to study the Order and later re-gazetted without amendment.	- An error was noted in the Netherlands Order by the Subcommittee. It was rectified by way of an Exchange of Notes with the Dutch authorities.		
	- 19 Orders made.	- 15 Orders made.		
(iii) Scrutiny and amendment of Notices	- Notices under section 3(14) in relation to names of Parties to Convention are <u>not</u> subject to scrutiny or amendment by LegCo pursuant to section 3(15).	- Notices under section 4(6) in relation to names of Parties to Convention are subject to scrutiny and amendment by LegCo.	Not applicable	Not applicable

立法會
Legislative Council

LC Paper No. LS2/05-06

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

Possible legal proceedings to be taken to clarify the constitutionality of section 3(5) of the United Nations Sanctions Ordinance (Cap. 537)

Background

Section 3(5) of the United Nations Sanctions Ordinance (Cap. 537) ("UNSO") provides that sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap. 1) shall not apply to regulations made under the UNSO. The effect is that any regulation made under the UNSO by the Chief Executive ("CE") to give effect to the instruction of the Ministry of Foreign Affairs of the People's Republic of China for implementing United Nations sanctions is not required to be laid before the Legislative Council ("LegCo") and is not subject to amendment by LegCo.

2. Professor Yash Ghai questioned the constitutionality of section 3(5) of the UNSO. He opined that "[A]n ordinance that takes away from the LegCo the ultimate control over the enactment of subsidiary legislation would therefore be unconstitutional. The LegCo has been given its legislative responsibilities by the National People's Congress and it cannot divest itself of that power ('delegatus non potest delegare')" (see p.5 - 6 of LC Paper No. CB (1)1665/04-05(01)).

3. The Administration, in its response (vide paragraph 4(b) and (c) of LC Paper No. CB(1)1934/04-05(01)), opined that "while LegCo is entrusted with the power and function to enact laws, the Basic Law does not prohibit the delegation of law-making power/function to other bodies or persons to make subsidiary legislation which is clearly contemplated by BL 56(2), BL 62(5), BL 8 and BL 18. In line with the theme of continuity of the Basic Law and section 2(1) of Cap. 1, LegCo may disapply section 34 (negative vetting procedure) and section 35 (positive vetting procedure) of Cap. 1 in relation to subsidiary legislation made by the CE". The Administration concludes that the disapplication of sections 34 and 35 of Cap. 1 in relation to subsidiary legislation made by the CE under section 3 of UNSO is consistent with the Basic Law and should be maintained.

4. The Subcommittee is concerned about the constitutionality of section 3(5) of UNSO. The Legal Service Division is requested to explore, if clarification is to be sought from the court, what possible legal proceedings may be taken and what the possible obstacles are.

Possible legal proceedings – judicial review

5. If the constitutionality of section 3(5) of UNSO is to be clarified, the more appropriate legal proceedings that could be taken is to seek a court declaration by way of an application for judicial review under section 21K of the High Court Ordinance (Cap. 4) and Order 53 of the Rules of the High Court (Cap. 4 sub. leg. A). An alternative could be to seek a declaratory judgment under Order 15 Rule 16 of the Rules of the High Court. However, the court has held that such action was not appropriate for cases involving public law[1].

Preliminary issues - capacity of LegCo and Subcommittee to sue and funding

6. Prior to making an application for judicial review, some preliminary issues, in particular, the capacity of LegCo or this Subcommittee to sue, and the funding of an action have to be considered.

7. At common law, the general rule is that a person with legal personality (either a natural person or corporation) may sue and be sued in his/its own name or jointly with other persons with legal personality. An unincorporated body cannot sue or be sued in its own name or jointly with others but may do so through its members in their own capacity.

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[1] For example –

(i) In *Lee Miu Ling and others v. Attorney General* (MP 1696/1994), the plaintiffs commenced proceedings by originating summons, seeking declaratory relief that those provisions in the Legislative Council (Electoral Provisions) Ordinance (Cap. 381) which related to functional constituencies were unconstitutional. Before hearing the case, Keith J. wanted first to be satisfied that the originating summons procedure was appropriate. After hearing both parties, the judge ruled that the action could proceed by way of originating summons since the Government did not object to it. On appeal to the Court of Appeal, the application for a declaration was refused. Litton VP commented that he had "no doubt that the only proper proceeding was by judicial review". (p.135 in [1996] 1HKC).

(ii) In *Lau Wong Fat v. Attorney General* [1997] HKLRD A15, the applicant challenged the constitutionality of the New Territories Land (Exemption) Ordinance. The proceeding was commenced by writ and the court held that that was the wrong procedure. It was held that where a person seeks to establish that the decision of a person or body infringes rights which are entitled to protection under public law, he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action. However, no further action was taken by the applicant.

8. LegCo is the legislature provided for under the Basic Law as a component of the political structure of the HKSAR. It is responsible for exercising the legislative power of the HKSAR and is vested with the powers and functions provided in Article 73 of the Basic Law. These powers and functions do not expressly include the power to sue and be sued. Nor do any of the provisions in the Basic Law confer on LegCo any legal personality. However, it may be noted that section 186 of the Copyright Ordinance (Cap. 528) provides that "for the purposes of holding, dealing with and enforcing copyright and in connection with all legal proceedings relating to copyright, the Legislative Council is to be treated as having the legal capacities of a body corporate". This is the only instance where LegCo is expressly given legal personality by statute but only in respect of limited purposes.

9. There are no precedent cases in which the legislature in Hong Kong has ever instituted a legal action, though the legislature has been involved as defendant in some cases. Most plaintiffs have tactfully avoided the issue of legal capacity of LegCo[2]. However, in the recent case of *Chan Yuk Lun v. The Legislative Council of the HKSAR* (HCA No. 1189 of 2004), the plaintiff, who acted in person, sought an order of mandamus to compel LegCo to substitute the term "British Crown" and other similar terms in the legislation of Hong Kong with appropriate terms, to enact legislation to protect the security of the People's Republic of China, and to pay the plaintiff damages of not less than one million dollars. During the handling of the case, Counsel's opinion was sought on whether the legislature established under the Basic Law is capable of being sued. Counsel opined that "[T]he LegCo has its powers and functions delineated under the Basic Law. It does not have unlimited powers. The colonial legislature of Hong Kong was sued in the case of *Rediffusion*

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[2] For example-

(i) In *Rediffusion (Hong Kong) Limited* (HCA507/1968), the plaintiff took out a writ and named "Sir David C.C.Trench, K.C.M.G., M.C., M.D.I.Gass, C.M.G., J.P., D.T.E. Roberts, O.B.E.,Q.C., J.P. for and on behalf of themselves and all other members of the Legislative Council of Hong Kong" as the 1st defendants and Geoffrey Catzow Hamilton as 2nd Defendant, seeking a declaration that it would not be lawful for the Legislative Council of Hong Kong to pass a Bill on copyright matters. At the hearing, application has been made to replace by the Attorney General the representatives originally named as 1st Defendants, as prompted by an observation coming from a member of the bench, and this was not opposed by the defendants. Hence, "the Attorney General of Hong Kong for and on behalf of himself and all other members of the Legislative Council of Hong Kong" were named as 1st Defendant.

(ii) In April 1997, in M.P. 1211 of 1997, In the matter of the inquiry by the Select Committee of the Legislative Council into the circumstances surrounding the departure of Mr. Leung Ming Yin, and in the matter of section 9(1) and 14(1) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) and in the matter of Order 24 Rules 13 and 15, Rules of Supreme Court, the Attorney General (the plaintiff) took out originating summons and the members of the Select Committee, i.e. the Hon Ip Kwok-Him, the Hon. Mrs Selina Chow, the Hon. Ronald Arculli, the Hon. Cheung Man-Kwong, the Hon. Margaret Ng, the Hon. James To Kun-sun, the Hon. Christine Loh Kung-wai, the Hon. Mrs. Elizabeth Wong, the Hon. Lawrence Yum Sin-ling, Dr. the Hon. Law Cheung-Kwok and Dr. the Hon. Philip Wong Yu-hong were named as defendants.

(iii) Also in 1997, in *Ng King Luen v. Rita Fan* (HCAL 39/1997), the President of the Provisional Legislative Council was named as a defendant.

(iv) In HCAL 71/1998, Chim Pui-chung sued The President of the Legislative Council on the decision that the motion to remove Chim from office be placed on the agenda for debate at the meeting of Legislative Council on 9 September 1998.

(Hong Kong) Limited v. AG and another [1970] HKLR 231….. The Privy Council held that the legislature could be sued, principally because it does not have unlimited power. Article 8 of the Basic Law provides for the maintenance of common law previously in force in Hong Kong. Accordingly, the principle in the *Rediffusion* case remains applicable.". Nonetheless, the issue was not argued in court. The *Chan Yuk Lun* case was struck out under Order 18 Rule 19 on the following grounds –

(a) no reasonable cause of action is disclosed;

(b) it is frivolous or vexatious; and

(c) it is an abuse of the process of the court.

10. With regard to Commonwealth experience on the issue of the legal capacity of a legislature, it is noted that in *Montana Band v. Canada* [1998] 2F.C. 3, a Canadian court has expressed the view that implied capacity to sue and be sued exists in respect of a Band Council in Canada. (According to the Indian Act of Canada, "band" means a body of Indians.) That case did not turn on whether an elected body such as the Band Council in question has the capacity to sue or be sued because apart from naming that body as plaintiff, certain members of that body were also named as acting on their own behalf and on behalf of all other members. According to the court, this manner of framing the legal action "covers any uncertainties about legal status that might exist". In another Canadian case, the Speaker of the Legislative Assembly of Ontario did initiate a legal action for and on behalf of the Legislative Assembly of Ontario[3].

11. It appears that there are no precedent cases in which legislatures in major Commonwealth jurisdictions have applied for judicial review of the constitutionality of a piece of primary legislation. This may be because of legal and constitutional reasons, such as the application of the doctrine of Parliamentary Supremacy. It may also be due to the practical reason that those legislatures are dominated by members of the ruling party who can exert influence on the government to change the law, if necessary and there is no need in practice to bring the matter to court. However, the constitutional status of the Legislative Council of the Hong Kong Special Administrative Region is quite different from those legislatures.

12. There is at present no clear judicial authority for the Legislative Council's capacity or the lack of capacity to sue and be sued. As a solution to overcome the uncertainty over LegCo's capacity to sue, one or more of the Members may act as parties acting on their own behalf and on behalf of all other members in an

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[3] In *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (379/99), the Speaker of the Legislative Assembly of Ontario applied for judicial review of a decision by the Ontario Human Rights Commission to proceed with the complaint of a non-Christian regarding the reading of Lord's Prayer as part of the daily proceedings at the Assembly. The Speaker of the Legislative Assembly claimed that the reading of Lord's Prayer at the beginning of each session was day-to-day operation of the Legislature and fell within the scope of parliamentary privilege and they had to be protected from outside attack from a body such as the Human Rights Commission. The application was allowed.

action. However, this solution may not be easy to come about, as consent of the Members not named in such an action has to be obtained. There is no procedure available for LegCo to seek consent of these other Members. Indeed any resolution which may be passed by LegCo for this purpose would face a possible constitutional challenge on the basis that LegCo is but only the Legislature established by the Basic Law and it is not vested with the powers and functions to sue the Executive Authorities. Even if LegCo were to pass a resolution authorising certain Member(s) to sue in the name of LegCo and its other Members, there would still be the question of how the proceedings are going to be funded. Any motion which has the object or effect of creating a charge on the public revenue may not be moved under the Rules of Procedure unless the CE gives his consent. It would be unrealistic to contemplate that the CE would give his consent in that regard.

13. The Subcommittee may consider taking up the legal action instead of LegCo, in which case similar issues would arise. Apparently, even if the Subcommittee voted to take legal proceedings by its members on behalf of the Subcommittee, approval or authorization may have to be sought from the House Committee or ultimately LegCo. The terms of reference of this Subcommittee should not cover an authority to sue.

14. From a practical point of view, any agreement to authorize Members or Subcommittee members to institute legal proceedings should better be sought outside of the setting of LegCo operating formally under the Basic Law. A LegCo motion may then be moved for Council to express recognition of such an agreement. The funding issue will also involve the vires issue. But perhaps it would only be reasonable for the LegCo Commission to allow itself to consider such funding application and may approve it with condition that if held otherwise by the court that LegCo does not have the necessary capacity to sue, the cost has to be refunded.

Thresholds that need to be considered to obtain leave for judicial review

15. In general, judicial review is the means by which the court exercises its general supervisory jurisdiction over decisions of public bodies. It is concerned with reviewing not the merits of the decision of which the judicial review is made but the decision-making process itself. It is a matter of discretion for the court to grant remedies including a declaration. The court will not, however, be concerned with a hypothetical or academic issue and will not give an advisory opinion.

16. Application for judicial review is a two-stage process: a leave application followed by a substantive hearing. Prior to making an application for leave, the following thresholds have to be considered and satisfied–

(a) the applicant having sufficient interest in the application (for example, where the decision challenged deprives him of a benefit or that he is being adversely affected by that decision);

(b) a decision to be reviewed, made by a public body against which the review should lie;

(c) grounds for review**,** i.e. whether there is an arguable case on the grounds for review (for example, any illegality, procedural impropriety or unreasonableness); and

(d) promptitude, i.e. whether the application has been made promptly and in any event within 3 months from the date when the grounds for review first arose.

17. On the application of the thresholds, it is relevant to refer to the recent case of *Leung TC William Roy v. Secretary for Justice* (HCAL 160 of 2004), in which leave was granted by Hartmann J. on 28 June 2005 to challenge the constitutionality of primary legislation. In the case, a 20-year old homosexual male, applied for judicial review seeking a declaration that sections 118C, 118F(2)(a), 118H and 118J(2)(a) of the Crimes Ordinance (Cap. 200) enacted in 1991 are unconstitutional in that they are inconsistent with Articles 25 and 39 of the Basic Law and Articles 1, 14 and 22 of the Bill of Rights. The provisions relate to the prohibition of both buggery and acts of gross indecency with a man under the age of 21. The applicant has not been prosecuted under any of the relevant provisions in the Ordinance.

18. The Secretary for Justice was named as respondent. Counsel for the respondent submitted that the court had no jurisdiction to grant leave as –

(a) the applicant was not affected by any decision of a public body and he had no locus standi;

(b) the applicant's challenge did not relate to any "decision" of a public body;

(c) that the applicant's complaint was concerned with a hypothetical issue; and

(d) that the applicant's challenge was in any event out of time.

19. Hartmann J. opined that the test to be applied in granting leave was whether the material before the court disclosed matters which, on further consideration, might demonstrate an arguable case for the grant of relief sought. He opined -

> "If an applicant seeks only declaratory relief, the court has the jurisdiction to hear the matter even though the challenge is not based on the existence of some 'decision' by a public body. Absent a 'decision', declaratory relief may be granted if the court considers it 'just and convenient' to do so.

> …Having found that it is prima facie arguable that, in only seeking declaratory relief, the applicant does not require a 'decision' to be identified in order to found jurisdiction, it must follow that he does not need to demonstrate that he has been affected by any 'decision'.
>
> …When declaratory relief only is sought going directly to primary legislation, what is being considered is an on-going state of affairs. What then becomes of paramount importance is whether there is a real question to be determined and whether the applicant has a real interest in it. ...In the present case, the court having a discretion, it does not seem to me that issues of promptness are of importance, not at least to prevent the applicant from arguing his case at a substantive inter partes hearing.".

20. In brief, Hartmann J. was of the view that if only a declaratory relief was sought, the applicant did not require a "decision" that affected him in order to found jurisdiction and that the issue of promptitude was not important so long as the case is prima facie arguable. Leave for application for judicial review was granted. The case was heard before Hartmann J. on 21 and 22 July 2005. Judgment for the applicant was handed down on 24 August 2005 and declarations that the four sections are inconsistent with the Basic Law and/or the Bill of Rights were granted. As the Secretary for Justice has lodged an appeal on 30 September 2005, it remains to be seen if the view of Hartmann J. on granting the application for leave of judicial review is to be upheld.

Conclusion

21. Should clarification on the constitutionality of section 3(5) of the UNSO by way of an application for judicial review be considered necessary, the internal issues of the capacity of the LegCo or the Subcommittee to institute legal proceedings and funding of cost have first to be resolved. Whether leave will be granted to such a challenge to the constitutionality of primary legislation will be considered by the court upon certain thresholds. The outcome of the appeal, the *Leung TC William Roy v. Secretary for Justice* case could throw light on whether those thresholds will be met for such a challenge.

Prepared by

Legal Service Division
Legislative Council Secretariat
November 2005