

立法會
Legislative Council

LC Paper No. CB(1)522/99-00
(These minutes have been
seen by the Administration)

Ref: CB1/BC/10/98/2

**Bills Committee on
International Organizations (Privileges and Immunities) Bill**

**Minutes of meeting
held on Monday, 22 March 1999, at 4:30 pm
in Conference Room B of the Legislative Council Building**

Members present : Hon James TO Kun-sun (Chairman)
Hon Cyd HO Sau-lan
Hon LEE Cheuk-yan
Hon Gary CHENG Kai-nam

Member absent : Hon Ambrose LAU Hon-chuen, JP

**Public officers
Attending** : Mr Stephen FISHER, Deputy Director of Administration
Mrs Apollonia LIU, Assistant Director of Administration
Mr K F CHENG, Senior Assistant Law Draftsman
Mr Frank POON, Deputy Principal Government Counsel
(International Law)

Clerk in attendance : Ms LEUNG Siu-kum, Chief Assistant Secretary (1)2

Staff in attendance : Mr KAU Kin-wah, Assistant Legal Adviser 6
Miss Becky YU, Senior Assistant Secretary (1)3

I Election of Chairman

Nominated by Mr CHENG Kai-nam and seconded by Ms Cyd HO Sau-lan, Mr James TO was elected chairman of the Bills Committee.

II Meeting with the Administration

(Legislative Council Brief (Ref: CSO/ADM CR 1/2017/98, LC Paper Nos. LS 97/98-99 and CB(1) 1027/98-99(02))

2. The Chairman enquired about the stance of the Central People's Government (CPG) on the Bill. The Deputy Director of Administration (DD of Adm) advised that CPG actually considered that the Bill was not necessary as the two national laws, namely, the Regulations of the People's Republic of China Concerning Consular Privileges and Immunities and the Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities which applied to Hong Kong by promulgation under the Basic Law (BL) had already given effect to the relevant provisions of international agreements relating to the privileges and immunities of international organizations in Hong Kong. The Administration however took the view that the approach taken in the national legislation where treaties were self-executing did not suit Hong Kong which was a common law jurisdiction. As in other common law jurisdictions, international rights and obligations arising from international agreements concluded by Hong Kong or applied to Hong Kong by CPG did not automatically have the force of law in Hong Kong. They should be transformed from the international legal plane onto the domestic legal plane by legislation. The objective of the Bill was to provide a framework under which privileges and immunities conferred on an international organization could be given the force of law in Hong Kong by way of an order to be made by the Chief Executive in Council. CPG had no objection to the introduction of the Bill.

3. On adoption of treaty obligations, DD of Adm confirmed that the Administration had not encountered any problem in this respect prior to the Reunification since the United Kingdom (UK) was also a common law jurisdiction. Should any international agreements to which UK was a party be applied to Hong Kong, Hong Kong would adapt the relevant UK legislation or introduce a local legislation in order to give the agreements the force of law in Hong Kong. The situation however had become different after the Reunification since Hong Kong remained a common law jurisdiction whereas the Mainland was a civil law jurisdiction. The Bill was therefore necessary to bridge the gap between the two different legal systems. He assured members that the drafting of the Bill was in line with that of the existing legislation of a similar nature.

4. Mr LEE Cheuk-yan was not convinced of the Administration's explanation. He pointed out that orders made under the existing International Organizations and Diplomatic Privileges Ordinance (IODPO) were subsidiary legislation subject to negative vetting by the Legislative Council (LegCo). However, orders made under the Bill were expressly excluded from the application of section 34 of the Interpretation and General Clauses Ordinance, and thus not subject to scrutiny by LegCo. DD of Adm explained that China had an international obligation to ensure compliance of the international

agreements applied to Hong Kong by CPG. If LegCo were to amend the provisions of these agreements when they were transformed into municipal law, China would not be able to fulfil its international obligations. Moreover, as the conferment of privileges and immunities on international organizations was a matter of foreign affairs which fell under the sovereignty power of China, the Administration concluded that section 34 of the Interpretation and General Clauses Ordinance should not apply to orders made under the Bill.

5. Referring to the definition of "international agreement" under clause 2 of the Bill, the Chairman agreed that LegCo might not be in a position to scrutinize orders made in respect of international agreements which were applied to Hong Kong by CPG. However, it should have the rights to examine orders made in respect of international agreements to which Hong Kong was a party as in the case of Mutual Legal Agreements (MLAs). DD of Adm advised that although Article 13 of BL stated that Hong Kong could conduct relevant external affairs on its own in accordance with BL, this was not applicable to the conferment of privileges and immunities which was a matter of foreign affairs. The Senior Government Counsel (International Law) (SGC(IL)) added that even if Hong Kong was authorized to confer privileges and immunities on certain international organizations, the relevant international agreements had to be approved by China before they would come into effect. The purpose of clause 2(a) was to provide flexibility to include such agreements. As regards MLAs, SGC(IL) stressed that the nature of MLA and that of diplomatic privileges and immunities were different. Besides, the signing of MLAs was provided for under Article 96 of BL which stated that Hong Kong might take appropriate arrangements with foreign states for reciprocal judicial assistance with the authorization or assistance of CPG.

6. On the implementation of international agreements, DD of Adm advised that some agreements would have legal effect once ratified. However, for other important agreements, exchange of diplomatic documents on their commencement would be required. The Host Country Agreement (the Agreement) between China and the Bank for International Settlements (BIS) concerning the establishment of a regional office of BIS in Hong Kong tabled at the meeting was a case in point. After the signing of the principal Agreement, Hong Kong had also signed a Memorandum with BIS on the implementation of the relevant provisions in the Agreement relating to the privileges and immunities of BIS in Hong Kong.

7. As to whether the Memorandum was subject to scrutiny by LegCo, DD of Adm answered in the negative since the two national laws had already given effect to the Memorandum. Besides, the Memorandum only set out the administrative arrangements through which the privileges and immunities under the Agreement would be implemented. The Chairman considered it confusing that the Memorandum, being an agreement signed by Hong Kong, should be implemented by virtue of the two national laws without the process of transferring it into Hong Kong municipal law. This was also at variance with the purpose of the current Bill which was to give effect to the privileges and immunities of certain international organizations through the introduction of local legislation. He requested the Administration to provide a written explanation on the matter.

(Post-meeting note: The Administration's response was circulated vide LC Paper No. CB(1)383/99-00.)

8. The Chairman also queried the rationale behind the presumption that LegCo would amend the legislation relating to the implementation of international agreements. DD of Adm reiterated that China had an international obligation to ensure compliance of international agreements applied to Hong Kong by CPG. If LegCo were to amend the provisions of these agreements when they were transformed into municipal law, China would not be able to fulfil its international obligations. The Chairman however pointed out that the Chief Executive (CE) could refuse to sign the subsidiary legislation if he considered the amendments not acceptable. DD of Adm clarified that the coming into effect of subsidiary legislation did not require CE's endorsement. The Chairman however pointed out that the Standing Committee of the National People's Congress could return the subsidiary legislation in question for amendment if it considered the legislation contravened BL. DD of Adm responded that confusion would arise with the co-existence of two contradictory legislation during the interim.

9. Noting that Hong Kong was not in position to make any amendments to the international agreements to which China was a party, and that Article 153 of BL had already determined the ways in which international agreements should be applied to Hong Kong, Mr CHENG Kai-nam questioned the need for the Bill. DD of Adm replied that it would be difficult for both the Administration and the public to know which international agreements would have legal effect in Hong Kong if such agreements were not transformed into municipal law. The Chairman opined that this was only a matter of editing which could be easily resolved by incorporating the relevant agreements into the Laws of Hong Kong as in the case of BL and the Constitution of the People's Republic of China. He shared Mr CHENG's view and pointed out that the Bill would only be necessary if it could delineate the legal relationship between the international organizations and the concerned parties in Hong Kong under the international agreements, or could clarify the provisions of international agreements in their application to Hong Kong. DD of Adm explained that it was not possible to transform each and every international agreement into local legislation given the complexity and workload involved in the interpretation of the relevant provisions. As such, the approach taken in the Bill was to attach an agreement to an order which would spell out the provisions in the agreement which were not applicable to Hong Kong and, if necessary, interpret the various terms of the agreement. Given that these orders had legal effect, the Chairman remained of the view that they should be subject to scrutiny of LegCo. DD of Adm considered it not necessary as amendments to these orders were not allowed.

10. The Chairman opined that there was still a need for LegCo to discuss these orders even if amendments were not allowed since this would facilitate a better understanding of the scope of privileges and immunities granted to the relevant international organizations and their effect on the general public. He was disappointed at the Administration's distrust of LegCo. He pointed out that under the current proposal, it was also possible that the Chief Executive in Council would make orders that contravened the provisions of the international agreements applied to Hong Kong by CPG. DD of Admin advised that as Article 48(8) of BL had stipulated that CE had to implement the directives issued by

CPG, the latter could direct the former to amend the orders which were not in conformity with the provisions of the agreements. However, BL did not provide a mechanism to repeal the decisions made by LegCo.

11. The Chairman considered it a retrogression that LegCo was deprived of the rights to scrutinize legislation relating to the conferment of privileges and immunities upon international organizations after the Reunification. DD of Adm clarified that not all legislation concerning privileges and immunities were subject to scrutiny by LegCo before the Reunification. In the event that the privileges and immunities conferred on an international organization did not correspond to that provided under IODPO, the relevant UK legislation would be adopted in Hong Kong by direct promulgation. The Chairman remained of the view that the legislation should be under the scrutiny of LegCo. He remarked that in the event of any legislation passed that was in contravention of BL, the Standing Committee of the National People's Congress could always repeal them under the provisions of Article 160 of BL. In reply to Mr LEE Cheuk-yan's question on whether China would consult Hong Kong before signing an international agreement which would apply to Hong Kong, DD of Adm confirmed that consultation did take place. He however stressed that the granting of privileges and immunities to international organizations was a matter of foreign affairs and of the sole responsibility of China as the sovereign state.

12. On the implementation of the Bill, DD of Adm advised that when an order in respect of an international organization was made under the Bill, the order under IODPO in respect of the same organization, if any, would be repealed. The repeal of the provisions under IODPO which dealt with international organizations would come into operation after the repeal of all those orders. However, the provisions under IODPO which dealt with diplomatic privileges and immunities would be retained. Mr LEE Cheuk-yan enquired about the rationale for repealing the Schedules under IODPO. DD of Adm explained that the First Schedule was repealed to provide greater flexibility for the Administration to grant privileges and immunities to an international organization in accordance with its international obligations. The Second and the Third Schedules were repealed because they mainly related to privileges and immunities of the Commonwealth Secretariat which had become obsolete after the Reunification.

13. Mr LEE expressed worries that persons aggrieved by the privileges and immunities of international organizations could no longer seek legal redress against the organizations concerned after enactment of the Bill. He opined that if CPG had no strong view on the need for the Bill, the Administration should consider withdrawing the Bill so that conflicts between civil rights and diplomatic privileges and immunities could continue to be dealt with by courts. DD of Adm advised that according to the advice from the Department of Justice, the two national laws had already given effect to the privileges and immunities of the relevant international organizations. Any attempt to challenge such privileges and immunities would not be successful. The Bill was essential to avoid unnecessary litigation against these international organizations.

14. Referring to the Agreement, Mr LEE noted with concern that BIS, as an employer, would be exempt from legislation relating to employee protection such as the

Employment Ordinance. He asked what measures were available to safeguard the interest of local employees. DD of Adm advised that the purpose of the conferment of privileges and immunities on international organizations was to facilitate these organizations to discharge their duties in the host countries. It was therefore unavoidable that certain private rights and obligations would be compromised. He stressed that the problem was not particular to Hong Kong. As regards the exemption in respect of employment legislation, DD of Adm clarified that Article 12 of the Agreement had stipulated that the exemption from such legislation was not applicable to the employment of any person by the Representative Office as a local employee. Moreover, local employees might request BIS to renounce its privileges and immunities in the employment contracts so that future disputes could be dealt with by local legislation. Noting that the privileges and immunities granted to BIS did not correspond exactly with those set out in the First Schedule to IODPO, Ms Cyd HO requested and the Administration undertook to provide a comparison table setting out the discrepancies.

(Post-meeting note: The Administration's response was circulated vide LC Paper No. CB(1)383/99-00.)

15. Both Ms HO and the Chairman expressed grave concern on the lack of proper checks and balances on the power of the Chief Executive in Council to make any provisions which it considered necessary under clause 3(1)(b). DD of Adm clarified that the scope of clause 3(1)(b) was only limited to the provisions required for the implementation or application of the international agreements in connection with privileges and immunities, such as the interpretation of certain terms of an agreement. Any provisions which fell outside the scope would be considered ultra vires. Ms HO asked if the Administration had consulted the Hong Kong Bar Association and the Law Society of Hong Kong in this respect. DD of Adm advised that as the conferment of privileges and immunities related to foreign affairs, the Administration did not see a need for consultation.

16. In reply to Ms HO's question on clause 4, DD of Adm confirmed that a certificate obtained under the third paragraph of Article 19 of BL should prevail over the certificate issued under clause 4(1) in the event of conflict or inconsistency arising from a question of fact between the two certificates.

17. Members generally expressed reservations at the Bill. They considered that the Administration should further elaborate on the need for the Bill. It should also explain the reason for introducing the Bill instead of amending IODPO and the difference between the two legislation. In the meantime, the Clerk was requested to write to the Hong Kong Bar Association and the Law Society of Hong Kong to solicit their views on the Bill and, inter alia, clause 3(1)(b).

(Post-meeting note: The letters were issued on 23 March 1999. The Administration's response was circulated vide LC Paper No. 383/99-00.)

III Any other business

18. The date of the next meeting would be decided after receipt of the relevant information papers.

(Post-meeting note: At the request of the Administration and with the concurrence of the Chairman, the scrutiny of the Bill was suspended to make way for the Bills Committee on Provision of Municipal Services (Reorganization) Bill.)

19. There being no other business, the meeting ended at 6:30 pm.

Legislative Council Secretariat

3 December 1999