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**Report on the Bills Committee on Merchant Shipping
(Security of Ships and Port Facilities) Bill**

Purpose

This paper reports on the deliberations of the Bills Committee on Merchant Shipping (Security of Ships and Port Facilities) Bill (the Bill).

Background

International obligations

2. The existing merchant shipping and port control legislation focuses on maritime safety and pollution prevention only. It does not deal with security issues nor cover any port facilities which are located on land. In the wake of the terrorist attacks on 11 September 2001, new provisions of the International Convention for the Safety of Life at Sea, 1974 (the SOLAS Convention) and the International Ship and Port Facility Security (ISPS) Code have been adopted by the International Maritime Organization (IMO) to enhance maritime security. The new requirements will come into force on 1 July 2004.

3. As the Central People's Government is a Contracting Government to the SOLAS Convention which is applicable to Hong Kong by extension, these security provisions will be binding on Hong Kong with effect from 1 July 2004. As an associate member of IMO, Hong Kong is obliged to give effect to the new requirements through domestic legislation. On 24 March 2004, the Bill was introduced into the Council. The Bill and its subsidiary legislation, if enacted, will provide the legal instrument for the Director of Marine (the Director) to implement the security requirements on Hong Kong registered ships and port facilities in Hong Kong, and to impose security control measures on foreign ships visiting the port of Hong Kong.

Measures to enhance maritime security

4. The new provisions of the SOLAS Convention and the ISPS Code aim to establish an international framework through which government agencies and the shipping and port industries work together to detect and deter acts that threaten security in the maritime transport sector.

5. In brief, ships engaged on international voyages and port facilities serving such ships are required to conduct security assessments, and to have approved security plans and procedures in place to react to different security levels. A Contracting Government is required to ensure ships flying its flag, port facilities within its jurisdiction, as well as foreign ships visiting its ports are in compliance with the requirements. The Contracting Government is also required to assess the degree of risk that a security incident may occur, and set security levels accordingly for ships and port facilities under its jurisdiction to follow.

6. All applicable ships are required to carry an International Ship Security Certificate that is issued by the ship's flag administration or its authorized Recognized Security Organization whilst all applicable port facilities shall have their security plans approved by the authority appointed by its Government. Ships failing to comply with the requirements may be refused entry into a port, detained or expelled from a port.

Consultation

7. According to the Administration's information when introducing the Bill into the Council, its proposal has the support of the Shipping Consultative Committee, the Port Operations Committee and the Port Area Security Advisory Committee, which comprise all major stakeholders of the local shipping and port industries. Subsequently, the Administration has also consulted the industries on the proposed subsidiary legislation and taken on board some of their comments.

The Bill and related subsidiary legislation

8. The main purpose of the Bill is to implement the new provisions of the SOLAS Convention and the ISPS Code adopted by IMO to enhance security of ships and port facilities.

9. The Bill empowers the Secretary for Economic Development and Labour (the Secretary) to make regulations to implement Chapter XI-2 of the SOLAS Convention and the ISPS Code; and to provide for incidental or related matters. It also empowers the Director to :

- (a) declare port facilities;
- (b) recognize security organizations;
- (c) authorize officers to perform any function that is provided for in the Ordinance, the SOLAS Convention and the ISPS Code;
- (d) inspect and control ships and port facilities; and
- (e) grant exemption from any provisions of the Ordinance.

10. The detailed security requirements for ships and port facilities, the offences and penalties, as well as appeal procedures, will be stipulated in a piece of subsidiary legislation to be made under the Bill after its enactment. When the Bill was introduced into the Council on 24 March 2004, a preliminary draft of the Merchant Shipping (Security of Ships and Port Facilities) Regulation was also issued to Members. The subsidiary legislation was subsequently re-titled as Merchant Shipping (Security of Ships and Port Facilities) Rules, the draft of which (the draft Rules) has been provided for the Bills Committee's scrutiny.

The Bills Committee

11. Members agreed at the House Committee meeting on 16 April 2004 to form a Bills Committee to study the Bill. Hon Miriam LAU Kin-yea was elected chairman of the Bills Committee and the membership list of the Committee is at **Appendix I**. The Bills Committee has held a total of six meetings to examine the Bill and the draft Rules.

Deliberations of the Bills Committee

Urgency of the legislative proposals

12. In general, members of the Bills Committee do not dispute the need for Hong Kong to pass domestic legislation to give effect to the new requirements under the SOLAS Convention and the ISPS Code. Regarding the implications if the legislative proposals are not enacted in time on or before 1 July 2004, the Administration has advised that failure to comply with the new requirements will not only undermine the security standard for Hong Kong ships and port facilities, breach international obligations but will also cause serious adverse effect on the commercial operations of the shipping and port industries of Hong Kong. Having regard to the dire consequences if Hong Kong cannot legislate in time and the fact that the relevant amendments to the SOLAS Convention and the ISPS Code have been adopted by IMO as early as

December 2002, members strongly consider that the Administration should have submitted its legislative proposals much earlier for members' scrutiny.

13. On the timing for submitting its legislative proposals, the Administration has explained that although the new provisions of the SOLAS Convention and the ISPS Code were adopted by IMO at a Diplomatic Conference on Maritime Security in mid December 2002, consensus could not be reached at that time on whether Part B of the ISPS Code should be made compulsory or for guidance only. This was eventually resolved through a vote at IMO in May 2003. As the nature and extent of powers required became clear, the Administration started detailed preparatory work to implement the new requirements and drafting of the Bill commenced towards the end of 2003. In the meantime, the Administration also began working with port facility operators and shipowners for planning and execution of the requirements specified in the ISPS Code. It was under these circumstances that the Bill was introduced into the Council in March 2004.

14. In response to members' concern about the timing of examining the legislative proposals, the Administration has been requested to confirm during the Second Reading debate on the Bill that the need for expeditious scrutiny of the Bill and the draft Rules in the present case is due to exceptional circumstances and should by no means be taken as a precedent.

Commencement of the Bill

(Clause 1)

15. Clause 1(2) states that "Subject to subsections (3) and (4), this Ordinance comes into operation on the day on which it is published in the Gazette". Clause 1(3) further provides that the Secretary for Economic Development and Labour may exercise the power to make regulation before the day on which the Ordinance is published in the Gazette. Similarly, clause 1(4) provides that a recognized security organization may perform any function before the day on which this Ordinance is published in the Gazette.

16. Members are gravely concerned about the propriety of empowering the Secretary to exercise his regulation-making power and a recognized security organization to perform its functions before the gazettal of the Ordinance. In response, the Administration has highlighted that the main purpose of sub-clauses (3) and (4) is to enable the performance of certain administrative work in time for the implementation of the new provisions of the SOLAS Convention and the ISPS Code on 1 July 2004. In case the Bill and the proposed subsidiary legislation cannot be enacted on or before 1 July 2004, the provisions in sub-clauses (3) and (4) will enable the Director to have the bare minimum power to carry out control on ships visiting and staying in Hong Kong, such as the power to inspect and deny entry of ships and to detain non-compliant ships. However, now that the Bills Committee has concluded scrutiny and in anticipation that the Bill and the proposed subsidiary legislation

can be enacted in time before 1 July 2004, the Administration has confirmed that the provisions will no longer be needed and clause 1(2), (3) and (4) will be deleted from the Bill. Notwithstanding, as a matter of principle, Hon Margaret NG has reiterated her grave concern over the propriety of the Administration's original proposal.

Application to ships

(Clause 4)

17. Clause 4(1)(b) states that the Ordinance applies to a non-Hong Kong ship while it is in Hong Kong. Clause 4(2)(a) states that the regulation made under section 6 of the Ordinance may apply to non-Hong Kong ships intending to enter Hong Kong. Members are concerned that as currently drafted, the scope of application of the subsidiary legislation is different from that of the Ordinance. In this regard, the Administration has confirmed its intention that the Ordinance should also apply to a non-Hong Kong ship intending to enter Hong Kong or in Hong Kong. Members also note that under exceptional circumstances, such as when it is necessary to declare an "exclusion zone", it may be necessary to extend the application of the Ordinance to other vessels which may not fall within the proposed definition of "ship". In response to members' request, the Administration has agreed to re-draft clause 4 to spell out the scope of application more clearly and that the application of the subsidiary legislation will be consistent with the Ordinance.

The extent of the application of the SOLAS Convention and the ISPS Code to certain port facilities

(Clause 5)

18. The Administration has advised that clause 5 will only apply to port facilities primarily used by vessels not engaged on international voyages. In future, if such a port facility in Hong Kong wishes to extend its business to serve ocean-going ships occasionally, then, on application of the port facility concerned, the Director may specify the extent to which the Convention and the Code should apply to such a port facility. In practice, the requirements that the Director will likely specify will include the appointment of a Port Facility Security Officer, the conduct of security assessment and the drawing up of a security plan etc.

19. In response to members' query on how the Director will exercise his discretion under clause 5, the Administration has confirmed that the extent of application of the Convention and the Code will be considered by the Director on a case by case basis. As regards the manner of specifying the extent of application, members note that after the Director has decided on the extent of application to certain port facilities, such information will be posted on the IMO website, as well as specified in the relevant statement of compliance to be issued by the Director to the operators of the port facilities concerned.

The Secretary's power to make regulations
(Clause 6)

20. One of the key proposals in the Bill is to empower the Secretary to make regulations to implement Chapter XI-2 of the SOLAS Convention and the ISPS Code. Hon Margaret NG has stated her view that the regulation-making power conferred on the Secretary under clause 6 is far too broad as it is as extensive as the scope of the principal ordinance. The Administration's response is that the proposed provision seeks to provide flexibility for implementing the relevant requirements under the SOLAS Convention and the ISPS Code which may be amended from time to time. Moreover, the subsidiary legislation in question will be subject to the negative vetting by the Legislative Council.

21. On clause 6(2) (a) to (m) which sets out some of the matters which may be provided in the Rules, members have raised concern on the policy considerations and the legal and drafting aspects of some of the proposed provisions.

Clause 6(2)(b)

22. Pursuant to clause 6(2)(b), the Rules may create offences for non-compliance with the SOLAS Convention and the ISPS Code and provide for penalty in the form of imprisonment not exceeding three years and a fine not exceeding \$500,000.

23. In this regard, members note that pursuant to section 28(1)(e) of the Interpretation and General Clauses Ordinance (Cap.1) (IGCO), subsidiary legislation may create offences punishable on summary conviction by a fine not exceeding \$5,000 and/or imprisonment not exceeding six months. As such, members are concerned about the power under clause 6(2)(b) which exceeds the aforesaid limitation. In response, the Administration has advised that clause 6(2)(b) is legally in order because by virtue of section 2(1) of IGCO, it is permissible for subsidiary legislation to provide a higher level of penalty than the general limitation stipulated in section 28(1)(e) of IGCO if such an intention is explicitly stated in the principal ordinance. The Administration has also stressed that as the international obligations are of great security importance, the level of penalty must be commensurate with the interests that the Administration seeks to protect. On whether the power conferred on the Secretary to prescribe offences and penalties is indeed excessive, the Administration considers that such power is still subject to the scrutiny of the legislature since the Rules to be made under clause 6 of the Bill and any future amendment thereto are subsidiary legislation subject to negative vetting by Members.

24. In response to members' enquiry about precedents of provisions in the principal ordinance which empower the making of subsidiary legislation carrying a level of penalty higher than that provided under section 28(1)(e) of IGCO, the Administration has cited section 3(3) of the United Nations Sanctions Ordinance (Ca. 537), section 56(3) of the Estate Agents Ordinance (Cap. 511), section 398 (6) of the Securities and Futures Ordinance (Cap. 571), section 3(5)(g) of the Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap. 413) and section 42(5) and (6) of the Broadcasting Ordinance (Cap. 562).

Clause 6(2)(c)

25. This clause empowers the Director to authorize any recognized security organization to perform any function that may be performed by such recognized security organizations under the Code. On the persons or organizations which may be eligible to become recognized security organizations, members note that at present, a total of nine classification societies have been provisionally authorized to review security plans, conduct verifications and issue International Ship Security Certificates in respect of Hong Kong registered ships on behalf of the Government.

26. In this connection, members note that under section 4.3 of the ISPS Code, there are a number of security-related duties which a Contracting Government cannot delegate to a recognized security organization. These include the setting of the applicable security level, approving a Port Facility Security Assessment and a Port Facility Security Plan, determining the port facilities for which a Port Facility Security Officer has to be designated, exercising control and compliance measures and establishing the requirements for a Declaration of Security. Members share the view that these exceptions should also be stated in the empowering provision of the Bill so that the scope of the Director's power under clause 6(2)(c) can be more clearly delineated. Noting members' view, the Administration will amend clause 6(2)(c) by making a reference to section 4.3 of the Code.

Clause 6(2)(e),(g) and (i)

27. These sub-clauses make provisions for the Director to set security levels, give security instructions and require compliance. Members note that under section 2.1.9 of the ISPS Code, there are three security levels (1 to 3) ranging from the normal situation to the situation under which further specific protective security measures shall be maintained for a limited period of time when a security incident is probable or imminent. Section 4.2 of the Code also requires a Contracting Government to issue appropriate instructions and provide security related information to the ships and port facilities that may be affected when it sets security level 3.

28. In this regard, some members of the Bills Committee have asked why the terms "security level" and "security instructions" have not been defined under the proposed section on "Interpretation" in the Bill. They point out that by providing a definition on each of the terms in the Bill, the scope of the power that can be exercised by the Director in relation to security levels and security instructions under the Rules can be appropriately limited to the extent as provided in the Bill. Having considered members' comments, the Administration's view is that it is more appropriate and user-friendly to provide the definitions of "security level" and "security instructions" in the Rules instead of in the principal ordinance because the substantive provisions relating to these matters are contained in the Rules. Members have not raised further query.

Appeals in connection with declaration of port facility and recognized security organization

(Clauses 7 and 8)

29. Clause 7 of the Bill provides for the declaration of port facilities by the Director and related matters while clause 8 provides for the Director's giving written recognition to a person as a recognized security organization. Similar arrangements are provided under clause 7(3) and clause 8(4) whereby an appeal against a decision of the Director may be lodged with the Administrative Appeals Board. Meanwhile, clause 7(4) states that "an appeal under subsection (3) does not prevent this Ordinance from applying or continuing to apply to the port facility concerned"; while clause 8(5) provides that "an appeal under subsection (4) against a decision does not prevent the decision from taking effect".

30. Members consider that as currently drafted, the scope of clause 7(4), which covers the application of the Ordinance to the port facilities notwithstanding the lodging of an appeal, appears to be wider than the scope of clause 8(5), which only relates to the decisions of the Director. However, members understand from the Administration that both clauses are actually concerned with the Director's decisions exercised under the Bill. To avoid any unintended consequence, the Administration has accepted members' suggestion to amend clause 7(4) along the lines of clause 8(5). For the avoidance of doubt, the Administration will also specify in the relevant clauses that the lodging of an appeal will not prevent the Director's decisions from continuing to take effect or to apply.

31. Members note that in many other statutes, a decision of the Administration is usually suspended when an appeal is lodged. However, this is not the case under clause 7(4) and clause 8(5). On the justification for the proposed approach, the Administration has pointed out that the main policy consideration is the importance of the subject matter at stake. The Director is dealing with matters which have implications on the safety of life and property. The declaration of port facilities and giving recognition to security

organizations are essential in ensuring Hong Kong's compliance with the SOLAS Convention and the ISPS Code. The Administration considers that if the Director's decisions are to be suspended upon an appeal being lodged, Hong Kong may not be able to give re-assurance to the international community, in particular its trading partners, that a maritime security system in compliance with the international standard is firmly in place. As regards precedents, the Administration has advised that on account of the important nature of the matters being regulated, the Banking Ordinance (Cap. 155) and the Bedspace Apartments Ordinance (Cap. 447) contain provisions that certain decisions made by the statutory authority concerned continue to be in force notwithstanding an appeal having been lodged.

Proposed powers of inspection

(Clause 13)

32. Clause 13 of the Bill creates offences in respect of, inter alia, producing or giving false information to an authorized officer. Members note that pursuant to clause 13(5), a person commits an offence if he provides or gives to an authorized officer any document or information that he knows to be false in a material particular; or recklessly provides or gives to an authorized officer any document or information that is false in a material particular.

33. On the policy intent underlying the element of "recklessness" as provided under clause 13(5)(b), members note that in principle, it is the Administration's intention to impose criminal liability on a person who has reasons to believe that the document or information in question is false in a material particular and yet still produces it to the authorized officer without due regard. As such, members have requested the Administration to re-draft the offence clause to provide more clearly that a person will commit an offence if he produces or gives any document or information to an authorized officer that is false in a material particular, being reckless as to its truth or falsity. The Administration has taken on board members' view and will improve the drafting of the relevant provision accordingly.

Access to the Convention and Code

(Clause 18)

34. Clause 18(1) of the Bill requires the Director to put the English and Chinese texts of Chapter XI-2 of the SOLAS Convention and the ISPS Code in a website on the Internet for browsing free of charge. Clause 18(2) also requires the Director to keep a copy of the said documents in his office and to make available the documents for public inspection free of charge.

35. Since the relevant texts in the Convention and the Code form the essential basis for the Bill and its subsidiary legislation, the Bills Committee considers that they should be readily available for reference by interested parties. At one stage, members have discussed the Administration's proposal

of attaching the relevant extract from the SOLAS Convention and the ISPS Code to the loose-leaf edition of the Laws of Hong Kong after the Bill and the Rules have been enacted and published. However, the Administration has subsequently advised that as all IMO publications are protected by the term of the Universal Copyright Convention on Intellectual Property, the aforesaid proposal will not resolve the copyright issue. The Administration has also decided to delete clause 18(1) from the Bill to avoid copyright problems.

36. In response to members' concern about the feasibility of making available the relevant texts in future, the Administration has reported that in the course of the legislative process, it has obtained the consent of IMO to display the texts of the relevant documents of the IMO Conference, which contain the resolutions relating to the amendments to the SOLAS Convention and the Code, on the Marine Department's website. As such, any interested parties can have access to the relevant provisions in the Convention and the Code as contained in the resolutions. The Administration has also advised that notwithstanding the deletion of clause 18(1), the Marine Department is still able to make available the aforesaid information on its website.

Draft Merchant Shipping (Security of Ships and Port Facilities) Rules

37. The Bills Committee has examined the draft Rules in detail. In response to members' comments, the Administration will introduce a number of amendments to improve the legal and drafting aspects of the Rules.

General drafting approach

38. On the drafting approach, members note that in many parts of the draft Rules, reference has been made to the relevant regulations under the SOLAS Convention and the sections under the ISPS Code, but the texts of the regulations/sections *per se* are not reproduced in the draft Rules. Members have exchanged views with the Administration on whether the relevant provisions in the Convention and the Code should, as far as practicable, be directly imported into and form part of the draft Rules so that the Rules can be self-contained and self-explanatory. The Administration, in response, has confirmed that it has adopted a pragmatic approach whereby relevant provisions in the Convention and the Code have been incorporated into the draft Rules where appropriate. Where this is not practicable, because of the complexity of the provisions involved or their presentational difference, the Administration will make a reference to the relevant regulations/sections of the Convention and the Code in the draft Rules.

39. In general, members do not have very strong view against this drafting approach but are keen to ensure that the Rules, when enacted, must be capable of implementing the relevant requirements and are sufficiently clear to those who need to comply.

Penal provisions

40. The draft Rules provide for a number of offences which are punishable on conviction by a fine and by imprisonment under some circumstances. Members observe that as currently drafted, many of the penal provisions in the draft Rules impose certain duties of compliance on the ship/vessel or the port facility. For example, under proposed Rule 14, a Hong Kong ship shall not engage on international voyage unless it holds and keeps on board the relevant Security Certificate. Proposed Rule 4(3) requires a ship or a port facility to act in accordance with a security instruction without delay. Proposed Rule 29 (1) imposes on port facilities the obligation to comply with requirements of security levels without delay. If there is any contravention or non-compliance with the requirements, the company, the master of the ship or the management of a port facility, as the case may be, commits an offence and will be liable on conviction to a fine and, in some cases, to imprisonment. Some members have questioned whether the penal provisions, as currently drafted, are sufficiently clear in imposing the criminal liability on an individual/person, namely the master of a ship or the management of a port facility, rather than on the object (i.e. the ship/vessel or the port facility) *per se*.

41. In response, the Administration has explained that the penal provisions in the draft Rules largely mirror the relevant provisions in the SOLAS Convention and the Code which prescribe certain duties of compliance on the ships/vessels and the port facilities. The draft Rules have further provided for criminal sanctions against non-compliance or contravention. Some members nevertheless point out that the Convention and the Code have only set out the security-related requirements but not the criminal sanctions for non-compliance. As the current legislative proposals seek to implement the requirements under the Convention and the Code, the members consider it important to draw up a set of penal provisions which should spell out clearly the ingredients of the offence in question and the party to be held criminally liable for the offence. They therefore ask the Administration to consider improving the drafting to this effect. The Administration has taken on board members' suggestion and have attempted to revise some of the relevant provisions in the draft Rules.

Views of the industries

42. While noting from the Administration that its proposal has the support of the shipping and port industries, members are concerned about the views, if any, of the industry on the draft Rules which set out the implementation details. In response, the Marine Department has consulted the Port Area Security Advisory Committee, the Shipping Consultative Committee, as well as port facility groups. It has received some queries relating to the level of fees as prescribed in proposed Rule 33, the expression of "without delay", and the offence of ships in Hong Kong waters failing to comply with

the requirements of security levels under proposed Rule 20 (3).

43. Members note that the level of fees charged by the Director in respect of the time spent by an authorized officer on providing services has been a subject of ongoing concern to the industry. In this regard, members note that in proposing to charge \$3,270 for the first hour or part hour and \$1,115 for each subsequent hour or part hour, the Administration will be able to recover the costs incurred for the inspection a ship or a port facility.

44. Members note that the expression "without delay" appears in a number of provisions in the draft Rules which impose a duty on a ship or a port facility to comply with certain security-related requirements. Having regard to the suggestion from the industry that "without delay" be changed to "without undue delay" in certain provisions, members in general consider that where applicable, the expression "without delay" should be substituted by "without undue delay" in the draft Rules so as to provide greater certainty. The Administration agrees to make the necessary amendments.

45. With some exception, proposed Rule 20 (1) of the draft Rules states, inter alia, that where a security level is set, a ship in the waters of Hong Kong shall without delay comply with the relevant requirements specified in the Code and implement the preventive and protective measures specified in its ship security plan in respect of the security level. In case of contravention, proposed Rule 20(3) provides that the company and the master of the ship each commits an offence. Members in general agree with the industry that it is reasonable to add the element of "without reasonable excuse" to the offence in question. Similarly, when examining proposed Rule 31 relating to the rectification of non-compliance with the requirements of the port facility security plan, members also consider that instead of prescribing a strict liability offence, the port facility management should only be held liable if it fails to effect the rectification "without reasonable excuse". The Administration accepts members' suggestion and will amend the Rules in question accordingly.

Other concerns

46. At members' request, the Administration has agreed that during the Second Reading debate on the Bill, the Secretary will assure Members in his speech that the Rules to be gazetted and tabled to the Council after the enactment of the Bill will be finalized from the draft Rules, which has been examined at length and agreed to by the Bills Committee subject to the amendments to be made by the Administration.

Proposed legislative timetable

47. With the agreement of the Bills Committee and the House Committee earlier on, the Administration has given notice to resume Second Reading debate on the Bill on 23 June 2004. If passed by the Council, the

enacted Bill will be gazetted on 25 June 2004. The Administration has advised that the Rules to be made by the Secretary will be published in an extraordinary issue of the Gazette before 30 June 2004 and will be tabled at the Council meeting on 30 June 2004.

Committee Stage Amendments

48. Most of the Committee Stage amendments (CSAs) proposed by the Administration have been introduced in response to members' views. The Bills Committee will not move any CSAs in its name.

Recommendation

49. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 23 June 2004. Members have noted and raised no objection to the Administration's proposed legislative timetable.

Consultation with the House Committee

50. The House Committee was consulted on 11 June 2004 and supported the recommendation of the Bills Committee in paragraph 49.

Council Business Division 1
Legislative Council Secretariat
16 June 2004

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

Membership List

Chairman Hon Miriam LAU Kin-yee, JP

Members Dr Hon David CHU Yu-lin, JP

Hon Margaret NG

Hon SIN Chung-kai

(Total : 4 Members)

Clerk Miss Polly YEUNG

Legal Adviser Miss Anita HO

Date 28 May 2004