

1: Whether the United Nations (UN) Sanctions (Afghanistan)(Amendment) Regulation 2002 (Amendment Regulation) is within the regulation making powers of the UN Sanctions Ordinance? (Raised by the Hon James TO)

Response:

In October 1999 and December 2000, the UN Security Council passed Resolutions (UNSCR) 1267 and 1333 condemning the continuing use of the areas of Afghanistan controlled by the Taliban for the sheltering and training of terrorists and planning for terrorist acts. Under previous instructions from the Ministry of Foreign Affairs (MFA) of the People's Republic of China (PRC), the Government implemented the UNSCR 1267 and 1333 in the HKSAR through the enactment of the UN Sanctions (Afghanistan) Regulation in June 2000 and UNS (Afghanistan) (Arms Embargoes) Regulation in October 2001 respectively. The latter expired on 18 January 2002, in line with UNSCR 1333.

Determining that the Taliban have failed to respond to demands in previous UNSCRs including UNSCR 1267 and 1333, and condemning the Taliban for allowing Afghanistan to be used as a base for terrorists training and activities and the Al-Qaida network and other associated terrorist groups for the multiple criminal and terrorist acts, the Security Council passed UNSCR 1390 in January 2002 to extend certain sanctions imposed by UNSCR 1267 and 1333. The Government subsequently received an instruction from the MFA of PRC to implement the Resolution in the HKSAR.

The legal advice we received was that it would be in order for us to implement the Resolution under the UN Sanction Ordinance. The reasons are :

- (a) The UN Security Council Resolution (UNSCR) 1390 seeks to extend certain sanctions imposed under UNSCR 1267 and 1333, which were passed by the Security Council to impose sanctions in relation to terrorism in Afghanistan. As such, UNSCR 1390 is an extension of UNSCR 1267 and 1333;

- (b) In UNSCR 1390, the Security Council makes frequent references to Afghanistan, including
- (i) Paragraph 1: "Recalling its resolutions 1267, 1333 and 1363", which are measures adopted by the Security Council with regard to the situation in Afghanistan;
 - (ii) Paragraph 2: "Reaffirming its previous resolutions on Afghanistan"; and
 - (iii) Paragraph 7: "Condemning the Taliban for allowing Afghanistan to be used as a base for terrorist training and activities, including".
- (c) The targets of the sanctions under UNSCRs 1267, 1333 and 1390 are individuals and entities designated by the Committee established pursuant to UNSCR 1267 (the 1267 Committee). Therefore, the targets of UNSCR 1390 are identical to those of UNSCR 1267 and 1333, apart from the updates made by the 1267 Committee from time to time, i.e. individuals and entities engaged in terrorism who use Afghanistan as their base. It would therefore be inappropriate to view "place", in the context of the UN Sanctions Ordinance, in isolation from the people who operate in that place.
- (d) After the 911 incident, the Security Council passed UNSCR 1373 on 28 September 2001 to impose measures against all terrorists, including the freezing of their funds and prohibition on supplying them of arms. These and other more specific measures are included in the UNSCR 1390, which was passed at a later date, i.e. 28 January 2002. This indicates that the Security Council had intended to give specific regard to the situation in Afghanistan in passing UNSCR 1390 as it could have simply terminated UNSCR 1267 and not extended UNSCR 1333, relying instead on UNSCR 1373.

- 2. Why does the Amendment Regulation impose strict liability in respect of the offence of the supply of weapons, while the UN (Anti-Terrorism Measures) Ordinance (Anti-Terrorism Ordinance) requires the proof of mens rea for the same offence? (Raised by the Hon James TO)**

Responses:

Sections 3B and 3C of the Amendment Regulation prohibit the supply, delivery and export of arms and related materials to relevant persons and undertakings as specified by the 1267 Committee, in accordance with paragraph 2(c) of UNSCR 1390. Under the Anti-Terrorism Ordinance, section 9 prohibits supply of weapons to terrorists and terrorist associates, giving effect to paragraph 2(a) of UNSCR 1373.

On the point about strict liability, Members may wish to note that under sections 3B and 3C of the Amendment Regulation, a defence is provided to the effect that the offence will be negated if the accused can prove that he did not know and had no reason to believe that the goods in question were prohibited goods, or the goods were to be supplied to a relevant person or undertaking. Our legal advice is that the sections are consistent with the human rights provisions under the Basic Law.

In comparing the Amendment Regulation and the UN Sanctions Ordinance in this area, it should be noted that the offences under the Regulation can only be committed in respect of relevant persons and undertakings specifically designated by the CE according to the namelist published by the 1267 Committee. By contrast, whereas the offences under the Anti-Terrorism Ordinance are linked to terrorists and terrorist associates, an individual or entity can be a terrorist or terrorist associate under the Anti-Terrorism Ordinance even if there has been no designation/specification by the CE or the court. It is accordingly quite appropriate for the Anti-Terrorism Ordinance to provide for a mental element (that the alleged offender knew or had reasonable grounds to believe that the receiver of the weapons was a terrorist or terrorist associate) and the Regulation to provide for a defence (that the alleged offender did not know that the prohibited goods were to be supplied to a relevant person or undertaking).

3. Whether the wide powers of search and investigation provided under the Amendment Regulation are within the scope of the UN Sanctions Ordinance. (Raised by the Hon Margaret NG)

Response:

The UN Sanctions Ordinance provides that:

"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" (section 3(2))

"Regulation 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; and

(b) on conviction on indictment by an unlimited fine and imprisonment for a term not exceeding 7 years." (section 3(3))

The UN Sanctions Ordinance provides that the contravention of any regulation made under the Ordinance shall be an offence. It is accordingly reasonable to provide for powers of search and investigation under the regulations to facilitate the enforcement of the respective provisions.

Also, given the nature of the offences under the Amendment Regulation, it is necessary to provide powers for search and investigation to facilitate the enforcement of the prohibitory sections. For example, powers under sections 3F, 3G, 3H, 3I and 3J are provided to facilitate the enforcement of sections 3B, 3C and 3E in connection with the prohibition on the supply, delivery, and export of prohibited goods to relevant persons and undertakings.

Our legal advice is that the provisions on search and investigation powers are consistent with the human rights provisions of the Basic Law.

Commerce, Industry and Technology Bureau
October 2002