

立法會 *Legislative Council*

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Paper for the House Committee meeting on 3 October 2003

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

Purpose

This paper reports on the deliberations of the Subcommittee on United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002 and United Nations Sanctions (Angola) (Suspension of Operation) Regulation 2002.

Background

2. The United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002 and the United Nations Sanctions (Angola) (Suspension of Operation) Regulation 2002 are made under section 3 of the United Nations Sanctions Ordinance (Cap. 537) (the Ordinance) by the Chief Executive (CE) on the instruction of the Ministry of Foreign Affairs (MFA) of the People's Republic of China (PRC) and after consultation with the Executive Council (ExCo). 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 so made. As a result, both Regulations are not required to be laid before the Legislative Council (LegCo) and are not subject to amendment by the Council.

The Regulations

The United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002 (the Afghanistan (Amendment) Regulation) (L.N. 134)

3. The object of the Afghanistan (Amendment) Regulation is to give effect to the United Nations Security Council Resolution (UNSCR) 1390 of 16 January 2002. UNSCR 1390 seeks to continue, amend and terminate certain sanctions imposed against the Taliban under UNSCR 1267 and against Usama bin Laden, the Al-Qaida Organisation and the Taliban under UNSCR 1333, which were made

at the time when Afghanistan was still under the control of the Taliban.

The United Nations Sanctions (Angola) (Suspension of Operation) Regulation 2002 (the Angola (Suspension of Operation) Regulation) (L.N. 151)

4. On 28 August 1997, UNSC passed UNSCR 1127 to impose certain measures on the National Union for the Total Independence of Angola (UNITA). To give effect to UNSCR 1127, sections 4D and 4E of the United Nations Sanctions (Angola) Regulation (the Measures) were made by the CE on the instruction of the MFA after consultation with the ExCo. Section 4D prohibits the entry and transit of any person designated as a senior official of the UNITA or an adult member of his immediate family through the HKSAR while section 4E cancels any travel document issued to such a person by the Director of Immigration.

5. UNSCR 1412 (2002) was passed on 17 May 2002 to suspend the Measures for 90 days from 17 May 2002 to 14 August 2002. Subsequently UNSCR 1432 (2002) was passed on 15 August 2002 to suspend the Measures for an additional period of 90 days up to 13 November 2002.

6. The object of the Angola (Suspension of Operation) Regulation, which has come into operation upon its gazettal on 18 October 2002, is to suspend the operation of sections 4D and 4E of the United Nations Sanctions (Angola) Regulation.

The Subcommittee

7. At the House Committee meeting on 4 October 2002, Members agreed that a Subcommittee should be formed to study the Afghanistan (Amendment) Regulation. At the House Committee meeting on 25 October 2002, Members agreed that the Subcommittee should also study the Angola (Suspension of Operation) Regulation. The membership list of the Subcommittee is in **Appendix I**.

8. Under the chairmanship of Hon Margaret NG, the Subcommittee has held five meetings with the Administration.

Deliberations of the Subcommittee

The Afghanistan (Amendment) Regulation

Validity of the Afghanistan (Amendment) Regulation

9. Members are of the view that the Afghanistan (Amendment) Regulation,

made under section 3 of the Ordinance, is ultra vires and therefore void. This is because "sanction" is defined in the Ordinance as "mandatory measures decided by the Security Council of the United Nations, implemented against a place outside the People's Republic of China" whereas the Afghanistan (Amendment) Regulation imposes sanctions against "persons" instead of a place.

10. Members note that UNSCRs 1267 and 1333 were made at the time when Afghanistan was still under the control of the Taliban. Although the targets remain to be Usama bin Laden, the Al-Qaida Organisation and the Taliban, the Afghanistan (Amendment) Regulation no longer imposes sanctions against a place (i.e. the territory of Afghanistan) as such as a result of the changing situation in Afghanistan. Members have also pointed out that some provisions in the Afghanistan (Amendment) Regulation overlap with certain provisions in the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (the Anti-Terrorism Ordinance) which sought to implement UNSCR 1373 and came into operation on 23 August 2002. To address these problems, members suggest that the Administration should -

- (a) amend the Ordinance to extend the scope of coverage in order to cover all kinds of UN sanctions, irrespective of whether they are targeted at persons or places, and to provide LegCo with the power to scrutinise regulations made thereunder; and
- (b) introduce an amendment bill to repeal those provisions in the Afghanistan (Amendment) Regulation which overlap with certain provisions in the Anti-Terrorism Ordinance.

11. The Administration, however, maintains its view that the Afghanistan (Amendment) Regulation is within the regulation making power of the Ordinance, as the Afghanistan (Amendment) Regulation was enacted to implement UNSCR 1390 and UNSCR 1390 is a continuation of UNSCRs 1267 and 1333, the target of which is Afghanistan.

12. In this connection, members have drawn the Administration's attention to a relevant past discussion when the Administration consulted the Panel on Security and the Panel on Administration of Justice and Legal Services at a joint meeting on 30 November 2001 on measures to combat terrorism and terrorist financing. The Secretary for Security informed members at the meeting that the Administration was considering implementing UNSCR 1373 through the making of a regulation under section 3 of the Ordinance or the introduction of a new bill. In response to questions raised about the first option, the Solicitor General said that the Ordinance applied to places outside the PRC, while UNSCR 1373 was not directed at a place. If UNSCR 1373 was to be implemented through the making of a regulation under section 3 of the Ordinance, an amendment would need to be made to the Ordinance first.

13. The Administration agrees that there is overlap between the Afghanistan (Amendment) Regulation and the Anti-Terrorism Ordinance in that they both contain provisions prohibiting the supply of funds and arms to the persons and entities designated by the Committee established pursuant to UNSCR 1267 (the Committee). However, the Administration has explained that such overlap is inevitable as it arises from the overlap between UNSCR 1373 and UNSCR 1390 themselves. The Administration has also pointed out that the target coverage of the Anti-Terrorism Ordinance is wider than that of the Afghanistan (Amendment) Regulation for it includes, but is not limited to, the persons and entities designated by the Committee.

14. While the Administration believes that it is appropriate to implement UNSCR 1373 and UNSCR 1390 separately, it is prepared to repeal the provisions relating to arms embargoes (including the enforcement provisions) and prohibition against supply of funds under the Afghanistan (Amendment) Regulation by way of an amendment regulation and to rely on sections 6, 7, 8 and 9 of the Anti-Terrorism Ordinance.

15. Members have asked the Administration for the legal authority to make an amendment regulation to repeal certain sections of the Afghanistan (Amendment) Regulation, given that the power of the Chief Executive to make regulations under section 3(1) of the Ordinance is to give effect to a relevant instruction from the MFA of the PRC.

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

17. The Administration has also pointed out that the Anti-Terrorism Ordinance has a number of provisions which overlap with the Afghanistan (Amendment) Regulation and are appropriate to implement parts of UNSCR 1390. As such, the Anti-Terrorism Ordinance can be regarded as impliedly amending the statutory obligation of the CE under the 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.

18. Hon Audrey EU disagrees with the explanation given in paragraphs 16 and 17 above, having regard to the fact that the legal authority for CE to make regulations under section 3(1) of the Ordinance comes from the MFA of the PRC.

19. The Chairman has pointed out that if the Administration's position is that if the Afghanistan (Amendment) Regulation was required to give effect to the instruction from the MFA of the PRC to implement UNSCR 1390, then the HKSAR Government would need to seek a fresh instruction from the MFA of the PRC to repeal certain provisions of the Afghanistan (Amendment) Regulation.

20. The Administration has replied that it would not proceed with its proposal of making an amendment regulation to repeal certain sections of the Afghanistan (Amendment) Regulation if members do not support such an approach.

Powers of search and investigation

21. Members consider that the powers of search and investigation under the Afghanistan (Amendment) Regulation are too wide. They have pointed out that similar powers originally proposed under the United Nations (Anti-Terrorism Measures) Bill (the Anti-Terrorism Bill), which was enacted to implement UNSCR 1373, are more limited in scope than those under the Afghanistan (Amendment) Regulation. Notwithstanding this, the Schedules to the Anti-Terrorism Bill containing similar powers were deleted during the Committee Stage by an amendment moved by the Administration. The Administration has agreed with the Bills Committee on the United Nations (Anti-Terrorism Measures) Bill that enforcement agencies will rely on general investigation powers under other existing legislation to enforce the Anti-Terrorism Ordinance.

22. The Administration has explained that the Afghanistan (Amendment) Regulation and the Anti-Terrorism Ordinance are two separate exercises implementing two different UNSCRs with different background and intention. The Administration has pointed out that the UN Sanctions Ordinance provides that the contravention of any regulation 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 Afghanistan (Amendment) Regulation, it is necessary to provide powers for search and investigation to facilitate the enforcement of the prohibitory sections.

23. The Administration has also pointed out that its legal advice is that the provisions on search and investigation powers are consistent with the human rights provisions of the Basic Law.

24. Although both the Anti-Terrorism Ordinance and the Afghanistan (Amendment) Regulation were gazetted on 19 July 2002, the Chairman considers it incumbent upon the Administration to see that the powers of search and investigation under the Afghanistan (Amendment) Regulation are in line with those under the Anti-Terrorism Bill which was passed by LegCo on 12 July 2002. This is particularly important because the Anti-Terrorism Bill was passed by LegCo through an open and transparent legislative process, whereas the

Afghanistan (Amendment) Regulation was made by CE without any scrutiny by LegCo.

Instruction received from the MFA to implement UNSCR 1390 in the HKSAR

25. Members have asked the Administration to provide to the Subcommittee the instruction from the MFA of the PRC to implement UNSCR 1390 in the HKSAR for the purpose of scrutinising whether the Afghanistan (Amendment) Regulation has given effect to the relevant instruction in full. If the Administration declined to release the relevant instruction, it should provide information on the legal basis or other principles justifying non-disclosure and a confirmation as to whether this was instructed by the MFA.

26. The Administration has explained that the issue of instructions by the MFA to the HKSAR to implement UNSCRs is consistent with the Basic Law. As the implementation of UNSCRs concerns foreign affairs and other considerations regarding national interests and international/foreign relations, the Administration considers it not appropriate to release the instructions to implement UNSCR 1390 to parties outside the HKSAR Government.

27. The Administration has also pointed out that correspondence between the Central People's Government (CPG) and the HKSAR Government, including the instructions concerning the implementation of UNSCRs, is intended for internal use only. As such, although the Administration has 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 departments.

28. The Administration has, however, pointed out that it has informed the public and the Subcommittee of the CPG's instructions, i.e., that the HKSAR Government should implement the decisions of UNSC in relation to UNSCR 1390. The HKSAR Government was informed of the contents of the resolution and the mandatory measures adopted pursuant to Chapter 7 of the UN Charter. As a member state of the UN, the PRC has an obligation to implement the Resolution. The CPG therefore instructed the HKSAR Government in February 2002 to implement the relevant provisions of UNSCR 1390 in the HKSAR. It was left to the HKSAR Government to work out the details of the measures to be adopted.

29. The Chairman and Hon Audrey EU consider that the Administration's decision not to release the actual document is devoid of any legal basis and arbitrary for the following reasons. First, the Administration has admitted that it is only a general practice for not releasing correspondences between the HKSAR Government and other governments, including the Central Authorities. Second, if the instruction is considered protected information under the Official Secrets Ordinance (Cap. 521), then disclosing the contents of the instruction should not be

allowed. Third, the Administration has not sought public interest immunity for not disclosing the instruction.

30. Arising from the discussion on the Afghanistan (Amendment) Regulation, members have asked the Legal Service Division to advise in writing on the following issues -

- (a) refusal to release the instruction from the MFA of the PRC to implement a resolution made by UNSC;
- (b) validity of the Afghanistan (Amendment) Regulation made under section 3(1) of the Ordinance;
- (c) exercise of power by the CE to amend or repeal certain provisions of the Afghanistan (Amendment) Regulation which overlap with those of the Anti-Terrorism Ordinance; and
- (d) implementation of the overlapping provisions of the Afghanistan (Amendment) Regulation.

The Legal Service Division's paper setting out its legal advice on the above four issues (LC Paper No. LS100/02-03) is in **Appendix II**.

The Angola (Suspension of Operation) Regulation

UNSCRs 1412 and 1432

31. Members note that the Angola (Suspension of Operation) Regulation only came into effect upon its gazettal on 18 October 2002. On being asked to clarify what measures were adopted to implement the above Resolutions for the period from 17 May to 17 October 2002, the Administration has explained that it received an instruction from the MFA to implement UNSCR 1412 (2002) in June 2002. Finding it impracticable to introduce a regulation to that effect for ExCo's consideration before its summer recess, the Administration considered it more appropriate and in the greater interest of Hong Kong to give effect to the Resolution through administrative means under its immigration control regime. It was possible for the Director of Immigration to carry out the Resolution by accepting applications for entry visas from senior officials of UNITA and their immediate family members during the effective period of the Resolution.

32. Although the Immigration Department has not received any applications from senior officials of UNITA and their immediate family members during the period in question, members consider it patently wrong for the Administration to have made the policy decision that the Director of Immigration would be able to exercise discretion to process such entry applications during the period from 17 May 2002 to 17 October 2002 when the United Nations Sanctions (Angola)

Regulation was still in force.

33. The Administration has explained that the reason why it was considered appropriate to process such entry applications is that it had anticipated that the CE would shortly make regulation to implement UNSCR 1412 to suspend sections 4D and 4E of the United Nations Sanctions (Angola) Regulation. Moreover, under the existing immigration control regime, visitors from Angola are required to apply to the Direction of Immigration for entry visas when they wish to enter HKSAR regardless of whether there are any UN-mandated restrictions on their travel or entry. Hence, it was possible for the Director of Immigration to carry out the provisions of UNSCR 1412 by accepting applications for entry visas from senior officials of UNITA and their immediate family members during the period in question.

34. The Administration has pointed out that although the processing of visa applications might have commenced, under no circumstances would the Director of Immigration issue an entry visa until the Angola (Suspension of Operation) Regulation came into force.

35. Members remain unconvinced about the appropriateness of using administrative means to give effect to UNSCR 1412 when the United Nations Sanctions (Angola) Regulation was still in force. Members have requested the Administration to provide a paper setting out why it considers it appropriate for the Director of Immigration to carry out the measures in UNSCR 1412 when the law to implement the Resolution had not been enacted.

The Administration's practical difficulties in implementing the measures in UNSCR 1412

36. The Administration has explained that after receiving the MFA instruction on UNSCR 1412 in June, the Administration found that it was practically impossible to introduce a regulation under the Ordinance suspending the sanctions to give effect to Resolution 1412 before 14 August 2002. Experience indicated that the whole process of drafting and enacting a regulation under the Ordinance would take at least two to three months. The chances of having a regulation in place before UNSCR 1412 expired on 14 August 2002 were therefore slim, taking into account the fact that the last meeting of the ExCo before its summer recess was scheduled for 9 July 2002. Even if the Administration had proceeded with the drafting of a regulation, UNSCR 1412 would have expired by the time it tabled the draft regulation before ExCo when it resumed after the summer recess.

37. In view of the above practical difficulties, the Administration proceeded to explore what action the HKSAR Government could take which would be consistent with the purpose of UNSCR 1412 and also within the bounds of the existing laws and regulations that were in force. The Administration found that it would be possible for the HKSAR Government to do so through the existing visa

control regime executed by the Immigration Department.

Complying with UNSCR 1412 under the Immigration Ordinance

38. The Immigration Ordinance provides that persons who do not enjoy the right of abode or right to land in Hong Kong require permission to land in Hong Kong as visitors regardless of where they come from and regardless of any UN-mandated restrictions. Visitors from Angola require visa to enter the HKSAR. Although UNSCR 1412 provides for a suspension of the travel restrictions imposed by UNSCR 1127, it does not derogate from the power of member states to impose visa requirements and certainly does not require that senior officials of the UNITA and their immediate family members be admitted. It follows that not granting a visa to senior officials of the UNITA and their immediate family members during the period when the Resolution was in force would not have constituted a violation of UNSCR 1412.

39. The Administration has further pointed out that in fact there were no relevant applications during the period when UNSCR 1412 was in force. Had there been any visa applications, the Director of Immigration would have examined them and deferred any action until a new regulation was in force to suspend the travel restrictions as provided for in the United Nations Sanctions (Angola) Regulation.

40. In conclusion, the Administration has reiterated that the HKSAR Government had acted in full accordance with the United Nations Sanctions (Angola) Regulation before it was amended on 18 October 2002. The Administration had also ensured that the HKSAR did not violate UNSCR 1412 in practice despite the fact that it was unable to enact a regulation to give effect to it under the Ordinance. Given the difficulties it had with implementing UNSCR 1412 through legislation at the time, the Administration considers that it took steps that were lawful, reasonable, and in the best interests of the HKSAR.

Repeal of the United Nations Sanctions (Angola) Regulation and the Angola (Suspension of Operation) Regulation

41. The United Nations Sanctions (Angola) Regulation and the Angola (Suspension of Operation) Regulation were repealed on 4 April 2003 by the United Nations Sanctions (Angola) (Repeal) Regulation 2003 (LN. 95 of 2003) to give effect to the instructions of the MFA in relation to UNSCR 1448.

42. Members stand firm on their view that the Administration should not have embarked on any administrative means to implement the measures of UNSCR 1412 when the United Nations Sanctions (Angola) Regulation was still in force. The practical difficulties to enact law to implement the Resolution before 14 August 2002 should not be used as a pretext for circumventing the law by using administrative means, which is detrimental to the rule of law in Hong Kong and

sets a bad precedent.

The Ordinance

43. Members share the view that the power of the CE under the Ordinance is too wide without any checks and balance, as demonstrated by the wide interpretation by the Administration of the expression "places outside the People's Republic of China" in the Afghanistan (Amendment) Regulation to cover persons connected to these places and the wide powers of search and investigation under the Afghanistan (Amendment) Regulation. They have asked the Administration to consider amending the Ordinance to provide for regulations made under section 3 to be subject to scrutiny by LegCo. The Legal Service Division's comments on the operation of the Ordinance (LC Paper No. LS45/02-03) is in **Appendix III**.

44. In response to the above request, the Administration has informed the Subcommittee that it considers that there is no pressing need to amend the Ordinance, which has been effective in implementing the CPG's instructions with regard to the imposition of sanctions against places outside the PRC in accordance with UNSCRs.

Conclusions

45. The Subcommittee is of the view that -

- (a) the Afghanistan (Amendment) Regulation is ultra vires and therefore void. The Administration has not given effect to the relevant instruction of the MFA of the PRC (paragraphs 9 and 10 above refer);
- (b) in the case of the Angola (Suspension of Operation) Regulation, the Administration should admit that it was wrong to have used administrative means to give effect to the instruction given by the MFA of the PRC to implement the measures of UNSCR 1412 when the United Nations Sanctions (Angola) Regulation was still in force (paragraph 42 above refers);
- (c) the Ordinance should be amended to extend the scope of its coverage in order to cover all kinds of UN sanctions, irrespective of whether they are targeted at persons or places, and to provide LegCo with the power to scrutinise regulations made thereunder (paragraphs 10(a) and 43 above refer); and
- (d) when making a regulation under the Ordinance in future, the relevant instruction given by the MFA of the PRC should be provided to LegCo as a matter of routine to enable Members to assess whether the regulation has given effect to the relevant

instruction in full.

Recommendation

46. The Subcommittee requests the Chairman of the House Committee to convey the conclusions of the Subcommittee to the Chief Secretary for Administration and to ask him to report the outcome of his consideration to the House Committee.

Advice sought

47. The House Committee is invited to note the Subcommittee's recommendation in paragraph 46 above.

Council Business Division 2
Legislative Council Secretariat
25 September 2003

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

Membership List

Chairman	Hon Margaret NG
Members	Hon Cyd HO Sau-lan
	Hon James TO Kun-sun
	Hon LAU Kong-wah, JP
	Hon Audrey EU Yuet-mee, SC, JP
	(Total : 5 Members)
Clerk	Ms Doris CHAN
Legal Advisers	Ms Bernice WONG Miss Monna LAI
Date	1 July 2003

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Legislative Council

LC Paper No. LS 100/02-03

Legal Advice in relation to United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002

Refusal to release the instruction from MFA of PRC to implement a resolution made by the UN Security Council

The Legal Service Division agrees with the Administration that there is no legal principle prohibiting the disclosure of instructions from MFA of PRC to implement resolutions made by the UN Security Council. The only reason that the Administration considers it inappropriate to release instructions from MFA of PRC is the general practice governing the handling of HKSAR Government's correspondence with all other governments.

2. The general practice may not be applicable to documents necessary to facilitate the scrutiny of a legislative proposal. In this particular case, regulations made under the Ordinance are to give effect to relevant instructions. It would be relevant for members to examine the actual instructions, rather than to rely on the Administration's interpretation of their contents, in order to be satisfied that the instructions have been given effect in full.

Validity of the Afghanistan (Amendment) Regulation made under section 3(1) of the Ordinance

3. The Legal Service Division remains doubtful whether the Afghanistan (Amendment) Regulation is within the regulation making powers of the Ordinance. Subsequent to the meetings of the Subcommittee, members of the Panel on Administration of Justice and Legal Services discussed at the meeting on 31 March 2003 with the Law Officer (International Law) on the government's policy on implementation of resolutions and conventions made by the United Nations. Members noted that the power of the Chief Executive to make regulations under section 3(1) of the Ordinance cannot be used to implement all decisions of the UN Security Council. There would be occasion when implementation had to be by way of primary legislation (assuming existing legislation or administrative means are not appropriate to implement the particular decision). Such a situation arose in the case of UNSCR 1373 which was directed towards terrorism generally and could not be categorized as a resolution imposing sanctions against a place.

4. We do not agree with the Administration's explanation to the Subcommittee for the making of the Afghanistan (Amendment) Regulation. The fact that UNSCR 1390 is a continuation of UNSCRs 1267 and 1333 is not a justification for the Afghanistan (Amendment) Regulation. Article 41 of the UN Charter does not define the scope of the measures that could be decided on except that they should not involve the use of armed forces. Nor does it limit the measures to those that could only be taken against a place.

5. The legal issue should be whether the three UNSCRs are for imposing sanctions against a place outside PRC. If they are, then the regulations implementing such sanctions may come within the scope of the Ordinance. The fact that the two sanctions set out in the original United Nations Sanctions (Afghanistan) Regulation have been either repealed or amended by the Afghanistan (Amendment) Regulation provides clear indication that the sanctions in UNSCR 1390 are targeted at the relevant persons and relevant undertakings (as defined in the Afghanistan (Amendment) Regulation) rather than at Afghanistan.

Exercise of power by the Chief Executive to amend or repeal certain provisions of the Afghanistan (Amendment) Regulation which overlap with those of the Anti-Terrorism Ordinance

6. We have reservations about the proposal to make an amendment regulation under section 3(1) of the Ordinance repealing the provisions relating to arms embargoes (including the enforcement provisions) and prohibition against the supply of funds in the Afghanistan (Amendment) Regulation.

7. Section 3(1) of the Ordinance imposes a statutory obligation on the Chief Executive to make regulations to give effect to a relevant instruction. These regulations are not to give effect directly to the measures or sanctions decided by the UN Security Council. On a strict construction of section 3(1), the Administration may need to obtain a relevant instruction from MFA of PRC before the Chief Executive may make any amendment regulation. Relevant instruction is defined in the Ordinance to include, where sanctions have been implemented, any instruction to the Chief Executive to cease implementing such sanctions, to modify such sanctions or the implementation of such sanctions.

8. There is also no apparent support for the Administration's argument to regard the Anti-Terrorism Ordinance as impliedly amending the statutory obligation of the Chief Executive under the Ordinance to the extent that the subsequent legislation itself effectively implements the relevant instruction. Even if the argument were to be accepted by the courts, it may not be applicable to the facts relating to the Anti-Terrorism Ordinance and the Afghanistan (Amendment) Regulation as illustrated by the following chronology of events :

12 April 2002	Gazettal of the Anti-Terrorism Bill
17 April 2002	First Reading of the Anti-Terrorism Bill
11 July 2002	Resumption of Second Reading debate of the Anti-Terrorism Bill
12 July 2002	Enactment of the Anti-Terrorism Ordinance Making of the Afghanistan (Amendment) Regulation
19 July 2002	Publication of the Anti-Terrorism Ordinance Publication and commencement of the Afghanistan (Amendment) Regulation
23 August 2002	Commencement of various provisions of the Anti-Terrorism Ordinance

9. The Anti-Terrorism Ordinance was enacted on the same day when the Afghanistan (Amendment) Regulation was made. Their respective dates of publication in the Gazette were also the same. The Administration has not clarified why it regards the Anti-Terrorism Ordinance as subsequent legislation.

10. To remove the overlapping provisions, amendment by way of primary legislation should be a more preferable solution. In addition to the options suggested by members set out in paragraph 10 of the Report, it may be feasible for the Administration to introduce a bill to repeal the overlapping provisions in the Afghanistan (Amendment) Regulation or to amend these provisions in such a way that they are consistent with the Anti-Terrorism Ordinance.

Implementation of the overlapping provisions of the Afghanistan (Amendment) Regulation

11. The Administration has stated in the letter dated 20 August 2002 that "in the event that an offence is caught under both the Anti-Terrorism Ordinance and the [Afghanistan] Amendment Regulation, the prosecution will decide on the appropriate proceedings to be initiated having regard to the circumstances pertaining to each individual case".

12. It may be for exactly the reasons mentioned in paragraph 11 that it is not desirable to have different criminal provisions for proscribed conduct of the same nature. The new sections 3B, 3C and 3E added by the Afghanistan (Amendment) Regulation relating to the supply, delivery, exportation and carriage of prohibited goods appear to impose strict liability subject to the availability of a statutory defence. In contrast, section 9 of the Anti-Terrorism Ordinance relating to the supply of weapon requires the prosecution to prove (a) the accused's intention, or (b) the

accused knowing or having reasonable grounds to believe, that the weapons will be supplied to or otherwise used by a person who the accused knows or has reasonable grounds to believe is a terrorist or terrorist associate.

13. The new sections 3F, 3G, 3H, 3I , 3J and 3K of the Afghanistan (Amendment) Regulation provide the Administration with wide powers of search and investigation. The Administration has explained that the powers 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. More details may be required to justify that the powers do not amount to arbitrary interference with privacy, family or home protected under Articles 29 and 39 of the Basic Law.

14. The Schedules to the Anti-Terrorism Bill containing similar powers were deleted during the Committee Stage by an amendment moved by the Administration. The Administration has agreed with the Bills Committee that enforcement agencies will rely on general investigation powers under other existing legislation to enforce the Anti-Terrorism Ordinance.

15. Section 19(2) of the Anti-Terrorism Ordinance provides that the Secretary for Security may make regulations for the purposes of facilitating the obtaining of evidence and information and enabling property to be seized and detained. At the meeting of the Panel on Security on 16 January 2003, the Administration informed Panel members that one of the objects of introducing a United Nations (Anti-Terrorism Measures)(Amendment) Bill 2003 ("the Amendment Bill") was to make new provisions enabling law enforcement agencies to require relevant persons to furnish information or to produce materials, and to search premises and seize relevant materials. Members may refer to the Administration's paper (LC Paper No. CB(2)846/02-03(03)) and minutes of the Panel meeting (LC Paper No. CB(2)1119/02-03).

16. In addition to the suggestion in paragraph 10 above, another option that the Administration may consider is to incorporate into the Amendment Bill provisions to repeal sections 3F, 3G, 3H, 3I, 3J and 3K of the Afghanistan (Amendment) Regulation or to amend those sections such that they are consistent with the powers to be proposed in the Amendment Bill.

Prepared by

The Legal Service Division
Legislative Council Secretariat
16 April 2003

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Legislative Council

LC Paper No. LS45/02-03

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

Comments on the Operation of the United Nations Sanctions Ordinance (Cap. 537)

Background

In the course of its scrutiny of the United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002 (the Afghanistan Amendment Regulation) and United Nations Sanctions (Angola)(Suspension of Operation) Regulation 2002, the Subcommittee has expressed concern over the operation of certain aspects of the United Nations Sanctions Ordinance (Cap. 537) (the Ordinance), under which the two regulations are made. Members may refer to LC Paper CB(2)920/02-03(01) for details of the Subcommittee's concern.

Purpose

2. The purpose of this paper is to comment, at the request of the Subcommittee, on the provisions of the Ordinance in the light of its operation in the form of the two regulations, with particular reference to the Subcommittee's concerns.

Enactment of the Ordinance

3. The United Nations Sanction Bill received its first reading on 9 July 1997, was passed on 16 July 1997 and commenced on 18 July 1997 upon its gazettal. No Bills Committee was formed.

4. Prior to 1 July 1997, United Nations (UN) sanctions were implemented in Hong Kong through Orders in Council issued by the United Kingdom Government. These orders lapsed at midnight, 30 June 1997.

5. In order to avoid a legal vacuum and to safeguard Hong Kong's reputation as a responsible trading and financial centre, the Central People's Government agreed that the HKSAR Government should enact legislation which would empower the Chief Executive, upon the instruction of the Ministry of Foreign Affairs (MFA), to make regulations to

implement UN sanctions. The LegCo Brief on the Bill issued at the time by the Trade and Industry Bureau is at Appendix III of the Background brief prepared by the Legislative Council Secretariat (LC Paper No. CB(2)91/02-03(01)).

Comments

Section 2(1) - Definition of "sanction"

6. "Sanction" is defined in section 2(1) of the Ordinance as including "complete or partial economic and trade embargoes, arms embargoes, and other mandatory measure decided by the Security Council of the United Nations, implemented against a place outside the People's Republic of China".

7. Members have expressed the view that the Afghanistan Amendment Regulation imposes sanctions against "persons" instead of a place i.e. the territory of Afghanistan and as such, might not be valid. The long title of the Ordinance also states that the Ordinance 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".

8. It is perhaps not in dispute that the Ordinance is to facilitate the implementation of measures decided on by the UN Security Council pursuant to Chapter VII (expressed as 'Chapter 7' in the Ordinance) of the UN Charter. Chapter VII in fact contains Articles 39 to 51, a copy of which is attached for ease of reference (LS45/02-03(01)). Members may wish to note that the only provisions that may be relevant for the purpose of the Ordinance are Articles 39 and 41, which state respectively -

"Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.";

"Article 41

The Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations."

9. It is noted that Article 41 does not define the scope of the measures that could be decided on under that Article except that they should not involve the use of armed force. Nor does it limit the measures to those that could only be taken against a place. However, it does provide that such measures "may include complete or partial interruption of economic relations" etc. It is interesting to note that the specific measures cited seem to be more usually targeted against a place. Even if a "place" is targeted, it would in practice include the activities or conduct of individuals or organisations carried out in the name of or for a particular state which by definition would constitute a place by virtue of the territory it occupies.

10. That the measures which could be decided on by the Security Council under Article 41 are not restricted to the specific measures cited nor targeted only against a place is clear from Security Council Resolution 1267, 1333 or 1390. For instance, the measures decided upon in those resolutions include freezing funds and other financial resources controlled by the Taliban, Usama bin Laden or Al-Qaida and other individuals, groups, undertakings and entities associated with them, preventing the entry into or transit of those individuals and closing all offices of Taliban and Ariana Afghan Airlines.

11. Members may therefore find it odd that the definition of "sanction" in the Ordinance should restrict the specified measures to those to be implemented against a place. The force of any argument that the definition is not intended to be exhaustive is however undermined by the clear wording of the long title and a similar reference in section 2(2)(a) of the Ordinance.

12. Members may wish to consider whether the scope of sanctions under the Ordinance should be clarified in order to cover all kinds of UN sanctions, whether they target at persons or places..

Section 3(5) - Disapplication of sections 34 & 35 of the Interpretation and General Clauses Ordinance

13. Another issue that has arisen is the role of LegCo in the scrutiny of the regulations made under the Ordinance. At present, 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 under the Ordinance. This deprives LegCo of its statutory role in the scrutiny of such regulations. However, this does not prevent the setting up of the Subcommittee to study the two regulations, seek clarification from and present its views to the Administration.

14. It is noted that in its LegCo Brief on the United Nations Sanctions Bill, the Administration argues that the reason for not placing the regulations to be made by the Chief Executive under the Bill before the legislature "is that UN Sanctions are external

affairs for which the HKSAR has no autonomy but may only conduct the same with the authorisation of the CPG (Article 13 of the Basic Law)" (paragraph 8).

15. However, members may wish to refer to section 3(1) and (2) of the Ordinance -

"(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."

Although the purpose of such regulations is primarily to give effect to instructions from MFA to implement Security Council resolutions, the effect of section 3(2) is that they may also contain provisions of a local nature, i.e. the creation of offences and the imposition of penalties.

16. Members may also wish to refer to comparable provisions in several other ordinances, namely section 3 of the Fugitive Offenders Ordinance (Cap. 503), section 4 of the Mutual Legal Assistance in Criminal Matters (Cap. 525) and section 3 of the International Organisations (Privileges and Immunities) Ordinance (Cap. 558). Under all those provisions, the Chief Executive in Council may make orders involving external relations which are subject to LegCo scrutiny. A copy of the relevant extracts is attached (LS45/02-03(02)).

17. Members may note that the issue of disapplication of section 34 of Cap. 1 arose when the Bills Committee considered the International Organisations (Privileges and Immunities) Bill in 1999-2000. Out of respect for the status and power of LegCo as the legislature of the HKSAR as provided for in the Basic Law, the Administration agreed to move a Committee Stage amendment to that bill deleting the provision that disappplied section 34 of Cap. 1. In making the amendment, the Administration recognizes that section 34(2) of Cap. 1 has already provided that LegCo may amend subsidiary legislation only "in any manner whatsoever consistent with the power to make such subsidiary legislation", and that LegCo would not act in any way that is ultra vires.

18. Similarly, if regulations under the Ordinance were to be made subject to section 34 of Cap. 1, LegCo's power to amend under its subsection (2) should be exercised in a way consistent with the power of the Chief Executive in Council to make the regulations, i.e. to give effect to the relevant instructions.

Other observations

19. The Administration has accepted members' view and will repeal those provisions in the Afghanistan Amendment Regulation which overlap with those in the United Nations (Anti-Terrorism Measures) Ordinance (Cap.575). If it is to be the established policy of the Administration that all future regulations made under the Ordinance shall not overlap with that ordinance or any other particular ordinance, it should perhaps be considered that the Ordinance be amended appropriately. For instance, the definition of "sanction" in the Ordinance may exclude any measure that has already been implemented under any such other ordinance.

20. Some other observations are also made with regard to the drafting of the Ordinance for the consideration of members -

- (a) the definition of "sanction" refers to 'mandatory measures' but section 2(2) merely refers to 'measure';
- (b) 'implemented' in the definition of "sanction" may not tally with the wording 'to be employed' in section 2(2); and
- (c) section 2(2)(b) is not made relative to any Security Council resolution.

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