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*Legislative Council*

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

**Meeting on 1 February 2008**

**The Subcommittee's proposed way forward**

**PURPOSE**

This paper recaps the work of the Subcommittee and sets out the Subcommittee's initial views on ways to improve the operation of section 3 of the United Nations Sanctions Ordinance (Cap. 537) ("UNSO") relating to the implementation in Hong Kong of sanctions resolved by the Security Council of the United Nations (UNSC).

**BACKGROUND**

2. During the term of the Second Legislative Council (LegCo), two Subcommittees have been set up under the House committee to study three Regulations made under section 3(1) of UNSO<sup>1</sup>. In the course of scrutiny, the Subcommittees concerned have identified a number of problems arising from the current arrangement of implementing UN sanctions in the Hong Kong Special Administrative Region (HKSAR). Members questioned the constitutionality of section 3(5) of UNSO stipulating that sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap. 1) (IGCO) do not apply to the regulations made under the Ordinance. Members also noted with concern that there were often long time gaps between the passing of the relevant resolutions by UNSC and the gazettal of regulations to implement the sanctions in Hong Kong.

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<sup>1</sup> The three regulations are the United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002, United Nations Sanctions (Angola) (Suspension of Operation) Regulation 2002 and United Nations Sanctions (Liberia) Regulation 2003.

3. In consideration that the problems identified were not confined to specific Regulations but might have implications on constitutional propriety and the rule of law, Members agreed at the House Committee on 8 October 2004<sup>2</sup> to set up a subcommittee to examine the current arrangement for implementing in Hong Kong the sanctions imposed through resolutions of the UNSC. The membership list and terms of reference of the Subcommittee are in **Appendix I**. Up to end December 2007, the Subcommittee has held nine meetings with the Administration, including a meeting attended by Mr WONG Yan-lung, Secretary for Justice. The Subcommittee is also grateful to Dr Yash GHAI, former Sir YK Pao Professor of Public Law at the University of Hong Kong, and the Hong Kong Bar Association for giving their expert views on the subject in response to the Subcommittee's invitation.

### **STUDY BY THE SUBCOMMITTEE**

4. The Subcommittee has analyzed various legal and constitutional issues arising from the current arrangement under UNSO for implementing UN sanctions in Hong Kong. In doing so, it has made broad reference to the Regulations gazetted since July 2004 (up-to-date list in **Appendix II**). Apart from expressing concerns and formulating views, the Subcommittee has also put up suggestions on how the existing arrangement may be improved. On completion of its study and after forwarding its draft report to the Administration for comments<sup>3</sup>, the Subcommittee finalized its report and submitted it to the House Committee on 18 May 2007. In August 2007, the Administration provided its response to the issues raised in the report. The main findings arising from the Subcommittee's study and the Administration's response thereto are summarized in the ensuing paragraphs.

#### **The question of "vires"**

5. While "sanction" is defined under section 2(1) of UNSO as including economic, trade and arms embargoes and other mandatory measures decided by UNSC implemented against a "place" outside the People's Republic of China (PRC), the Subcommittee has noted that at least seven of the Regulations gazetted since July 2004 were targeted at persons, undertakings or entities, and not at a place or a territory. Concern has been raised as to whether such Regulations are ultra vires of the primary legislation. According to the Administration, it would be too restrictive to view sanctions against a place in isolation from the

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<sup>2</sup> This was the first meeting of the House Committee held by the Third Legislative Council.

<sup>3</sup> The Subcommittee forwarded its draft report to the Administration for comments on 9 February 2006 but no comments on the draft report had been received in the ensuing months. After the matter was raised by the Chairman of the House Committee with the Chief Secretary for Administration on 18 May 2007, the Administration provided its written response to the Subcommittee in August 2007.

persons/entities operating there or having a connection with that place. It considers that sanctions against a "place" comprehend the activities or conduct of individuals or entities in the place.

### **Disclosure of the instructions issued by the Ministry of Foreign Affairs (MFA) to the Chief Executive (CE)**

6. On whether the MFA's instructions can be disclosed to the legislature for reference, the Administration remains of the view that such instructions are internal documents and should not be disclosed.

### **Giving effect to MFA's instructions in relation to sanctions**

7. The Subcommittee notes that the implementation of UN sanctions in HKSAR is a matter of discharging PRC's international obligation to UN, which is a matter of foreign policy over which the Central People's Government (CPG) has sole responsibility. Notwithstanding, the Subcommittee has noted that the actual method of implementation is a decision for the HKSAR Government.

8. However, a salient point highlighted in the Administration's response to the Subcommittee's report, which has not been mentioned in its previous written information nor during past meetings, is that the entire set of draft regulation (including implementation details) is submitted to CPG for approval before the legislative process under section 3(1) of UNSO commences. The Administration considers that since the entire set of relevant regulation is part and parcel of the instruction given by CPG, there is no room for amendment by LegCo.

### **Removal of vetting by LegCo of subsidiary legislation**

9. Members are gravely concerned that section 3(5) of UNSO may have deprived LegCo of its constitutional role in scrutinizing and, where necessary, amending subsidiary legislation. The Regulations made under UNSO may be challenged as being legally ineffective if the statutory basis on which they have been made is unconstitutional. The Administration's view is that the Basic Law does not prohibit the delegation of law-making power and that the disapplication of sections 34 and 35 of IGCO in the scrutiny of subsidiary legislation predated 1 July 1997.

### **Timeliness of implementation**

10. On the need for timely implementation of UN sanctions, the Subcommittee has noted the undesirable situation of long time gaps between the passing of the relevant resolutions by UNSC and the gazettal of some of the Regulations. In response, the Administration has made endeavours to expedite the process, such as more streamlined arrangements and dedicated officers in the Department of Justice to deal with the subject. Some recently gazetted Regulations of average complexity have a shorter time gap of one to two months

between the receipt of MFA instructions and the gazettal of the Regulations.

### **Suggested alternative approaches**

11. Having conducted a comparative study on three other Ordinances<sup>4</sup> which also implement international obligations, the Subcommittee has suggested that consideration be given to incorporating 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 make reference to the existing arrangements for Hong Kong to enter into bilateral agreements with other countries in relation to fugitive offenders and mutual legal assistance in criminal matters. The Administration considers that the suggestion may not be feasible as it is not possible to devise standard clauses for incorporation into the primary legislation. There can also be no question of repealing regulations made under section 3(1) of UNSO as they are to implement the directives issued by CPG in respect of foreign affairs.

### **FURTHER DELIBERATION BY THE SUBCOMMITTEE**

12. The Subcommittee has followed up and exchanged views with the Administration on a number of issues, and formulated its initial views on the way forward.

#### **The legislature's involvement**

13. In presenting its position, the Administration has recapped that before the reunification on 1 July 1997, UN sanctions were implemented in Hong Kong by the United Kingdom (UK) Government by way of Orders in Council under the United Nations Act 1946. Pursuant to the Statutory Instruments Act 1946, the Orders in Council were required to be laid before Parliament but were not subject to any parliamentary procedure to amend or repeal them. LegCo also did not have any vetting power over such Orders.

14. On whether there was parliamentary oversight over the relevant Orders in Council, members note that under the UK Parliament, 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 Council made under the United Nations Act 1946. In this connection, the Subcommittee notes that LegCo may also set up subcommittees to examine individual regulations made under UNSO; but Members cannot move amendments to such regulations.

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<sup>4</sup> They are the Fugitive Offenders Ordinance (Cap. 503), Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) and United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575).

### **Instructions issued by MFA in relation to UN sanctions**

15. Given that the instructions issued by MFA form the basis of the regulation-making process under UNSO, the Subcommittee has noted with concern the Administration's latest revelation that the entire set of draft regulations (including implementation details) has to be submitted to CPG for approval prior to the commencement of the legislative process under section 3(1) of UNSO. At members' request for further clarification on the extent of involvement of CPG, the Administration has provided a flow chart (**Appendix III**) setting out the sanctions regulation-making process. In gist, the instructions issued by MFA to CE request the HKSAR Government to take concrete steps to effectively implement sanctions under the specific UNSC resolutions. After receiving the instructions, the HKSAR Government would prepare a draft regulation under UNSO and present it to CPG for comments, if any. Only after the draft regulation has been endorsed by CPG would the HKSAR Government submit it to the Executive Council for approval.

16. In this connection, members note that the instructions issued to CE by MFA have not prescribed the specific vehicle to be used for implementing the sanctions in question. As such, making regulations under section 3(1) of UNSO may not be the only vehicle as the Administration is also at liberty to consider other options such as by amending existing legislation, or by introducing a separate piece of legislation (such as the enactment of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) to give effect to UNSC Resolution 1373) as appropriate.

17. On legislative options, the Administration has advised that where the sanctions resolved by UNSC relate to particular places and are time-limited, they will be implemented by way of regulations made under UNSO. In this connection, members consider that upon deciding to pursue the option of making regulations under UNSO, the Administration should inform the relevant Panel(s) to see if members have any views.

### **Vetting of subsidiary legislation by LegCo**

18. The Administration has submitted that the disapplication of sections 34 and 35 of IGCO under UNSO is permissible under the laws of Hong Kong and at common law. It considers that the implementation of UN sanctions by primary legislation in the form of UNSO and by CE making regulations under section 3(1) of UNSO upon receiving instructions from CPG is in accordance with the normal legal procedure of enactment of legislation in HKSAR under the Basic Law and Article 48(8) of the Basic Law whereby CE is under a constitutional duty to implement the directives of CPG.

19. Members do not subscribe fully to the Administration's view, and point out that as the Regulations made under section 3(1) of UNSO often create new offences, purport to have serious penal effect and confer vast investigation and

enforcement powers, they should be subject to vetting by the legislature. The Administration has been asked to consider members' suggestion of consulting LegCo on the draft regulations before forwarding them to CPG for approval.

20. On checks and balances, the Administration has advised that safeguards are already available, notably the provisions in the principal Ordinance in relation to the maximum penalties, the scope of the relevant UNSC resolutions within which the regulations are to be made, and the vetting by CPG of the draft regulations. Moreover, the time-critical nature of UN sanctions requires their prompt implementation. In highlighting the importance of legislative oversight as part of the due process in enacting legislation, members consider that scrutiny by LegCo does not necessarily result in delay, as evidenced in past urgent scrutiny of legislative proposals. On the contrary, input by LegCo would render the legislative process more accountable and compliant with the due process.

### **Improvements to the current arrangement**

21. The Subcommittee is of the view that the current arrangement of implementing UN sanctions should be reviewed and improved. For this purpose, the Subcommittee has drawn up suggestion on alternative approaches (as recapped in paragraph 11 above). The Administration has also been asked to re-examine whether it is necessary to amend the relevant provision of UNSO so as to define the scope of sanctions to include individuals and entities in or having a connection with the relevant place which is subject to sanction. Members note that if necessary and subject to certain conditions, they may consider whether suitable amendments should/can be proposed to UNSO by way of a Member's Bill.

### **VIEWS ON THE PROPOSED WAY FORWARD**

22. The Subcommittee is keenly aware of the need for HKSAR to implement UN sanctions in fulfilment of CPG's international obligations to UN. Members' main concern is whether it is proper and most appropriate for the HKSAR Government to adopt the current form or legislative approach as enshrined in UNSO to give effect to the instructions issued by MFA to implement such sanctions. The Subcommittee has come to the view that the current arrangement should be improved with a view to enhancing its accountability and its compliance with the due process in enacting legislation. This may be achieved by engaging LegCo in the legislative process at the following junctures :

#### **(a) Deciding on the legislative option for implementing UN sanctions**

As the instructions issued by MFA to CE do not specify the vehicle to be used in implementing the sanctions in question, the Administration would need to consider whether the making of regulations under UNSO or other legislative options (e.g. amending existing legislation or introducing a separate piece of legislation)

should be pursued. If it is decided that the sanctions are to be implemented by way of UNSO, the Administration should inform the relevant LegCo Panel(s)<sup>5</sup> to see if members have any views.

**(b) Consulting LegCo on the legislative proposal**

Having regard to the sanctions regulation-making process in **Appendix III** and given that the regulations made under section 3(1) of UNSO purport to have serious penal effect and confers vast powers, LegCo's views on the draft regulations should be sought before they are presented to CPG for endorsement.

23. The Subcommittee has also considered other ways to improve the current arrangement for implementing UN sanctions. The alternative approaches suggested by the Subcommittee to provide LegCo a role in the legislative process and revising the definition of "sanction" to put its scope beyond doubt are some of the proposed improvements. Members are aware that if necessary and subject to certain conditions, they may wish to consider proposing suitable amendments to UNSO by way of a Member's Bill.

**ADVICE SOUGHT**

24. Members are invited to further consider the initial views set out in paragraph 22(a) and (b) and paragraph 23 on ways to improve the existing arrangement for implementing UN sanctions in HKSAR. After consolidating members' comments, the Subcommittee's views will be finalized and presented to the Administration for consideration.

**RELEVANT PAPERS**

25. A list of relevant papers is at **Appendix IV**.

Council Business Division 1  
Legislative Council Secretariat  
16 January 2008

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<sup>5</sup> The policy bureau responsible for UNSO is the Commerce and Economic Development Bureau (the Commerce, Industry and Tourism Branch) and hence, the corresponding LegCo Panel should be the Panel on Commerce and Industry. However, in line with the existing practice in LegCo, all other non-Panel Members are also invited to attend briefings on legislative proposals.

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

**Membership list**

<b>Chairman</b>	Hon Margaret NG
<b>Members</b>	Hon Martin LEE Chu-ming, SC, JP Dr Hon LUI Ming-wah, SBS, JP Hon LAU Kong-wah, JP  (Total : 4 members)
<b>Clerk</b>	Miss Polly YEUNG
<b>Legal Adviser</b>	Mr Kelvin LEE
<b>Date</b>	1 July 2005



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

**Terms of Reference**

To examine the legal and constitutional issues arising from the current arrangements for implementing in Hong Kong resolutions of the United Nations Security Council in relation to sanctions as provided under the United Nations Sanctions Ordinance (Cap. 537) with reference to Regulations made under section 3 of the Ordinance.

**Regulations made under section 3 of the United Nations Sanctions Ordinance  
(Cap. 537)  
(since July 2004)**

<b>Regulation</b>	<b>Date of gazettal</b>	<b>Date of receipt of instruction from the Ministry of Foreign Affairs</b>	<b>Resolution of the United Nations Security Council <i>[Date of expiry]</i></b>
1. United Nations Sanctions (Iraq) (Amendment) Regulation 2004	9 July 2004 (L.N. 132 of 2004)	May 2003	Resolution 1483 of 22 May 2003
2. United Nations Sanctions (Liberia) Regulation 2004	3 December 2004 (L.N. 198 of 2004)	July 2004	Resolution 1521 of 22 December 2003 <i>[21 December 2004]</i>
3. United Nations Sanctions (Democratic Republic of the Congo) Regulation	4 March 2005 (L.N. 27 of 2005)	August 2004	Resolution 1552 of 27 July 2004 <i>[31 July 2005]</i> and Resolution 1493 of 28 July 2003 <i>[27 July 2004]</i>
4. United Nations Sanctions (Sudan) Regulation	1 April 2005 (L.N. 45 of 2005)	August 2004	Resolution 1556 of 30 July 2004
5. United Nations Sanctions (Liberia) Regulation 2005	10 June 2005 (L.N. 94 of 2005)	July 2004 for Resolution 1532 and January 2005 for Resolution 1579	Resolution 1532 of 12 March 2004 and Resolution 1579 of 21 December 2004 <i>[Section 10 expired on 20 June 2005, sections 3, 4, 5, 6, 7, 11, 12, 13, 14, 15 and part 5 expired on 20 December 2005]</i>

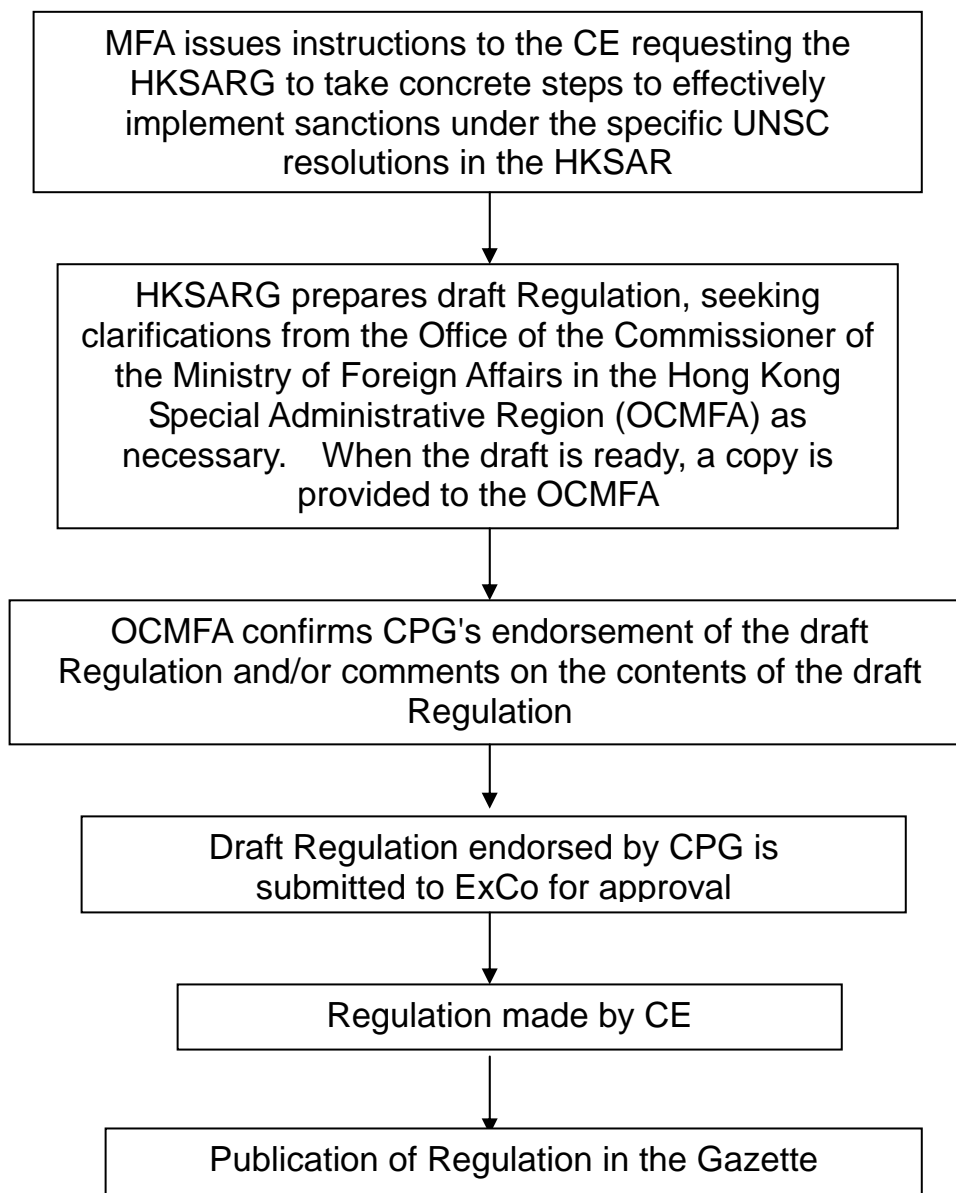
<b>Regulation</b>	<b>Date of gazettal</b>	<b>Date of receipt of instruction from the Ministry of Foreign Affairs</b>	<b>Resolution of the United Nations Security Council <i>[Date of expiry]</i></b>
6. United Nations Sanctions (Côte d'Ivoire) Regulation	8 July 2005 (L.N. 122 of 2005)	December 2004	Resolution 1572 of 15 November 2004 <i>[14 December 2005]</i>
7. United Nations Sanctions (Democratic Republic of the Congo) (Amendment) Regulation 2005	8 July 2005 (L.N. 123 of 2005)	May 2005	Resolution 1596 of 18 April 2005
8. United Nations Sanctions (Sudan) (Amendment) Regulation 2005	8 July 2005 (L.N. 124 of 2005)	May 2005	Resolution 1591 of 29 March 2005
9. United Nations Sanctions (Democratic Republic of the Congo) Regulation 2005	28 October 2005 (L.N. 192 of 2005)	September 2005	Resolution 1616 of 29 July 2005 <i>[31 July 2006]</i>
10. United Nations Sanctions (Liberia) Regulation 2005 (Amendment) Regulation 2005	28 October 2005 (L.N. 193 of 2005)	September 2005	Resolution 1607 of 21 June 2005 <i>[20 December 2005]</i>
11. United Nations Sanctions (Liberia) Regulation 2005 (Amendment) Regulation 2006	17 March 2006 (L.N. 58 of 2006)	January 2006	Resolution 1647 of 20 December 2005 and resolution 1521 of 22 December 2003 <i>[Sections 10B and 11A of the United Nations Sanctions (Liberia) Regulation 2005 (Amendment) Regulation 2006 expire at midnight on</i>

<b>Regulation</b>	<b>Date of gazettal</b>	<b>Date of receipt of instruction from the Ministry of Foreign Affairs</b>	<b>Resolution of the United Nations Security Council [Date of expiry]</b>
			<i>19 June 2006; and the following provisions expire at midnight on 19 December 2006 : the definitions of "commander", "Commissioner", "master", "operator", "owner", "person connected with Liberia" and "prohibited goods" in section 2; paragraphs (a) and (b) of the definition of "licence" in section 2; sections 3A,4A,5A,6A,7A,12A,13A,14 A and 15A; Part 5A; the Schedule]</i>
12. United Nations Sanctions (Côte d'Ivoire) Regulation 2006	17 March 2006 (L.N. 59 of 2006)	January 2006	Resolution 1643 of 15 December 2005 and resolution 1572 of 15 November 2004 <i>[The definitions in section 2 of the Regulation, other than the definitions of "authorized officer", "Security Council" and "ship", sections 3,4,5,6,7,8,10 and 11, parts 3,4,and 5 and sections 36(2) and 37 expire at midnight on 15 December 2006]</i>
13. United Nations Sanctions (Liberia) Regulation 2005 (Amendment) (No.2) Regulation 2006	15 September 2006 (L.N. 188 of 2006)	July 2006	Resolution 1683 of 13 June 2006 and resolution 1689 of 20 June 2006 <i>[Section 10C of the Regulation expires on 19 December 2006]</i>

<b>Regulation</b>	<b>Date of gazettal</b>	<b>Date of receipt of instruction from the Ministry of Foreign Affairs</b>	<b>Resolution of the United Nations Security Council <i>[Date of expiry]</i></b>
14. United Nations Sanctions (Democratic Republic of the Congo) Regulation 2006	17 November 2006 (L.N. 257 of 2006)	August 2006	Resolution 1698 of 31 July 2006 <i>[31 July 2007]</i>
15. United Nations Sanctions (Lebanon) Regulation	19 January 2007 (L.N. 8 of 2007)	August 2006	Resolution 1701 of 11 August 2006
16. United Nations Sanctions (Côte d'Ivoire) Regulation 2007	27 April 2007 (L.N. 64 of 2007)	March 2007	Resolution 1727 of 15 December 2006 <i>[31 October 2007]</i>
17. United Nations Sanctions (Côte d'Ivoire) Regulation 2006 (Repeal) Regulation	27 April 2007 (L.N. 65 of 2007)	--	--
18. United Nations Sanctions (Liberia) Regulation 2005 (Amendment) Regulation 2007	27 April 2007 (L.N. 66 of 2007)	March 2007	Resolution 1731 of 20 December 2006 <i>[Section 10D of the United Nations Sanctions (Liberia) Regulation 2005 expires at midnight on 19 June 2007; and the following provisions expire at midnight on 19 December 2007 : the definitions of "arms and related material", "commander", "Commissioner", "master", "operator", "person connected with Liberia", "prohibited goods" and "Resolution 1731" in section 2; paragraphs (a) and (b) of</i>

<b>Regulation</b>	<b>Date of gazettal</b>	<b>Date of receipt of instruction from the Ministry of Foreign Affairs</b>	<b>Resolution of the United Nations Security Council <i>[Date of expiry]</i></b>
			<i>the definition of "licence" in section 2; sections 3B, 5B, 7B, 12B, 13B, 14B and 15B; Part 5B]</i>
19. United Nations Sanctions (Democratic People's Republic of Korea) Regulation	15 June 2007 (L.N. 120 of 2007)	November 2006	Resolution 1718 of 14 October 2006
20. United Nations Sanctions (Liberia) Regulation 2005 (Amendment) (No.2) Regulation 2007	15 June 2007 (L.N. 121 of 2007)	May 2007	Resolution 1753 of 27 April 2007
21. United Nations Sanctions (Iran) Regulation	28 September 2007 (L.N. 179 of 2007)	January and April 2007	Resolutions 1737 of 23 December 2006 and 1747 of 24 March 2007

**Flow-chart of the Major Steps  
in the Sanctions Regulation-making Process**



## List of relevant papers

Paper	LC Paper No
✧ Report of the Subcommittee to the House Committee meeting on 18 May 2007 prepared by the Legislative Council Secretariat <a href="http://www.legco.gov.hk/yr06-07/english/hc/papers/hc0518cb1-1587-e.pdf">http://www.legco.gov.hk/yr06-07/english/hc/papers/hc0518cb1-1587-e.pdf</a>	CB(1)1587/06-07
✧ Administration's paper "Comments on the report to the House Committee prepared by the Subcommittee" <a href="http://www.legco.gov.hk/yr04-05/english/hc/subcom/hs01/papers/hs01cb1-2323-1-e.pdf">http://www.legco.gov.hk/yr04-05/english/hc/subcom/hs01/papers/hs01cb1-2323-1-e.pdf</a>	CB(1)2323/06-07(01)
✧ Submission from the Hong Kong Bar Association (English version only) <a href="http://www.legco.gov.hk/yr04-05/english/hc/subcom/hs01/papers/hs011030cb1-108-1-e.pdf">http://www.legco.gov.hk/yr04-05/english/hc/subcom/hs01/papers/hs011030cb1-108-1-e.pdf</a>	CB(1)108/07-08(01)
✧ Administration's response to submission from the Hong Kong Bar Association <a href="http://www.legco.gov.hk/yr04-05/english/hc/subcom/hs01/papers/hs011030cb1-144-1-e.pdf">http://www.legco.gov.hk/yr04-05/english/hc/subcom/hs01/papers/hs011030cb1-144-1-e.pdf</a>	CB(1)144/07-08(01)