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

Background brief

Purpose

This paper provides background on the provisions and mechanism for implementing in Hong Kong resolutions of the United Nations Security Council (UNSC) in relation to sanctions, and summarizes the concerns raised by the Subcommittee during the study of regulations made under the United Nations Sanctions Ordinance (Cap. 537) (UNSO) in the Fourth Legislative Council (LegCo).

Background

2. Prior to 1 July 1997, resolutions of the UNSC in relation to sanctions were implemented in Hong Kong by way of Orders in Council which were made by the United Kingdom Government and extended to Hong Kong. All such Orders in Council as applicable to Hong Kong lapsed at midnight on 30 June 1997. To put in place a mechanism to ensure the continued application and enforcement of UNSC resolutions in relation to 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. Under the mechanism, when the UNSC made a resolution regarding sanctions and calls on Member States including the People's Republic of China to enforce those sanctions, the Ministry of Foreign Affairs (MFA) may issue instructions to the Chief Executive (CE) to implement the sanctions

specified in the resolutions. The CE shall, under section 3(1) of the UNSO, make regulations to give effect to such instructions. These regulations may prescribe penalties for breaches of provisions therein subject to the maximum limits prescribed in section 3(3) of the UNSO.

4. Section 3(5) of the UNSO provides that sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap. 1) shall not apply to regulations made under UNSO. Such regulations are therefore not required to be laid before LegCo and are not subject to its approval or amendment.

5. A subcommittee was formed under the House Committee (HC) in the Third and the Fourth LegCo in October 2004 and December 2008 respectively to consider regulations made under UNSO for implementing in Hong Kong UNSC resolutions in relation to sanctions. Regulations made and gazetted under UNSO would be considered by Members at HC meetings and, where necessary, referred to the dedicated subcommittee for study.

Issues of concern raised by the Subcommittee formed in 2008 (the Subcommittee)

Legal issues

Legislative vehicle for implementation of UNSC sanctions

6. The Subcommittee shared the view of the previous Subcommittee formed in 2004 that making regulations under section 3(1) of the UNSO might not be the only method to implement UNSC sanctions because MFA's instructions had not prescribed the specific vehicle to be used for the purpose. The HKSAR Government was therefore at liberty to consider other options, such as by applying or amending existing legislation as in the case of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (UNATMO).

7. The Administration explained that the UNSO was purposefully enacted as a legislative framework for implementing UNSC sanctions, and regulations made under UNSO should be the primary instruments for such purpose. UNATMO, however, specifically aimed at implementing UNSC Resolution 1373 and a number of international conventions as well as the recommendations of the Financial Action Task Force¹ of which Hong Kong, China was a member. The international instruments covered by UNATMO

¹ Financial Action Task Force is an inter-governmental body whose purpose is to develop and promote national and international policies to combat money laundering and terrorist financing.

sought to tackle terrorism and the financing of terrorism in a continuous manner, and were not "sanctions" against a place as such. In view of the differences in the nature of the subject matters involved and the time-critical nature of sanctions against places, the Administration was of the view that the legislative approach under UNATMO was not appropriate for implementing UNSC sanctions.

Deviation from the powers vested by the principal ordinance

8. In the course of examining the United Nations Sanctions (Democratic People's Republic of Korea) (Amendment) Regulation 2010 introduced to implement the expanded sanctions against the Democratic People's Republic of Korea arising from UNSC Resolution 1874 and UNSC's related decisions, certain members of the Subcommittee expressed concern about the introduction of the new sections 24A and 24B under the Amendment Regulation to provide for new powers to forfeit and dispose of seized prohibited items pursuant to a court order. As the forfeiture provision was not provided for under the principal ordinance, these members queried whether the new provisions were ultra vires. They held the view that since the new sections had serious penal effect and would confer vast enforcement power on the HKSAR Government, they should be subject to vetting by LegCo.

9. The Administration explained that the new sections 24A and 24B were made in accordance with the empowering section under section 3 of the UNSO, which provides that "The Chief Executive shall make regulations to give effect to a relevant instruction" without specifying the means. Under section 3(2), contravention of the regulations may be made an offence and penalties may be prescribed subject to the maximum penalty set out in section 3(3). The Administration was of the view that section 3(3) is intended to set out the maximum fine and term of imprisonment to be prescribed under section 3(2) and does not restrict the type of penalties that could be imposed under subsection (2).

10. The Administration also advised that given that Resolution 1874 explicitly required seizure and disposal of specified items, the making of the new provisions on forfeiture and disposal was not only incidental to but was essential to give effect to the relevant instruction. As such, the new provisions were properly made pursuant to section 3 of UNSO and were intra vires. According to the Administration, the provisions could provide transparency and procedural improvement to enable interested parties to claim back or object to the forfeiture of seized items in an orderly manner under the self-contained regime of the Amendment Regulation. The trade

would also find sections 24A and 24B familiar, as they were not too different from the established forfeiture arrangements under Part VI of the Import and Export Ordinance (Cap. 60) (apart from excluding the mandatory forfeiture provisions). Noting the Administration's explanation, the Chairman of the Subcommittee urged the Administration to consider standardizing the procedures on forfeiture and seizure of prohibited items in future review of relevant ordinances.

Administrative issues

Timeliness of the regulations made under UNSO

11. Despite improvements made in reducing the time gap between the receipt of MFA's instructions and the gazettal of relevant regulations to around three months in most cases, the Subcommittee noted with concern the long time gap between the passing of UNSC resolution 1367 in September 2001 and the gazettal in October 2008 of the United Nations Sanctions (Federal Republic of Yugoslavia) (Prohibition on Terrorist Activity) Regulation (Repeal) Regulation to implement resolution 1367, and between the receipt of the relevant instruction from MFA in June 2010 and the gazettal in March 2011 of the United Nations Sanctions (Iran) (Amendment) Regulation 2011 made to give effect to UNSC Resolution 1929 adopted in 2010. In the latter case, the Administration explained that since Resolution 1929 covered a number of new prohibitions and strengthened measures that were not commonly found in previous UNSC decisions, more time was required to examine how best to include the new provisions in the new subsidiary legislation.

Notification arrangements

12. The Subcommittee was keen to ensure that proper channels were in place to notify the relevant parties (including the trade and those involved in the provision of professional and financial services in Hong Kong) that were affected by regulations made under UNSO to implement UNSC sanctions. The Administration has assured that apart from issuing press releases, it is the standing practice of the Commerce and Economic Development Bureau, upon the gazettal of these regulations, to disseminate such information to the bureaux/departments concerned which would then notify the stakeholders under their purviews as appropriate through routine channels such as newsletters, regular meetings with industry and trade bodies. The said arrangement has been effective in ensuring timely dissemination of information as well as implementation of relevant regulations.

13. At the request of the Subcommittee, the Administration undertook to inform the Subcommittee and the Panel on Commerce and Industry, as early as possible, of those UNSC sanctions which have direct relevance to and impact on trade and industry in Hong Kong by way of a LegCo Brief providing information on the relevant UNSC resolution, the trade relations between Hong Kong and the country under sanction, and the implications on the economy of Hong Kong.

Drafting issues

Use of a model law approach

14. The Subcommittee noted that while different sanction measures, targets and subjects of UN sanctions might be formulated for different countries or places, the drafting approach adopted in most regulations made under UNSO was broadly similar. Some members of the Subcommittees formed in 2004 and 2008 were of the view that the use of a model law approach (or developing different models for different scenarios) was conducive to improving efficiency in the preparation and the study of the regulations, and that the Administration should consider using the model law approach when preparing future regulations to be made under UNSO.

15. The Administration advised that while a model law approach could serve as a useful reference, the specific details of the sanction measures might differ in different resolutions. It might therefore not be possible to devise a standardized approach and "model clauses" that would be appropriate for universal adoption in all subsidiary legislation on UN sanctions.

Drafting improvements

16. During the study of the United Nations Sanctions (Côte d'Ivoire) (No. 2) Regulation 2008 (Côte d'Ivoire Regulation 2008), the Subcommittee noted with appreciation the drafting improvements (such as the adoption of plain language equivalents for certain words and expressions often used in legislation, e.g. "under" instead of "pursuant to") made to the English text of the Côte d'Ivoire Regulation 2008. The Subcommittee also made a number of drafting and textual suggestions to further improve the clarity and quality of the provisions therein. The Administration agreed to consider these suggestions and make appropriate improvement in future regulations made under UNSO.

17. The Subcommittee further considered that guidelines should be provided by the Department of Justice to uphold the quality of law drafting, and suggested that the Law Draftsman be invited to brief the Panel on Administration of Justice and Legal Services (the AJLS Panel) on the work of the Law Drafting Division and its new initiatives including improvements to the drafting of bilingual legislation. The issue on quality of law drafting was subsequently referred to the AJLS Panel for consideration to follow-up.

Latest position

18. The Subcommittee submitted an interim report and a further report to HC on 25 June 2010 and 29 June 2012 respectively, recommending in the further report the setting up of a dedicated subcommittee in the Fifth LegCo to deal with regulations made under section 3 of the UNSO. The Subcommittee also recommended that for regulations which involved minor amendments, such as date of commencement and UNSC resolution numbers, a streamlined approach should be adopted to study the regulations by circulating the information papers provided by the Administration instead of going through the regulations by conducting section-by-section examination at meetings.

19. On 12 October 2012, HC agreed that a dedicated subcommittee should be formed in the Fifth LegCo to consider regulations made under the UNSO. Four regulations gazetted on 28 September 2012 (L.N. 139 to L.N. 142) were referred to the newly formed Subcommittee for consideration.