

香港特別行政區政府
工商及科技局
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19 February 2003

Ms Doris Chan
Clerk to Subcommittee
Legislative Council Secretariat
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(Fax No : 2509 9055)

Dear Ms Chan,

**Subcommittee on United Nations (Afghanistan)(Amendment)
Regulation 2002 and United Nations Sanctions (Angola)
(Suspension of Operation) Regulation 2002**

Meeting on 25 February 2003

Thank you for your letter of 23 January 2003 seeking our clarification on a number of issues. Our replies are set out as below -

- (a) *to provide the instruction by the Ministry of Foreign Affairs (MFA) of the People's Republic of China (PRC) to implement the United Nations Security Council Resolution (UNSCR) 1390 in the HKSAR. If the relevant instruction cannot be released, the Administration is required to provide a written response on the legal basis or other principles justifying non-disclosure and a confirmation as to whether this was instructed by MFA.*

As a member state of the UN, the PRC has an obligation to implement UNSCRs which are adopted pursuant to Chapter 7 of UN Charter. The implementation of UNSCRs concerns foreign

affairs and other considerations regarding national interests and international/foreign relations. Correspondence between CPG and HKSAR Government, including the instructions concerning the implementation of UNSCRs, is intended for internal use only. As such, although we have not received any instructions with regard to the release of such internal correspondence, the HKSAR Government considers it inappropriate to release them to persons outside the Administration. This is a general practice governing the handling of the HKSAR Government's correspondence with all other governments.

We have however informed the public and the LegCo Subcommittee of the contents of the CPG's instruction, i.e., that the HKSAR government should implement the decisions of the UNSCR in relation to UNSCR 1390. We can confirm again that the HKSAR Government has received such an instruction from the CPG giving details of the Resolution with a copy of it (to which the public can gain access at the UN website <http://www.un.org/documents>) making it clear that it was a mandatory measure adopted pursuant to Chapter 7 of the UN Charter. As a member State of the UN, the PRC was obliged to implement the Resolution and accordingly instructed the HKSAR Government to take the necessary implementing measures within the HKSAR. The details of these implementing measures were left to the HKSAR.

- (b) *whether the existing section 10 of the UN (Anti-Terrorism Measures) Ordinance could cover the requirement of UNSCR 1390 to prohibit the provision of technical advice, assistance or training related to military activities to terrorists; and the amendment to that section to be proposed by the Administration, and in the light of the proposed amendment, the appropriateness of using that section to cover the requirement of UNSCR 1390 to prohibit the provision of technical advice, assistance or training related to military activities to terrorists.*

Please refer to the note at Annex prepared by the Security Bureau.

- (c) *the types of instructions received by the HKSAR Government from MFA, other than those on the implementation of UNSCRs, and the reason(s) why these instructions cannot be released to Members of the Legislative Council (LegCo)*

Instructions from MFA to the HKSAR Government cover matters relating to defense and foreign affairs. Other than instructions on

the implementation of UNSCRs, the Commerce, Industry and Technology Bureau received instructions with regard to the implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. The reason for not releasing the relevant instructions is as explained in (a) above.

- (d) *why the Administration considers it in order to repeal certain sections of the Afghanistan Regulation, given that the Chief Executive is required to make regulations to give effect to a relevant instruction from MFA of the PRC under section 3(1) of the United Nations Sanctions (UNS) Ordinance (Cap. 537)*

The Chief Executive has a statutory obligation under section 3(1) of the UNS Ordinance (Cap. 537) to give effect to a relevant instruction. In the present case he has complied with that obligation by making the UNS (Afghanistan)(Amendment) Regulation to give effect to UNSCR 1390. This statutory obligation, of course, only applies if the UNS Ordinance is capable of being used to implement the relevant instruction; in the case of UNSCR 1373, it was not. But if an intra vires regulation can be made to give effect to a relevant instruction, it should be made.

The United Nations (Anti-Terrorism Measures) Ordinance has a number of provisions which overlap with the Regulation and are appropriate to implement parts of UNSCR 1390. As such this Ordinance can be regarded as impliedly amending the statutory obligation in section 3 of the United Nations Sanctions Ordinance to make a Regulation to the extent that the subsequent legislation itself effectively implements the relevant instruction. The effect of this implied amendment is that the original Regulation may be amended or repealed.

- (e) *the Administration's views on the comments made by the Legal Service Division of the LegCo Secretariat on the operation of the UNS Ordinance set out in LC Paper No. LS 45/02-03, and in particular, whether the Administration would amend the Ordinance to extend its scope of coverage with regard to sanctions imposed by the UN Security Council and to provide for regulations made under s.3 to be vetted by LegCo*

We note the comments made by the Legal Service Division of the LegCo Secretariat set out in LC Paper No. LS 45/02-03.

As the United Nations Sanctions Ordinance has been effective in implementing the Central People Government's instructions with regard to the imposition of sanctions against places outside the People's Republic of China in accordance with UN Security Council Resolutions, we consider that there is no pressing need to amend the Ordinance.

Yours sincerely,



(Anita Chan)

for Secretary for Commerce, Industry and Technology

c.c.

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**LegCo Subcommittee on United Nations Sanctions
(Afghanistan)(Amendment) Regulation 2002 and United Nations
Sanctions (Angola)(Suspension of Operation) Regulation 2002**

**Implementation of the requirement of United Nations
Security Council Resolution 1390 to prohibit the
provision of technical advice, assistance or training related
to military activities to terrorists designated by the United Nations**

Purpose

This note provides information on whether the requirement under paragraph 2(c) of United Nations Security Council Resolution (UNSCR) 1390 to prohibit the provision of technical advice, assistance or training related to military activities to terrorists designated by the United Nations (the Requirement) can be implemented by section 10 of the United Nations (Anti-Terrorism Measures) Ordinance (the Ordinance)(Cap. 575).

Background

2. The United Nations Sanctions (Afghanistan)(Amendment) Regulation 2002 (the Regulation) has been enacted since July 2002 to give effect to UNSCR 1390. Section 3D of the Regulation gives effect to the Requirement.

3. The Ordinance has also been enacted since July 2002 to implement the mandatory elements of UNSCR 1373 and the most pressing Special Recommendations of the Financial Action Task Force on Money Laundering for combatting the financing of terrorism. Section 10 of the Ordinance is intended to give effect to part of paragraph 2(a) of UNSCR 1373 suppressing the recruitment of members for terrorist groups.

4. At the meeting of the Subcommittee held on 21 January 2003, Members requested the Administration to examine if the provision of section 10 of the Ordinance can cover the Requirement.

Section 10 of the Ordinance

5. The existing section 10 of the Ordinance provides that –

“(1) A person shall not –

(a) recruit another person to become a member of, or to serve in any capacity with; or

(b) become a member of, or begin to serve in any capacity with,

a person specified in a notice under section 4(1) or (2).

(2) Where a person is a member of, or is serving in any capacity with, a person specified in a notice under section 4(1) or (2) immediately before the date of publication in the Gazette of the notice, the first-mentioned person shall take all practicable steps to cease to be such a member or to cease to so to serve, as the case may be."

6. Section 10 as it now stands would only cover situations where the person who provides technical advice, assistance or training related to military activities to a terrorist/terrorist associate designated by the United Nations Committee also becomes a member, or serves with the terrorist/terrorist associate in some capacity. A person who provides technical advice etc. for a fee would, in most circumstances, not fall into either category.

Proposed amendment of section 10 of the Ordinance

7. It should however be noted that during the scrutiny of the Ordinance before its passage, some law academics had commented that "to serve in any capacity with" in section 10 was too wide and would for instance, make it criminal for a person to take up employment with a terrorist organization as a cleaner. We considered the comment reasonable.

8. As agreed by the majority of the Members of the Bills Committee, we moved a Committee Stage Amendment (CSA) intended to narrow the scope of section 10 by deleting "to serve in any capacity with" and to provide for the appropriate mens rea for offences under section 10. The CSA was, in the event, not approved due to a technicality. The existing section 10 as passed is not brought into operation.

9. Meanwhile, we are proceeding with the stage two anti-terrorism legislative exercise in which one of the proposals is to amend section 10 as described in paragraph 8 above.

Conclusion

10. Considering that (i) section 10 of the Ordinance is intended to implement the requirement of UNSCR 1373 to prohibit recruitment of members for terrorist groups; (ii) the section as it presently stands is inadequate to cover the Requirement; (iii) the section is not brought into operation; and (iv) a proposal for its amendment will be put forward, we are of the view that it cannot be relied upon to cover the Requirement.

Security Bureau
February 2003