THE LEGISLATIVE REQUIREMENT FOR THE IMPLEMENTATION OF THE INTERNATIONAL SHIP AND PORT FACILITY SECURITY (ISPS) CODE [1].

1.0 Introduction.

1.1 In fulfilling its objectives, the International Maritime Organization which, is a specialized United Nations agency (hereinafter called "IMO") promotes the adoption of conventions and protocols, which upon entry into force are binding on and must be implemented by all States, which are parties to them. As a result of the September 11, 2001 (or 9/11) terrorist attacks with airplanes on the World Trade Centre in the United States of America and pursuant to the decision of its General Assembly in November, 2001, IMO held a Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974, as amended [hereinafter called "SOLAS"] [2], on Maritime Security between 9th and 13th December, 2002 in London. At the Conference, IMO adopted new regulations to enhance ship and port security and to prevent shipping, port facilities, ships, passengers and crew from becoming targets of international terrorism. Also at that Conference, the Contracting Governments adopted the International Ship and Port Facility Security Code [hereinafter called "the ISPS Code"] on 12th December, 2002 by its Resolution 2. Furthermore, the Contracting Governments resolved to amend chapters V and XI of SOLAS by which compliance with the ISPS Code will become compulsory on 1st July, 2004 (if deemed accepted on 1st January, 2004 under "tacit acceptance"), amended the existing chapter XI of SOLAS and renumbered it as chapter XI-1 and adopted a new chapter XI-2 of the Annex to SOLAS (hereafter called "chapter XI-2") on special measures to enhance maritime security. The provisions of the said chapter XI-2 as amended and of the ISPS Code apply to ships and port facilities etc and will come into force on 1st July, 2004. Consequently, it is high time that all the parties concerned started establishing methodically and systematically all necessary infrastructure including legislative, administrative and operational infrastructure, needed to give effect to their provisions and the other Resolutions of the Conference, so as to avoid the taking of hasty actions at the 11th hour and the need for control actions against ships found not in compliance with their provisions.

1.2 It is noteworthy that the aims of the ISPS Code include the establishment of an international framework for cooperation between Contracting Governments, Government agencies, local administrators and the shipping and port industries to direct, assess security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade[3]; the setting up of respective roles and responsibilities of all the parties concerned at the

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[1] Being the text of the paper presented by Mr. Mike Igbokwe, LLB [Hons.], BL, PG Dip. (Maritime Law) and Notary Public at the Workshop organised by the Nigerian Association of Master Mariners at the Muson Centre, Onikan Lagos on 18th November, 2003.

[2] Nigeria is a Contracting Government.

[3] Recognising that the special measures taken will prevent pollution, safeguard those on board and ashore, prevent and suppress acts threatening security in the maritime transport sector, by its Resolution 7 of 12/12/02, IMO encouraged Contracting Governments to inter alia establish and disseminate information to facilitate the interaction of ships and ports facilities to which chapter XI-2 of SOLAS applies and also non-conventional vessels and port facilities.

national and international levels for ensuring maritime security, ensuring the early and efficient collation and exchange of security-related information, providing a methodology for security assessments so as to have in place plans and procedures to react to changing security assessments at all levels and to ensure confidence that adequate and proportionate maritime security measures are in place. The aims of the ISPS Code are to be attained by the designation of appropriate officers and personnel on each ship, in each port facility and in each shipping company to prepare and to put into effect the security plans that will be approved for each ship and port facility. *The implementation of the provisions will require continuous effective cooperation and understanding between all those involved with, or using ships and port facilities including ship's personnel, port personnel, passengers, cargo interests, ship and port management and those in local and national authorities with security responsibilities*.[4] So, current practices and rules have to be reviewed and modified by Contracting Governments if they do not provide the adequate "level of security" so as to comply with the ISPS Code and Part A of Chapter XI-2. The new requirements place major additional responsibilities on SOLAS' Contracting Governments, but the IMO technical assistance cooperation[5] is there to assist them in implementing the provisions.

1.3 The ISPS Code has two parts, namely Parts A and B. Part A contains the **mandatory** requirements concerning Chapter XI-2, and Part B contains the **recommendatory** or **guidance** requirements regarding the provisions of the said Chapter XI-2 and Part A of the ISPS Code. The new Chapter XI-2 makes a reference to Part A of the ISPS Code and requires ships, companies and port facilities to comply with the relevant requirements of the said Part A of the ISPS Code. Article 1.6 of Part B of the ISPS Code states that the Contracting Governments have under the provisions of chapter XI-2 and Part A of the ISPS Code, various responsibilities some of which were set out in the Article. The guidance in Part B of the ISPS Code are to be taken into consideration when implementing the security provisions set out in Part A of the ISPS Code and in chapter XI-2, and even though Part B is recommendatory, it contains the process which all concerned parties have to go through in order to comply with Part A of the ISPS Code. This is why this paper will deal with the legislative requirements for the implementation of both Chapter XI-2 and the ISPS Code in Nigeria which will be looked at under some subtitles below.

1.4 Without trying to give an overview of the contents of the ISPS Code, it is important to understand some important aspects of the ISPS Code. The ISPS Code applies to passenger ships engaged on international voyages such as passengers ships (including high-speed passengers craft), cargo ships (including high speed craft of not less than 500 gross tonnage), mobile offshore drilling units and port facilities serving such ships.[6] The Contracting Governments are to establish security levels and provide guidance for protection from security

[4] See Articles 1.2 and 1.3 of the ISPS Code.
[5] The Technical Cooperation Committee of IMO considers any matter within the scope of IMO dealing with the implementation of technical cooperation projects for which IMO acts as the executing or cooperating agency and other matters relating to IMO's activities in the technical cooperation area.
[6] See Article 3.1 of the ISPS Code. Subsequently, IMO's maritime security committee passed a circular no. 1097 clarifying that neither the floating production, storage and offloading nor floating storage units are subject to the ISPS Code but that they should have some security procedures in place to prevent "contamination" of ships and port facilities subject to the ISPS Code.

incidents based on specified factors. The higher the security level the greater the likelihood of occurrence of a security incident and Contracting Governments may delegate certain of their security-related duties under chapter XI-2 and Part A of the ISPS Code to a recognised security organisation with the exception of certain areas of their security related responsibilities.[7] As for the shipping company, it must prepare ship security plan (based on ship security assessments), empower the master to have overriding authority and responsibility to make decisions on safety and security of the ship and ask for the assistance of the company or any Contracting Government as he deems necessary and support the company chief security officer, the master and ship security officer in fulfilling their duties and responsibilities under chapter XI-2 and Part A of the ISPS Code.[8]

1.5 Moreover, a ship is to carry on board it a ship security plan approved by and act on the security level established by the Contracting Government in order to identify and take preventive measures against security incidents and the ship must keep records of various security activities and incidents.[9] Applicable ships' security system and approved ship security plan shall be subject to specified verifications carried out by officers of the Administrations inter alia before the ship is put in service or before the requisite certificate is issued for the first time and before and/or after five years. After the initial or renewal verification an International Ship Security Certificate shall be issued or endorsed either by the Administration (or a recognised security organisation acting for it) for a period not exceeding five years and may become invalid in certain cases, although an interim international ship security certificate may be issued on certain basis for six months or until the main certificate is issued.[10] As for a port facility, one or more of it shall have designated for it/them a port facility security officer whose specified duties include conducting initial security survey of the port facility, considering its security assessment, developing, maintaining and implementing the port facility security plan etc, and who shall be given the needed support to fulfil the duties and responsibilities imposed by chapter XI-2 and Part A of the ISPS Code and shall with the port facility security personnel have knowledge and shall have received training and taken part in drills and exercises.[11]

2.0 TREATIES AND IMO CODES.

(a) Differences.

2.1 Treaties and IMO Codes are different and because the ISPS Code is a Code, the difference between them is important in determining the legislative requirement for the implementation of the ISPS Code and chapter XI-2. A treaty means an international agreement or by whatever name called, e.g. Act, Charter, Concordant, Convention, Covenant, Declaration, Protocol or Statute, concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and

[7] See Article 4 of the ISPS Code.
[8] See Articles 6 ibid.
[9] Articles 9 and 10 ibid.
[10] See Article 19 ibid.
[11] See Articles 17 and 18 ibid.

whatever its particular designation[12]. In addition to conventions and other treaty instruments, IMO adopts Codes and Recommendations by its Assembly, its Maritime Safety Committee and the Marine Environment Protection Committee. IMO's six main bodies which are concerned with the adoption or implementation of treaties are its Assembly, its Council, its above-named Committees and the Legal and the Facilitation Committee in which developments in shipping and other related industries are discussed by Member States and the need for a new treaty or amendments to existing treaties can be raised. However, such IMO *Codes and Recommendations are non-treaty instruments* because they are not concluded between States in international law but by its Assembly and Committees and usually are not mandatory instruments although member states are expected to implement their provisions. Nevertheless, it is now becoming common for such Codes to stipulate which of their provisions are mandatory and which are merely recommendatory to IMO Contracting Governments and also common for IMO to amend its treaties and incorporate the provisions of such Codes into its treaties by reference and to use the means of "tacit acceptance" to cause Member States to consent to the amendments thereby bringing them into force within a short time[13]. It follows that on its own, the ISPS Code is not a treaty, although by being incorporated into the SOLAS by reference, it has become a part of a treaty (SOLAS) which is binding on parties to SOLAS as from the time stipulated for its coming into force.

(b) **Becoming a party to a Treaty**.

2.2 The legislative requirements for the implementation in Nigeria of a multinational or multilateral treaty (which SOLAS is), or a bilateral treaty or a non-treaty IMO Code, is a function of the applicable international law and Nigerian municipal laws. As soon as a State becomes a party to a treaty in force, it is bound by its provisions in its legal relations established by the treaty between it and other contracting States or parties to it[14], but the provisions of such a treaty will not become implementable or enforceable in the State unless the mode stipulated by its municipal laws for the implementation of the provisions of the treaty have been fulfilled and a State may not use its internal law as a justification for its failure to perform a treaty unless its consent to be bound by the treaty violates its internal law of fundamental importance.[15] Without their consent, non-parties have neither duties nor rights under treaties.[16] Although our Court of Appeal held that a treaty, such as the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924, popularly known as the Hague Rules, is autonomous and above the domestic legislation of the subscribing countries and that the provisions of

[12] See, Abacha v. Fawehinmi [2000] 6NWLR [Pt. 660] 228 at 340. See also, Art. 1 of Vienna Convention on the Law of Treaties, 1969, but the Convention on the Law of Treaties between States and International Organisations or between International Organisations, 1986, which is, not yet in force confirms that international organisations have capacities to enter into treaties in line with their rules.

[13] The "tacit acceptance" method was applied to the early coming into force of the International Safety Management [ISM] Code and ISPS Code. The new chapter IX of SOLAS which entered into force by tacit acceptance on 1st July, 1998, makes mandatory the ISM Code adopted by IMO in November, 1993. It appears to be a brilliant way of avoiding the long time it takes treaties to come into force and to speed up the implementation of IMO treaties by member states that are for security and safety.

[14] This is because in line with Art. 26 of the Vienna Convention on the Law of Treaties, 1969, the fundamental principle of the law of treaties is "pacta sunt servanda"; treaties are binding on the parties and must be performed in good faith.

[15] See Arts. 27 and 46 of the Vienna Convention on the Law of Treaties.

[16] See Art. 34 supra.

such treaties cannot be suspended or interrupted even by the agreement of the parties,[17] yet the Supreme Court has held that treaties are not superior to our constitution, which is supreme.[18]

2.3 In international law, every Nation-state is free to make its own constitutional arrangements for the exercise of its treaty-making power. Both under customary international law and also under the Vienna Convention on the Law of Treaties, 1969,[19] each State has the capacity to conclude or make treaties. In the United Kingdom, (Nigeria's ex-colonial master), it is the Crown that has powers[20] to make treaties and that issues full powers or other authority to negotiate and sign treaties whereas the ratification and approval of treaties by Parliament are not needed. The courts cannot censure this power of the Crown.[21] When Nigeria was under British colonial rule and not being a state subject of international law, it was the British Parliament that used its Acts or Orders to make applicable to Nigeria the provisions of the treaties Britain ratified.[22] Now, having become an independent State, in Nigeria it is the President or the Government of the Federation (that is to say, the executive arm of the Federation) that exclusively negotiates or makes treaties. Under the 1999 Constitution,[23] the executive powers of the Federation is vested in the President and may be exercised subject to the provisions of any law of the National Assembly, by the President either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation. Therefore, in the treaty practice of Nigeria, the Government of the Federation has, as a first step in meeting the legislative requirement for the implementation of chapter XI-2 and the ISPS Code, to consent to Nigeria being bound by chapter XI-2 and the ISPS Code.

2.4 Moreover, it is noteworthy that under the Vienna Convention on the Law of Treaties 1969[24], the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession [which in each case means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty][25] or by any other means if so agreed. It is noteworthy that in treaty practice, it is the treaty itself that provides for the mode by which a State becomes a party to it either by signature, ratification, acceptance, approval or accession and if it is by "*signature subject to ratification*", it amounts to "signature subject to ratification" and is meant to allow a Government a further opportunity to examine the treaty when it is not necessarily bound to submit it to another Constitutional procedure for ratification. *Ratification*, which is becoming outdated as a means of consenting to be bound by a treaty due to

[17] See, U.A.C. [Nig.] Ltd v. Global Transport S.A. [1996] 5NWLR [Pt. 448] 291 at 300; Oshevire v. British Caledonian Airlines Ltd [1990] 7NWLR [Pt. 163] 489.
[18] Abacha v. Fawehinmi supra.
[19] See Art.6 supra.
[20] See R v. Secretary of State, ex parte Rees-Mogg [1994] 1ALLER 457 CA.
[21] However, under the Constitution of the United States of America, the American President has power to make treaties by and with the advice and consent of the Senate in which two-thirds of its members present so vote, although "executive agreements" which are made by its President alone are not subject to the approval of its Senate.
[22] See Ibidapo v. Lufthanza Airlines [1997] 4NWLR [Pt.498] 124 at 157/162 where that was the case in the adoption and implementation of the Warsaw Convention, 1929.
[23] See section 5(1)[a].
[24] See Art.11.
[25] See, Art.2(1)(b) supra.

expansion of interactions between States in economic and technical fields, is essentially a formal act of submitting the treaty-making power of the executive to parliamentary or other control before it becomes binding. *Accession* is the traditional method by which a State in certain circumstances becomes a party to a treaty of which it is not a signatory but usually the right to accede is made independent of the entry into force of the treaty. Under certain circumstances, a State may when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation.[26] Signatories may ratify or accept a treaty whilst non-signatories may accede to it. *Reservation* means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, approving or acceding to a treaty, where it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.[27]

(c) Approaches to implementation of treaties.

2.5 The domestication of treaties is a mode of implementing treaties by making binding treaties a part of the municipal laws of a country and in respect of treaties, the terms "domestication" and "implementation" are interchangeable. The methods of implementing treaties differ from country to country and in some cases the same country uses various methods on different occasions but there are two main approaches to the implementation or the reception of customary international law or treaties as part of the municipal law of a State, namely "incorporation" and "transformation". Under the doctrine of incorporation, international law is automatically part of the municipal law of a State without constitutionally needing to be ratified, whereas the doctrine of "transformation" is the positivist-dualist view that both international and municipal laws are two separate and distinct legal systems and that before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be specifically and expressly "transformed" or adopted into municipal law through a constitutional mechanism such as an Act of Parliament. It is remarkable that in the United States of America and the United Kingdom, the incorporation approach is adopted in respect of customary international law. In this regard, English courts are to discover what the prevailing customary international rule is and apply that rule[28] but the two countries differ in the approaches they adopt in respect of their application of treaties within their domestic jurisdictions.

2.6 In the United States of America, its treaty practice is based on the difference between "self-executing" and "non-self-executing" treaties. Where a treaty involves political questions, the treaty is left to the Congress to legislate on rather than its being applied automatically. By its Constitution,[29] treaties made under the authority of the United States are part of its supreme law, its judges are bound by them and treaties are regarded by courts as equivalent to an Act of the Legislature whenever they operate of themselves without the aid of any legislative provision whereas the President may only ratify a treaty if at least

[26] See Art. 19 supra.
[27] See Art.2(1)[d] supra.
[28] See, Trendtex Trading Corporation v. Central Bank of Nigeria (1977) 2WLR 356 HL; Maclaine Watson v. Department of Trade and Industry (1988) 3WLR 1033 at 1116. CA.
[29] See, Article VI section 2 supra. See also the Head Money Cases: Edye v. Robertson [112 US 580 91884) US Supreme Court.

two-thirds of the Senate approve it[30]. In the US, a non-self-executing treaty must undergo a legislative transformation before it can be legally enforceable against US subjects and institutions[31] or modified or repealed, but "self-executing" treaty obligations are upon the US becoming a party to it, treated by American courts as a part of American law. It is also treated as having being automatically incorporated into its national legal system[32] and as having the same status as a Federal law with force of law and only replaced by later, contradictory Federal law.

2.7 Under the "transformation" approach to the implementation of treaties that is common in the United Kingdom and the Commonwealth countries including Nigeria, a treaty cannot operate of itself within the State or adversely affect private rights unless it has been made a part of the domestic law of the State by the Parliament through an enabling or implementing legislation.[33] In the decided case of **AG for Canada v. AG for Ontario**, [34] it was held that "within the British Empire, the making of a treaty is an executive act whilst the *performance* of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes… Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default." The rationale behind this is that if treaties were to apply directly within the state without legislative Act, the executive would be able to legislate without the legislature. In the case of **Maclaine Watson v. Department of Trade and Industry,**[35] the House of Lords made the UK position clear when it said inter alia "… .the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties. … are not self-executing. Quite simply, a treaty is not part of English law unless it has been incorporated into the law by legislation."[36] Where a treaty affects the rights and duties of British citizens, or its application will modify or add to existing common law or statute, or creates financial obligations for the UK, an Act of Parliament must be passed to enable the provisions of the treaty operate within the UK.

(d) Procedure for domestication/implementation of chapter XI-2 and ISPS Code in Nigeria.

(i) The 1999 Constitution.

[30] See, Article 11 of the American Constitution.
[31] See, Forster v. Nielson, 27 US (2Pet.) 253, 311.
[32] This is how the 1910 Salvage Convention became a part of US national law.
[33] See The Parlement Belge [1878-79] 4PD.D 129.
[34] [1915] 1KB 857 and [1937] AC 326 at 347-348.
[35] [1989] 3 AllER 523 at 531
[36] See also Littrell v. USA [No.2] (1995) 1WLR 82. The exceptions to this rule are treaties relating to conduct of war or cession of territitory and unimportant administratitive agreements.

2.8 With the above general information in mind, it is easier to examine and appreciate the legislative requirements in Nigeria for the implementation of chapter XI-2 and the ISPS Code under the 1999 Constitution and the Merchant Shipping Act cap. 244. The pertinent question is, Can the ISPS Code and chapter XI-2 be properly implemented under section 12(1) and the Exclusive Legislative List of the 1999 Constitution? Under the 1999 Constitution of the Federal Republic of Nigeria, the legislative powers of the Federal Republic of Nigeria is vested in the National Assembly which consists of a Senate and a House of Representatives and which Assembly shall to the exclusion of the Houses of Assembly of States, have power to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution.[37] Some of the matters included in Part I of the Second Schedule of the Exclusive Legislative List which relate to the topic being discussed and are relevant to the subjects covered by the ISPS Code and chapter XI-2 are the **"Implementation of <u>treaties relating to matters on this list</u>"**[38], "**Maritime shipping and navigation, including-**

(a) **shipping and navigation on tidal waters**;
(b) …….
(c) Lighthouses, lightships, beacon; and **other provisions for the safety of shipping and navigation;**
(d) **such ports as may be declared by the National Assembly to be Federal ports (including the constitution and powers of port authorities for Federal ports)**",[39] **any other matter with respect to which the National Assembly has power to make laws in accordance with the provisions of this Constitution[40] and any other matter incidental or supplementary to any matter mentioned in the List**.[41]

It is submitted that the procedure for the enactment of laws by the National Assembly on the implementation of treaties with respect to matters not in the Exclusive Legislative List but in the Concurrent Legislative List is different from the above method since it requires ratification of the Bill by a majority of all the Houses of Assembly in the Federation.[42] An examination of the matters listed in the Concurrent List shows that the subjects covered by the ISPS Code and chapter XI-2 are not included in it.

2.9 **It is the author's further submission that chapter XI-2 is a part of a treaty, SOLAS, binding on Nigeria the moment it comes into force by virtue of its being a Contracting Government to SOLAS, 1974 and that the ISPS Code though an IMO non-treaty instrument, has been incorporated into Chapter XI-2 by reference and has become a part of SOLAS**. Both chapter XI-2 and the ISPS Code can therefore be said to be a part of a treaty relating to maritime shipping, navigation, safety of shipping and navigation, Federal ports facilities and ports authorities which are matters on the Exclusive Legislative List, the implementation of the treaty relating to which the National Assembly has powers to legislate on for the peace, order and good government of the

[37] See sections 4(1), 4(2) and 4(3) of 1999 Constitution.
[38] Item 31 of Part 1 of the Second Schedule of the Exclusive Legislative List.
[39] item 36 ibid.
[40] Item 67 ibid.
[41] Item 68 ibid and section 2 Part III of the said Second Schedule of the Exclusive Legislative List.
[42] See, Section 12(2) and 12(3) of the 1999 Constitution.

Federation pursuant to sections 4(2) and 4(3) of the 1999 Constitution. The subjects that SOLAS' chapter XI-2 and the ISPS Code contain having been covered under the above mentioned items listed in Part 1 of the Second Schedule of the Exclusive Legislative List, the ISPS Code and chapter XI-2 will not go through the rigorous procedure that matters not included in the Exclusive Legislative List go through for the purpose of implementing a treaty relating to them.

2.10 Moreover, **section 12(1) of the 1999 Constitution** of the Federal Republic of Nigeria provides that:

"No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."

This is the section of the Constitution of the Federal Republic of Nigeria normally referred to as prescribing for, and following the "transformation" approach to the reception of treaties in, Nigeria in line with the treaty practice in the United Kingdom and the Commonwealth as illustrated by the cases cited above. Pursuant to it, a treaty between the Federation and another country[43] shall only become legally enforceable in Nigeria to the extent it has been enacted into law by the National Assembly. The section envisages that after the Executive arm of government has consented to Nigeria being bound by a *bilateral* treaty between Nigeria and another country, the National Assembly will enact the treaty into law to whatever extent it deems fit and in practice, the Bill will thereafter be sent to the President for his assent within 30 days before it becomes an Act of the National Assembly[44] enabling the application of the treaty as one of Nigerian municipal laws and having force of law to the extent to which the treaty has been enacted into law by the National Assembly and assented to by the President. It is only after this process that the law enforcement agents and administrations and the Nigerian courts can enforce the Act domesticating the provisions of the treaty.

2.11 In the case of **Abacha v. Fawehinmi**, [45] the Supreme Court held that a treaty is not binding unless and until the National Assembly has incorporated it into the Nigerian law and before such enactment into law, it has no force of law as to make its provisions justiciable in Nigerian courts. Therefore, Nigeria must first become a party to a treaty and domesticate the treaty before it can start enforcing the provisions of the domesticated treaty in its law courts or by its law enforcement agents or administrations because a bilateral treaty entered into by

[43] The Treaties (Making Procedure etc) Act No. 10 of 1993, designates the Federal Ministry of Justice as the depository of all treaties entered into between the Federation and any other country for record purposes, which Ministry shall maintain a register of treaties open to public inspection on payment of requisite fees. It also specifies treaties requiring enactment into law and ratification, but it is submitted that in view of section 12 of the 1999 Constitution, ratification alone is insufficient and so, all bilateral treaties including those ratified, would have to be enacted into our municipal laws before they can be enforceable. That provision on ratified treaties is therefore unconstitutional. Moreover, it is questionable whether, multilateral treaties would also need to be deposited with the Ministry since the Act provides for the deposition of only bilateral treaties.

[44] See Section 58 of the 1999 Constitution.

[45] [2000] 6 NWLR [Pt. 660] 228 at 288.

its Government is not self-executing and is not a part of Nigerian law. Furthermore, as far as individuals are concerned, a treaty is *res inter alios acta* from which the individuals cannot derive rights and by which they cannot be deprived of rights or subject to obligations; a treaty is outside the purview of the court not only because it is made in the conduct of foreign relations, which is the prerogative of the Executive arm of Government, but also because, as a source of rights and obligations, it is irrelevant.[46] In **Abacha v. Fawehinmi**,[47] the Supreme Court relying on the Privy Council's case of **Higgs & Anor v. Minister of National Security & Ors** of the Times of 23/12/99, held that **no matter how beneficial to the country or its citizenry, an international treaty to which Nigeria has become a signatory may be, it remains unenforceable, if it is not enacted into the law of the country by the National Assembly and that if a treaty is not incorporated into the municipal law, our domestic courts would have no jurisdiction to construe or apply it, its provisions have no effect upon citizens rights or duties although it may have indirect effect on the construction of statutes or may give rise to legitimate expectation by citizens that the Government, in its acts affecting them would observe the terms of the unincorporated treaty.** This position differs from the dicta of the Honourable Justice Wali, JSC [rtd] in **Ibidapo v. Lufthanza Airlines**[48] which has usually been relied on by some legal practitioners as an approval of the incorporation doctrine of implementation of treaties which Nigeria is a party to, namely that "The practice of our courts on the subject matter (of municipal application of international law) is still in the process of being developed and the courts will continue to apply the rules of international law provided they are found to be not overridden by clear rules of our domestic law. Nigeria as a part of the international community, for the sake of political and economic stability, cannot afford to live in isolation. It shall continue to adhere to, respect and enforce both multilateral and bilateral agreements where their provisions are not in conflict with our fundamental law".

2.12 Moreover, it is also good law and the treaty practice in Nigeria that where treaty rights and obligations have not yet been embodied in the law by statute and the treaty is not part of the domestic law, the courts have no power to enforce such treaty rights and obligations otherwise the judiciary will be usurping the constitutional legislative functions of the Parliament or the National Assembly.[49] So without being properly incorporated into Nigerian domestic law by the National Assembly, the provisions of chapter XI-2 and the ISPS Code cannot be a source of rights and obligations and it will be unconstitutional for Nigerian courts to enforce any rights or obligations arising from them. Even though, Treaties (Making Procedure etc) Act No. 1993 specifies categorizes treaties into those requiring enactment into law and those requiring ratification only, it is submitted that in view of Section of 1999 Constitution and the Abacha case, unless a treaty is enacted into Nigerian law after its ratification, it does not become enforceable.

[46] See, Mclaine Watson v. Department of Trade [1989] 3AllER 523 at 544-545 HL.
[47] Supra at 288/9 & 356-357.
[48] [1997] 4NWLR [Pt.498] 124 at 150.
[49] See, R v. Secretary of State for Home Department, Ex P. Brind [1991]1AC 696 HL.

2.13 What the author has observed recently in respect of chapter XI-2 and the ISPS Code is that without having been first enacted into an Act by the National Assembly and knowing the extent to which chapter XI-2 and the ISPS Code will be enacted into law, some parastatals under the Federal Ministry of Transport have started some sort of self-regulation and implementation or preparation for the implementation of the provisions of chapter XI-2 and the ISPS Code. Even though a Presidential Committee on the Implementation of the ISPS Code has been set up by the President with the Honourable Minister of Transport and his Honourable Minister of State as its Chairman and Deputy Chairman respectively, the Committee has not yet been inaugurated and as such has no known action plan or work plan yet and its impact is yet to be felt in the implementation of the ISPS Code. Desirable and imperative as an early preparation for the implementation and enforcement of chapter XI-2 and the ISPS Code is, it should be realized that without being properly domesticated, such self-regulation and regulation of persons, ships and port facilities and any administrative and operational infrastructure that may be put in place or enforced would be illegal, contrary to due process and unenforceable in Nigerian courts.

2.14 Where a treaty that has an international flavour like SOLAS and is already domesticated by Nigeria, is in conflict with another Nigerian law, its provisions will prevail over the other national law since it is presumed that the legislature does not intend to breach an international obligation but the domesticated treaty is not superior to the Nigerian Constitution. Its international flavour cannot prevent the National Assembly from removing it from the body of our municipal laws by simply repealing it.[50] However, such a repeal or by extension, the non-ratification and domestication of chapter XI-2 and the ISPS Code may open Nigeria to international sanctions by other contracting parties[51] and expose its flagged-ships not in compliance with chapter XI-2 or the ISPS Code to sanctions when trading in ports of States implementing the treaty and make some foreign vessels to be wary of patronizing Nigerian port facilities for security reasons. It is interesting that the US plans to impose sanctions on countries, which do not implement the ISPS Code and chapter XI-2 upon the expiration of the deadline for their implementation on 1st July, 2004.

2.15 However, it is the author's submission that since section 12(1) of the 1999 Constitution refers to treaties "between the Federation and any other country", it is only the implementation of *bilateral* treaties and not the implementation of *multilateral* treaties relating to matters on the Exclusive Legislative List such as maritime shipping and navigation including shipping and navigation, safety of shipping and navigation, Federal ports, ports authorities and other things incidental or supplementary to them, that the 1999 Nigerian Constitution empowers the National Assembly to enact into law under items 31, 36 and 68 of Part I of the second schedule of the Exclusive Legislative List, in order to have the force of law.[52] It is

[50] See, Abacha v. Fawehinmi supra at 289.
[51] See, Abacha v. Fawehinmi, supra at 318-319.
[52] The only saving grace would seem to be that being a major constitutional issue, a Nigerian court faced with construing Section 12(1) of 1999 Constitution, where the question is whether the Constitution used the expression "between the Federation and any other country" in the wider or in the narrower sense, may follow the principles of constitutional construction which inform it and which it considers most appropriate and reasonable to adopt in the circumstance and in response to the demands of justice, may

submitted that if the National Assembly domesticates a multilateral treaty such as IMO's SOLAS (incorporating the new chapter XI-2 and the ISPS Code), by an Act of the National Assembly pursuant to Section 12(1) and items 31, 36 and 38 of Part I of the second schedule of the Exclusive Legislative List, the enactment will be inconsistent with the Constitution, unconstitutional and as such void to the extent of its inconsistency with the Constitution[53]. Therefore, the ISPS Code and chapter XI-2 of SOLAS cannot be properly domesticated under section 12(1) and the Exclusive Legislative List of the Constitution and there is a lacuna in the 1999 Constitution for the domestication of or the enactment of a law by the National Assembly for the implementation of, *multilateral* treaties involving the Federation relating to maritime shipping and navigation, safety of shipping and navigation, Federal ports and ports authorities which the ISPS Code and chapter XI-2 of SOLAS, are about. <u>This calls for an urgent amendment of Section 12(1) of the Constitution to include the enactment into law of multilateral treaties between Nigeria and other countries such as SOLAS. This should be considered by members of the reconstituted National Assembly Joint Committee on the Review of the 1999 Constitution in producing a new Constitution for the Federal Republic of Nigeria.</u>

<u>(ii) Regulations under the Merchant Shipping Act, cap. 224, 1990.</u>

2.16 Can the provisions of chapter XI-2 and the ISPS Code be properly implemented by the Honourable Minister of Transport making *Regulations* on them in the circumstance by way of subsidiary legislation based on the powers conferred on him by section 408 of the Merchant Shipping Act[54] an subject to Section 411 of the Merchant Shipping Act ? If so how? An examination of the two sections will reveal the answer.

Section 408 of the Act provides as follows:
"The Minister (of Transport) may make regulations generally for carrying this Act into effect, and in particular and without prejudice to the generality of the foregoing, such regulations may provide for—
(a) anything which is required to be, or may be, prescribed under this Act;
(b) carriage of passengers and cargo and the keeping and transmission of lists thereto;
(c) ……...
(d) ……
(e) ……..
(f) ……
(g) ……

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lean to the broader interpretation that multilateral treaties are equally envisaged in Section 12(1) unless there is something in the text or the rest of the Constitution to indicate that the narrower interpretation will best carry out the objects and purposes of the Constitution as was illustrated by the case of Nafiu Rabiu v. State (1979-81) Vol. 12 NSCC 291 at 300/301 (SC). It can also be argued that since section 318(4) of the 1999 Constitution provides that the Interpretation Act cap. 192 shall apply for the purposes of interpreting the provisions of the Constitution, and section 14(b) of the Interpretation Act states that "words in the singular include the plural and words in the plural include the singular", in order to avoid absurdity and avoid multilateral treaties being undomesticated under section 12(1) of the Constitution, the word "country" should be construed to include its plural and the expression should read, treaties "between the Federation and any other country or countries", that is to say bilateral and multilateral treaties.

[53] See, Section 1(3) of the 1999 Constitution on its supremacy.

[54] Chapter 224 Laws of the Federation of Nigeria, 1990.

(h) ……..
(i) ……
(j) ……..
(k) …….
(l) …….
(m)……..
(n) the control of vessels operating within Nigeria (other than naval vessels of the Government of the Federation, or of the Government of any part of the Commonwealth, or of a foreign Government) for which the Minister is satisfied that no other adequate provisions has been made in this Act or by any other written law, or which has been generally or partially exempted from the provisions of this Act;
(o) ……..
(p) ……
(q) ……
(r) ……
(s) the prevention of pollution, by oil, of navigable waters;
(t) ……..
(u) the prohibition or restriction of navigation in any waters over which the Government of the Federation has control."

Section 411 of the Act provides as follows:
"All …..regulations made under this Act shall be laid upon the table of each House of the National Assembly as soon as possible after the commencement of the next meeting thereof following the publication of such…. regulations; and may at any time during that meeting be amended by resolution passed by each House of the National Assembly. If the … regulations are not so laid they shall be inoperative but without prejudice to the validity of anything purporting to have been done thereunder."

2.17 Although the above sections of the Act do not specifically deal with, and section 12 of the 1999 Constitution specifically deals with, the implementation of treaties, the requirement of laying the ministerial regulations by way of subsidiary legislations before the National Assembly for amendment after being gazetted, is a recognition by the Act which is an existing law[55], of the constitutional legislative powers of the National Assembly and will enable the National Assembly to make inputs into or review the regulations before approving them and not usurp its powers to make laws. **Since the paragraphs of section 408 of the Act set out above relate to the matters covered by the ISPS Code and chapter XI-2, special measures to enhance maritime safety and security based on the ISPS Code and chapter XI-2 can be introduced by the Honourable Minister of Transport by way of subsidiary legislations through gazetted Regulations shown to be for carrying the Merchant Shipping Act into effect, and will become valid, constitutional, operative**

[55] By section 315 of the 1999 Constitution, an existing law is any law or rule of law in force immediately before the date when the section came into force or which having been made before that date came into force after that date and shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of the Constitution and shall be deemed to be an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly has powers under the Constitution to make laws.

and enforceable if, and after being laid before the National Assembly[56]. It must be pointed out that the setback in this section is that if the ministerial Regulations are not laid before the National Assembly for approval, they will not function and yet their not functioning will not affect the force or validity of anything done under the regulations, but the Regulations will remain constitutionally suspect. So whether pursuant to section 12 of the 1999 Constitution or pursuant to sections 408 and 411 of the Merchant Shipping Act, chapter XI-2 and the ISPS Code must go through the National Assembly before becoming operative and enforceable but in the latter, the National Assembly will not be seen as enacting a multilateral treaty into municipal law.

2.18 The foregoing underline the fact that chapter XI-2 and the ISPS Code as a part of SOLAS, 1974 as amended, are not self-executing in Nigeria and that the National Assembly must play a role in their legislative implementation before they can become enforceable in Nigeria by individuals, law enforcement agents administrations and the courts. Consequently, the author submits that if SOLAS has not been a multilateral treaty, the provisions of chapter XI-2 and the ISPS Code could be implemented/domesticated in Nigeria by the National Assembly either by:

1. setting them out as an Annex or a Schedule to an enacted Act of the National Assembly to be called "The ISPS Code and Chapter XI-2 SOLAS, 74 as amended [Ratification and Enforcement] Act", just the way the Warsaw Convention 1929, was set out as a schedule to the Carriage by Air [Colonies, Protectorates and Trust Territories] Order, 1953, or, the way the African Charter on Human and Peoples Rights [Ratification and Enforcement] Act set out the African Charter on Human and Peoples Rights as chapter 10 Laws of the Federation of Nigeria[57], or the Carriage of Goods by Sea Act set out the Hague Rules in a Schedule to it. The schedule may contain the provisions of the ISPS Code and Chapter XI-2 SOLAS, 74 word for word or only the favourable ones in line with our national interest; or,

2. amending a relevant existing Act of the National Assembly especially the Merchant Shipping Act to incorporate by reference, the provisions of the ISPS Code and Chapter XI-2 SOLAS, 74 word for word or with necessary modifications, or so as to conform with their terms just like the United Kingdom adopted the 1957 Brussels Convention on Limitation of Liability by the Merchant Shipping Act, 1958 which amended section 503 of its Merchant Shipping Act, 1894 so as to conform with the provisions of the 1957 Brussels Convention, or,

3. the translation of all or some of their substantive provisions into terms of national law in the same manner as the United Kingdom adopted the 1910 Salvage Convention by means of the Maritime Conventions Act, 1911 and the Arrest Convention by the Administration of Justice Act 1956, now replaced by Sections

[56] The Honourable Minister of Transport domesticated the provisions of the International Convention on Standards of Training Certification for Watchkeeping and Seafarers, 1978 by making the Statutory Instrument 12 of 2001 called Merchant Shipping [Training and Certification of Seafarers] Regulations, 2001, but it was without laying them before the National Assembly which therefore makes the constitutional validity and legality of the regulations suspect and attempts to enforce them may be challenged in court by aggrieved persons on such grounds.

[57] See the cases of Abacha v. Fawehinmi and Ibidapo v. Lufthanza Airlines supra.

20 and 21 of the Supreme Court Act of United Kingdom, 1981 and the way Nigeria adopted some provisions of the 1952 Arrest Convention in The Admiralty Jurisdiction Act, 1991.

Nevertheless, until section 12(1) of the 1999 Constitution is amended to include the implementation of multilateral treaties (which would take time), the provisions of the ISPS Code and Chapter XI-2 or such part as are in the national interest can be gazetted as ministerial regulations by way of subsidiary legislations if shown to be for the carrying of the Merchant Shipping Act into effect, and laid before the National Assembly for review and approval in order to be operative.

2.19 It is worthy of note that in order to implement the ISPS Code and the SOLAS amendments, on 25/11/02, President Bush signed into law, the **US Maritime Transport Security Act**, **2002** which provides inter alia for increased port and ship security, encouragement of investment in long term technology and management of security risks. It also mandates US Coast Guard to conduct vulnerability assessments of ships and facilities that may be involved in a security incident and to prepare a National Maritime Transport Security Plan. On 1/7/03, the US Coast Guard released interim rules and planned to release the final rules in November, 2003 whereas the US Customs has signed US Customs-Trade Partnership Against Terrorism with shippers, carriers, brokers and warehouse operators in order to improve and quicken security procedures at US ports in view of the fact that the new security measures cause delays and increased costs/expenses never envisaged before.[58]

3. **CONCLUSION**.

3.1 In ending this paper, it should be noted that Nigerian and foreign ships and port facilities will face serious problems after 1st July, 2004 for non-compliance with the provisions of chapter XI-2 and ISPS Code[59] **The Conference of Contracting Governments had drawn the attention of Contracting Governments and the industry to the fact that neither chapter XI-2 nor the ISPS Code provide for extension of the implementation date [1/7/04] for the introduction of the special measures to enhance maritime safety and security[60] and urged the said Governments to take as a matter of *high priority*, any action needed to finalize as soon as possible any legislative or administrative arrangements, which are required at the national level to give effect to the requirements of the adopted amendments to Chapter XI-2 and the ISPS Code relating to the certification of ships entitled to fly their flags or port facilities within their territories.**[61] The Conference also recommended that the Contracting Governments and their Administrations should designate dates in advance of the application date of 1/7/04, by which requests for review and approval of ship security plans, verification and certification of ships and review and approval of

[58] In fact BIMCO has introduced new terms into the chaterparty in respect of cargo being carried to the US in order to protect ship owners from and indemnify them against financial losses and take care of new and complex responsibilities imposed by the ISPS Code and the US Maritime Transport Security Act, 2002.

[59] Regulation 9 of Chapter XI-2 and section A/9.81 of the ISPS Code.

[60] See, paragraph 1 of IMO Resolution 6 of 12/12/02.

[61] See, paragraph 2 supra.

port facility security assessments and of port facility security plans should be submitted in order to allow Contracting Governments, Administrations and recognized security organizations (RSOs) time to complete the review and approval and verification and certification process and for companies, ships and port facilities to rectify any non-compliance.

3.2 **In fact by now, as a Contracting Government, the Federal Government of Nigeria should have properly domesticated the ISPS Code and chapter XI-2 and should have started through its agencies under the Federal Ministry of Transport to advise companies and ships operating under its flag to take steps depending on the degree of perceived risks in their ships' areas of operation, to increase awareness of potential dangers so that their crews will become extremely vigilant and alert to security threats they may face or suspect, whether they are in port at offshore terminals or underway**. Regrettably, Nigeria does not have a good reputation for and a good record of quickly consenting to being bound by, implementing and enforcing maritime or other treaties, which are in its national interest.[62]

3.3 Therefore, the Federal Government should as a matter of urgency inaugurate the Presidential Committee on the implementation of the ISPS Code which should quickly come out with its Action Plan and Work Plan on the implementation and enforcement procedures of the ISPS Code and chapter XI-2.[63] The Presidential Committee should quickly engage a maritime lawyer/consultant familiar with ISPS Code and chapter XI-2, to prepare the necessary documents for the implementation of the ISPS Code and chapter XI-2 whose implementation draft work would be considered by a Committee (constituted by the Presidential Committee) comprising the maritime lawyer/consultant, maritime technocrats, shipping companies and operators, ship surveyors, security experts/companies, port and ship managers, ship and port personnel, cargo interests, freight forwarders, bonded terminal operators, the Navy and Naval Police, Nigerian Police Force, Nigeria Customs Service, Private Security Organisations and port users and other persons directly affected by their provisions in time for the legislative requirements for their implementation to be met before 1st July, 2004. The Transport Committees of the Senate and the House of Representatives should also be prepared for urgent necessary parliamentary debates on and the urgent passing of the Bill (if any) or approval of the gazetted Regulations, shortly after they have been presented to the National Assembly[64]. Some agencies of the Federal Government[65] have been doing a lot in sensitising all parties concerned

[62] For example, The Civil Liability Convention 1992 Protocol [acceded to on 13/5/02], Protocol '92 to amend the FUND Protocol 1971 [acceded to on 13/5/02], MARPOL 73/78 [acceded to on 13/5/02], Search and Rescue Convention 1979 [ratified on 13/5/02], UNIDROIT Convention on International Financial Leasing, 1988 [ratified in 1994], and The Hamburg Rules have not been domesticated; The Salvage Convention 1989, The Suppression of Unlawful Acts against Safety of Maritime Navigation, 1988 and its Protocol of 1998 and other relevant IMO conventions and the 1976 Limitation of Liability Convention have not been acceded to or ratified by Nigeria, whereas favourable provisions of the following conventions which are not yet in force which could be adopted by Nigeria without being a party to them are yet to be adopted, namely: International Convention on Arrest of Ships, 1999, Convention on the Conditions for Registration of Ships, 1986, Convention on Transport Terminals in International Trade, 1991, Convention on the Liability of Operators of Ships, 1986, Convention on Maritime Liens and Mortgages, 1993. Nigeria implemented the International Convention on Standards of Training, Certification and Watch keeping for Seafarers, 1978 only shortly before it took effect in 2001.

[63] This will avoid a duplication of efforts and resources by different parastatals under the Transport Ministry under whose statutory functions, come the enforcement of chapter XI-2 and the ISPS Code.

[64] The National Assembly is known to "fast track" the passing of Bills just like it "fast-tracked" the amendment to and repeal of the Corrupt Practices and Other Related Offences Act, 2000, in 2003.

[65] For instance, the Nigerian Ports Authority and the National Maritime Authority.

including ship owners, port users, government and port users and preparing operational and administrative infrastructure for the enforcement of the ISPS Code and chapter XI-2, but without the legal implementation infrastructure being put in place, those efforts would be worthless for being unenforceable. The provisions of the ISPS Code and chapter XI-2 will not be enforceable against foreign and Nigerian vessels in Nigerian waters and ports facilities, but they will be enforced against Nigerian vessels outside Nigeria where they are in force and may prevent foreign vessels from patronizing Nigerian ships and ports facilities because of security and safety reasons. The arrest and detention of the **MV Trainer** in Alabama, US for non-compliance with the ISM Code a few years ago and the fine paid by Nigeria before the ship was released, are still very fresh in our minds. So, the time to act on the implementation and prepare for the enforcement, of the ISPS Code and chapter XI-2, is **NOW**. There should be no more "fire brigade" approaches to consenting to being bound by, implementing and enforcing relevant beneficial maritime treaties that are in our national interest!

I thank you for listening.

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For Further Reading:

1. ISPS Code 2003 Edition published by IMO.
2. Early Implementation of the Special Measures to Enhance Maritime Security MSC/Cir. 1067 of 28/2/03 by IMO.
3. Enhancing Maritime Security published by IMO.
4. Guidance relating to the implementation of SOLAS Chapter XI-2 and its ISPS Code, MSC/Cir. 1097 dated 6/6/03 published by IMO.
5. IMO's Maritime Security Working Group [MSC77/WP.15] published by IMO.
6. Implementation of the Convention by Contracting States by F. Berlingieri.
7. International Law by Malcolm N. Shaw, Fourth Edition, 1996.
8. Cases and Materials on International Law by DJ Harris, 5th Edition.
9. "Maritime Security Measures and Related Charter Clauses" a paper presented at the International Bar Association Conference, San Francisco, USA on 15/9/03 by Mr. Frode Grotmol.