

立法會
Legislative Council

LC Paper No. CB(1)588/05-06
(These minutes have been seen
by the Administration)

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

**Minutes of Fifth meeting
held on Tuesday, 13 December 2005, 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 attending** : Hon Audrey EU Yuet-mee, SC, JP
- Member absent** : Dr Hon LUI Ming-wah, SBS, 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
- 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. Paper issued since last meeting

- (LC Paper No. CB(1)313/05-06 -- Paper dated 16 November 2005 from Subcommittee Clerk to members)
2. Members noted that the above paper had been issued for the Subcommittee's information.

II. Meeting with the Administration

Matters arising from the meeting on 12 July 2005

- (LC Paper No. CB(1)2164/04-05 -- List of issues which require follow-up action/consideration
- LC Paper No. CB(1)2251/04-05(01) -- The Administration's written response to issues raised by the Subcommittee
- LC Paper No. LS2/05-06 -- Paper on "Possible legal proceedings to be taken to clarify the constitutionality of section 3(5) of the United Nations Sanctions Ordinance (Cap. 537)" prepared by the Legal Service Division of the LegCo Secretariat)

3. Noting that in its written response to issues raised by the Subcommittee, the Administration had re-affirmed its stance that the current arrangement under the United Nations Sanctions Ordinance (UNSO) (Cap. 537) for implementing resolutions of the UN Security Council (UNSC) in relation to sanctions should be maintained, members shared the view that they were not convinced by the arguments put forward in the paper. Regarding the Administration's view that the current arrangement was more effective in giving effect to time-limited UNSC resolutions, the Chairman recalled that even under the existing mechanism, there had been incidence of sanction measures having expired before the necessary regulation could be introduced. Moreover, this explanation covered only the technical aspect of the implementation arrangement but could not address the fundamental question about the constitutionality of UNSO.

4. Mr Martin LEE was gravely concerned that the current arrangement under section 3(5) of UNSO had deprived the legislature of the Hong Kong Special Administrative Region of its constitutional role in scrutinizing and, where necessary, amending subsidiary legislation, thereby placing the legislative power in the hands of the executive instead. Mr LEE considered that the Administration had not addressed the Subcommittee's concern and the view of Professor Yash GHAI that UNSO was inconsistent with the Basic Law (as set out in Professor GHAI's written submission dated 12 May 2005 to the Subcommittee (LC Paper No. CB(1)1665/04-05(01)). He expressed dissatisfaction at the Administration's response and took the view that the question of the constitutionality of UNSO might have to be resolved through judicial means.

The way forward

5. The Chairman said that the Subcommittee had deliberated thoroughly on the current arrangement for implementing the resolutions of UNSC in relation to sanctions, having regard to the expert advice of Professor Yash GHAI and the Administration's explanation. On one side, the Subcommittee considered the current arrangement unsatisfactory and might even be unconstitutional. On the other side, the Administration maintained its position in support of the current arrangement without indicating any intention for major changes. Given the divergence of views between the Subcommittee and the Administration on the propriety of the current arrangement, the Chairman did not envisage that the Subcommittee could take the matter further at this stage. She therefore suggested that the Subcommittee should make a report to the House Committee (HC) setting out its concerns about the current implementation arrangement and suggestions for improvement, the expert advice it had obtained, the Administration's stance that the current arrangement should be maintained, as well as the possible legal proceedings which might be taken to clarify the constitutionality of section 3(5) of UNSO. The Subcommittee would also recommend that the HC Chairman convey the Subcommittee's observations to the Chief Secretary for the Administration (CS) and request CS to critically re-examine the matter in consultation with the Secretary for Justice (S for J).

6. Members agreed in principle with the Chairman's suggestion. Mr LAU Kong-wah pointed out that to allow further discussion by HC on the need to seek judicial clarification, the possible legal proceedings to be taken should be presented in the report as an option or the next possible course of action for the consideration of HC, but not as the Subcommittee's firm or agreed course of action for which HC's endorsement was being sought. Ms Audrey EU commented that the Subcommittee might wish to consider seeking the views of the incumbent S for J on the current implementation arrangement of UNSC sanctions under UNSO. Mr Martin LEE shared her view.

7. Referring to paragraph 5 of the paper prepared by the Legal Service Division (LC Paper No. LS2/05-06), members agreed that if the constitutionality of section 3(5) of UNSO was to be clarified, the appropriate legal proceedings that could be taken was to seek a court declaration by way of an application for judicial

review under section 21K of the High Court Ordinance (Cap.4) and Order 53 of the Rules of the High Court (Cap. 4 sub. leg. A). As to the issue of the capacity of the Legislative Council (LegCo) or the Subcommittee to sue, members noted the observation of the legal adviser that there were no precedent cases in which LegCo or other legislatures in major Commonwealth jurisdictions had applied for judicial review on the constitutionality of a piece of primary legislation. There was at present no clear judicial authority for LegCo's capacity or the lack of capacity to sue and be sued. The Chairman and Mr Martin LEE were inclined to think that if HC decided that legal proceedings to clarify the constitutionality or otherwise of UNSO would be taken, the issue of who should act as the plaintiff in the application for judicial review might be resolved by one or a few LegCo Member(s) applying in his/their personal capacity. For example, members of the Subcommittee could be individually named as plaintiffs.

8. The Chairman sought members' view on whether independent advice of a counsel should first be sought on the merits of the case if HC agreed that legal proceedings as proposed should be taken. Mr Martin LEE agreed with the suggestion and said that this point could be incorporated in the Subcommittee's report for the consideration of HC.

Clerk

9. The Chairman directed the Clerk to prepare a draft report having regard to the concerns and suggestions raised by the Subcommittee in the foregoing paragraphs for the consideration of the Subcommittee in due course. Members agreed that a meeting would be arranged to consider the draft report when it was ready. Members also agreed with the suggestion of the representative of the Department of Justice that the draft report be passed to the Administration for comments. The Administration would take the opportunity to brief S for J on the Subcommittee's deliberations and seek his views, if any. The Subcommittee would then consider the Administration's input and decide whether and how the report would be suitably revised having regard to such input, if any.

Admin

10. Meanwhile, members agreed that a meeting be scheduled in early January 2006 for the Subcommittee to scrutinize the ten pieces of regulation made under section 3 of UNSO since July 2004. Members would be notified of the meeting arrangements in due course.

(Post-meeting note: With the concurrence of the Chairman, the next meeting was scheduled for Tuesday, 17 January 2006 at 11:00 am. Notice of the meeting was issued to members vide LC Paper No. CB(1)557/05-06 on 19 December 2005.)

III. Any other business

11. There being no other business, the meeting ended at 3:07 pm.

**Proceedings of the fifth 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, 13 December 2005 at 2:30 pm
in Conference Room B of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action required
000000 – 001129	Chairman Mr LAU Kong-wah Mr Martin LEE Ms Audrey EU	Discussion on the arrangements for the meeting: (a) The Subcommittee to discuss with the Administration its written response to issues raised by the Subcommittee (LC Paper No. CB(1)2551/04-05(01)); and (b) Members to consider the way forward for the Subcommittee, including making a report to HC to set out the Subcommittee's concerns about the current arrangement under UNSO, the Administration's stance and the possible legal proceedings to be taken.	
001130 – 001234	Chairman	Welcoming remarks	
001235 - 001632	Administration	Briefing by the Administration (LC Paper No. CB(1)2551/04-05(01))	
001633 – 001927	Chairman Mr Martin LEE Administration	(a) The arguments put forward in the paper provided by the Administration were not convincing and could not address the fundamental question about the constitutionality of UNSO (b) Concern about the current arrangement under section 3(5) of UNSO which had deprived LegCo of its constitutional role in scrutinizing and, where necessary, amending subsidiary legislations, thereby placing the legislative power in the hands of the executive instead	

Time Marker	Speaker	Subject(s)	Action required
		(c) The Administration's explanation that as set out in its written replies (LC Paper Nos. CB(1)1934/04-05(01) and CB(1)2551/04-05(01)), the current arrangement under UNSO was consistent with the Basic Law and should be maintained.	
001928 - 002450	Mr Martin LEE Chairman Administration	Desirability of seeking the comments of S for J on the Subcommittee's concerns about the current arrangement under section 3 of UNSO before the Subcommittee submitted its report to HC	The Administration to take follow-up action as required in paragraph 9 of the minutes
002451 - 003713	Chairman Mr Martin LEE ALA2	<p>(a) Possible legal proceedings to be taken if the constitutionality of section 3(5) of UNSO was to be clarified (LC Paper No. LS2/05-06)</p> <p>(b) Capacity of LegCo or the Subcommittee to sue and possible solution to overcome the uncertainty of such capacity</p> <p>(c) Way forward for the Subcommittee and arrangement for future meetings</p>	The Clerk to take follow-up action as required in paragraph 9 of the minutes