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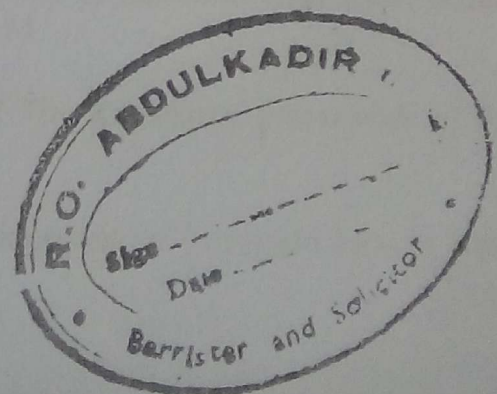
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PREVENTING ARMAGEDDON: IMPLEMENTATION OF THE INTERNATIONAL SHIP AND PORT FACILITY SECURITY (ISPS) CODE IN NIGERIA

*

A. O. Abdulrazaq

Introduction

It is saying the obvious that maritime security has its goal at ensuring the freedom of navigation, the flow of commerce, the protection of ocean resources, as well as securing the maritime domain from nation-state threats, terrorism, drug trafficking and other forms of transnational crime, piracy, environmental destruction and illegal seaborne immigration.¹ For a particular threat to constitute a maritime threat, it must justify reaction on behalf of the states(s) that perceive the threat.²

Interestingly, the operators of the maritime shipping industry while given their exposition and exegesis of the phenomenon have focused more on the maritime transport system. According to them, the safe arrival of cargo at its destination without interference or being subjected to criminal activity is synonymous to maritime security and safety.³ However, it is essential to mention that those measures employed by owners, operators and administrators of vessels, port facilities, offshore installations and other maritime organisations to protect against seizure, sabotage, piracy, pilferage are surprising.⁴ The IMO maintained that any act of protection against unlawful and deliberate interference with peace and harmony of the sea is maritime security⁵ but however draws a clear

¹Bateman .S, "Capacity Building for Maritime Security Cooperation: What are We Talking About?" in Andrew Forbes (ed), *Maritime Capacity Building in the Asia- Pacific Region*, (Australia: Sea Power Centre Center, 2010), 9.

² Ibid, at 10

³Raymond C.Z and Arthur Morrien, "Security in the Maritime Domain and Its Evolution since 9/11" in Rupert Herber-Burus, Sam Bateman, and Peter Lehr (eds), *Lloyd MIU Hand book of Maritime Security*, (United States of America: CRC Press, 2008) 3 and 4.

⁴ Mejia M.Q. Jr, "Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and Other Acts of Maritime Violence", *Journal of International Commercial Law* (2003), p.153 at 155. See also Hawkes K.G, *Maritime Security*, (Centreville: Cornell Maritime Press, 1989).

⁵ This position was posited by Proshanto K. Mukhereand Maximo Q. Mejia Jr, "The ISPS Code: Legal and Economic Considerations" in Mejia M.Q.jr, (ed), *Contemporary Issues in Maritime Security* (Malmo, World Maritime University, 2004). Actually, the authors were referring to the work of IMO in this regard. But the distinction has not been an obvious one within the IMO, especially as the same word has been used for safety and security in other languages including Spanish and French. The new Spanish and French expressions were devised for purposes of referring to maritime security after the revision of Chapter XI of

distinction between maritime security and safety. Maritime safety involves any act of preventing or minimizing the occurrence of accidents at sea that may be caused by substandard ships, unqualified crew or operator error. It needs be emphasized that implementation of ISPS Code in Nigerian ports is also a factor to reckon with, having regard to the present experience of insecurity in Nigeria.

Importance of Port Security to International Commercial Development

Port security is important to international commercial development but the continuing development in genuine international commerce in the maritime sphere has been accompanied by rising criminal threats. This threat to maritime security comes in many varieties to wit; smuggling of people, drugs, weapons, including Weapon of Mass Destructions (WMD's), and other contraband, as well as armed robbery and piracy against ships. Incidents of maritime crime are likely to be concentrated in areas of serious commercial maritime activities and this could be seen where there is major political and economic volatility, or in regions that have little or no maritime law enforcement capacity. In recent times, criminals are usually well prepared and equipped with sophisticated communication gadgets, destructive weapons and high-speed craft. The capabilities to board and hijack large ongoing vessels, confirmed the series of tactics and intelligence the terrorists could adopt in carrying out this heinous crime.

While attempting to face the challenges of maritime security, the International Maritime Organisation has put in place a convention on maritime security like the Safety of Life Convention (SOLAS), 1974. The convention on maritime security is a unique provision in that it tries to suppress any unlawful act on board a vessel and sustain/promote commercial activities via the sea. It is not in doubt that person(s), in order to achieve ulterior motives, tend to undermine the machinery in place at ensuring security of life and property at sea. However, a lot of issues are associated with the provisions of the IMO on security challenges ranging from applicability of the convention to the offender who is not a national of a state who has ratified or subscribed to the convention, jurisdiction of a state to try an offender on board a vessel and indeed the implementation of the provisions of the IMO on maritime security. Activities often regarded as constituting maritime threats include the movement of terrorists, terrorist attacks, raising

the Safety of Life at Sea Convention (SOLAS Convention) .The Spanish version is '*proteccion maritime*' (as opposed to *Seguridad maritime*) and the French is '*Surete maritime*' (as opposed to *securite maritime*). See generally, Mejia M.Q. Jr, "Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and Other Acts of Maritime Violence", *Journal of International Commercial Law*, (2003), 155.

funds for terrorist activities through shipping activities, shipping of sophisticated weapons, drug trafficking, unlawful ingress and egress of people, piracy and armed robbery at sea.⁶

Port security has a significant impact on the number of vessels that call at a particular port, typically, maritime port operations are within the jurisdiction of a port state⁷ but under customary international law and the United Nations Convention on the Law of the Sea (UNCLOS), 1982, foreign flagged vessels have the right of innocent passage. However, innocent passage does not guarantee access to ports, nevertheless, the commercial interest of states demands that world's maritime ports open to international trade and this is a reflection of consensus among the sovereign states and not a product of any customary international responsibilities or obligations.⁸ Therefore, ports security plays a central role in maritime security and this is why UNCLOS made it clear that coastal states have power to issue regulations on ports security and matters relating to safety at ports.⁹

IMO and International Ship and Ports Facility Security (ISPS) Code

The International Maritime Organization was established under an international convention in 1948 and having its first meeting in 1959. This organisation is a specialized agency of the United Nations with its headquarters in London and it comprises of 167 member states and three associate members. The primary task of the organisation is to regulate shipping to wit; safety, security and marine environmental protection. The IMO oversees some international conventions which govern vessel operation like the safety of life at sea through SOLAS¹⁰, MARPOL Convention,¹¹ etc. The International Maritime Organization (IMO) has been tackling the alarming incidence of maritime safety and security under the umbrella of its Maritime Safety Committee since 1980s.¹² Many states

⁶ Klein N at pp. 242-249. See also Ashley R. J, "Initiative to Enhance Maritime Security at Sea", *Marine Policy* (2004), 28 and 41, Bruce B.S and Scott C.T, "Setting, Strengthening and Enforcing Standards for U.S. Port Security", in Herber-Burus. R, Sam Bateman, and Peter Lehr (eds), *Lloyd MIU Hand book of Maritime Security* (United States Of America: CRC Press, 2009), 300-301 and Hansen H.T, "Distinction in the Finer Shades of Gray: The "Four Circles Model" for Maritime Security Threat Assessment", in Herber-Burus. R, Sam Bateman, and Peter Lehr (eds), *Lloyd MIU Hand book of Maritime Security* (United States of America: CRC Press, 2009), 75-77.

⁷ Article 2 (1) UNCLOS.

⁸ Ichalanga K., "Congolese Maritime Ports Suggestion for Reform" *Ocean and Coastal Law Journal*, Vol.14.2 (2007), 241-251.

⁹ Article 211 (3).

¹⁰ Safety of Life Convention, 1949.

¹¹ Haward .M, and Vince. J, "*Oceans Governance in the Twenty-First Century: Managing the Blue Planet*", (United Kingdom: Edward Elgar Publishing Limited, 2008), 55-56. See also Frank .V.

¹² Mejila M.Q. Jr, at155. This author cited Kenneth G. Hawkes, *Maritime Security* (Centreville: Cornell Maritime Press, 1989).

have ratified the International Ship and Ports Facility (ISPS) Code for security in maritime ports. Maritime security is a fundamental part of IMO's responsibilities. A broad security regime for international shipping entered into force on 1 July 2004. The mandatory security measures, adopted in December 2002, include a number of amendments to the 1974 Safety of Life at Sea Convention (SOLAS), the most extensive of which enshrines the novel International Ship and Port Facility Security Code (ISPS Code). The ISPS Code contains comprehensive security-related requirements for Governments, port authorities and shipping companies in an obligatory section (Part A), together with a series of guidelines on how to meet these obligations in a second, non-mandatory section (Part B).¹³

The ISPS Code is a form of measures adopted by the IMO to improve the security of both port facilities and individual vessels involved in international trade.¹⁴ It is a part of the requirements of the ISPS Code that vessels on international voyages and the port facilities that serve them must conduct a security assessment, designate security officers, develop a security plan, take appropriate precautionary measures against security incidents and carry out training and drills.¹⁵

Development of the ISPS Code

The development leading to the creation of the ISPS Code requires brief explanation to provide context for the remarkable breadth of the Code. In an effort to address port security challenges post-9/11, the IMO and other international organisations began to develop a novel maritime security system with vital elements for enhancing international maritime security. Specifically, the IMO Assembly met in London in November 2001 to appraise and revise methods for addressing terrorist threats. A week-

¹³ Raymond C.Z. and Morien Arthur, "Security in the Maritime Domain and its Evolution Since 9/11" in Herbert-Burns R., Bateman S. and Lehr P., (eds), *Lloyd's MTU Handbook of Maritime Security* (United States of America: CRC Press, 2009), 4. See also Maritime Security available at http://www.imo.org/blast/mainframe.asp?topic_id=861 (accessed on 1/4/12), Shicun W.U. and Keyuan Z.O.U., "Maritime Security in the South China Sea: Cooperation and Implications" in Shicun W.U. and Keyuan Z.O.U., *Maritime Security in the South China Sea: Regional Implications and International Cooperation*, (Great Britain: Ashgate Publishing Limited, 2009), 6 and Maogoto M.N., *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror*, (Great Britain: Ashgate Publishing Ltd, 2005), 111.

¹⁴ Rachael B. Brailier, "Protecting U.S Ports with Layered Security Measures for Container Ships", *Military Law Review*, Vol. 185 Fall I (2005), p. 2.

¹⁵ Ibid. See also Bateman S., "Good Order at Sea in the South China Sea", in Shicun W.U. and Keyuan Z.O.U., *Maritime Security in the South China Sea: Regional Implications and International Cooperation*, (Great Britain: Ashgate Publishing Limited, 2009), p. 20. See also Jones. M.S., "Implications and Effects of Maritime Security on the Operation and Management of Merchant Vessels" in Herbert-Burns R., Bateman S. and Lehr P., (eds), *Lloyd's MTU Handbook of Maritime Security*, (United States of America: CRC Press, 2009), pp. 88-98.

long diplomatic conference was held in December 2002 wherein the IMO adopted several measures designed to strengthen maritime security and thereby, prevent potential terrorists from targeting the international shipping business.¹⁶ The ISPS Code did not become operative until 1 July 2004 despite its adoption in December, 2002 for the 155 contracting parties to SOLAS. The IMO member states had until 1st July, 2004 to execute the new regulations. It is important to note that Nigeria is a member state to SOLAS, but the question remains whether Nigeria has complied with the implementation of the Code in her ports? The main goals of the ISPS Code inter-alia are:

- i. To establish an international framework between states, shipping and port industries;
- ii. To prevent security lapses affecting international trade;
- iii. To discover such lapses in the case of their occurrence.

The ISPS Code was intended to identify and allow preventive measures against security insurgencies which were threatening the security of vessels. The code applies to passengers and cargo vessels of 500 gross tonnage and above. The degree to which the ISPS Code applies to vessels rests squarely on the type of vessels, passengers, cargo and trading patterns of visiting vessels. The ISPS Code is not applicable to warships, fishing vessels and government vessels which are not being using for commercial purposes.¹⁷

However, with regard to non-applicability of the ISPS Code to fishing vessels and government vessels, the question remains, is it not possible for the maritime terrorists to use fishing and government vessels (as the two are exempted from ISPS Code) to accomplish their mission? It would be recalled that during the Indonesia-Malaysia confrontation which occurred between 1962-1966,¹⁸ the Indonesian Irregular forces tried to penetrate into Malaysia through waters by using trawlers and fishing boats but some of them were successfully over-powered and captured by the marine police and navy. It was reported that some of these Indonesian Irregulars forces were shot dead while trying to escape from the net of the Malaysian security forces. Therefore, if all these fishing vessels are not subjected to control and proper monitoring, the event of the Indonesia-Malaysia confrontation could still repeat itself. Also, it is on record that the vessels used to attack

¹⁶Brailler R.B, at p.24. See also, Zallen B.S, "Preventing Armageddon I: Enhancing America's Board and Port Security After 9/11", *Strategic Insights*, Vol.III, Issue 11(November,2004) and Hong .N, at p.46.

¹⁷ Klein. K, atp.158. See also Raymond C.Z and Morrien Arthur, at p 6

¹⁸Will Clegg, "Irregular Forces in Counterinsurgency Warfare", available at www.securitychallenges.org.au/ArticlePDFs/vol5no3Clegg.pdf (accessed on 29/11/12). See also *Indonesia-Malaysia Confrontation*, available at <http://www.asiafinest.com/forum/lofiversion/index.php/t138175.html> (accessed on 20/3/13).

the Iraqi oil platform and USS Cole were covered by the ISPS Code, hence they were not seen as constituting danger to maritime security. Consequent upon this, the IMO has taken an impressive step to tackle the problem through the adoption of non-mandatory guidelines on security aspects of vessels which are not within the category of the ISPS Code and indeed other amendments to SOLAS Convention but it is still uncertain whether this will be able to address this problem.

Furthermore, the ISPS Code is to provide a standardized, steady framework for evaluating risk, and enabling governments to counterbalance changes in the threat levels with changes in vulnerability vessels and port facilities.¹⁹ It is also to determine the extent of risk to which a port is exposed and measures that is needed in order to assess the risk at one port. In order to fight the menace, the ISPS Code assigned roles to flag, coastal, port states and Port security officers.²⁰ The flag states also have the responsibility for approving the Ship Security Plans which must be held by each vessel to which the ISPS Code apply. In the same vein, the flag states must assess the security threats and set security levels as appropriate for their vessels and coastal states to develop and implement Port Facility Plans on the basis of a Port Facility Security Assessment and training of the Port Facility Security Officers.²¹

The utilisation of the ISPS Code involves the use of the provision of information to ports regarding vessels seeking to enter port and it indicates or gives details of the 10 previous ports which vessels had visited before getting to that port. Apart from this arrangement, the port states may make additional security pacts as a precondition for entry of vessels to all its local ports and this could be done through local legislations and institutions. The free flow of information in respect of incoming vessels is an essential ingredient to enable the port states control, track down or have detailed information about vessels and this information must have been communicated to the port states at least 24 hours (500 nautical miles from a state's coastal)²² so as to discover and destroy any

¹⁹Ibid, at p.159. See also Noor Apandi Osnin, "ISPS Code: Implementation in Malaysia", in Herbert-Burns R, Bateman .S and Lehr .P, (eds), *Lloyd's MTU Handbook of Maritime Security*, (United States of America: CRC Press, 2009), pp. 338-343.

²⁰ These securities officers are port facility security officers, company security officers and ship security officers. See Section 2 of the ISPS Code to the SOLAS Convention.

²¹ Klein. K, *Maritime Security and the Law of the Sea*, (Oxford: University Press, 2011), p. 159.

²² Zallen B.S, id. The 24 hours rule in specific reference to national arrangement is discussed in paragraph 4.4.2 of chapter of this thesis. See Bowman G.W, "Thinking Outside the Border: The National Security and the Forward Deployment of the U.S Border," *Houston Law Review*, vol. 44:2 (2007), p.208. See also Klein. N, "Legal Implication of Australia's Maritime Identification System" (2006) 55 *International and Comparative Law Quarterly* (2006), pp. 337 and 339 and Rahman . C, "Evolving U.S. Framework for Global Maritime Security from 9/11 to the 1000-ship Navy", in Herbert-Burns R, Bateman .S and Lehr .P, (eds), *Lloyd's MTU Handbook of Maritime Security*, (United States of America: CRC Press, 2009), p.41.

possible threats of the incoming vessels before the arrival at the port. Where the destruction of the harmful object on board takes place at a close range or proximity to the port, it may be dangerous to the port state. In a situation where the master of a vessel failed in this onerous responsibility of giving information of their approach to port states, the port states reserve the right to decline access to vessel involved.²³ Further, the port states have the right to direct a vessel whose master has failed to supply necessary information to a specific location within the territorial sea or internal waters of the port states to carry out inspection or out rightly denial of access. Also, it is part of the modalities for checkmating port security to demand for a vessel's International Ship Security Certificate. This demand is in compliance with the provisions of SOLAS²⁴ and where this is not provided or there are reasonable grounds to believe that the vessel has failed to observe the ISPS Code, the port states may take lesser administrative measure against the vessel like delaying, detaining, etc. such vessel, but the measure must be proportionate and not unreasonable.²⁵

The IMO as an important body of the United Nations also adopted a circular on guidance for the use of radio signals by ships under attack or threat of attack from pirates or armed robbers. It recommends that when shipboard personnel detect pirates before they boarded the ship, a piracy/armed robbery attack message should be sent through the International Maritime Mobile Satellite Organization (INMARSAT) or Digital Selective Calling (DSC) equipment on distress and safety frequencies, provided the ship has not been ordered to maintain radio silence. When radio silence has been ordered by pirates, the circular recommends that the order should be complied with to avoid physical violence or death to the crew.²⁶ It is beyond peradventure that ports, waterways, and their intermodal connectors are the backbone of world trade. In 2005 alone, 7.11 billion tons of goods were conveyed by sea, a quantity that represented over 90% of international trade, therefore the need to safeguard the seas.²⁷

Before the 9/11 insurgence, the IMO had considered methods of improving security of ships at ports and the sea. After 9/11, the maritime community realised that security was essential to successful seaports and marine transportation as safety and logistic efficiency. This is available in the new international maritime security regime, the

²³ Klein K, id160. The failure of the master of the ship in this regard is also a contravention of the provision of SOLAS.

²⁴ That is chapter XI-2 of SOLAS.

²⁵ See ISPS Code, Part B, Section 4.43; IMO Maritime Safety Committee, 'Guidance for ISPS Code' 24(6.1). See also Jones. M.S, at pp.88-89 and Bateman .S, "Good Order at Sea in the South China Sea", in Shicun W.U and Keyuan Z.O.U, *Maritime Security in the South China Sea: Regional Implications and International Cooperation*, (Great Britain: Ashgate Publishing Limited, 2009),p.20.

²⁶ Keyuan Z, *Law of the Sea in East Asia: Issues and Prospects* (New York: Routledge,2005),p. 145.

²⁷ Ibid.

International Ship and Port Facility Security (ISPS) Code, (developed under the auspices of the UN), International Maritime Organization (IMO), and the U.S. robust port security regulations under the authority of the Maritime Transportation Security Act.²⁸

Importance of ISPS Code to Container Security Initiative (CSI)

The Container Security Initiative is another strategy for tackling security in ports. It is designed to strengthen ports protection through international cooperation and technology located in some strategic ports the world over. The CSI *inter-alia*:

- i. Identifies high risk containers through the use of advance information before loading into board a vessel;
- ii. Knows whether cargo has been tampered with after security screening and this is done by using a smarter tamper- evidence;
- iii. Pre-screens high risk containers, including radiation detectors and large scale X-ray imaging equipment so that security inspections can be done quickly without delaying flow of legitimate cargo.²⁹

It is not in doubt that maritime shipping presents tremendous opportunities for attacks throughout the world and one of the greatest challenges of the maritime shipping is the transportation of containers. Indeed, thousands of containers enter ports each day and thereafter infiltrate the mainland, railways and roads. The consequence of any lapses in the security arrangement of a single container has the potential of devastating a whole nation.³⁰ For example, the detonation of a single nuclear or radiological device smuggled in a container would have a serious impact on both world trade and economy.³¹

To be able to tame the issue of container insecurity, the impact of the ISPS Code is imperative. The ISPS Code is expected to affect the international maritime community as well as the world economy; due to the key role of shipping in trade and because of the remarkable role that container ships play in international trade, implementation of the ISPS Code is critical in addressing the container security issues. The justification for the ISPS Code is that port security involves a risk management function and in order to manage risks, identification of risks is process or signal to the solution. Therefore, the

²⁸ See The United States Maritime Transportation Security Act, 2002.

²⁹ Zallen B.R, *ibid.* See also Romero J, "Prevention of Maritime Terrorism: The Container Security Initiative" *Chicago Journal of International Law*, 4 (2003), p. 597. See also Murphy M.N, "Life or Pipedream? Origins, Purposes, and Benefits of Automatic Identification System, Long Range Identification and Tracking, and Maritime Domain Awareness", in Herbert-Burns R, Bateman S and Lehr P, (eds), *Lloyd's MJU Handbook of Maritime Security*, (United States of America: CRC Press, 2009), p.14, Hong N, *id.* p.47 and UNCTAD on the "Review of Maritime Transport", (New York and Geneva, 2004).

³⁰ *Ibid.*, 15.

³¹ *Ibid.*

ISPS Code assigns duties to owners, governments and operators of certain vessels and ports involved in international trade. These duties provide a partial shield against the threat of container ships by requiring foreign vessels and ports to recognise vulnerabilities and to create and carry out security plans to address the vulnerabilities.³² The higher the checks and balances in place at flag states, the greater the possibility of enhancing every area of security. For example, a container ship that visited ports with tremendous security histories and reputable security plans may pose a little security risk to port states. Conversely, container vessels with less cosmological security plans may trigger more challenges and a need for inspection. The more information available to port states before hand, the more equipped port states' authorities will be ready to determine a timely action. Availability of information to port states about a ship and its containers is made possible where ISPS Code is operation. Thus, low threats, high threats and necessary security measures will be more readily noticeable and through these strategies, the ISPS Code attempts to eliminate some of the unidentified elements contained in the international shipping of container ships.³³

Port Security, Transshipment of Cargo and GATT 1947

There are other strategies in place to tackle the issue of port security and these include the General Agreement on Tariffs and Trade (GATT). The GATT in its preamble recognises the desirability of entering into mutually and reciprocal beneficial arrangements towards substantial elimination of discriminatory treatment in international commerce.³⁴ In other words, to promote maritime commerce, states are obliged not to discriminate against foreign flagged ships by port or coastal states. The whole essence of the GATT is to promote freer international trade by requesting contracting states to carry out their commercial relations in line with the principle of the most-favoured-nation and national treatment.³⁵

Thus, in order to ensure that shipping activities are carried out in accordance with the trade's practices and national legislations, customs officials of a state concerned play a vital role in port and maritime security. However, for states customs to achieve their objectives, there is a need for a new security regime. This new security regime may

³² Brailler R.B, at p. 24.

³³ Ibid.

³⁴ See the preamble to GATT 1947.

³⁵ Wilkinson R, *Multilateralism and the World Trade Organisation*, (London: Routledge, 2000), pp. 20-23. See also Articles I and III of the GATT. See also Grossman G.N, "United States-Defensive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea not for Attribution" in Horn H and Mavroidis P.C (ed), *The Two WTO Case Law of 2002*, (Cambridge University Press: New York, 2005), p.108, Qureshi A.H and Ziegler A.R, *International Economic Law*, 3rd ed. (London: Sweet and Maxwell, 2011), pp.66-67.

include not just existing national maritime institutions, but also security and customs organisations which could be organised in conjunction with the World Customs Organisation. The United States for instance has obtained the WCO and European Union support for its CSI program and for this reason, the U.S Customs launched a program known as "Customs-Trade Partnership Against Terrorism (C-TPAT). The main aim of this program is to identify and eliminate weaknesses in its containers imports supply chains like unvented foreign suppliers, shippers and procedures. This is intended at reducing the potentiality of smuggling weapons and delaying of inspection.³⁶ The World Customs Organisation promotes trade and open market across the world in accordance with the natural concomitants of globalisation.³⁷

WTO Frameworks on Port Security

The GATTT 1947 has now been replaced with the World Trade Organisation in 1995 but its original effect (as modified in 1994) is still in operation under the WTO framework. The WTO on the other hand works with norms of trade generally based on agreements and this is why WTO agreements display or act in some aspects to prevent abuses of the global market³⁸ like infiltration of containers with Weapons of Mass Destruction (WMD). In this sense, a new regime would widen beyond merely focusing on the maritime aspects of terrorism. To a large extent, the United States has recognised this requirement in its representation to the IMO, stating that the obligation for maritime security goes beyond IMO's parameter of the maritime world into land-based sources. To accurately address this issue, other stakeholders including the Nigerian Customs are required to develop effective overall security measures and move away from manual inspection of cargo which is the trend in the Nigerian ports.

The only international legal provision which may represent a major impediment to the introduction of a new security regime appears in the General Agreement on Tariffs and Trade (GATT). Article 5(2) provides for Freedom of Transit through the territory of each member state, using the routes most suitable for international transit and for traffic in transit to or from the territory of other contracting parties. The provision goes further to discourage discrimination against vessels on the grounds of the place of origin of the vessels, flag of vessels, departure, destination, entry or exit or any circumstances regarding the ownership of goods, vessels or other means of transport. The above suggests that engaging in container profiling and discriminatory targeting of transshipment cargo from selected states may in fact be contrary to the GATT agreement. In the U.S. perspective, it

³⁶ Bowman G.W, at207.

³⁷ Arup .C, *The New World Trade Organization Agreements: Globalizing Law through Services and Intellectual Property*, (United Kingdom: Cambridge University Press, 2000), 42.

³⁸ Ibid.

is clear that ships carrying containers originating from Iraq or Afghanistan would be subjected to special examination by security officers. There are security exceptions within the GATT agreement. Article 21(b) permits a state to override the agreement in cases involving guns, the trafficking of nuclear material or during a general time of emergency. This provision appears to suggest that security challenges may in some cases be allowed to take precedent over other provisions of the agreement; therefore a new security system targeting specific vessels and cargo as a normal matter of routine might not amount to a contravention of the agreement. Importantly, international organisations like WCO, WTO, etc. have been created to carry out certain functions that are practically impossible for states alone to discharge³⁹ which in a way is rapidly changing port and maritime security. Despite the involvement of these international organisations, states still remain sovereign and control this process through their agencies like the Nigerian Navy.

Armageddon of Non-Implementation of the ISPS Code in Nigeria

In this sub-heading, the danger posed in the non-implementation of the ISPS Code by the Nigeria Port Authority is the focus. The earliest days of civilization in human history brought about the international port industry and since then it has developed progressively over the years. However, cargo-handling methods which were both difficult and risky remained largely the same until the containers and roll-on roll-off ("ro-ro") systems were introduced in the 1960s.⁴⁰ Technical developments have continued since then, including the introduction of increasingly sophisticated cargo-handling equipment with greatly increased capacity and reach.⁴¹

In addressing port security, the International Maritime Organization (IMO) adopted the International Ship and Port Facility Security (ISPS) Code that are being applied by some member states. The ISPS Code is a device reporting relevant security-related developments, assessing their potential effect on the trading systems, international transport and expounding the application of the innovative security measures. Most existing regulatory security policies utilise a standard set of apparatus and various stages to determine the scope of potential risks and the effect of threats vis-à-vis the security of the maritime network. The development and application of management techniques, risk assessment and economic impact to maritime security must take into consideration the complex regulatory framework of port security in Nigeria.

³⁹ Schermers H.G and Blokker N.M, *International Institutional Law*, 5th Revised Ed., (The Netherlands: MartinusNijhoff Publishers, 2011), p.606.

⁴⁰ See "ILO, Safety and Health in Ports, International Labour Office", (Switzerland, 2005) p.1. This is available at www.ilo.org/publns (accessed on 20 July, 2012).

⁴¹ Ibid.

Nigerian ports are urged to comply with the provision of the code under the Nigerian Ports Authority Act 2004 and research has shown that Nigeria is yet to comply with ISPS Code. The non-compliance with the implementation of the Code impelled the United States Coast Guard (USCG) to give ultimatum to the Nigerian Port Authority. It would be recalled that sometimes in May, 2013 gave 90 days ultimatum for the implementation of the ISPS Code. In order to eschew the wrath of the USCG, the Nigerian Maritime Administration and Safety Agency (NIMASA) was saddled with the responsibility of the implementation of the Code.⁴² Having been appointed the designated Authority for its implementation, the management of NIMASA since then has been making efforts to ensure implementation of the Code. Whether NIMASA's effort has yielded any positive result is not readily available. It is no doubt that the degree of non-compliance with the ISPS Code is responsible for the vulnerability and series of attacks taking place in the Nigerian maritime domain. This in a way is affecting the level at which harms and dangerous substances are being imported into Nigeria as there is no device to follow the movement of the incoming vessels. Also, the non-compliance is tantamount to inadequate measures for anti-terrorist attack which is considered a potential threat to International shipping, the basis of United States reaction. Some of the basic requirements for a PF to be ISPS code compliant include, Perimeter wall fence, Access Control, Lighting, Close Circuit Television (CCTV): Patrol and Port Pass. This research has also shown⁴³ that non-compliance with the ISPS Code which culminated in the manual search of containers at various ports in Nigeria has made it difficult for the customs officers to discover harms which might be transported to the country through the containers. The ISPS Code is a kind of measure adopted by the IMO to improve the security of both individual ships and port facilities involved in international trade.⁴⁴ It is a requirement of the ISPS Code that ships on international voyages as well as the port facilities which serve them, develop a security plan, conduct a security assessment, perform training, designate security and drills officers and take suitable preventive measures against security insurgence.⁴⁵

⁴² Andrew Airah uobhor, "Implementation of the ISPS Code", (Daily Independence 27/01/14), available at <http://dailyindependentnig.com/2013/08/nimasa-and-isps-code-implementation-momentum/> (accessed on 27/01/14)

⁴³ "ILO, Safety and Health in Ports, International Labour Office" id.

⁴⁴ See the U.S Sub-committee on Coast Guard and Maritime Transportation, *Hearing on Implementation of the Maritime Transportation Security Act, Background*, available at <http://www.house.gov/transportation/cgmt/06-09-04/06-09-04memo.html> (accessed on 11 July, 2012). See also Helmick, J.S., "Port and Maritime Security: A Research Perspective," *Journal of Transport Security*, (2008) p.17.

⁴⁵ Ibid.

Although, the ISPS Code was adopted in December 2002, it only became operative on 1 July, 2004 among the 155 contracting state parties to SOLAS.⁴⁶ Therefore, IMO member states had up till 1 July 2004 to implement the ISPS new regulations.⁴⁷ The overarching objectives of the ISPS Code is the establishment of an international framework between states, as well as ports and shipping industries to prevent security lapses affecting international trade. The ISPS Code regulation is expected to shape the international maritime community and the world economy, owing to the key role of the shipping industry in trade.⁴⁸ The implementation of the ISPS Code by member states is critical in addressing the issue of container security because of the remarkable role that container ships are playing in international trade.⁴⁹

Nigeria as a port state is a party state to the IMO regulation on the ISPS Code, however the compliance of the Nigerian ports with the ISPS Code appears wanting owing to the empirical research conducted in this regard.⁵⁰ This has given rise to certain pressure, by way of ultimatum for compliance by the United States of America. Interestingly, it is noteworthy that thousands of containers are usually alighted from ships on a daily basis, therefore inspection of all these containers apparently becomes impossible for the customs officers to discover harmful or dangerous substances. A single container left without inspection might contain harms or substances which could be disastrous to the whole nation. In fact, the easiest way of transporting harms or dangerous substances to a country is through ports by way of containerisation particularly where the security and detective measures are weak as in Nigeria's situation. Compliance with the ISPS Code obligation has been said not to be an easy task but it is suggested that compliance requires clearly defined levels of authority and lines of communication between the shore and shipboard personnel.⁵¹ The most worrisome part of the non-compliance with the ISPS Code is that

⁴⁶ Ibid.

⁴⁷ Unlike other Conventions that may require affirmative ratification by participating governments, SOLAS provides for what is termed "tacit acceptance procedure so that an amendment shall enter into force on a specified date unless, before that date, objections to the amendment are received from one-third of the parties or from the parties whose combined merchant fleets represent not less than 50 percent of world gross tonnage. The International Convention for the Safety of Life at Sea, Chapter XI contains two parts: Chapter XI-1, "Special Measures to Enhance Maritime Safety;" and Chapter XI-2, "Special Measures to Enhance Maritime Security." Chapter XI-2 contains the ISPS Code.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ The field research conducted in this respect indicated that port authorities are still being urged to comply with the ISPS regulation despite its adoption in Nigeria.

⁵¹ See Agbakoba, O. *The Maritime Newsletter*, Vol.1 (Lagos: Olisa Agbakoba & Associate, 2000) pp 180-181.

the IMO which is an organ of the United Nations for its implementation cannot impose penalty for non-implementation by port states. It is therefore argued that total compliance with the ISPS Code in Nigerian ports would minimise or reduce the incidence of trans-boundary harms by containers through ports.

Conclusion

No doubt that Nigeria as a port state and party to the International Maritime Organisation ensure compliance with the implementation of the ISPS Code. Implementation of this important security code will forestall or minimise importation of dangerous cargo as well as destructive weapons through the border ports. Nigeria experience in recent times on the issue of security speaks of our porous border. This is why it is strongly canvassed that there is urgent need for Nigeria to ensure optimal implementation of the ISPS Code, notwithstanding the fact that IMO lacks enforcement regime.