

立法會
Legislative Council

LC Paper No. CB(1)320/07-08
(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 eighth meeting
held on Tuesday, 30 October 2007, at 2:30 pm
in Conference Room B of the Legislative Council Building**

- Members present** : Hon Margaret NG (Chairman)
Hon Martin LEE Chu-ming, SC, JP
Hon LAU Kong-wah, JP
- Member absent** : Dr Hon LUI Ming-wah, SBS, JP
- Public officers attending** : Mr WONG Yan-lung, SC, JP
Secretary for Justice
- Ms Amelia LUK
Acting Law Officer (International Law)
- Mr Peter WONG
Deputy Principal Government Counsel
(Treaties and Law)
- Miss LEE Sau-kong
Acting Deputy Principal Government Counsel
(Treaties and Law)
- Ms Linda LAI, JP
Deputy Secretary for Commerce and Economic
Development (Commerce and Industry)

Mr Jonathan MCKINLEY
Principal Assistant Secretary for Commerce and
Economic Development
(Commerce and Industry)

Clerk in attendance : Miss Polly YEUNG
Chief Council Secretary (1)5

Staff in attendance : Mr Jimmy MA
Legal Adviser

Mr Kelvin LEE
Assistant Legal Adviser 1

Ms YUE Tin-po
Senior Council Secretary (1)5

Ms Guy YIP
Council Secretary (1)1

Action

I The Administration's response to the Subcommittee's report submitted to the House Committee

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| (LC Paper No. CB(1)144/07-08(01) | -- Administration's response to submission from the Hong Kong Bar Association |
| LC Paper No. CB(1)2323/06-07(01) | -- The Administration's paper "Comments on the report to the House Committee prepared by the Subcommittee" |
| LC Paper No. CB(1)108/07-08(01) | -- Submission from the Hong Kong Bar Association (English version only) |
| LC Paper No. LS9/07-08 | -- Observations on the Administration's paper "Comments on the report to the House Committee prepared by the Subcommittee" prepared by the Legal Services Division of the Legislative Council Secretariat |

- LC Paper No. CB(1)1587/06-07 -- Report of the Subcommittee to the House Committee meeting on 18 May 2007 prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)1586/06-07 -- Summary of key issues raised in the report of the Subcommittee prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)108/07-08(02) -- List of Regulations made under section 3 of the United Nations Sanctions Ordinance (Cap. 537) (since July 2004 and up to 8 October 2007)
- LC Paper No. CB(1)126/07-08(01) -- Views on the United Nations Sanctions (Liberia) Regulation 2003 from Hong Kong Bar Association and the Administration's reply
- LC Paper No. CB(1)126/07-08(02) -- Speech of Secretary for Trade and Industry at the Second Reading of the United Nations Sanctions Bill at the Legislative Council meeting on 9 July 1997
- LC Paper No. CB(1)126/07-08(03) -- Press release on gazettal of United Nations Sanctions Bill on 8 July 1997)

The Subcommittee deliberated (Index of proceedings attached at Appendix).

2. The Chairman welcomed the Secretary for Justice (S for J) and his colleagues to the meeting.

Submission from the Hong Kong Bar Association (HKBA) and the Administration's response thereto

3. While the Subcommittee's legal adviser would study the Administration's response, the Chairman also asked the Clerk to write to HKBA inviting them to provide further views, if any, on the Administration's response to its submission.

Clerk

(Post-meeting note: The Subcommittee's invitation letter was sent to HKBA on 31 October 2007.)

The Administration's response to the Subcommittee's report

4. Members agreed that S for J would brief the Subcommittee on the Administration's response which would also cover the key issues stated in the "Summary of the Subcommittee's key observations/recommendations and the Administration's comments thereon" prepared by the Legislative Council Secretariat (tabled at the meeting and subsequently issued vide LC Paper No. CB(1)155/07-08(01) on 31 October 2007).

Pre-handover arrangement

5. S for J highlighted that before the reunification in 1997, UN sanctions were implemented by the UK Government in Hong Kong by way of Orders in Council under the United Nations Act 1946. Pursuant to the Statutory Instruments Act 1946, the Orders in Council implementing the sanctions of UNSC were laid before the Parliament but not subject to any parliamentary procedure to amend or repeal them. LegCo also did not have any vetting power over such Orders. In this connection, the Legal Adviser supplemented that there was parliamentary oversight over the relevant Orders in Council as a Joint Committee on Statutory Instruments (delegated or secondary legislation which was governed by the Statutory Instruments Act 1946) was in place and tasked to study the statutory instruments in question, including the Orders in Councils made under the United Nations Act 1946. S for J noted and the Legal Adviser agreed that in practice, LegCo could also set up subcommittees to engage in similar discussion on regulations made under the UNSO.

Scope of instruction given by the Ministry of Foreign Affairs (MFA) in relation to UN sanctions

6. At the invitation of the Chairman, S for J highlighted the key steps in the regulation-making process under section 3 of the United Nations Sanctions Ordinance (Cap. 537) (UNSO). In gist, when a sanction measure resolved by the Security Council of United Nations (UNSC) was to be implemented in the HKSAR, CPG would issue an instruction to the HKSAR Government that the latter should take concrete measures to implement the relevant UNSC resolution effectively in the HKSAR. The HKSAR Government would prepare a draft regulation under UNSO and forward it to CPG for approval. The CPG would issue an instruction to CE endorsing the draft regulation if it agreed with the draft, and the draft regulation approved by the CPG would form part of CPG's instruction requiring the CE to implement the sanction. Upon receipt of CPG's approval of the terms of the draft regulation, the HKSAR Government would then commence the legislative process by tabling it before the Executive Council.

Admin

7. To facilitate the Subcommittee's reference, S for J was requested to set out the regulation-making process in writing, detailing all relevant steps taken, as well as to inform the Subcommittee of the scope of the instruction issued by MFA to CE.

8. Members noted that at a meeting on 10 December 2002, the former Subcommittee on United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002 and United Nations Sanctions (Angola) (Suspension of Operation) Regulation 2002 had requested the Administration to provide a copy of the MFA's instructions in relation to the relevant UN sanction. They also noted that as stated in Annex B of the Administration's response to this request dated 15 January 2003 and the reply to (a) in the letter dated 19 February 2003 from the Commerce, Industry and Technology Bureau responding to a follow-up question raised by the same Subcommittee regarding the contents of the MFA's instructions (both tabled at the meeting), it was left to the HKSAR Government to work out the details of the measures to be adopted to implement the relevant provisions of the UNSC resolutions in the HKSAR. This was quite different from the information provided by S for J as stated in paragraph 6 above. Members sought the Administration's explanation as to why the information in paragraph 6 had not been revealed to the Subcommittee in the course of its past deliberation.

(Post-meeting note: The aforesaid information provided by the Administration to the former Subcommittee was circulated to members vide LC Paper Nos. CB(1)155/07-08(02) and CB(1)155/07-08(03) on 31 October 2007.)

Admin

9. S for J advised that having examined the Subcommittee's report and personally studied the matter in depth, he was satisfied that he had presented to members the actual regulation-making process which had taken place since the enactment of the UNSO. While assuring members that there was no intention on the part of the Administration to mislead members or conceal certain information, S for J undertook to look into the Administration's earlier responses and revert to the Subcommittee. In response to members, S for J further advised that the sentence "It was left to the HKSAR Government to work out the details of the measures to be adopted", or any similar expression, was not contained in the instructions issued by MFA seen by him.

Giving effect to MFA's instructions in relation to implementation in Hong Kong of international obligations under UNSCR 1373

10. Members noted that unlike the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (UN(ATM)O) which also implemented international obligations, UNSO had excluded LegCo from vetting the subsidiary legislation made under the principal Ordinance. In response, S for J explained that UN(ATM)O implemented not only UNSC Resolution 1373 but also a number of international conventions as well as the recommendations of the Financial Action Task Force (FATF) of which Hong Kong, China was a member. The international instruments covered by the UN(ATM)O sought to tackle terrorism and the financing of terrorism in a continuous manner. On the other hand, the UNSO implemented sanctions (primarily trade sanctions and often time-limited) resolved by the UNSC against a place outside the People's Republic of China (PRC). Due to the differences in the nature of the subject matter involved, and the time-critical nature of sanctions against places, the legislative approach under the UN(ATM)O was not appropriate for implementing sanctions under the UNSO. While the Administration remained of the

Admin view that instructions from MFA were internal documents and should not be disclosed, S for J undertook to look into members' enquiry as to whether and how the instruction given by MFA relating to the enactment of UN(ATM)O was different from that of UNSO insofar as the adoption of legislative approach to implement UNSC Resolutions was concerned, and to revert to members as far as possible.

Removal of vetting by LegCo of subsidiary legislation

11. Noting that the disapplication of sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap.1) (IGCO) was adopted in certain Ordinances, members sought the Administration's views on the general guidelines and policy considerations for adopting such disapplication provisions in the making of subsidiary legislation. S for J noted that this was a broad topic and suggested that the discussion be focused on the UNSO. In any event, the submission from the Hong Kong Bar Association dated 20 October 2007 referred to a number of cases which set out some general principles.

Admin 12. In this connection, the Chairman remarked that the Regulations made by CE under UNSO had serious penal effect and asked the Administration to consider consulting LegCo on the draft regulations before forwarding them to CPG for approval. S for J noted the Chairman's suggestion, but pointed out that safeguards already existed, including that: the principal Ordinance laid down the legislative framework for the sanctions Regulations (especially with regard to maximum penalties); safeguards were available under the Basic Law; sanctions Regulations could only implement UNSC Resolutions; and the draft Regulations would be vetted by the CPG before they were made. Nevertheless, S for J noted the Chairman's request for the Administration to consider her suggestion.

Scope of UNSO

Admin 13. In relation to section 2(1) of UNSO which stipulated that sanctions were mandatory measures to be implemented against a "place" outside PRC, members were concerned that some of the Regulations gazetted since July 2004 were targeted at a "relevant entity" or a "relevant person" and not a "place" as specified in UNSO. S for J explained that it would be too restrictive to view sanctions against a "place" in isolation from the persons/entities who operated there or who had a connection with that place. In practice, sanctions against a "place" would necessarily include sanctions targeted at the activities or conduct of individuals or entities in that place or having a connection with that place (e.g. the sale of fire arms and weapons which nature of operation was often cross-border). The Administration was of the view that a more liberal and purposive interpretation instead of a restrictive and literal meaning of the term should be adopted in the context of UNSO. The Chairman was of the view that to give effect to such policy intent, a more preferable approach was to amend the relevant provision of UNSO so as to clearly define the scope of sanctions to include individuals and entities in or having a connection with the relevant place which was subject to sanction. S for J noted the Chairman's view.

Date of next meeting

- Clerk 14. Members agreed to fix the date for the next meeting upon availability of the information provided by the Administration and HKBA (if any).

II Any other business

15. There being no other business, the meeting ended at 4:31 pm.

Council Business Division 1
Legislative Council Secretariat
23 November 2007

**Proceedings of the eighth 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, 30 October 2007 at 2:30 pm
in Conference Room B of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action required
000000 - 002542	Chairman LA	<p>(a) Introductory and welcoming remarks</p> <p>(b) LA's briefing on observations of the Legal Services Division (LC Paper No. LS9/07-08) and several key issues raised in the past meetings, including the scope of UNSO and the removal of vetting by LegCo of subsidiary legislation.</p> <p>(c) The Chairman drew the meeting's attention to the paper prepared by the Legislative Council Secretariat on summary of the Subcommittee's key observations/recommendations and the Administration's comments thereon (the paper tabled at the meeting was subsequently issued vide LC Paper CB(1)155/07-08(01) on 31 October 2007)</p>	The Clerk to follow up as stated in paragraph 3 of the minutes
002543 - 010529	Chairman Administration Mr LAU Kong-wah Mr Martin LEE LA	<p>(a) S for J's briefing on the background of the implementation of UN sanctions in HKSAR before and after reunification (LC Paper No. CB(1)2323/06-07(01))</p> <p>(b) The Legal Adviser advised that in the case of UK Parliament, the Joint Committee on Statutory Instruments (delegated or secondary legislation which were governed by the Statutory Instruments Act 1946) had studied the Eritrea and Ethiopia (United Nations sanctions) Order 2000 (S.I. 2000/1556) and the Eritrea and Ethiopia (United Nations sanctions) (Overseas Territories) Order 2000 (S.I. 2000/1557). Since drafting errors on the Orders had been detected by the Joint Committee, the Foreign and Commonwealth Office was asked to amend the instruments to rectify the problem. The Joint Committee had subsequently reported the matter to both Houses (the House of Commons and the House of Lords).</p> <p>(c) S for J advised that as in the case of Hong Kong, implementation of UN sanctions was by primary</p>	The Administration to follow up as stated in paragraphs 7 and 9 of the minutes

Time Marker	Speaker	Subject(s)	Action required
		<p>legislation in the form of UNSO and by CE making regulations under section 3(1) of UNSO upon receiving instruction from CPG. Despite the disapplication provision, regulations made under UNSO by CE were gazetted before they could take effect, and LegCo briefs were prepared to inform Members about the regulations. Such regulations could also be examined by this Subcommittee. This was in addition to LegCo's power to debate and discuss with the Administration on issues relating to the implementation of UNSC sanctions.</p> <p>(d) S for J's elaboration on the procedures undertaken by HKSAR Government to implement sanction measures resolved by UNSC and the issuing of instruction by MFA</p> <p>(e) Members' concern as to why the information provided by S for J as stated in paragraph 6 of the minutes had not been revealed to the Subcommittee in the course of its past deliberations.</p>	
010530 - 012137	Mr LAU Kong-wah Administration Chairman Mr Martin LEE	Discussion on giving effect to MFA's instructions in relation to the UN(ATM)O which implemented international obligations under UNSC Resolution 1373	The Administration to follow up/consider as stated in paragraph 10 of the minutes
012138 - 014854	Chairman Administration Mr LAU Kong-wah LA	<p>(a) S for J's briefing on the removal of vetting by LegCo of subsidiary legislation which was permissible under IGCO and common law (LC Paper No. CB(1)2323/06-07(01))</p> <p>(b) The Legal Adviser advised that -</p> <p>(i) subject matters which were provided in subsidiary legislation made under Cap. 444 and Cap. 1130 as referred by S for J were only related to internal regulation and management of the respective organizations concerned; and</p> <p>(ii) as seen in the above two Ordinances and the Fugitive Offenders Ordinance (Cap. 503) as well as other Ordinances (e.g. International</p>	The Administration to note as stated in paragraph 12 of the minutes

Time Marker	Speaker	Subject(s)	Action required
		<p>Organizations (Privileges and Immunities Ordinance) which aimed to implement in Hong Kong international conventions and agreements, whether it was proper for LegCo to delegate the legislative (regulation-making) power to the executive government and to exclude itself from the vetting of subsidiary legislation under the primary Ordinance was a policy matter.</p> <p>(c) S for J responded that –</p> <ul style="list-style-type: none"> (i) implementation of UN sanctions in HKSAR was a matter of foreign affairs which was the responsibility of CPG; (ii) many of the sanctions are time-critical and require speedy implementation; (iii) prior to reunification, Orders in Council to implement UN sanctions were not subject to amendment/repeal by the UK Parliament or the HK LegCo. The doctrine of continuity and the legislative history of UNSO also needed to be considered; and (iv) the making of regulations by CE to implement the relevant resolution of UNSC under UNSO in accordance with the Basic Law and with the agreement of CPG was constitutional and lawful. <p>(d) LA's advice on the special procedure for LegCo Members to speak on a piece of subsidiary legislation which was subject to negative vetting but over which no amendment was moved</p> <p>(e) The Subcommittee remained of the view that the exclusion of LegCo's scrutiny was not appropriate because the regulations had serious penal effect and conferred vast investigation and enforcement powers</p>	
014855 - 020349	Chairman Administration Mr Martin LEE	Discussion on the scope of UNSO in relation to section 2(1) of UNSO which stipulated that sanctions were mandatory measures to be implemented against a "place" outside PRC	The Administration to note as stated in paragraph 13 of the minutes

Time Marker	Speaker	Subject(s)	Action required
020350-020438	Chairman	Arrangements for the next meeting	The Clerk to follow up as stated in paragraph 14 of the minutes

Council Business Division 1
Legislative Council Secretariat
23 November 2007