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Secretary for Economic Development and Labour  
(Attn: Mr H B CHAN,  
Assistant Secretary (Port, Maritime & Logistics)4)  
Economic Development and Labour Bureau  
38/F, Two Exchange Square  
Connaught Place  
Central  
Hong Kong

20 May 2004

**BY FAX**

Fax No. : 2523 0030  
Total Nos. of Page(s) : (11)

Dear Mr Chan,

**Merchant Shipping (Security of Ships and Port Facilities) Bill**

I refer to your letter dated 14 April 2004 and note that you have agreed to amend some of the clauses. To save the time of the Bills Committee, I would be grateful if you could let us have the amended version of those clauses, in particular, clause 1, for Members' perusal before the first meeting of the Bills Committee. In respect of your response, I would like to seek further clarifications on the following-

**Clause 4**

2. Sub-clause (1) (b) states that the Ordinance applies to a non-Hong Kong ship while it is in Hong Kong. Sub-clause (2)(a) states that the regulation may apply to non-Hong Kong ships intending to enter Hong Kong. Could you confirm that none of the provisions in the Bill would apply to a non-Hong Kong ship intending to enter Hong Kong? If the Bill could apply to a non-Hong Kong ship intending to enter Hong Kong, would it be better to provide for the same and amend clause 4(1)?

**Clause 6(1)**

3. I have perused the precedents that you cited. None of the provisions state that "(T)he Secretary may make regulation for the purposes of this Ordinance as stated in the long title." Are there any other precedents on "the purposes of this Ordinance as stated in the long title"?

4. Further, the main purpose as suggested in the long title of this Bill is "to enhance security of ships and port facilities and for that purpose to implement the Convention". The explanatory memorandum and the LegCo Brief state that the purpose is to implement the Convention. In your reply, you also stated that it "gives flexibility for implementing the requirements of the Convention and the Code". Please clarify the purpose of this Bill as stated in the long title.

Clause 6(3)

5. "The principle of comity between nations requires that each sovereign state should be left to govern its own territory." (p.306 of Francis Bennion's *Statutory Interpretation*, 4<sup>th</sup> Edition). Would clause 6(3) contravene the principle against extra-territoriality? Since I could not find any precedent of this clause in our statute books, could you provide a precedent of this clause for our perusal?

6. Apart from the above, I have some further comments on the drafting aspects of the Bill as marked up in the Enclosure for your consideration. I would be grateful if you could let us have your reply, in both English and Chinese, before the first meeting of the Bills Committee.

Yours sincerely,

(Anita HO)  
Assistant Legal Adviser

Encl.

c.c. Department of Justice (Attn: Mr. Gilbert MO, DLD(BD&A) and  
Miss Amy CHAN, GC)

LA

## Annex

MERCHANT SHIPPING (SECURITY OF SHIPS AND PORT  
FACILITIES) BILL

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## A BILL

## To

Point ①

Is the purpose of the Bill to enhance security of ships and port facilities and for that purpose to implement the December 2002 amendments to the International Convention for the Safety of Life at Sea, 1974 and the International Ship and Port Facility Security Code and related provisions in the Convention; and to provide or "to implement" for incidental or related matters.

Enacted by the Legislative Council.

Which comes first?

Cause and effect? 1. Short title and commencement

(1) This Ordinance may be cited as the Merchant Shipping (Security of Ships and Port Facilities) Ordinance.

(2) Subject to subsections (3) and (4), this Ordinance comes into operation on the day on which it is published in the Gazette.

(3) The power under section 6(1) may be exercised before the day on which this Ordinance is published in the Gazette.

(4) A recognized security organization may perform any function referred to in section 6(2)(c) before the day on which this Ordinance is published in the Gazette.

## 2. Ordinance binds the Government

This Ordinance binds the Government.

## 3. Interpretation

(1) In this Ordinance, unless the context otherwise requires—

③ "authorized officer" (獲授權人員) means—

(a) any officer of the Marine Department of or above the rank of Marine Inspector Class II or above.

(b) any police officer of or above the rank of sergeant or above or and.

Cf. same definition of "authorized officer" in:

(i) Merchant Shipping (Local Vessels) Ord. (Cap. 548),

(ii) Shipping and Port Control Ord. (Cap. 313),

(iii) Merchant Shipping (Salvors) Ord. (Cap. 369)

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(c) any ~~other~~ public officer authorized under section 9;

"the Code" (《規則》) means the International Ship and Port Facility Security Code adopted by the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974 on 12 December 2002;

"Contracting Government" (締約政府) means the government of a party to the Convention;

"the Convention" (《公約》) means the International Convention for the Safety of Life at Sea, 1974 (SOLAS);

"Director" (處長) means the Director of Marine;

④ cf. definition in SOLAS → "high-speed craft" (高速船) means a craft capable of a maximum speed in metres per second equal to or exceeding  $3.7V^{0.1667}$  where V is the displacement corresponding to the design waterline ( $m^3$ );

"Hong Kong ship" (香港船舶) means a ship which is registered in Hong Kong under the Merchant Shipping (Registration) Ordinance (Cap. 415);

⑤ CSA → "international voyage" (國際航程) means a voyage from—

(a) a party to the Convention to a place outside the party; or

(b) a place outside a party to the Convention to the party;

"non-Hong Kong ship" (非香港船舶) means a ship other than a Hong Kong ship;

⑥ CSA → "port facility" (港口設施) means an area of land or sea declared as a port facility under section 7;

"recognized security organization" (經認可的保安組織) means a recognized security organization recognized under section 8;

"Secretary" (局長) means the Secretary for Economic Development and Labour;

⑦ CSA → "ship" (船舶) means—

(a) a passenger ship (including a high-speed craft which carries more than twelve passengers) that is engaged on international voyages; or

(b) a cargo ship (including a high-speed craft) of 500 gross tonnage or upwards that is engaged on international voyages,

CSA and includes a mechanically propelled vessel capable of engaging in drilling operations for the exploration for or ~~exploitation~~ <sup>exploitation</sup> of resources beneath the sea-bed such as liquid or gaseous hydrocarbons, sulphur or salt, not on location.

(2) A reference in this Ordinance to the Convention or the Code is a reference to the Convention or the Code, as the case may be, as amended from time to time.

#### 4. Application to ships

⑧ CSA (1) Subject to subsections ~~2 and~~ (3), this Ordinance applies to—

→ pls consider adding the definition of "security levels",

"security instructions", "the Administration", "vessel", "passenger ship"

"ship/port interface" etc. for easier understanding of the Bill.

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- (9) CSA? (a) a Hong Kong ship, whether or not it is in Hong Kong; and  
(b) a non-Hong Kong ship while it is in Hong Kong.
- (2) The regulation made under section 6 may—  
(a) ~~apply to non-Hong Kong ships~~ intending to enter Hong Kong; *or*  
~~and~~
- (10) Should (2)(b) be under clause 6? → (b) impose restriction in relation to any vessel for the purposes of abating or containing any security threat.
- (3) This Ordinance does not apply to—  
(a) warships;  
(b) naval auxiliaries; and  
(c) other vessels owned or operated by a *Contracting* government and used only on non-commercial service. *L*
- cf. para 3 of Reg. 2 of SOLAS*
5. *Government* Extent of application to certain port facilities *in Hong Kong*  
*cf. para. 2 of Reg. 2 of SOLAS* The Director may specify the extent of application of the Convention and the Code in relation to any port facility, which, in his opinion → *Why "in his opinion"?*  
(a) is used primarily by vessels not engaged on international voyages; and  
(b) is required occasionally to serve ships to which this Ordinance applies.  
(Will the Director publish the specification notice by Local Notice in the Gazette?)
6. Regulation
- (13) CSA? (1) The Secretary may make regulations for the purposes of this Ordinance ~~as stated in the long title~~.
- (2) Without prejudice to the generality of subsection (1), regulation<sup>s</sup> made under this section may—  
(a) require compliance with the Convention and the Code in relation to ships and port facilities;  
(b) create offences for the purpose of paragraph (a) and provide for penalty in the form of imprisonment not exceeding 3 years and a fine not exceeding \$500,000;  
(c) empower the Director to authorize any recognized security organization to perform any function that may be performed by such recognized security organization under the Code;  
(d) make supplementary provision for—  
(i) the recognition of recognized security organization under section 8; and *Has the "recognized organization" been recognize?*  
(ii) the authorization of such organization pursuant to paragraph (c); *already?*
- (14) Why "in the form of"? →
- (15) "supplementary" to what?
- (16) Whose decision? → (e) provide for the setting of security levels by the Director;  
(f) make provision for appeal against a decision made pursuant to the Convention and the Code;

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- (g) empower the Director or any person designated by him to give security instructions when the highest security level is set;
- (h) require compliance with requirements of the security levels referred to in paragraph (e) in relation to ships and port facilities;
- (i) require compliance with security instructions referred to in paragraph (g);
- (j) confer on the Secretary or the Director any power that may be exercised by—

(i) a Contracting Government;

(ii) the Administration; or

(iii) any person who is authorized by a Contracting Government, under Chapter XI-2 of the Convention or the Code;

(k) make administrative provision for—

(i) specification of extent of application under section 5; and

(ii) declaration of port facility under section 7;

(l) empower the Director to charge fees and make provision for the recovery of such fees;

(m) empower the Director to declare any area of the waters of Hong Kong to be an area closed to all vessels or to any class or type of vessel for security reasons.

(3) The regulation made under this section may have effect outside Hong Kong.

(4) The regulation made under this section may amend the Schedule to the Administrative Appeals Board Ordinance (Cap. 442) to make any decision made under the regulation subject to appeal under that Ordinance.

(5) For the avoidance of doubt, the regulation made under this section may refer to the provisions of the Convention and the Code without setting them out.

7. Declaration of port facility

(1) The Director may by notice published in the Gazette—

(a) declare as a port facility any area of land or sea (including any building or structure on such area) at which interactions that occur when a ship is directly or immediately affected by actions involving the movement of persons or goods or provisions of port services to or from the ship take place;

(b) vary any such port facility; or

(c) declare that any such port facility ceases to be a port facility.

(2) A notice published under subsection (1) is not subsidiary legislation.

(3) The owner, occupier or operator of a port facility may appeal to the Administrative Appeals Board against a decision of the Director—

(17)

The Secretary to

confer on the Secretary

(18) Does it refer to the Hong Kong Government? Under "Administration"?

(19) Why "administrative"? If "administrative", why enact it as "law"?

(20)

Can H.K. has jurisdiction over other territories or subjects of other countries?

(21)

What "doubt"?

(22)

Can "land or sea" be varied?

(23)

Why not a sub. leg.?

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- (a) to declare the port facility; or
- (b) not to declare that the port facility ceases to be a port facility.
- (4) An appeal under subsection (3) does not prevent this Ordinance from applying or continuing to apply to the port facility concerned.
- (5) The Director shall make, in such manner as he thinks fit, available for inspection free of charge by the public a list of all port facilities.

8. Recognized security organization

organization which?

(24)

- (1) The Director may in writing recognize any person who
  - (a) has appropriate expertise in security matters and appropriate knowledge of ship and port operations; and
  - (b) is widely recognized in the international maritime community as having good standing,

as a recognized security organization

(2) The Director may revoke a recognition given under subsection (1) if he is satisfied that the recognized security organization concerned does not meet the requirements prescribed in subsection (1)(a) and (b).

(3) The Director shall not exercise his power under subsection (2) without—

- (a) giving adequate prior notice of his intention to do so to the recognized security organization concerned; and
- (b) giving the organization an opportunity to make representation.

(4) Any person aggrieved by a decision of the Director to revoke a recognition under subsection (2) may appeal to the Administrative Appeals Board against the decision.

(5) An appeal under subsection (4) against a decision does not prevent the decision from taking effect.

Is there any "safety at stake" that the decision has to take effect despite an appeal?

9. Authorized Officers

(1) The Director may authorize in writing any public officer to be an authorized officer.

(2) An authorized officer may perform any function that is provided for in this Ordinance, the Convention and the Code.

10. Inspections and control of ships

(26)

Pls elaborate on the difference between "ascertain" and "ensure" in that both terms have to be used at the same time.

Subject to sections 12 and 13, an authorized officer may, for the purposes of ascertaining whether and ensuring that the provisions of this Ordinance which relate to ships are complied with, exercise one or more of the following powers—

- (a) to board and inspect a ship;

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(b) to require the master or owner or charterer of a ship or any person who is responsible for the operation of the ship or any other person on board the ship to produce such documents and give such information as specified by an authorized officer;

(27) cf. s 60(1)(b) of Cap 313 (c) to examine and copy any document referred to in paragraph (b);  
(d) to take such measurements and photographs and make such recordings as he considers necessary;  
recordings "記錄" → recordings  
and not "記錄". (e) to direct any person referred to in paragraph (b) to take such actions as are necessary to ensure that the provisions are complied with;  
Which one is correct?

(28) Is there any need to (f) if the master contravenes a direction made under paragraph (e),  
notify consular officer if a → to detain the ship until the direction is complied with.  
foreign ship  
is detained?

### 11. Inspections of port facilities

Subject to sections 12 and 13, an authorized officer may, for the purposes of ascertaining whether and ensuring that the provisions of this Ordinance which relate to port facilities are complied with, exercise one or more of the following powers—

(a) to enter and inspect a port facility;  
(b) to require the owner, occupier or operator of a port facility to produce such documents and give such information as specified by an authorized officer;  
(c) to examine and copy any document referred to in paragraph (b);  
(d) to take such measurements and photographs and make such recordings as he considers necessary;  
(e) to direct any person referred to in paragraph (b) to take such actions as are necessary to ensure that the provisions are complied with.

### 12. Magistrate's warrants

(1) An authorized officer shall not enter any part of a ship or port facility which is used solely for dwelling purpose pursuant to section 10 or 11 except by virtue of a warrant issued by a magistrate under subsection (2).

(2) If a magistrate is satisfied on oath by an authorized officer that it is necessary, for the purposes of ascertaining whether and ensuring that the provisions of this Ordinance which relate to ships or port facilities are complied with, to enter any part of a ship or port facility which is used solely for dwelling purpose pursuant to section 10 or 11, he may issue a warrant to an authorized officer to effect entry.

(29) cf. s 60A(2) of  
Cap 313



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(30)

13. Further provisions as to powers of inspection

What is the need of this phrase?

(1) As far as it is practicable, an authorized officer shall produce proof of his identity and authority upon request before or on exercising his powers under sections 10 and 11.

(2) An authorized officer may, if necessary, use reasonable force in exercising his powers under sections 10 and 11.

(3) A person who fails to comply with a requirement or direction made under sections 10 and 11 commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 6 months.

(4) A person who obstructs an authorized officer in exercising his powers under sections 10 and 11 commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 3 months.

(5) If, in response to a requirement made under sections 10(b) and 11(b), a person—

(31) Any precedent? (a) produces or gives to an authorized officer any document or information that he knows to be false in a material particular; or (b) recklessly provides or gives to an authorized officer any document or information that is false in a material particular, the person commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 6 months.

14. Exemption

(32) Does it cover any agreement between Hong Kong and the Central People's Government or the Macau Government? (1) The Director may grant exemption from any provision of this Ordinance for— (a) ships engaged on short international voyages on fixed routes between port facilities in Hong Kong and areas of land or sea outside Hong Kong which fall within the description of section 7(1)(a); or

(33) cf. s. 63 of Cap. 313 (b) such port facilities, if they are covered by an agreement between the Government and another Contracting Government on alternative security arrangements.

(2) The Director may grant exemption from any provision of this Ordinance for a Hong Kong ship or a class of Hong Kong ship if he is satisfied that security measures which are at least as effective as those provided for in the provision have been implemented in relation to the ship or class of ship.

(34) "port facility" is defined as "area of land or sea". Does it mean that "a class of area of land or sea"? (3) The Director may grant exemption from any provision of this Ordinance for a port facility or a class of port facility which is not covered by an agreement referred to in subsection (1) if he is satisfied that security measures which are at least as effective as those provided for in the provision have been implemented in relation to the port facility or class of port facility.

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### 13. Master's discretion for ship safety and security

If the master of a ship takes or executes any decision which, in his professional judgment made in good faith, is necessary to maintain the safety and security of the ship—

- (a) the taking or execution of that decision shall not by itself constitute a breach of any duty owed to any person by him under any contract (including an employment contract); and
- (b) he does not incur any civil liability for the taking or execution of that decision.

(31)

CSA

### 16. Duty to avoid undue detention or delay

- (1) When the Government—

- (a) imposes control measures under paragraph 1 of Regulation XI-2/9 of the Convention; or
- (b) takes steps under paragraph 2 of that Regulation,

it has a duty to make all possible efforts to avoid a ship being unduly detained or delayed.

(36)

Precedent for  
future Bills?

- (2) Failure to discharge the duty under subsection (1) shall, for the purpose of the law of tort, be a breach of statutory duty.

### 17. Co-operation with other Contracting Governments

- (1) The Government may—

- (a) request any Contracting Government outside Hong Kong to perform; or
- (b) perform at the request of any Contracting Government outside Hong Kong,

any function that may be performed at such request under the Convention or the Code.

- (2) The power conferred by subsection (1) may be exercised through the Director.

(37)

CSA

Any need to make  
request via  
CPG?

(38)

### 18. Access to Convention and Code

Consent from the  
Convention to  
upload their

information? No

copyright issue involved?

- (1) The Director shall put the English and Chinese texts of Chapter XI-2 of the Convention and the Code in a website on the Internet for browsing free of charge.

- (2) The Director shall—

- (a) keep a copy of the English and Chinese texts of Chapter XI-2 of the Convention and the Code at his office; and
- (b) allow the public to inspect such texts during normal business hours free of charge.

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**Consequential Amendments**

**Administrative Appeals Board Ordinance**

**19. Schedule amended**

The Schedule to the Administrative Appeals Board Ordinance (Cap. 442) is amended by adding—

“64. Merchant Shipping (Security of Ships and Port Facilities) Ordinance ( of 2004)	A decision of the Director of Marine under section 7(1)(a) or (c) or 8(2).”.
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**Explanatory Memorandum**

The object of this Bill is to implement the International Ship and Port Facility Security Code (“the Code”) and the amendments to the International Convention for the Safety of Life at Sea, 1974 (“the Convention”) that were adopted by the Diplomatic Conference on Maritime Security held in December 2002.

2. Clause 1 states the short title of the proposed Ordinance and provides for its commencement. Clause 2 makes the proposed Ordinance binding on the Government.
3. Clause 3 sets out the definitions necessary for interpreting the proposed Ordinance.
4. Clause 4 states the extent of application of the proposed Ordinance to ships.
5. Clause 5 empowers the Director of Marine (“the Director”) to specify the extent of application of the Convention and the Code to certain port facilities.
6. Clause 6 empowers the Secretary for Economic Development and Labour to make regulations for the purposes of the proposed Ordinance.
7. Clause 7 empowers the Director to declare any area of land or sea to be or ceases to be a port facility. It also provides for the appeal mechanism available to the owner, occupier or operator of a port facility that is affected by a decision of the Director.
8. Clause 8 empowers the Director to recognize any person who satisfies certain criteria as a recognized security organization. The Director may revoke a recognition given to a person after giving adequate prior notice and opportunity to make representation to that person. Any person aggrieved by a decision of the Director may appeal to the Administrative Appeals Board.