

## 電郵意見

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事由:	對《維護國家安全法》之有關意見
內容:	<p><b>International Trade Union Confederation comments and recommendations to the Macau SAR Government Macau concerning the draft legislation on Article 23 of the Macau SAR Basic Law</b></p> <p style="text-align: right;">29 November 2008</p> <p style="text-align: center;"><b>Article 23 of the Macau SAR Basic Law</b></p> <p style="text-align: center;"><i>'The Macau Special Administrative Region shall enact laws, on its own, to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or the theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies'</i><sup>1</sup></p> <p>The International Trade Union Confederation, which represents 168 million unionised workers through its 233 national affiliated union centres in 155 countries and territories, including China's Hong Kong SAR, would like to express its concerns over the draft legislation based on Article 23 of the Macau SAR Basic Law, submitted for public consultation in the Macau SAR on 22 October 2008. Due to the time constraints involved in the consultation the ITUC will focus on the most relevant issues involved.</p>

<sup>1</sup> The Hong Kong SAR contains the exact wording. The translation of the Draft Bill used here is, with one exception, that of the ITUC itself.

	<p>The ITUC is concerned that the consultation document (hereafter draft bill) contains several highly problematic areas and is being introduced without adequate consultation.</p> <p><b>Timeframe</b></p> <p>The ITUC is extremely concerned that the period of 40 days set aside for public consultation is not adequate to allow for the fullest possible public discussion. Nor is it an adequate timeframe to allow the government and authorities to enter into full consultation with all groups concerned. We also note with disquiet the reports that some sectors of society have not been invited to attend the arranged public consultation sessions held by the authorities. We understand that among the five consultation sessions held by the government, only one was public whilst the others were closed door for designated communities and associations. Those groups who have been allegedly made unwelcome include important the Casino and Construction workers trade union. It has also been reported that a student and activists forum scheduled for 20 November was cancelled after officials from the University of Macau pressured the organising students to cancel the event.</p> <p>The ITUC is also aware of a survey of some 1,000 residents undertaken by the <i>General Union of Neighbours Association</i> which concluded that over 60 percent of residents have no clear understanding of Article 23 and the draft bill despite the fact that the majority apparently agreed with the enactment of Article 23 'as long as it was legislated for the sake of the national security'. A further survey undertaken by the <i>Union for the Construction of Macau</i> states that around 85 percent of respondents had little or no knowledge of the law. It is quite clear then that much more time is needed to disseminate information about the potential impact of the law and the potential interpretation and implementation of the draft Bill.</p> <p>The Consultation period must be extended in order to allow for a full consultation of all concerned parties and any subsequent legislation should not be rushed through the legislature.</p>
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<sup>2</sup> Translation sourced from Godinho, Jorge A. F., *The Regulation of Article 23 of the Macau Basic Law: A Commentary of the Draft Law on the Protection of State Security* (November 17, 2008). 

**Wide scope for interpretation**

Article 23 legislation seeks to introduce into the Macau Special Administrative Region (MSAR) national security legislation banning treason, secession, subversion, secession and sedition. The proposed legislation is made in a context of extensive mainland influence and what some see as pervasive media self censorship and restrictions on civil society.

The basic Laws of both the Hong Kong SAR and the MACAU SAR provide for the eventual legislation on this area but after widespread unrest over the proposed legislation in Hong Kong, authorities there have not since reopened the debate. The draft bill for public discussion in Macau is a far more reasonable and well thought out consultation document than the initial consultation document in Hong Kong - it is clear that the Macau authorities have attempted to ensure that their draft will not meet with the widespread criticism and mass protests seen in Hong Kong. However, while most articles are better defined there remains some imprecision and certain clauses are open to an unacceptably wide level of interpretation.

Given this possibility of extensive interpretation, in addition to larger concerns on basic human rights, the ITUC believes the proposed legislation may, unless further tightened contravene ILO Conventions 87 and 98, in particular Article 3 of Convention 87 on the right to organize activities and the non-interference by public authorities and Article 11 on the obligations by members of the ILO to "take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize".

The ITUC is therefore seriously concerned about the proposed legislation's potential to hinder the ability of trade unions and other labour groups in Macau in their exercise of the right to freedom of expression, especially in light of the already restrictive limits on civil society groups and trade unions in Macau.

**Indirect application of PRC legislation**

While we note the drafter's attempts to ensure this draft is clearly defined we are concerned that this legislation will increase the influence of the PRC's

vague and broad definitions of subversion and national security. National security laws and in particular the crime of “subversion” is often used against worker activists and others attempting to promote labour rights and the right to freedom of association. The ILO has on many occasions, commented on and criticized the lack of freedom of association in the PRC. In the PRC there is only one state controlled and sanctioned trade union – the All China Federation of Trade Unions (ACFTU) and its branches. Unofficial unions, informal worker groups and attempts to form labour groups are not allowed, recognised or permitted to exist. Workers attempting to create independent trade unions or advocacy groups are often charged with “national security” offences relating to “subverting state power” or in some cases “leaking state secrets”. Many of the large-scale disputes are seen as potential catalysts for other workers and are quickly suppressed using force and the flexible provisions on national security. The use of Chinese criminal law to convict workers on political grounds has great reverberations for similar activities supporting workers struggles in Macau. It is a major concern that the legislation, as drafted, may prevent Macau residents from supporting the work of labour activists deemed subversive in the PRC.

### **Patriotism**

*“Love of the Motherland and love of Macau, love of body and soul have been a tradition of excellence by the residents of this region. After the return to the Motherland, the spirit of this love has become a driving force in building and developing the Region, and shaping a common perception under which it is up to the Macau SAR to perform the mission of defending national security.”*

Draft Bill, Introductory paragraphs

The ITUC is concerned that the bill is being promoted as a necessary requirement of a “patriotic society”; confusing patriotism and love of country with obedience to government initiatives and political dogma.

The linking of patriotism and a love for one’s country with obedience and allegiance to the ruling government is a tactic which is often used by governments when they attempt to limit freedom of speech for a minority or minorities or when they attempt to push through a politically sensitive piece of legislation. The Macau SAR government is no exception. Previously, in the Hong Kong SAR, those who criticized the mainland authorities or the local government’s failure to provide an adequate timetable for universal suffrage

criticized government were branded as 'unpatriotic'. The ITUC urges the government of Macau not to equate a love of the motherland with the smooth passing of its proposed bill on Article 23 but instead to allow for an informed debate on the issue, welcoming criticism and dissenting opinions.

**On the crimes of treason, secession and subversion.**

The ITUC has limited time to comment on the proposed crimes except to highlight that the punishments suggested far exceed existing provisions in the Macau Criminal Code for crimes against the 'political, economic and social' system of Macau.

The ITUC is also concerned over the definition of the other "serious unlawful means" when describing crimes other than "violence" in secession and subversion. For example, in the definition of the crime of secession it is written that:

*For the purposes of this law, the following are deemed to be serious unlawful means:*

- 1) acts against the life, physical integrity or liberty of persons;*
- 2) acts of depositing of the means of transport or telecommunications, or other infrastructure, or acts against the security of transportation and communications, including telegraph, telephone, radio, television or other electronic communication systems;*
- 3) acts of causing fire, releasing radioactive substances, toxic or suffocating gases, contamination of food or water intended for human consumption or spreading diseases;*
- 4) acts involving the use of nuclear energy, fire weapons, incendiary means, explosives devices or substances, postal parcels or letters containing dangerous substances or devices. [Article 3.2]*

This definition contains some troubling aspect. Firstly the definition does not expressly rule out peaceful demonstrations and activist campaigns. The wording '*acts against the security of transport and communications*' is open to extensive interpretation and may include non-violent large-scale demonstrations or strikes in public areas which may affect traffic or block

streets and the rail systems. These are common occurrences in large-scale labour protests in the mainland. In addition acts against 'electronic communications' - - such as mass email actions or petitions by trade unions or other groups may also be included in a broad interpretation of this article.

Secondly we would urge that the term 'other criminal' acts instead of 'other unlawful means' is used to avoid punishment of civil acts, such as the unintentional damage to employers property or public property.

The potential for broad interpretation may impact activities held by trade unions, especially those such as industrial actions, strikes, assemblies or public processions, which run the risk of public disorder and potential violence, especially if suppressed by the police or similar bodies. The parties involved - including the organizing union or group (even if not the instigator of violence) are then open to being labeled as subversive. Even if a campaign or mass event does not turn into a public disturbance, the police may still say that it has and use this as an excuse to ban the event or indeed future events, thus threatening the right to freedom of association, expression and the right to strike.

As we know from recent experience in Macau peaceful labour marches may result in violence if the police reaction is misjudged and poorly handled as was the case in May 2007 when an estimated 2,400 people participated in demonstrations during which the police fired gunshots injuring a passer-by.

While a definition for other 'serious unlawful means is given for the crime of secession, no such definition is given for the 'other serious unlawful means' under the crime of subversion. A tightly drafted definition must be provided.

### **Sedition**

- 1. Anyone who incites, directly and publicly, the acts described in articles 2, 3 or 4, shall be punished with 1 to 8 years imprisonment.*
- 2. Anyone who incites, directly and publicly, the members of the Macau Garrison of the People's Liberation Army to abandon their functions or to engage in acts of rebellion shall be punished with 1 to 8 years imprisonment. Article 5*

### **Lack of clear definition**

The crime of sedition essentially relates to incitement to violence or 'serious unlawful means' in order to overthrow the government, attempt secession or constrain the government (treason, secession and subversion).

In including the words 'directly and publicly' it is clear that the drafters noted the need to ensure that the law upholds the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. These Principles state that expression may be punished only if the government can demonstrate that the expression was intended to incite imminent violence; that the expression was very likely to incite such violence, and there was direct and immediate connection between the expression and the likelihood or occurrence of such violence. The wording here however does not expressly make this connection of immediacy and directness clear. ■

The term 'incitement' remains unclear and the proposed wording does not rule out all concerns over the potential interference with freedom of expression and the independent functioning of the media. 'Direct and public' means to incite can and do include the spoken and written word as well as demonstrations and strikes which fall into the realm of freedom of expression and association and as such, limits should not be placed on them except in extremely narrow circumstances.

In addition there is an inadequate definition of what is a 'direct' incitement as opposed to only an 'indirect' incitement which remains vague and open to interpretation. While there have been public assurances that 'chanting slogans' will not fall into this category and while the guiding principles of the draft state that the definition does not include 'suggestions or recommendations, academic research or comments alone' more clarity is needed.

#### **Support for labour movements**

In addition, if the alleged act took place outside Macau in any place where it was a crime – for example, the serious disruption of traffic during labour demonstrations in the mainland - then it is not clear if the illegality of the act in the mainland will influence the interpretation of such events as 'subversive' under the proposed law and support in Macau – directly and publicly - for such activities thus being classed as seditious.

The ITUC is therefore concerned to ensure that the final bill expressly rules out the possibility that Macau civil society can be prosecuted under this legislation for publicly expressing opinions supporting labour movements in

the mainland which have been classed as subversive by the central authorities as well as ruling out prosecution for publicly promoting, advising, financially or otherwise supporting such movements.

### **Potential prosecution of media workers**

The consultation document states clearly that the term 'in public' includes the use of the media in defining sedition. This is extremely problematic. There are obvious dangers for commentary or opinion pieces in the media covering sensitive issues of secession or activities classed as subversive being classed as seditious or potentially seditious themselves. There is no public interest or defence clause covering the media from prosecution for work carried out as part of their job.

In addition the ITUC is concerned that the current text may result in increasing levels of self censorship and a lack of critical reporting. This is especially worrying in the relatively restrictive climate in Macau. The ITUC was dismayed at the April 2008 arrest of a Macau resident for allegedly posting a message on *cyberctm.com* encouraging people to disrupt the planned Olympic Torch Relay through Macau as well as the shutdown of the internet forums *orchidbbs.com* and *cyberctm.com* during the relay.

As the ITUC has made clear on many occasions we are also deeply concerned at the apparent blacklisting political activists and unionists who are denied entry to Macau at politically sensitive times or to attend meetings and/or demonstrations. The recent successful entry into Macau of Leung Kwok-Hung serves to highlight the previous repeated denial of entry to the legislator. Given the use of emotive language in the public consultation document and public debate, the potential for the authorities and the media themselves to create a broad definition of what may potentially be seen as subversive or seditious is extremely high, bringing with it an increased risk of self censorship.

Finally, the ITUC, in common with many groups, believes that sedition is a crime of speaking words against the state and has long been used as a tool to suppress dissent and imprison dissidents and others for peacefully exercising her rights to freedom of expression and association. It has been removed from many countries and in many states where it is retained it is no longer

used.

Free information flow is at the core of trade union work and education programmes, and is instrumental for the organization of collective actions defending workers' rights. The ITUC and Global Union Federations, their affiliates in Hong Kong and Macau and other labour groups produce reports and campaigning materials on labour issues in China. Much of the material produced on the right to freedom of association in China is considered by mainland authorities to be both subversive in nature and to contain "state secrets". The research, collection and publication of such material would be considered "seditious" and subversive in the mainland. In order to prevent pre-emptive and protective self censorship by labour groups, it needs to be made clear that these publishing activities are not classified as furthering 'subversion' on the mainland or inciting people in Macau and elsewhere to support acts defined as 'subversive', and that this work is not seen as 'seditious'.

The ILO has clearly stated that "the right to express opinions through the press or otherwise is an essential part of trade union rights"; that "The freedom of expression which should be enjoyed by trade unions and their leaders should also be guaranteed when they wish criticize the government's economic and social policy", and that to this end "workers, employers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities", while respecting propriety.

### **Theft of state Secrets**

*1. Whoever steals, spies or purchases State secrets, causing danger to or harming State interests related to national independence, to State integrity and unity, or its internal or*

*external security, shall be punished with imprisonment from 2 to 8 years.*

*2. Whoever receives instructions, directives, money or assets from a Government, organization or association from outside of the Macau SAR, or any of their agents, for the practice of spying acts, namely to steal, spy or purchase State secrets, or to recruit others to practice such acts, with knowledge of such, or, in any way, renders assistance or facilitates the practice of such acts, shall be punished with imprisonment from 3 to 10 years.*

*3. If the perpetrator, breaching a specific duty imposed by the status of his function*

*or service, or of the mission of which he was charged by a competent authority, practices the following conducts, he shall be punished:*

- 1) In case of the conducts described in paragraph 1, with imprisonment of 3 to 10 years;*
- 2) In case of the conducts described in paragraph 2, with imprisonment of 5 to 15 years;*
- 3) In case he renders public or makes accessible to unauthorised persons a State secret,  
with imprisonment of 2 to 8 years;*
- 4) In case of the previous subparagraph, by negligence, with imprisonment up to 3 years.*

*4. For the purposes of this article, 'State secret' shall cover the documents, information or objects that should be kept secret in the framework of national defence, external relations, or other matters having to do with the relation between the Central Authorities and the  
Macau SAR mentioned in the Basic Law.*

*5. Judicial organs shall obtain from the Chief Executive a certificate on the specific documents, information or objects relating to State secrets, whenever questions are posed in a  
criminal procedure; before issuing such certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.<sup>2</sup>*

The ITUC is concerned that the proposed legislation on state secrets will not only increase the likelihood of self censorship but will also introduce into the Macau SAR the vague, elastic and retroactive nature of the PRC's national laws on state secrets.

While Chief Executive Edmund Ho has stated that "*freedom of the press, information and publication*" in Macau would not be jeopardised, it is already clear that social, political and economic pressures already contribute to limiting expressions of dissent and political opposition to the Macau authorities and the central government. The ITUC believes that the imposition of Article 23 legislation, especially if poorly worded will further increase this climate of fear.

It is important to note that while the Chief Executive has stated publicly that around four people only have access to state secrets in Macau, it is clear that under the current state secrets legislation in the PRC many more people are

at risk of being charged with state secrets related crimes. The ITUC wishes to remind the Macau SAR Government that the definition of state secrets, as enshrined in the State Secrets laws of the PRC remains imprecise and elastic. People currently detained in China for allegedly revealing state secrets include workers passing on published newspaper articles and published news of mass demonstrations. We refer you to the attached annex for a non-exhaustive list of labour activists and others detained on charges of subversion or state secrets related crimes in the PRC.

While the draft Bill does contain some narrowing of the limit of state secrets, this is not enough in the face of such poorly defined national legislation which allows almost total discretion by the authorities. The ITUC would like to ask that the draft bill be revised to ensure a far greater narrowing of the scope of state secrets and clarity over how and who will define such a documents or facts as a 'secret'. In particular we draw your attention to the two laws governing state secrets in relation to labour issues, namely the "Regulations on the specific scope of State secrets and other secret matters in labour and social security work," promulgated jointly in January 2000 by the Ministry of Labour and Social Security (MLSS) and the State Secrets Protection Bureau; "Regulations on the specific scope of State secrets and other secret matters in trade union work," promulgated jointly in May 1996 by the All-China Federation of Trade Unions (ACFTU) and the State Secrets Protection Bureau.

As a further guarantee of freedom of information and expression, a public defence clause should be included.

### **Proscription of groups and links between Macau groups and foreign groups**

The ITUC is concerned that these two articles (seven and eight) may be used to limit legitimate activities and ties between Macau groups – including trade unions – and foreign or international bodies, including the ITUC.

The proposed definition of who or what constitutes a 'political group' is far too vague and could include almost all civil society groups, including trade unions and labour rights groups.

The wording regarding punishment of those providing 'support' is unclear and

too extensive. There are concerns over the excessive nature of some of the proposed fines which may lead to a situation whereby the bankrupting of groups under this legislation is seen as an effective means of quashing legitimate political or other opposition. In addition the use of collective financial punishment for members of a society is excessive and again will lead to civil society group members limiting activities for fear of potential criminalization. This will only serve to reduce the contribution of civil society to the harmonious development of Macau.

At a time of increasing labour activism and awareness in Macau, the potential proscription of trade union groups coupled with the possibility of sentencing for offences relating to subversion and sedition could affect the membership of trade union and labour groups in Macau and as such negatively affect progress towards a more vibrant civil society and freedom of association.

The ITUC is also concerned that actions of the ITUC in support of Chinese labour movements and other movements elsewhere may be seen as subversive or even secessionist and may lead to repercussion for our local partners. The ITUC is further concerned that potential affiliates of the ITUC and the Global Union Federations may be discouraged to work with groups and individuals to promote labour rights in China, including groups already classified in the mainland as subversive or as "hostile elements", although such cooperation is protected by ILO Convention no. 87.

### **Preparatory Acts**

*The preparatory acts of crimes under Articles 2, 3, 4.,. 5 or 6. Thereof, shall be punished with penalty of imprisonment up to 3 years.*

The ITUC believes that this particular article is unclear and far too vague leading to potential abuse. The punishment proposed is excessive and the article should be defined clearly and narrowly. The crime of preparatory act for the crime of sedition should be removed entirely as sedition is in itself a preparatory act.

### **Conclusions**

Although we welcome the fact that several parts of this bill are clearly defined (especially in contrast to the first draft proposed during the initial

consultation in Hong Kong), we remain worried that the proposed legislation defines all the four offences of treason, sedition, subversion and secession in terms which still need further defining. The draft as it stands could easily be used against civil society – in much the same way that existing legislation is used in mainland China – to unduly restrict the right to freedom of association in Macau – contrary to the principles of “One Country - Two Systems”.

We also note that several of the provisions contain punishments or definitions which are potentially more damaging to freedom of association, expression and information than the revised drafts offered by the Hong Kong Government. This will set a troublesome precedent for future Hong Kong legislation. The ITUC urges the Macau SAR government to instead work towards a clearly defined bill which promotes and protects fundamental human rights thus supporting the sustainable political and economic development of the Macau SAR.

### **Recommendations**

1. While the ITUC does not dispute the need for legislation on state security to be implemented as prescribed in the Macau Basic law, it does not see any pressing need for such legislation to be brought in a hurried manner. It therefore asks that the period of public consultation be extended and that no specific timetable for implementation is given to allow for the fullest possible discussions.

We also ask that all sectors of society however critical of the government they may be, are given the right to debate the issue and provide views to the government directly.

2. The ITUC calls for a clear and narrow definition of the term “other unlawful means” in the offences of secession and subversion in order to make sure that the proposed bill will not unduly limit fundamental human rights. We ask that peaceable tools and tactics used by the labour movement, including strikes, be expressly exempted from prosecution;

3. The ITUC calls for improved clarity and a more extensive definition of the term; “directly and in public” in relation to the crime of sedition and for the full application of the Johannesburg Principles.

4. The ITUC also asks that the bill supports continued freedom from interference for media and that a 'public interest' defense be included in the legislation.

4. The ITUC calls for a clear definition of the term 'state secrets' in the legislation surrounding theft of state secrets. In particular it asks that the law not include a general reference to mainland definitions of a 'state secret' until such a time as the state secret laws in the People's Republic of China conform to international law. As regards trade union and labour related issues we expressly ask that the laws governing labour-related state secrets be repealed.

5. The ITUC calls for a proper and narrow definition of the term "preparation" for the crimes as described in article nine; that any preparatory acts for sedition be excluded and that penalties be lowered.

6. Finally the ITUC urges the Macau SAR government to take this opportunity to implement a clearly defined bill of the highest standard which promotes and protects fundamental human rights.

**Annex: Labour activists detained on charges of state secrets and subversion in the PRC.**

Several well-known cases of worker representatives charged with subversion, most of whom have already been catalogued at the ILO, include; **Yao Fuxin** and **Xiao Yunliang**, from Liaoyang, both detained after peaceful demonstrations and the organization of an independent workers congress in March 2002. Yao and Xiao were sentenced to seven and four year's imprisonment respectively under Article 105 of the Chinese Criminal Law; **Di Tiangui**, from Shanxi province imprisoned in 2002 on charges of "incitement to subvert state power" after calling for an independent retired workers association; **Yue Tianxiang**, from Gansu Province, who was sentenced to 10-year imprisonment on the charge of "subverting state power" on 5 July 1999 after establishing an independent journal *China Workers Monitor*; **Xu Jian**, a lawyer from Inner Mongolia sentenced to four years' imprisonment for "incitement to subvert state power" in 2000 for providing legal counseling to workers; **Li Wangyang** from Hunan Province who was sentenced to 10 years' imprisonment in 2001 on charges of "incitement to subvert state

	<p>power" after attempting to receive compensation for ill treatment received while serving a previous sentence for organizing the Shaoyang Workers' Autonomous Federation; <b>Hu Mingjun</b> and <b>Wang Sen</b> from Sichuan Province who were convicted of subversion and sentenced in 2002 for organizing labour protests in 2000; and <b>Zhang Shanguang</b> from Hunan Province who was sentenced to ten years' imprisonment in December 1998 after being accused of revealing state secrets and endangering national security after talking to foreign media about a demonstration organized by local unemployed workers and farmers.</p>
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