

立法會
Legislative Council

LC Paper No. CB(1)983/05-06
(These minutes have been seen
by the Administration)

Ref: CB1/HS/1/04/1

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

**Minutes of sixth meeting
held on Tuesday, 7 February 2006, at 10:45 am
in Conference Room B of the Legislative Council Building**

- Members present** : Hon Margaret NG (Chairman)
Hon Martin LEE Chu-ming, SC, JP
Dr Hon LUI Ming-wah, SBS, JP
Hon LAU Kong-wah, JP
- Public officers attending** : Mrs Philomena LEUNG
Principal Assistant Secretary for Commerce, Industry
and Technology (Commerce and Industry)
- Mr John HUNTER
Deputy Principal Government Counsel
(Treaties and Law)
Department of Justice
- Mr CHAN Tung-wai
Assistant Secretary for Commerce, Industry and
Technology (Commerce and Industry)
- Clerk in attendance** : Miss Polly YEUNG
Chief Council Secretary (1)3
- Staff in attendance** : Miss Anita HO
Assistant Legal Adviser 2
- Ms Rosalind MA
Senior Council Secretary (1)8
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The Subcommittee deliberated (Index of proceedings attached at **Appendix**).

Action

I. Confirmation of minutes and matters arising

(LC Paper No. CB(1)588/05-06 -- Minutes of meeting held on 13 December 2005

LC Paper No. CB(1)824/05-06(01) -- Draft report of the Subcommittee to the House Committee)

2. The minutes of the meeting held on 13 December 2005 were confirmed.

II. Meeting with the Administration

(LC Paper No. CB(1)692/05-06(01) -- List of Regulations made under section 3 of the United Nations Sanctions Ordinance (Cap. 537) (since July 2004)

LC Paper No. CB(1)848/05-06(01) -- The Administration's response to Assistant Legal Adviser (ALA)'s letters dated 9 and 25 January 2006

LC Paper No. CB(1)848/05-06(02) -- Letter dated 25 January 2006 from ALA of the Secretariat to the Administration

LC Paper No. CB(1)692/05-06(02) -- Letter dated 9 January 2006 from ALA of the Secretariat to the Administration

LC Paper No. CB(1)729/05-06(01) -- The Administration's response dated 13 January 2006 to ALA's letter dated 9 January 2006)

(Other relevant papers on the Regulations gazetted since July 2004 are listed on the agenda for the meeting)

Issues requiring further examination by the Administration

3. The Chairman referred members to LC Paper No. CB(1)692/05-06(01) listing the 10 Regulations gazetted since July 2004. On the long time gaps between the passing of the relevant resolutions adopted by the United Nations Security Council (UNSC) and the

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gazettal of some Regulations, members noted the efforts taken by the Administration to shorten the time gap but reiterated their strong view that the Administration should improve the current arrangement by exploring alternative approaches to implement UNSC resolutions in a more expeditious manner. As to the Subcommittee's earlier suggestion for expediting the implementation arrangement by incorporating into the United Nations Sanctions Ordinance (Cap. 537) (UNSO) all the provision on enforcement powers and other key provisions which generally apply to all UN sanctions, the Administration responded that it had already considered the suggestion and its views were set out in LC Paper No. CB(1)2251/04-05(01) issued in August 2005. To address members' concerns, the Administration was requested to consider means to improve the current arrangement with reference to the following:

- (a) The arrangement for implementing UNSC resolutions in relation to sanctions as adopted by the Macau Special Administrative Region (SAR) Government. According to available information, UNSC resolutions were promulgated by notices made by its Chief Executive and published in the Gazette. They became part of the laws of Macau and separate legislation was not required to be made; and
- (b) Re-examine the Subcommittee's suggestion earlier on to incorporate into the primary legislation (i.e. (UNSO)) all the provisions on enforcement powers and other key provisions which generally apply to all UN sanctions; and to set out in a Schedule to UNSO the targets and subjects of sanctions which might differ on each occasion.

4. Members noted the view of the former subcommittee which studied the United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002 that the Amendment Regulation made under section 3 of UNSO was ultra vires. As "sanction" was defined in UNSO as "mandatory measures decided by the Security Council of the United Nations, implemented against a place outside the People's Republic of China", regulations gazetted to implement UNSC resolutions which imposed sanctions against a "person" instead of a "place" might be ultra vires. The Administration explained that it would be inappropriate to view "place" in the context of UNSO in isolation from the people who operated in that place or had a connection with that place. Sanctions against a "place" would in practice comprehend the activities or conduct of individuals or entities in the place. Members were not convinced of the Administration's explanation and expressed concern that regulations made under UNSO to implement UNSC resolutions in relation to sanctions against "person" might fall outside the coverage of the definition of "sanction" under section 2(1) of UNSO and would therefore be ultra vires. In this connection,

members urged the Administration to look further into the question of the scope of UNSO.

5. To facilitate the Subcommittee's consideration of the subject, the Chairman requested the Assistant Legal Adviser to set out, preferably in the form of a table, the relevant provisions in the 10 Regulations gazetted since July 2004 (as listed in CB(1)692/05-06(01)) which imposed sanctions on "persons", entities (other than a "place" as provided for in the principal ordinance) and/or the provisions which sought to freeze the funds held by a person named in the relevant UNSC resolutions. Meanwhile, the Administration was also requested to provide further information on the corresponding enforcement measures when the target of sanctions was a "person" and not a "place". The Chairman stated her observation that apparently, there was a growing trend of UN sanctions being imposed to freeze the flow of capital/funds associated with certain places or persons. As such, she asked the Administration to provide comments on whether there was such a trend and if so, its implications, particularly on the legislation seeking to implement such sanctions.

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6. Referring to section 4 of the United Nations (Anti-terrorism Measures) Ordinance (Cap. 575) (UN(ATM)O) which stipulated that "where a person is designated by the UNSC Committee as a terrorist or a terrorist associate, the Chief Executive may publish a notice in the Gazette specifying the name or names of the person", the Chairman asked the Administration to examine the feasibility of using the relevant provisions under UN(ATM)O to implement UN sanctions on "persons". The Administration responded that persons designated by the various UNSC Committees might not necessarily be terrorists but nonetheless noted the Chairman's view for consideration.

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7. Some members reiterated their grave concern about the current arrangement under section 3(5) of UNSO which had deprived the legislature of the Hong Kong SAR of its constitutional role in scrutinizing and, where necessary, amending subsidiary legislation. Having regard that the Regulations made under section 3(1) of UNSO purported to have serious penal effect and confer vast powers, some members remained doubtful as to whether it was proper for the Legislative Council (LegCo) to delegate the regulation-making power to the executive government and to divest itself of the power of scrutiny over subsidiary legislation.

8. Mr Martin LEE referred to paragraph 7 of the Administration's response (LC Paper No. CB(1)1934/04-05(01)) to Professor Yash GHAI's submission and noted that the Administration had referred to the judgment of the Court of First Instance on the case of *Lau Kwok Fai Bernard v Secretary for Justice* (HCAL Nos. 177 of 2002 and 180 of 2002) in support of its argument that the Basic Law did not institute a

Admin rigid separation of powers. In this regard, Mr LEE recapped a judgment of the Court of Final Appeal (CFA) on the case of *a Solicitor v. the Law Society of Hong Kong and another* (FACV No. 7 of 2003) on the constitutionality of the then section 13(1) of the Legal Practitioners Ordinance (Cap. 159) which was later repealed in July 2005. He requested the Administration to take into consideration the aforesaid judgment of CFA and re-consider the constitutionality of section 3(5) of UNSO. The Administration agreed to look into Mr LEE's view and whether the CFA judgment in question was relevant to consideration of the subject matter.

The way forward

Admin 9. The Chairman said that subject to any comments members might have, the draft report on the deliberations and recommendations of the Subcommittee (LC Paper No. CB(1)824/05-06(01)) would be forwarded to the Administration for comments. The Administration would look into the issues raised by the Subcommittee and take the opportunity to consult the Secretary for Justice on the matter. The Subcommittee would then consider the Administration's input and decide whether and how the report should be suitably revised having regard to such input, if any. The finalized report would then be submitted to the House Committee. Members raised no question on the draft report and agreed with the above courses of action.

(Post-meeting note: The draft report of the Subcommittee was forwarded to the Administration for comments on 9 February 2006.)

Date of next meeting

10. Members agreed to hold the next meeting in about a month's time. The Secretariat would consult members on the meeting date in due course.

(Post-meeting note: With the concurrence of Hon Margaret NG, Chairman of the Subcommittee, the next meeting was scheduled for Thursday, 23 March 2006 at 9:00 am. Notice of the meeting was issued to members vide LC Paper No. CB(1)889/05-06 on 10 February 2006.)

III. Any other business

11. There being no other business, the meeting ended at 12:09 pm.

**Proceedings of the sixth meeting of the
Subcommittee to Examine the Implementation in Hong Kong
of Resolutions of the United Nations Security Council in relation to Sanctions
on Tuesday, 7 February 2006 at 10:45 am
in Conference Room B of the Legislative Council Building**

| Time Marker | Speaker | Subject(s) | Action required |
|--------------------|--|---|---|
| 000000 – 001229 | Chairman | (a) Introductory and welcoming remarks (b) Confirmation of minutes of meeting on 13 December 2005 | |
| 001230 - 004912 | Chairman Administration Mr LAU Kong-wah Dr LUI Ming-wah ALA2 | (a) Reasons for time gaps between the passing of the relevant UNSC resolutions and the gazettal of regulations for implementation (b) The Administration's effort to monitor the relevant UN website with a view to tracking the passing of resolutions. (c) Possible alternatives to improve the timeliness of implementing UNSC resolutions in relation to sanctions | The Administration to take follow-up action as required under paragraph 3 of the minutes |
| 004913 - 010444 | Chairman ALA2 Dr LUI Ming-wah Administration | (a) Members' concern that regulations made under UNSO to implement UNSC resolutions in relation to sanctions against a "person" might fall outside the scope of the definition of "sanction" under section 2(1) of UNSO and would therefore be ultra vires (b) The Administration's explanation that it would be inappropriate to view "place" in the context of UNSO in isolation from the people who operate in that place or have a connection with that place (c) The implications of a growing trend, if any, of UN sanctions being imposed on the flow of capital/funds associated with | ALA2 to take follow-up action as required under paragraph 5 of the minutes The Administration to take follow-up actions as required under paragraphs 4, 5 and 6 of the minutes |

| Time Marker | Speaker | Subject(s) | Action required |
|--------------------|---|---|--|
| | | certain places or persons, in particular on the legislation to implement such sanctions. | |
| 010445 - 011229 | Mr Martin LEE Administration Chairman | (a) Mr Martin LEE's strong view that the current arrangement under UNSO had deprived the LegCo of its law-making power and was unconstitutional (b) The Administration's explanation that the Basic Law did not institute a rigid separation of powers | The Administration to take follow-up action as required under paragraph 8 of the minutes |
| 011230 - 011425 | Chairman | (a) The way forward (b) Date of next meeting | The Administration to take follow-up action as required under paragraph 9 of the minutes |