

Issues Raised

The Administration's Response

The Administration to consider means to improve the current arrangement with reference to the following:

- (a) The arrangement for implementing United Nations Security Council (UNSC) resolutions in relation to sanctions as adopted by the Macau Special Administrative Region 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) Seriously consider the Subcommittee's suggestion earlier on to incorporate into the primary legislation (i.e. United Nations Sanctions Ordinance (Cap 537) (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

Macau operates a legal system different from Hong Kong's. Our understanding is that the Macau Law No. 4/2002 (Compliance with Certain Instruments of International Law) creates specific offences relating to (i) provision of prohibited non-military services, (ii) transactions (import or export) in prohibited products or goods, (iii) application and disposition of prohibited funds, and (iv) supply of prohibited weapons or related equipment and provision of prohibited military logistical assistance or military services. The items in respect of which prohibitions etc. apply are apparently defined in very wide and general terms. The various prohibitions are then stated to apply in respect of a state territory person or public or private entity subject to international rules of sanctions – thereby creating a link to the particular UNSC resolution. Even though it seems that UNSC resolutions will be published in the Macau gazette, it will then be a matter for interpretation as to how the various general provisions in the Macau Law are circumscribed by the particular UNSC resolution. One also has to consider whether these definitions will be adequate to cover future UNSC resolutions.

As regards the suggestion in (b), the Administration has set out its views in paper CB(1)2251/04-05(01). Although the types of sanction measures decided by the UNSC in respect of different countries/places may be similar, the detailed sanction measures often vary from one UNSC resolution to another. It is therefore not possible to devise standard

of sanctions which might differ on each occasion
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The Administration to look further into the question of the scope of UNSO.
[para 4 of minutes]

The Administration to provide comments on whether there was a trend of UN sanctions being imposed to freeze the flow of capital/funds associated with certain places or persons, and if so, its implications, particularly on the legislation seeking to implement such sanctions. The Administration to provide further information on the corresponding enforcement measures.
[para 5 of minutes]

clauses for incorporation into the UNSO. The enforcement provisions in regulations made under the UNSO are similar, and reference will be made to the most recently-made regulation when drafting a new regulation.

As conveyed to the Subcommittee earlier and also in paper CB(1)848/05-06(01), it would be too restrictive to view "place", in the context of the UNSO, in isolation from the people who operate there or have a connection with that place. Sanctions against a "place" will in practice comprehend the activities or conduct of individuals or entities in that place or have a connection with that place. Regulations made under the UNSO fall within the coverage of the definition of "sanction" in the UNSO.

Since 1 July 1997, 39 regulations involving 44 resolutions have been made under the UNSO. Of the 44 resolutions, 12 resolutions involve decisions requiring Member States to freeze the funds of/prohibit against making available funds to certain persons/entities/etc. They are UNSCR 661(1990), UNSCR 883(1993), UNSCR 1173(1999), UNSCR 1267(1999), UNSCR 1333(2001), UNSCR 1390(2002), UNSCR 1532(2004), UNSCR 1572(2004), UNSCR 1591(2005), UNSCR 1596(2005), UNSCR 1616(2005), and UNSCR 1643(2005). Of the 4 UNSCRs adopted in 2005, 2 were renewal of expired measures previously introduced.

The abovementioned sanction either targeted at persons actively operating in a certain place or persons having a connection with that place sufficiently proximate for the UNSC measures to be regarded as sanctions against a place. The sanction measure therefore falls within the definition of "sanction" in the UNSO and could be implemented through

The Administration to examine the feasibility of using the relevant provisions under the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (UNATMO) to implement UN sanctions on "persons".
[para 6 of minutes]

The Administration to reconsider the constitutionality of section 3(5) of the UNSO in the light of the judgment of the Court of Final Appeal on the case of *a Solicitor v. the Law Society of Hong Kong and another* (FACV No. 7 of 2003) on the constitutionality of section 13(1) of the Legal Practitioners Ordinance (Cap. 159).

regulations made thereunder. Typically in these regulations, there would be provisions prohibiting against making available funds to the persons/entities/etc as specified in the relevant UNSC resolutions. In so doing, we would have effectively implemented the requirement to freeze and prohibit the making available of funds.

Under section 4 of the UNATMO, the Chief Executive may specify a person as a "terrorist", but this is confined to persons who are designated by the UNSC Committee established pursuant to UNSCR 1267 or a UN Committee which function is, inter alia, to designate persons as terrorists. The persons mentioned in the above resolutions are persons designated by the various UNSC Committees established pursuant to the relevant UNSC resolutions, which function may not include the function to designate persons as terrorists.

Under section 5 of the UNATMO, the Chief Executive may make an application to the Court of First Instance for an order to specify a person as a terrorist. This requires application to the Court and each case would need to be justified on its own merits having regard to the definition of "terrorist" and "terrorist act" in the UNATMO. We do not think this is an effective or speedy way to implement UNSC resolutions where names of persons who would be subject to the sanction measures are clearly specified (and who may not necessarily be terrorists).

Re A Solicitor concerns the statutory limitation imposed by legislature on the Court of Final Appeal's power of final adjudication under BL82. In paragraph 31 of the judgment, Li CJ states that: "The legislature in providing for appeals in statutes may limit recourse to [the CFA] for final adjudication and thus, may limit its power of final adjudication to appeals

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permitted by such statutes. But limitation cannot be imposed arbitrarily by the legislature. The limitation imposed must pursue a legitimate purpose and there must be a reasonable proportionality between the limitation and the purpose sought to be achieved. These dual requirements will be referred to collectively as 'the proportionality test'."

In our view, it is unlikely that SAR courts would apply the "proportionality test" developed in *Re A Solicitor* to the present case. Our observation is that the approach in *Re A Solicitor* (and the proportionality test set out therein) is not directly relevant to the constitutional issue here for at least two reasons. First, the present case concerns delegation (rather than limitation) of LegCo's power and functions to enact laws to other bodies or persons. In this connection, it is also important to note that the delegation (and the exclusion of LegCo scrutiny under sections 34 and 35) was decided by the legislature itself. Another important distinction between *Re A Solicitor* and the present case is that the power of LegCo to exclude certain delegated legislation from its scrutiny under sections 34 and 35 predated 1 July 1997. In view of the theme of continuity, the continuation of this power or the exercise of it after 1 July 1997 is unlikely to be inconsistent with the constitutional order provided for in the Basic Law.

The Administration to look into the issues raised by the Subcommittee in its draft report and take the opportunity to consult the Secretary for Justice on the matter.

[para 9 of minutes]

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We are studying the issues raised and will consult the Secretary for Justice.