

THE MARITIME SECURITY AGENCY (ESTABLISHMENT ETC) BILL 2009: ITS IMPLICATIONS TO THE MARITIME INDUSTRY.

As a stakeholder in the Nigerian maritime industry who had been following maritime legislations, Government's maritime policies and events in the maritime industry and who has also contributed his quota thereto, upon reading at page 6 of the This Day newspapers of 11th January, 2010 that a Public Hearing had been scheduled by the House of Representatives Committee on Marine Transport for 13th January, 2010 on the Maritime Security Agency Bill, I decided to make my views on the implications of passing the Bill known to your Committee. I state below the implications of the Bill.

1. Wrongful creation of duplication and multiplicity of Government Agencies, functions and costs.

1.1 I am of the view that the enactment of the Maritime Security Agency Establishment Bill, 2009 ('the Bill') will wrongly create a duplication of Government Agencies with similar and duplicated aims, functions and costs. An examination of certain sections of the Nigerian Maritime Administration and Safety Agency ('NIMASA') Act, No 17, 2007 ('the Act'), and the Bill will buttress my assertion. By a combined reading of sections 1(ii), 1(2), 2(4) and 3 of the Act, NIMASA has already been established as a body corporate with perpetual succession that can inter alia enter into contracts and incur obligations and the objective of inter alia regulating and promoting **maritime safety and maritime security**, to be responsible for executing the provisions of the Act and other Acts on **maritime safety and security** under the supervision of the Federal Ministry of Transport. However, by sections 1 and 3 of the Bill, the proposed Maritime Security Agency ('Agency') is to be established as a body corporate with perpetual succession and objectives of providing direction and leadership in the establishment of a platform for 'national maritime security', provide security information and mechanism to protect all national maritime and maritime related infrastructure within Nigerian territorial waters and regulate persons engaged in maritime security services within Nigeria territorial waters. Some of these aims are already a part of the duties of the Nigerian Navy under the Armed Forces Act. Under Section 22(1)(f),(g),(h),(l),(o), (p) and (q) of the Act, NIMASA's functions, powers and duties include providing search and rescue service, providing directions and ensuring compliance with vessel security measures, carrying out air and coastal surveillance, enforcing and administering the provisions of the Cabotage Act, providing national maritime search and rescue service and establishing the procedure for the implementation of IMO and ILO Conventions on maritime safety and **maritime security** to which Nigeria is a party and the implementations of the codes, resolutions and circulars arising therefrom.

1.2 On the other hand, by section 4 of the Bill the functions of the Agency include 'to the exclusion of any other body' to ensure the continuation and coordination of the implementation of Chapter 11(2) of SOLAS International Ship and Port Facility Code of the IMO, provide national maritime infrastructure security, and assist in search and rescue operations of all agencies and organisations. Under the section it is also to establish a security and infrastructure protection mechanism for all seaports and jetties in

Nigeria, functions being already performed by other Government agencies whereas under its section 6, a contravention of the Cabotage Act (which Act NIMASA is charged to administer and implement), is said to be prejudicial to the safety and security of the Nigerian maritime zone.

1.3 By section 22(2) of the Act, NIMASA shall inter alia inspect ships for the purposes of **maritime safety and security** and generally perform any other duty for ensuring **maritime safety and security** or matters incidental thereto. Under sections 23(5)(j) and 23(6) of the Act, NIMASA can enter ports, terminals and vessels to monitor and investigate matters related to **maritime safety and security** and its officers were for the purpose of the Act given powers which any enforcement agency may exercise under any Federal Act applicable to the Nigerian Maritime Zone. Although not specifically set out, these law enforcement agencies would definitely include the Nigerian Navy, Marine Police, Nigerian Police Force, Nigerian Customs Services, Nigerian Immigration Service and Nigerian Air Force. In fact, section 23(10) of the Act gives NIMASA the mandate to collaborate with, request for and be entitled to assistance by other designated Government Agencies responsible for the maintenance of security in Nigerian Maritime Zone. Sections 40(1) and 40(3) of the Act also allow NIMASA to detain unsafe ships and mandate NIMASA to have regard to the ISM Code, ISPC Code and other international conventions and Acts on ship safety and security. But under section 5 of the Bill, the Agency shall notwithstanding the provisions of any other Act, stop, enter, board, inspect, search any ship or craft within the Nigerian maritime zone or territorial waters, demand the production of any documents, expel ships, enter any ports, terminals, jetties and ships to monitor and investigate any matters relating to maritime safety and security whereas section 30 of the Bill also empowers the Agency to stop and inspect ships and intercept, interfere with the communication capabilities of ships or vessels or crafts. Notwithstanding that by sections 28 and 30 of the Act, NIMASA is responsible for ship registration and shall maintain a register for receiving and recording all information and documents with respect to ships, by section 32 of the Bill the Agency is mandated to keep records of the number, type, and location of ships entering or leaving Nigeria's territorial waters.

1.4 Moreover, salient provisions of the Bill appear clearly to have been lifted from and are the exact provisions of the Act. For instance, in addition to those referred to above, the provisions of sections 5(3), 5(4) and 5(5) of the Bill giving the Agency's designated officers the same powers as those of any law enforcement agency exercising powers in the Nigerian maritime zone, boarding, inspecting, searching or entering ships and on innocent passage are exactly the same as the powers under sections 23(6) and 23(7) and 23(8) of the Act given to designated officers of NIMASA. The provisions of sections 9(2), 9(3), 9(4) and 9(5) of the Bill on the role and powers of the Agency's Board are exactly the same as the provisions of section 5(2)(a), 5(3) and 5(4) of the Act on the Board of NIMASA. The duties of the Agency's Director-General and executive directors in sections 11 and 12 of the Bill are couched in the same words as the duties of the Director-General of NIMASA in sections 11(2) and 12 of the Act. So also are the provisions of the Secretary to the Agency's Board in section 18 of the Bill similar to section 13 of the Act in respect of NIMASA's Board Secretary.

1.5 Therefore, it is obvious from the above that the Act has established a Government Agency (NIMASA) for and given copious powers to NIMASA with respect to ensuring maritime security within Nigerian Maritime Zone and charged with performing a lot of the functions that the Agency in the Bill is now being proposed to also perform. The duplication and overlapping of functions, aims and powers, structure and administrative costs that will arise, are a waste of human and financial resources that could be channelled to other sectors of the economy. Should the Bill be passed, the overlapping functions and powers that would arise between NIMASA and the Agency especially concerning maritime safety and maritime security and inspection and detention of ships and funding are bound to induce struggles for recognition and control and friction in the implementation of those overlapping functions by the two Government agencies. It will also put service users through chaos and duplication of efforts and expenses before the two agencies. **It would be unfortunate and tantamount to policy summersault if about two years after merging JOMALIC (created under the Nigerian Maritime Labour Act, 2003), Government Inspector of Shipping and National Maritime Authority to form NIMASA, the National Assembly will pass another Act that would create an agency that would have functions similar to NIMASA's in very important respects. So, whilst it is necessary to have a legislation that will truly prevent and suppress maritime insecurity, it is not necessary to create another Agency for these purposes: NIMASA as the appropriate agency for it is already in place and should be allowed to administer and implement it.**

2. Escalation of Administrative costs/Waste and harm to the economy.

2.1 One of the main implications of the duplication and multiplicity of agencies and functions is the attendant duplication of Government's costs of administering the agencies and also the costs of doing business with them by members of the public. Government has often had to spend scarce resources that should have been channelled towards other developmental projects, into the existing avoidable duplication and multiplicity of agencies and functions, tantamount to wastage. By virtue of the overlapping functions and powers of NIMASA and the proposed Agency stated above, there are bound to be unhealthy competition and rivalry and confusion in the exercise of those functions and powers by the agencies and also on the part of the general public. In that case, unless one of the agencies backs down for the other on the implementation of its functions or exercise of its powers, shipping companies, ships and Crew members in Nigeria are bound to comply with the directives issued by each agency even if the directives are on the same subject matter and would have to either pay the necessary fees, charges and levies dictated by each agency or be penalized. A chaotic situation may therefore arise because these persons may be confused as to whose requirements and directives they should follow or ignore at their peril. But the non-passing of the Bill would eliminate the multiple costs, efforts and time and make for certainty in the minds of the general public, ship owners, shipping companies, crew members as to what requirements to meet.

2.2 One of the reasons why by section 2 of the NIMASA Act, the former National Maritime Authority, JOMALIC and Government Inspector of Shipping were merged to become NIMASA, was to avoid such wastage, duplication and problems for receivers of shipping services. By the said merger and Act, the empowerment of the single agency (NIMASA) that came out of the merger, removal of the loopholes in the adequate administration and enforcement of current maritime safety, security and environment were filled by the lawmakers. Rather than depleting resources, time and energies on separately performing overlapping functions and aims, these should be combined for the use of a single agency for maritime safety, security and administration. Unnecessary competition and struggle among the two agencies would not arise. The growth of the maritime industry would not be assisted by the National Assembly if after the costs and time and efforts that the said merger had saved them, the National Assembly should again by way of some somersault, create and put them back into an avoidable situation where they would be facing similar problems.

3. Increased Cost of Shipping Services that will adversely affect the economy.

3.1 Should the Bill be passed, the Agency would have to recruit and pay its new staff and directors, the room for which has already been made in section 19 of the Bill, thereby further stretching the economy. A part of the funding of NIMASA is by section 15 of the Act from 3% of gross freight on all international inbound and outbound cargo from ships or shipping companies operating in Nigeria, 0.5 % of stevedoring charges collected by employers of dock labour among other sources. Under section 44 of the Cabotage Act, 2003 cabotage vessels area already paying 2% surcharge on any cabotage carry they transport. By section 21 of the Bill, the sources of the Agency's fund shall include among other sources, 1% of the value of the gross tonnage of inbound and outbound cargo in vessels calling at or departing from any port in Nigeria and the maritime security levy which according to section 28 of the Bill shall be 1% of the declared annual profit of any company engaged in maritime-related activity. By section 29 of the Bill, the Agency could impose other charges to be due from other certain persons. Honourable Members of the House of Representatives, the additional costs that would be imposed by the Agency if created, will end up creating import-levy induced inflation and high cost of shipping of cargo and doing maritime business that would force shippers to resort to ports of neighbouring countries like Cotonou for the clearing of their goods thereby reducing traffic to and revenue of Nigerian ports to Nigerian ports as was the case in recent past.

3.2 Nigeria is an import-dependent country and a lot of its industries depend on imported raw materials and goods for the manufacture of their goods which they mainly sell in Nigeria. The shipping of goods in and out of Nigeria should not be allowed to be the most expensive in the world and dwarf the economy through losses that would be suffered by our ports operators due to the fact that the ports would no longer be attractive to patronage because of diversion of cargo to other neighbouring countries with less or concessionary charges. It is usually the common man who is the ultimate consumer of the imported goods and shipping services that bears the brunt of excessive charges and levies and in the face of global economic meltdown and recession which has started taking its

toll on the Nigerian economy, the introduction of such additional charges and levies by the Bill would further slow down the Nigerian economy.

4. The Bill is an aberration to the Nigerian Maritime Industry.

4.1 Before and after Nigeria became independent, matters concerning the maritime sector whether maritime safety, maritime security or marine pollution or maritime labour, were always handled or supervised by the Federal Ministry of Transport or its Minister or persons to whom it had delegated its powers and functions. An examination of the provisions of the Merchant Shipping Act, 1962 and Sections 1 and 2 of the Merchant Shipping Act, 2007 will reveal this clearly and that the said Minister had often made Regulations and delegated his powers under the Merchant Shipping Act to the Government Inspector of Shipping or NIMASA. In fact Section 2(4) of the Act provides that NIMASA shall be under the supervision of the Federal Ministry of Transport (which is in charge of marine transport), section 25 of the Act states that the Transport Minister may give NIMASA written directives regarding the performance of its functions. Moreover section 26(3) provides that before making any determination imposing charges and the persons to pay same, NIMASA shall give the Transport Minister a written notice of the proposed determination. So, the Minister controls and supervises all matters concerning merchant shipping. By sections 6, 7 and 11 of the Act, the President appoints members of the Governing Board of NIMASA, its Chairman and Director General on the recommendation of the said Minister. Notices of resignations by these persons are addressed to the President through the Minister and a board member is removed or suspended from office on the recommendation of the Minister with the President's approval. See section 9 of the Act.

4.2 However, in the case of the proposed Agency, the powers that should be and that are being exercised by the said Minister in respect of merchant shipping had wrongly been taken away and had been given to the National Security Adviser (NSA). This was done inter alia by stating in section 2 of the Bill that it applies to any person, ship, aircraft or any other craft or object in the internal and territorial waters of Nigeria (which are already regulated by the Acts supervised by the Minister) and in sections 3, 4, 5(2), 6 of the Bill giving the Agency the aims, functions and powers similar to those of NIMASA which is supervised by the Minister. To worsen the situation, by sections 9, 15 and 16 of the Bill, members of the Governing Board of the Agency which include its Director-General, Executive Directors and representatives of other Ministries and the Office of the NSA shall be appointed by the President on the recommendation of the NSA. By sections 11(2) and (3) of the Bill, a Board member or Executive Director or the Director-General of the Agency shall give a written notice of resignation to the President through the NSA and by section 12 a member of the Agency may be suspended or removed by the President on the recommendation of the NSA.

4.3 It was for the above reasons that it has been argued that the Bill is a bad precedent and an intervention by the military (which is not trained or educated or knowledgeable) in maritime affairs sufficiently or at all, under a civilian regime in and control of merchant shipping intended to make the Military and National Security Adviser relevant and visible and to usurp the constitutional and statutory

maritime transport functions of the Federal Minister of Transport under the guise of providing ‘maritime security’ or ‘security and safety of information and communication facilities’ which if not stopped would be the beginning of such military interventions in and spell doom for the growing Nigerian merchant maritime industry. In fact recently due to the attempted suicide bombing of a US-airplane in the USA by Mr. Farouk Abdulmuttalab, a Nigerian on 25/12/09 there has been an escalated clamour in and through the Press for a quick passing of the ‘Bill on terrorism’ which is before the National Assembly as a way of criminalizing, deterring, preventing and controlling and punishing such acts. However, a proper reading of the Bill especially its Explanatory Memorandum would show that it does not have anything to do with or the checking of terrorism or the kind of terrorism attempted by Mr. Abdulmuttalab by as a passenger in an aircraft and not in a ship or by a ship, neither is it a maritime security bill warranting a new Agency in the real, full and true sense and meaning of that expression. The views expressed by the former Honourable Minister of Transport, Dr. Abiye Sekibo reported at page 6 of This Day newspapers of 11/1/2010 that the Bill is an attempt by some persons to transform into a full-fledged permanent government agency, the ad hoc Presidential Implementation Committee on Maritime Safety and Security (PICOMSS) the Chairman of which he was (and which Committee was set up during his tenure to fast-track Nigeria’s attainment of the security status prescribed under the ISPC Code by the IMO), and that instead of winding it and its operations up since 1st July, 2004 PICOMSS had been drawing funds from the organisations that initially financed its operations, should weigh heavily in the minds of Members of your Committee against passing the Bill.

5. The Bill is a deviation from the Stakeholders’ Recommendations at the International Conference on Piracy and Armed Robbery at Sea, Abuja, 2008.

5.1 One cannot talk of maritime security without talking of piracy and armed robbery at sea against ships and other related offences including the seizure of cargo and kidnapping of crew members for ransom and terrorism against ships, or cargo, or crew members and maritime and maritime-related infrastructure etc. Between 28th and 30th April, 2008, an International Conference on Piracy and Armed Robbery at Sea, organised by NIMASA and the Nigerian Navy was held at the Sheraton Hotel, Abuja. At that Conference, the goodwill message of the then Secretary-General of IMO, Efthimios E. Mitropoulos who was represented by Kyung-Rae Min, Deputy Director, Sub-Division for Implementation and Co-ordination Maritime Safety Division of IMO, was read. Maritime stakeholders including the Federal Ministry of Transport, Nigerian Navy, NSA, PICOMSS, IOCS, MISCO, NIMASA, NPA, NSC, banks, NNPC-NAPIMS, Ministry of Foreign Affairs, other security agencies like Nigerian Customs Service, Nigeria Immigration Service, ISAN, NITOA, Federal Legislators, etc were either invited, present or represented. Both local and foreign resource persons including the maritime stakeholders and the NSA also presented well-researched papers after which the Conference was segmented into plenary and workshop groups in order to facilitate effective intercourse of ideas with a view to articulating remedies to identified challenges on combating piracy and armed robbery at sea in Nigeria. **The Conference was broken into two workgroups of Capacity Building and Procedural Workgroups in order to deliberate on human and infrastructural challenges and examine existing regulations and operations of all stakeholders with a view to articulating effective preventive measures and response mechanism respectively. Each workgroup had a Chairman (the Procedural**

Workgroup Chairman of which I was) who was the moderator and also terms of reference. Piracy and Armed robbery at sea including maritime security based on our peculiar and local circumstances, were fully discussed and recommendations were made thereon by the stakeholders.

5.2 At the end of the workgroup sessions, each chairman presented the report of its workgroup at the plenary session which adopted and came out with recommendations on specific issues discussed at the Conference including the enactment of a Maritime Security Act (not in the form now being proposed in the Bill), time frame for the implementation of each recommendation and the Ministry or Agency that is to implement each recommendation. In fact, on the need for a local regulatory framework on Piracy and Armed Robbery at Sea (and Other Related Offences) in Nigeria the recommendation of the maritime stakeholders was that an **'enabling and implementation regulatory framework be enacted as the Maritime Security Act to identify and impose sanctions and penalties in respect of criminal and other offences arising from piracy and armed robbery at sea'** and the action was to be carried out by the Federal Ministry of Transport through its Agency charged with maritime safety and maritime security (that is to say, NIMASA) that will be the implementer of the Act, Federal Ministry of Justice and the National Assembly and not the NSA. I am aware that recently the Federal Ministry of Transport through NIMASA had commissioned the drafting and enactment of that **Piracy and Armed Robbery at Sea (and Other Related Offences) Bill** in line with the recommendations made by the maritime stakeholders at the international conference, the work on which is almost concluded and would soon be sent to the National Assembly.

5.3 Therefore, this Bill as sponsored and constituted is contrary to the wishes and intentions and decisions of the maritime stakeholders on the requisite legal framework on piracy and armed robbery at sea at the said international conference in which IMO was present, and also the position of IMO on maritime security administration. In order for our country not to be ridiculed and embarrassed by the international community and IMO or be seen as a country that has no regards for the decisions of its maritime stakeholders and consultations with them or cause maritime stakeholders lose confidence in the implementation of recommendations of similar conferences in the future and to ensure the implementation and effectiveness of the Maritime Security Act, it is imperative that the Executive arm of Government should ensure that a **Piracy and Armed Robbery at Sea (and Other Related Offences) Bill** in line with the recommendations of the said international conference and which NIMASA is already working on, should be substituted for the Bill. That **Piracy and Armed Robbery at Sea (and Other Related Offences) Bill** being worked on by NIMASA will soon be presented to the National Assembly.

6. Not IMO-Compliant.

6.1 In late 2009, through the efforts of the Federal Minister of Transport, the Minister of Foreign Affairs, the heads of the agencies under them etc, Nigeria was able to retain its seat in category C, at the IMO. As an important member of the IMO from Africa and especially the West and Central African sub-region, Nigeria cannot afford to work against or enact maritime laws against the positions and resolutions and treaties of IMO. It is the policy of IMO that every country and its member States should have a stand-alone Act on piracy and armed robbery at sea to be implemented by its maritime safety and maritime administration agency. IMO always deals with a single maritime safety and administration in a member-State for quicker, clearer, more-focused, cost-saving, efficient and effective maritime and safety administration such as NIMASA.

When IMO came to Nigeria, it did not recognize PICOMSS as the focal agency for the implementation of its treaties, codes and resolutions because it wants maritime security and safety administration and implementation to be de-militarized and so emphasized the suppression and prevention of armed robbery and piracy against ships rather than military confrontation. Nigeria cannot afford to single out itself.

6.2 Moreover, complying with and enacting laws that comply with international law, IMO treaties that it has signed or ratified and best international standards and practice would enhance our national pride and international image as a maritime nation among the comity of nations and IMO-member states.

7. CONCLUSION.

7.1 In closing, bearing in mind the above-stated implications of the Bill and the recommendations made by maritime stakeholders at the said international conference on piracy and armed robbery at sea in 2008, I would urge the sponsors of the Bill and the National Assembly to work with NIMASA to pass within the next three months, the **Piracy and Armed Robbery at Sea (and Other Related Offences) Bill** being proposed by NIMASA in line with the recommendations of the maritime stakeholders.

7.2 There is an urgent need for the enactment of a **Piracy and Armed Robbery at Sea (and Other Related Offences) Bill** to have comprehensive provisions to tackle maritime security including armed robbery, terrorism and piracy at sea and maritime infrastructure and other related offences in line with IMO conventions. However, a new agency should not be created to implement the provisions of the Act, but NIMASA under the supervision of the Federal Ministry of Transport should be the implementer of the **Piracy and Armed Robbery at Sea (and Other Related Offences) Bill** because it is already charged with maritime safety and security administration and implementation. The Maritime Security Agency Bill would create more problems for the maritime industry, economy and Nigerian masses than it gives the impression it wants to solve, as pointed out above. Even though it had been argued that by allowing NIMASA to be the implementer of the Act, it will be biting more than it can chew, but my submission on that is that what needs to be done is to strengthen NIMASA and other security agencies with which it would collaborate in ensuring maritime security, capacity-wise and funding-wise etc.

Thank you.
Mr. Mike Igbokwe, SAN.
13/01/2010.