

MARITIME SAFETY COMMITTEE
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MEASURES TO ENHANCE MARITIME SECURITY

Guidance for the Development of National Maritime Security Legislation

Comments on the Report of the Correspondence Group

Submitted by the ITF and IFDMA

SUMMARY

Executive summary: This document provides comments on the Report of the Correspondence Group on Guidance for the Development of National Maritime Security Legislation

Strategic direction: 6

High-level action: 6.1

Planned output: 6.1.1

Action to be taken: Paragraph 14

Related documents: MSC 82/24, paragraphs 4.71 and 4.72, MSC 82/WP.4, annex 3; MSC 84/4/4, MSC 84/24, paragraphs 4.9 and 4.10; MSC 85/1/1, paragraph 4.4, MSC 85/WP.6, paragraphs 8-11, MSC 85/26, paragraphs 4.6 to 4.10; MSC 93/4; SOLAS chapter XI-2 and the ISPS Code

Introduction

1 These comments on the outcome of the Correspondence Group on the Guidance for the Development of National Maritime Security Legislation contained in document MSC 95/4 (United States) are submitted in accordance with paragraph 6.12.5 of MSC-MEPC.1/Circ.4/Rev.3, *Guidelines on the organization and method of work of the Maritime Safety Committee and the Marine Environment Protection Committee and their subsidiary bodies*.

Background

2 In 2006, MSC 82 agreed to recommend the inclusion, as a high-level action item, of the development of model legislation on maritime security in the work programme. In 2008, MSC 85 noted that in a significant number of cases the required national legislation implementing the provisions of SOLAS chapter XI-2 and the ISPS Code was either absent or inadequate, or based on obsolete national legislation. Document MSC 85/4/4 addressed the

need for an administrative structure to fulfil the international obligations of national authorities regarding maritime security, the necessary national oversight system that has to be set up, the framework of relations between the authorities and the recognized security organizations (RSO), and instructions on specific aspects of SOLAS chapter XI-2 and the ISPS Code that ship and port facility operators have to implement. The Maritime Security Working Group (MSWG) at MSC 85 agreed that the development of model enabling legislation, i.e. giving legal force to the provisions within national law of SOLAS chapter XI-2 and part A of the ISPS Code, would be very useful. The MSWG also agreed that such legislation should not be overly prescriptive.

Discussion and Comments

3 The nature of the high level enabling legislation giving legal authority to administrative authorities to implement regulations is dependent upon the framework of the political and legal system in each Member State. Whether there is a separation of legislative and executive powers or a system of blended political powers with codetermination of regulatory action at the administrative level will determine both the need for and the nature of enabling legislation.

4 It is clear from the related documents that the past actions of the Committee were directed toward developing high-level guidelines for model enabling legislation for national legislative bodies to authorize lower level administrative agencies to promulgate regulations to implement SOLAS chapter XI-2 and part A of the ISPS Code. They were not directed toward a lower level review of the ISPS Code and revising its provisions in a more prescriptive manner than provided for in the Code. The proposed guidance is, in effect, a rewrite of the ISPS Code rather than enabling legislation.

5 As the numbering system in the proposed guidance differs from the ISPS Code it is difficult to align and track changes and ascertain their specific impact on the current security system under the ISPS Code. This has the potential to obscure unintended and uncertain consequences for seafarers and access to ships.

6 Some Member States have conformed national laws to the actual provisions of the ISPS Code by substantially adopting its text into their legislation to give it legal force. If that practice is to be followed it would be more appropriate to use the actual ISPS Code as the model, rather than giving legal force to the revised version in the proposed model legislation.

7 While the proposed guidance is not mandatory in the sense it is not binding on the Parties to the SOLAS Convention, it contains persuasive authority-creating principles that have official recognition. We note that in document MSC 93/4 (Australia, Canada, Guyana, Japan, Marshall Islands, Peru, Philippines, Saint Kitts and Nevis, Senegal, United Republic of Tanzania and United States) it is requested that the guidance be issued as an MSC circular and included in the annex to section 2.2 of the IMO Guide to Maritime Security and the ISPS Code. While technically not mandatory, the proposed guidance is more prescriptive than the ISPS Code requires and can result in imposing greater burdens on seafarers and access to ships moored at port facilities.

8 There is a concern that the proposed guidance, particularly in section 4.6.1 on access control, contains overly prescriptive lower level guidelines that are inconsistent with the provisions in the ISPS Code. The ISPS Code recognizes that there are wide differences in the level of security threats to different Member States and at different types of port facilities. Those diverse circumstances were accommodated by language in the mandatory part A of the Code that mandated general principles but allow flexibility with the guidance in part B of the Code as to how individual States and port facilities take into account the general principles set out in the Code.

9 Guidance coming from IMO should reflect the requirements of IMO instruments. It should not reflect opinions or views that go beyond or expand IMO requirements. This principle is recognized in the approval of IMO model courses under the STCW Code. The sound reason for this principle is that IMO guidance should only reflect IMO requirements agreed to by a consensus of the parties to IMO instruments.

10 As an example of the inconsistency with the ISPS Code the proposed guidance contains mandatory language that all seafarers as well as others must be screened and/or searched as well as pre-approved, and all vehicles shall be searched. There are no similar provisions in part A of the Code, which recognizes that access controls should be proportionate to the risk. Part B of the Code provides that vehicles and persons may be searched and the frequency of such searches, including, random searches, should be specified in the Port Facility Security Plan (PFSP) and approved by the Contracting Government.¹ The Code recognizes that in many cases the time and resources needed for a mandatory search of all persons and vehicles entering a port facility would be impractical and could jeopardize the efficient operation of the port and the maritime transportation system.

11 The requirement that all seafarers and visitors must be preapproved is not found in the ISPS Code and leaves open the question of who has the right to control access to the ship through the pre-approval process. If it is the port facility or ship's agent they would have the ability to effectively deny seafarers rights to shore leave. The port facility would also have the ability to use approval of access as a profit centre, or limit which vendors or service providers have access to the ship to permit monopoly pricing. Access control can, and has, become a business enterprise for some port facilities. They could also screen substandard ships with possible abusive working conditions from contact with representatives of seafarer's welfare or labour organizations. In addition, preapproval requires a bureaucratic paperwork process between the parties that can, and has, frustrated the needed access for seafarers, service providers and the efficient working of the ship. How pre-approval is managed can be in conflict with the ISPS Code requirement that PFSPs shall have procedures for facilitating access to the ship.

12 The access control provisions in the proposed guidance are not risk based as they propose a single security regime for all PFSPs alike that is not based on a specific security risk assessment and proportionate to the threat level at a particular port facility. There are very large differences in the security risks between passenger, container, general cargo, tanker and dry bulk cargo terminals. There are also very large differences in the threat levels from terrorism in different Member States and regions. These differences have been recognized by providing flexibility in the guidance in part B of the Code. That flexibility is not recognized in the proposed guidance. But, the larger question is whether it is appropriate to include at the legislative level a one size fits all model security plan that belongs at the administrative level and takes into account the specific circumstances of each port facility.

13 While our particular concern is focused on access to ships within a security regime there is also the threshold question of whether there is now a compelling need for IMO sanctioned guidance on enabling legislation at the national level. The item was approved for inclusion in the work programme of the Organization in 2006 shortly after the adoption of SOLAS chapter XI-2 and the ISPS Code. In 2015 there is no longer a shortage of precedents in the legislation and regulations of other Member States to use as a source of information and unofficial guidance in drafting appropriate enabling legislation adapted to the political and legal system of the individual Member State.

¹ ISPS Code, Part B, paragraphs 16.16 to 16.20.

Action requested of the Committee

14 The Committee is invited to consider the above comments and take action as appropriate.
