

***Analysis of the ISPS Code and Its Implementation:
Case Study of Malaysia and South Korea***

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Abstract

Following the terrorist attacks of 9/11, the International Maritime Organization (IMO) was faced with the issue of maritime security against terrorist incidents. Accordingly, it adopted the *International Ship and Port Facility Security Code (ISPS Code)* in December 2002 as part of the *International Convention for the Safety of Life at Sea (SOLAS 1974- as amended)* in order to increase maritime security through fulfilling its regulations by Contracting Governments. This Code, entered into force on 1 July 2004, provides a set of regulations for ship and port facility security. The first part of this paper focuses on the introduction of the ISPS Code and analysis of its key regulations. The second part of this paper focuses on the successful practices of two Contracting Governments, namely Malaysia and South Korea. Accordingly, this paper evaluates the enforcement of the regulations of the ISPS Code by concentrating on these two countries in East Asia

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in order to measure the effectiveness of the Code in enhancing maritime security of these two countries. This paper concludes that to achieve the objectives of the ISPS Code, all Contracting Countries should fully implement its regulations and for achieving higher standards in maintaining maritime security they are advised to take advantage of the experiences and practices of such successful countries as Malaysia and South Korea in fulfilling the regulations of the ISPS Code. The research method applied in this paper is based on the descriptive - analytical method.

Keywords: Terrorism, Maritime Security, ISPS Code, Malaysia, South Korea

1. Introduction

Maritime security has always been one of the most challenging issues in the context of international law in general and in the context of the international law of the sea in particular. Enhancement of maritime security is in the interest of all nations. No doubt, all nations benefit from sustainable security in the seas. It is clear that all peaceful and legitimate uses of the seas require safety and security in the seas. In addition, since 90% of world trade is carried by sea (IMO Profile, 1), any danger or risk against the safety of seas, vessels, ports and even port facilities can affect international trade and global economy.

Today, threats to maritime security take many forms; piracy, maritime terrorism, human or drug trafficking,

organized crime, proliferation of weapons of mass destruction, and smuggling weapons, arms, goods, or even humans, especially women and children are only some of these threats. (Kandler, 2016, 4). The danger posed by maritime terrorism against the security of seas, ships and ports is of special importance.

Because of their particular nature, seas are considered as a remarkable potential for conducting terrorist activities. Terrorists can easily utilize the vastness of the seas to conduct covert and secret operations or transport weapons and ammunition through them illegally. Terrorists may also cause extensive economic damages by targeting ships and their cargo, force governments to perform an action or refrain from doing any particular action by kidnapping or posing serious physical threats to their crew or passengers, or even in some cases may use the ship itself as a floating bomb, and may also cause extensive injuries or economic damages by ramming ships into sensitive targets or into other ships or by detonating them close to strategic targets. It should also be noted that many terrorists whose activity from a land base is impossible can operate and launch attacks by utilizing the seas. Furthermore, the growth and importance of maritime industries, the increase of importance of ports as populous key locations and also development of the strategic and economic value of onshore and port facilities, all contribute to terrorists increased interest in targeting these objects and accordingly pose a greater threat to people and States. (Greenberg, 2006, 10-11).

After the events of 9/11 (2001) and emergence of the war on terror, terrorism and its spread throughout the world

were considered as an increasingly prevalent threat. In particular, the threat of terrorism affected the maritime domain and accordingly the international community had to come up with more serious and effective measures to face and combat this threat and immediately began taking measures to increase safety and security of seas, ships and, especially, ports and port facilities. In November 2001 the International Maritime Organization (IMO) attempted to remedy the security gaps of ships and ports, where were made obvious by the terrorist attacks. (Cox, 2013, 82) In fact, the terrorists' use of the hijacked plane in the 9/11 terrorist attacks, clearly demonstrated that more extensive measures were needed not only to prevent terrorist attacks on ships and ports, but also to prevent ships being used as tools in terrorist attacks and threats.(Jeong, 2013, 8).

Therefore in December 2002 at the twenty second session of the assembly of IMO, it was agreed upon the necessity of accepting and expanding new measures and regulations regarding the safety of ships and port facilities. It was for this purpose that the Maritime Safety Committee (MSC) of the IMO was entrusted with holding a diplomatic conference. This diplomatic conference, held in 2002 by the IMO, made an amendment by adding Chapter XI-2 to the *International Convention for the Safety of Life at Sea*

(SOLAS) 1974.³ In this new Chapter, a set of provisions were made to for ensuring maritime security of ships and port facilities. These provisions, called the *International Ship and Port Facility Security Code (ISPS Code)*⁴, were promulgated in 2003 and, after a short time, on 1 July 2004 came into force for all contracting governments of the SOLAS Convention.

This Code consists of regulations and guidelines concerning security of ships and ports, and its goal is to create an international legal framework consisting of a series of measures and actions through which safety and security of ships and port facilities can be better ensured.

It is in this context that this paper first introduces the ISPS Code and its structure and analysis its strengths and weaknesses. Then in the second part of the paper, it focuses on the way the ISPS Code is implemented in its two Asian member countries, that is Malaysia and South Korea. They are geographically located in East and Southeast Asia and

³ SOLAS (as amended) was adopted by the IMO on November 1st 1974 and entered into force on May 25th 1980. The main objective of the SOLAS Convention is to specify minimum standards for the construction, equipment and operation of ships, compatible with their safety. The convention requires signatory flag states to ensure that ships flagged by them comply with at least these standards. (What is SOLAS Convention? - International Convention for the Safety of Life at Sea, <https://www.edumaritime.net/imo/solas>, pp.1-5, at 1.)

⁴ It was originally in the form of a draft prepared by the Maritime Safety Committee (MSC) of the International Maritime Organization (IMO) called as “*the International Code for the Security of Ships and of Port Facilities*”. For the whole text of the ISPS Code see: Annex 1: Conference Resolution 2, Adoption of the International Code for the Security of Ships and of Port Facilities, SOLAS/CONF.5/34, Adopted by the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea on 12 December 2002.

are both contracting governments to the SOLAS convention that have adopted and implemented the ISPS Code. They are both countries whose economies are extensively dependent on maritime trade, and both have extensive marine borders. Malaysia, as a country located next to the *Strait* of Malacca, which is a sensitive and dangerous hotspot of maritime threats, highly values its maritime security. South Korea also considers great importance for its maritime security with its strategic location in the Korean Peninsula. Accordingly, as far as the implementation of ISPS Code is concerned, their achievements and challenges will be discussed.

2. The ISPS Code: Introduction and Analysis

2.1. ISPS Code Structure

The ISPS Code include two parts: Part A and Part B. Part A of the ISPS Code⁵ is made up of mandatory regulations to as referred to Chapter XI-2 of the SOLAS Convention”. (ISPS Code, 2003, 4). Part A, consisting of 19 sections with two appendixes⁶, deals with such matters as definitions and concepts used in the Code, three security levels to be applied to ships and port facilities, the scope of application of the Code, responsibilities and obligations of governments, companies, ships and port facilities, and other regulations and technical information regarding the

⁵ Part A: Mandatory Requirements regarding the Provisions of Chapter XI -2 of the International Convention for the Safety of Life at Sea, 1974, As Amended.

⁶ These two appendixes are as follows:

Appendix 1: Form of the International Ship Security Certificate, and

Appendix 2: Form of the Interim International Ship Security Certificate.

provisions and requirements of the Code. It is considered mandatory for all contracting governments of the SOLAS Convention. In addition, the appendices of this part include two template forms for international ship security certificates and international ship security interim certificates.

Part B of the ISPS Code⁷ is also in 19 sections with two appendixes⁸. The guidelines in Part B, which have a recommendatory and non-mandatory nature, give more details about the regulations of part A. In fact, Part B of the Code provides a series of recommendatory guidelines on how to meet the requirements and obligations set out within the provisions of Part A. (SOLAS XI-2 and the ISPS Code, 1) Part B also points out the specific security measures and guidelines for ships and port facilities for the three different security levels, as determined by governments, which were mentioned in Part A of the ISPS Code. (*These three security levels are mentioned below in section 2.4 of the paper.*) Although this part is not considered to be mandatory, governments may choose to adhere to the guidelines in this part of their own initiative even making them mandatory through their ratification by domestic legislative bodies. (Jeong, 2013, 11)

2.2. ISPS Code Objectives

⁷ Part B: Guidance regarding the Provisions of Chapter XI – 2 of the Annex to the International Convention for the Safety of Life at Sea, 1974 as Amended and Part A of This Code (The ISPS Code)

⁸ These two appendixes are as follows:

Appendix 1: Form of a Declaration of Security between a Ship and a Port Facility, and Appendix 2: Form of a Statement of Compliance of a Port Facility.

Analysis of the ISPS Code and Its Implementation

Main objectives of the ISPS Code are clearly stated in Section 1.2 of Part A as follows:

1. To establish an international framework involving co-operation between Contracting Governments, Government agencies, local administrations and the shipping and port industries to detect security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade;
2. To establish the respective roles and responsibilities of the Contracting Governments, Government agencies, local administrations and the shipping and port industries, at the national and international level for ensuring maritime security;
3. To ensure the early and efficient collection and exchange of security-related information;
4. To provide a methodology for security assessments so as to have in place plans and procedures to react to changing security levels; and
5. To ensure confidence that adequate and proportionate maritime security measures are in place (ISPS Code, 2003, Section 1.2).

In order to achieve these objectives, SOLAS contracting governments, port authorities and shipping companies are required, under the ISPS Code, to designate appropriate security officers and personnel, on each ship, port facility and shipping company. These security officers, Ship Security Officers (SSOs) and Company Security Officers (CSOs), and designated Port Facility Security Officers (PFSOs), are charged with the duties of assessing, as well as preparing and implementing effective security plans that

are able to manage any potential security threat.⁹ (SOLAS XI-2 and the ISPS Code, 1)

2.3. The Scope of the Application of the ISPS Code

Section 3.1 of Part A of the code deals with the scope of application of the code. According to this Section, this Code applies to the following types of ships engaged on international voyages:

- (a) Passenger ships, including high-speed passenger craft;
- (b) Cargo ships, including high-speed craft, of 500 gross tonnage and upwards; and
- (c) Mobile offshore drilling unit.

It also applies to “Port facilities serving such ships engaged on international voyages”. The ISPS Code does not apply to warships and naval auxiliaries, or ships belonging to a contracting government or used by a contracting government only for governmental non-commercial purposes. (ISPS Code, 2003, Part A, Section3.3)

2.4. Security Levels Mentioned In The ISPS Code

⁹ According to Sections 2.6, 2.7, and 2.8, SSO, CSO, and PFSO are defined respectively as follows:

2.6 Ship Security Officer (SSO) means the person on board the ship, accountable to the master, designated by the Company as responsible for the security of the ship, including implementation and maintenance of the ship security plan and for liaison with the company security officer and port facility security officers.

2.7 Company Security Officer (CSO) means the person designated by the Company for ensuring that a ship security assessment is carried out; that a ship security plan is developed, submitted for approval, and thereafter implemented and maintained and for liaison with port facility security officers and the ship security officer.

2.8 Port Facility Security Officer (PFSO) means the person designated as responsible for the development, implementation, revision and maintenance of the port facility security plan and for liaison with the ship security officers and company security officers.

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Regulations of the ISPS Code set three security levels to be applied to ships and port facilities as follows:

Security level 1 means the level for which minimum appropriate protective security measures shall be maintained at all times.

Security level 2 means the level for which appropriate additional protective security measures shall be maintained for a period of time as a result of heightened risk of a security incident.

Security level 3 means the level for which further specific protective security measures shall be maintained for a limited period of time when a security incident is probable or imminent, although it may not be possible to identify the specific target.

Every contracting government is obliged to determine the appropriate security level based on the clearly stated factors in Section 4 of the ISPS Code. The first factor is the degree that the information on the threat is credible. The second factor is the degree that the information on the threat is verified. The third is the degree that the information on the threat is specific or imminent. And finally the fourth factor is the degree of information on the potential consequences of such a security incident.

The security level that is determined by the government is applied to ships flying the flag of that government and to ports in the jurisdiction of that government (those ports that are included in the application of the Code). For any of these security levels, various functional duties and measures are mandated for ships, port facilities and their authorities. Regulations in the Code point out the functional duties and measures to be undertaken for ships (ISPS Code, 2003, Part A Section7) and for and port facilities (ISPS Code, 2003,

Part A Section14) in relation to each security level, as determined by the government.¹⁰

2.5. Assessment of The ISPS Code

The enforcement of the regulations of the ISPS Code can greatly contribute to the increase of the safety and security of ships and port facilities since they reduce the threats and dangers against such safety and security. In practice, implementation of these regulations can, to a significant degree, limit the illegal accesses to ships and ports and in doing so increase their security. It is notable that the implementation of the regulations of the ISPS Code have gone smoothly with almost no problems and this indicates that States have followed a preventive, proactive and collective attitude in dealing with security threats that target ports and ships and these regulations have been received well communally.

2.5.1 Positive Aspects of the ISPS Code:

In general, the ISPS Code has had the following main positive effects:

- (a) The ISPS Code has established common grounds for international cooperation in maritime security;
- (b) Implementation of the regulations of the ISPS Code has provided a safer environment for maritime transportation,

¹⁰ Instructions and recommendations and guidelines for the implementation of these duties and measures are mentioned in details in Part B of the ISPS Code.

seafarers, port facilities and port personnel; (ISPS Code for Ships - An Essential Quick Guide, 6)

(c) In the process of acceptance and implementation of the regulations of the ISPS Code States have become more aware and conscious of the threat of terrorism and the vulnerability of ships and maritime facilities. (McNaught, 2005, 94)

In spite of the positive impact of the regulations of the ISPS Code in ensuring ship and port facility security, the Code faces some shortcomings and challenges which should be tackled if it is to be more effective and efficient. Among the main shortcoming and challenges are:

2.5.2 Shortcomings of the ISPS Code:

The main shortcomings of the ISPS Code are so follows:

(a) One of the limitations of the ISPS Code comes from the fact that only Part A of the Code contains mandatory regulations and its regulations are mandatory for the SOLAS Contracting Governments. Part B of the ISPS Code is only recommendatory for these Governments. The implementation of the regulations of Part B is essential to achieve the purposes of the Code and to implement the regulations of Part A more effectively.

(b) The regulations of the ISPS Code do not cover large and complex industrial areas that are frequently in close proximity of port facilities around the world and do not regulate activities related to them.

(c) One other issue is the high cost of implementing the mandates set out by the regulations of the ISPS Code for governments and shipping companies. For example ship

owners are forced to increase the number of security personnel which leads to higher costs. Another example is that costs imposed on ports because they have had to introduce and follow new security measures under the Code, they are in turn imposed onto ship owners in the form of extra fees, when using those ports. (Raymond, 2004, 3)

(d) Since the ISPS Code has mainly been the response to the 9/11 incidents with no further amendments or reconsiderations, have been issued to it is unable to respond to newer security threats against ports and facilities. In other words, The Code has not mentioned any ways to combat new forms of terrorism and the threats posed by it against ship and port security, such as drone attacks. (Singh, 2019, 15)

2.5.3 Challenges Facing the ISPS Code:

The Principal Challenges facing the ISPS Code are:

(a) One of the challenges facing the ISPS Code is that Contracting Governments to the ISPS Code may apply different security standards. This is due to the fact that each government is entrusted with implementing the regulations of the Code in their own legal framework and, among others, can for instance determine, on its own initiative, the level of security required.

(b) The implementation of the ISPS Code faces barriers when it comes to some of the contracting governments which are either sponsoring terrorism or incapable of enforcing effective and proportionate security standards in accordance with the regulations of the ISPS Code, be it due to weakness in management or action, limitations and

shortage in resources, or lack of sufficient knowledge and expertise. (McNaught, 2005, 93)

(c) One of the challenging aspect of the ISPS Code is the scope of application itself. According to Section 3 of the Code, its regulations only apply to those ships that have a GRT higher than 500 and are engaged on international voyages. This means that numerous small fishing ships, and merchant ships trading on local routes are not included in the scope of these regulations whereas it is these vessels which are more vulnerable to security threats and dangers. (Raymond, 2004, 3)¹¹ Although the regulations in Part B of the ISPS Code recommends to governments to establish and extend security measures to vessels that are not included in the scope of application of the Code according to Section 3, nevertheless, since the regulations in this part are not mandatory for governments, they cannot effectively cover the gap created by the limitations in the scope of application and implementation of the Code.¹²

¹¹ This is especially true when speaking of dangers of terrorism against the security of ships and port facilities: terrorists use small high-speed crafts or hijack fishing boats in order to carry out their attacks on ships or to smuggle arms and ammunition. It should be also added that small ships carrying inflammable substances, such as petroleum, gasoline, natural gas or certain chemical substances, are much more vulnerable to terrorist attacks. These vessels are smaller and slower, and approaching them is more easily achieved. Also, the cargo of these ships has more flammable and explosive qualities compared to enormous oil tankers. Therefore these ships are more readily turned into moving and mobile bombs and in this regard are very useful and attractive targets for terrorists. (Bateman, 2006, 83)

¹² It should be added that the threats caused by hiding WMDs inside shipping containers and transporting them through seas and ports is not effectively addressed and mitigated through the regulations of the code. (Jeong, 2013, 49).

(d) Another challenge is the long and complicated process to acquire the respective certificates reflected in the regulations of the ISPS Code slows down the process of ensuring ship and port facility security. This complexity increases as the security level established by the Code is enhanced. Accordingly, when the risk associated with threats against the security of ships and port facilities is higher, the process of ensuring that security in accordance with the code is achieved more slowly. (ISPS Code for ships-An Essential Quick Guide, 6)

2.6 The IMO and the ISPS Code

As far as the IMO is concerned, the following matters in relation to the ISPS Code are worthy of consideration:

(a) The IMO, in its turn, has not yet provided any specific instruction plans and procedures in the framework of the Code in order to give a proper response to possible security dangers and incidents, a matter which has caused developing countries to face problems in this regard. (Cox, 2013, 84)

(b) One challenging aspect of the ISPS Code is that the IMO is powerless in enforcing the regulations of the Code and can only have supervision over the process of implementing the regulations of the code. (Raymond, 2004, 3) This can lead to IMO not being able to force a government if it, for any reason, is unwilling or unable to implement the regulations of the Code.

3. Implementation of the ISPS Code in Malaysia

3.1. Malaysia as a Maritime Nation

Malaysia is a country located in South Eastern Asia, and it is geographically divided in two parts by the South China Sea. The western part of Malaysia is next to the Strait of Malacca, which is one of the most important shipping lanes in the world. In terms of maritime security incidents such as piracy and maritime terrorism, it is also a high-risk hotspot. As far as shipping and trade routes are concerned, Malaysia has been located in a key geographical situation in the South Eastern Asia. It is also highly dependent on the sea for its economic activities. Trade consists of a high percentage of its Gross Domestic Product (GDP) and most of that trade is carried out by sea. Malaysia is the second producer of oil and gas in South Eastern Asia (Country Analysis Brief: Malaysia, 1) and the third exporter of natural liquid gas in the world. (Top 10 Largest Exporters of Liquid Natural Gas, 8 & 9) Maritime environment provides the basis and support for its other economic activities such as port activities, maritime tourism, shipbuilding, commercial facilities, and many more. These activities provide Malaysia with income, jobs and investment opportunities and have large-scale effects on Malaysian economy. (Daniel, 2018, 1) For all these reasons, ensuring maritime security is crucial for Malaysia. It is in this direction that the Malaysian government ratified the ISPS Code in 2003, which is one year before it came into force for contracting governments of the SOLAS.

Malaysia, as a government with a great economic reliance on sea and also as a developing country, has faced ups and downs in enforcing the ISPS Code. In the following section of the paper, the process of the implementation of the Code

in Malaysia will be explained and assessed and its achievements and challenges in implementing the code are discussed.

3.2. Implementation of the ISPS Code in Malaysia

According to Malaysian law, the governmental entity generally in charge of enforcing the ISPS Code is the Malaysian Ministry of Transport (MMT). The MMT provides a standardized framework for cooperation and information transfer between designated port authorities, port officers and ship companies. The MMT, considering the circumstances, sets the appropriate security level among the security levels determined in the Code for ships flying the flag of Malaysia and also for ships approaching ports under the jurisdiction of the government of Malaysia. In addition, the MMT is also charged with issuing appropriate security guidelines and providing relative security information whenever the security level reaches the highest level, which is level three.

The MMT has, moreover, the responsibility of appointing a designated authority through governmental mechanisms so that such authority ensures the provisions of the ISPS Code related to security of port facilities and ship/port interface are implemented.

As mentioned above, the MMT is the principal authority when it comes to implementing the regulations of the ISPA Code in Malaysia, but since those regulations contain matters of security, the National Security Council (NSC), an agency under the jurisdiction of the Department of the Prime Minister, is also involved in implementing the Code.

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This is because the NSC has authority to mobilize security forces such as the Royal Malaysian Navy, Malaysian Maritime Enforcement Agencies, Royal Marine Police, and the Immigration Department, if there is a need for their involvement. Furthermore, according to the Malaysian law the NSC is responsible for determining the security level in consultation with the Malaysian Marine Department (MARDEP), which is the designated authority in implementing the Code.

The MARDEP has a variety of duties regarding the implementation of the ISPS Code, such as:

- (a) Approving port facility security assessments, and if necessary, amendments to those approved assessments.
- (b) Determining which ports and port facilities need a security officer, and
- (c) Approving port facility security plans, and if necessary, amendments to those approved plans, and testing those approved plans or their amendments. (Razali & Ghani, 2017, 2)

Ports in Malaysia are divided into Federal ports and State ports. In addition to these major ports, there are minor ports which fall under the jurisdiction of MARDEP. Federal ports, which are under the jurisdiction of the MMT, are themselves further divided into major and minor ports. Currently there are seven major federal ports in Malaysia as follows: Port Klang, Penang Port, Bintulu Port, Johor Port, Pasir Gudang Port, Pelabuhan Tanjung Pelepas, Kuantan Port, and Kemenan Port. (Razali & Dahalan, 2012, 46)

Six out of these seven ports have been privatized and are operated by port authorities – the exception being Kemenen

Port (being operated by the Federal Authority). In total, there are 78 ports and port facilities in Malaysia of which 71 ports and port facilities are subject to the implementation of the provisions of the Code¹³, and depending on the category of the port, implementation of these provisions is supervised by the MARDEP or the Ministry of Transport. (Razali & Dahalan, 2012, 46)

3.3. The Malaysian Proper Performance in Implementing the ISPS Code

Malaysia has adopted and ratified the regulations of the ISPS Code in 2003 as one of the international measures that the country has adopted to increase its maritime security. For the purpose of the implementing the regulations of the Code within the legal system of Malaysia, the Parliament of Malaysia made an amendment to its 1952 Merchant Shipping Law in 2007. This amendment, known as Act 1316, contains the regulations of the Code. In other words, the regulations of the ISPS Code were made enforceable in Malaysian domestic law by this Act.¹⁴

It must be noted that as a government that highly values its maritime security, even before the 9/11 incidents and then the need for the creation of the ISPS code and its ratification by the IMO, Malaysia already had regulations in its domestic law related to maritime security. Nevertheless,

¹³ The remaining 7 ports are not subject to Section 2.3 of Part A of the ISPS Code, because they are not providing services to ships engaged on international voyages.

¹⁴ It should be added that even prior to the creation of the ISPS Code Malaysia had enacted Act 298, adopted (as amended, first enacted in 1959). This Act specifically deals with designating protected areas and places and their security measures and its regulations could be extended to ports as well.

Malaysia adopted and implemented the Code in order to improve its maritime security.

It should be noted that in the process of ratifying the regulations of the ISPS Code in Malaysian domestic legislation, the adopted law not only includes the regulations of the Code, but it also goes beyond and adds additional clauses of its own, according to which there are further responsibilities and even penalties placed upon port authorities. This indicates that the Malaysian domestic law has extended the domain of the ISPS Code in order to strengthen its maritime security. This extension of the scope of the regulations of the Code and inclusion of extra measures in domestic law demonstrates the crucial importance the Government of Malaysia places on matters related to maritime security. (Gunasekaran, 2012, 137) For example, when compared to those of the ISPS Code, the scope of the regulations of Act 1316 has been expanded because the Act 1316 has gone beyond ship/port interface. (Gunasekaran, 2012, 174)

Furthermore, in the Act 1316, the phrase “port facilities” used in the Code has been changed to “maritime facilities”. According to Section 249a of the Act 1316, maritime facilities are:

- (a) “an area of land, water or other supporting surface used, designed, prepared, equipped or set apart for use, either in whole or in part, for the arrival, departure, movement or servicing of vessels;
- (b) a building or installation and equipment in the area associated with it or used or set apart for handling or storing goods that have been or are destined to be transported on a vessel;
- (c) Equipment and facilities used to provide services relating to marine transportation;

- (d) a fixed and floating structure, including an offshore industry structure;
- (e) an off-shore industry mobile unit”

As observed above, the scope of this definition is more extensive than port facilities. Also it is worthy of note that Malaysian domestic law is not only limited to ships and crafts and ports, as is the case under the scope of the Code, but are also extended to floating storage offloading (FSO) and to floating production storage offloading (FPSO).¹⁵ FSOs are not, literally, mobile drilling units that fall under the scope of the Code, but are floating objects. Of these two categories, eleven exist in Malaysia. (Gunasekaran, 2012, 176) It seems that because of their function, they would be desirable targets for terrorist attacks or other threats against maritime security. This is because they can be completely inflammable and explosive, attacks against them have the potential to cause extensive fatalities and injuries. Also, these attacks may have considerable economic consequences. Therefore, the government has endeavored that through its domestic law, to extend the application of the ISPS Code to the FSO and FPSO in order to protect and secure them.

Another notable feature of Act 1316, when compared to the ISPS Code, is the sanctions defined in the Act 1316. This Act, in addition to duty to report in certain circumstances to the Designated Authority, sets a number of sanctions in some cases for violating the regulations of the code in accordance to the Act as a result of failure to report, whereas no sanctions have been provided in the ISPS Code. (Gunasekaran, 2012, 177) For instance, Section 249r of the Act holds that:

¹⁵ These are stagnant ships that provide a space for oil extracted from the sea.

(1) “The company, master of a ship, Maritime Transport Security Officer or operator of a designated marine facility shall report immediately to the Designated Authority upon the occurrence of the following security incidents:

- (a) An explosion that is not the result of an accident;
- (b) A bomb threat, armed attack, hostage taking, stowaway or hijacking; or
- (c) Any breach of security.

(2) Any company, master of a ship, Maritime Transport Security Officer or operator of a designated marine facility who fails to report the security incident shall be liable for each offence to a fine not exceeding fifty thousand Ringgit or to imprisonment for a term not exceeding five years or to both”.

In any case, the Government of Malaysia has made step forward in improving its maritime security by way of Act 1316. It seems that Malaysia, through its strong performance, has to some extent managed to overcome some of the challenges facing the ISPS Code, such as the limited scope of the regulations of the Code, lack of an appropriate sanctions and the high cost of implementing the code, all of which stem from the nature of the regulations of the code. This clearly demonstrates that how effectively governments can through their domestic legislative bodies overshadow gaps in a set of international regulations. Furthermore, governments can reap the benefits of a set of international regulations by making appropriate policy, without their vital interests such as economic matters being negatively impacted.

For example, at the beginning of implementing the regulations of the code in Malaysia, there was concern that the cost of port operation would be imposed onto their users. Nevertheless, the MMT, the main policymaking body for ports in Malaysia, held that the cost of security measures not be imposed upon the users. Certainly, there are exceptions, such as when the captain of a ship, when docking at a port under Malaysian jurisdiction and subject to the regulations of the code, requests special security measures and actions to be taken beyond those the port provides, such as requesting special security guards. The cost of such services are separately received from users. Generally, however, the Government of Malaysia has never intended to impose the costs caused by the implementation of the regulations of the code to the shipping community. (Gunasekaran, 2012, 209)

It would seem this action would alleviate any concerns from the port users regarding the payment of additional costs and this in turn prevents a drop in use of Malaysian ports because of a higher cost to use them. This matter desirably influences maritime trade in Malaysia and subsequently will have a positive economic effect.

3.4. Challenges Faced by Malaysia in the Implementation of the ISPS Code

As discussed above, one of the main challenges in implementing the ISPS Code is the high cost involved to

enforce it.¹⁶ Implementing the regulations of the Code also needs an economic infrastructure and investment which especially in cases of implementation of the regulations of the Code in small ports or ports that are under the jurisdiction of developing or poor countries, as opposed to those of industrial and developed countries, are limited.

Malaysia, as a developing nation, is no exception. At the time of Malaysia adopting the Code, an overall assessment of the costs was made. The estimate for costs of implementation of the ISPS Code was 81 million RM, approximately equal to 26 million USD. Yet, Malaysia had a considerable infrastructure and stock of equipment in its ports because it had of prior regulations in place to secure the maritime security of its ports. (Gunasekaran, 2012, 207) Regardless, the cost involved at the beginning of the implementation of the regulations of the ISPS Code in Malaysia was an issue to be tackled. Accordingly, the Government of Malaysia took necessary actions to prevent imposing costs onto users of ports and in order to managed this challenge to some degree in order to maintain its ports as economically active as possible.

Another challenge Malaysia faced in implementation of the ISPS Code was the need to provide security trainings and exercises for ship and port security officers in implementing the regulations of the ISPS Code. Following the entry into force of the Code for contracting governments in 2004, progress on implementation of the regulations of the code by the shipping companies in Malaysia was slow.

¹⁶ The Organization for Economic Co-operation and Development (OECD) had estimated the initial costs of implementing the regulations of the code for global ship operators to be 1.279 billion USD for the first year, and after that 730 million USD annually (Razali & Dahalan, 2012, 44).

Alongside with the financial burden, another reason for the slow progress in the implementation of the ISPS Code in Malaysia was related to the mandates of the Code in relation to such matters as designating company security officers, ship security officers, port facility security officers, setting ship security plans, and performing security assessment, all needed planning, expertise and training which did not exist at the beginning of the adoption of the ISPS Code in Malaysia. (Razali & Dahalan, 2012, 44)

Therefore, like any other government, Malaysia needed time to gain experience in applying the mandates of the code and, as a result, to speed up and improve upon applying those mandates. Considering the current state of the implementation of the regulations of the ISPS Code in Malaysia, it may be concluded that the Government of Malaysia has appropriately handled this challenge well.

One other matter is that Section 18 of Part A of the Code details precise and strict mandates and measures regarding trainings and drills. Obviously, the knowledge and training of the personnel involved in these trainings and drills must be constantly updated and they must have an adequate level of awareness and consciousness of security matters.

As an informed person related to MARDEP states: “The manpower involved in performing trainings and drills [in Malaysia] possesses the sufficient level of awareness and consciousness of security matters only when performing trainings and drills, and at normal times the level of awareness is very low.” (Gunasekaran, 2012, 215) This is despite the fact that according to Clause 4, Section 18, Part A of the Code, the goal of performing these trainings and drills is to ensure that port security personnel are proficient and effective at all times in all aspects of the duties entrusted to them at all three security levels of the code, and

can efficiently detect any problem or incompetence related to security matters.

Thus, considering the low level of security awareness and consciousness amongst port security personnel at times other than drills, it appears that the mandates of Section 18, Part A of the Code are not adequately satisfied in Malaysia in the current state. Terrorist threats and other threats against ship and port security may occur suddenly at any time and therefore to correctly and effectively combat these threats, it is necessary to have a constant and efficient awareness and consciousness, even during ordinary circumstances.

3.5. Overall Assessment of Malaysian Practice in Implementation of the ISPS Code

Despite some shortcomings and challenges, Malaysia has acted reasonably well in implementing the regulations of the ISPS Code so that Malaysia can be introduced as a successful example of a developing country in East Asia in implementing the regulations of the ISPS Code.

In Malaysia, there is a good relationship and good communication among the MMT and the designated authority that is MARDEP with ship and port security officers. They efficiently cooperate with each other in the framework set out by the MMT in detecting and deterring threats against the security of the maritime sector in Malaysia. There has also been a good link between ports and shipping lanes in Malaysia. In addition, by holding security trainings and drills regularly, and also through endeavors being made to increase the level of awareness of security threats, the level of maritime security has been strengthened in Malaysia.

By implementing the ISPS code, security of ships and ports in Malaysia has increased and by providing a competent and effective regime regarding ship and port security, Malaysian ports have been able to have a significant participation in world trade. Malaysia has maintained an acceptable and appropriate record in implementing the regulations of the ISPS Code among developing countries. The actions taken by the Government of Malaysia, in particular in establishing and adjusting domestic law and regulations in order to cover the gaps of the ISPS Code and to support port users, makes Malaysia a leading example and role model for other Contracting Governments of the Code, especially developing countries.

4. Implementation of the ISPS Code in South Korea

4.1. Importance of Maritime Security in South Korea

South Korea, officially the Republic of Korea, is located in East Asia and consists of several islands, with approximately 2400 kilometers of shoreline. It is a country with a direct and close connection to sea. Maritime areas under the jurisdiction of South Korea is four and a half times the area of land areas under the jurisdiction of its government. They cover nearly 130 thousand square miles and generally extend to 900 miles beyond the shoreline.(Lee &Yun, 2005, 621) Furthermore, in 2018, 44 percent of the economy of South Korea was exports carried out by container ships through the seas. Therefore, it is obvious that South Korea is a country dependent on seas with many interests and concerns in maritime security. (Roehrig, 2019, 1)

For these reasons, matters such as preventing maritime terrorist attacks, reducing the country's vulnerability to damages from terrorist attacks, and also protecting important and critical infrastructure, marine borders, ports and their facilities and maritime transport and shipping, and improving and maintaining economic competitiveness, are among the strategic objectives of South Korea in maritime security. (Lee & Yun, 2005, 642)

Accordingly, South Korea adopted the regulations of the ISPS Code in its domestic legislation in 2003 and has enforced them ever since.

4.2. The Structure of South Korean National Legislation and Implementation of the ISPS Code

Domestic documents in South Korea that provide rules and laws consists of 4 types of documents: *Acts, Presidential Decrees, Ministerial Decrees, and Ministerial Orders*. Acts are laws that are passed by the National Assembly and have the highest enforcement value among all other documents. Of all these documents, it is the Act that principally comprises punishments, including fines or imprisonment, if it is not adhered to. Other documents do not usually have such potential, although they can, depending on the situation, provide some administrative measures such as fines in case of negligence on behalf of the private sector when violating their regulations. (Jeong, 2013, 15)

Before the establishment of the ISPS Code and before its adoption by South Korea, a security regime concerning maritime security had existed in South Korean legal system called the *Presidential Decree on National Security*. This decree contained articles about security of port facilities and

certain vessels. The Decree has established the National Critical Infrastructure (NCI). The NCI includes infrastructure of port facilities and certain vessels that are of vital importance strategically and economically. (Jeong, 2013, 14)

Despite this Presidential Decree, South Korea decided to ratify the ISPS Code and to reflect it in its domestic legislation. It appears that this move by South Korea was motivated by two reasons:

Firstly because the code is a set of regulations on the international level that are more comprehensive and more effective in combatting threats against maritime security.

The second and more important reason is that the security regime established in South Korean legal system before the Code, as evidenced by its name, is in the category of presidential decrees, and that means when it comes to enforcement, it is in a weaker position compared to an Act and lacks certain features of an Act, such as imposing sanctions.

It was for these reasons that the Government of South Korea ratified the regulations of the ISPS Code in 2007 through the National Assembly and in the form the *International Ship and Port Facility Security Act*. It should be noted that South Korean Government initially had, in fact, adopted a domestic ministerial order in 2003 to implement the Code, even though it was in a form a domestic document at a lower level than an Act. The reason for this was that at the time the Government did not have enough time to adopt the Code at the level of an Act. Then after, it became necessary to reflect the regulations of the

Code in the form of a higher kind of South Korean domestic legislation. Thus, in 2007, the regulations of the ISPS Code was passed as an Act by the National Assembly. This new Act reflects the regulations of the Code reasonably and includes necessary sanctions. (Jeong, 2013, 14)

As emphasized above, the Government of South Korea initially adopted the regulations of the Code in 2003 in the form of a domestic ministerial order, in order to prepare for the implementation of the Code in Korea and the Ministry of Oceans and Fisheries appointed a specialist group to precisely reflect the regulations of the Code in Korean domestic legislation. The Government also fully supported industries by using organizations to hold security drills and trainings. By 2004, the government's efforts led to the Republic of Korea having a competent security system based on the regulations of the ISPS Code which at the time covered 425 vessels flying the South Korean flag and 123 ports and port facilities used by foreign vessels, and it also enforced security mandates in conformity with the Code. (Jeong, 2013, 21)

In 2008 the Government of Korea also adopted a Presidential Decree called the *Enforcement Decree of the International Ship and Port Facility Security Act*. The objective of this presidential decree, according to its first article, was to prescribe and determine what to be mandated by the International Ship and Port Facility Security Act, and to take measures deemed necessary to enforce it.¹⁷ In a way,

¹⁷ Article 1, The South Korean Enforcement Decree of the International Ship and Port Facility Security Act (hereinafter cited as EDISPFSA)

this document is considered the executive guideline of the Act.

4.3. International Ship and Port Facility Security Act of South Korea

As mentioned above, the International Ship and Port Facility Security Act is the Korean domestic legislation for enforcing the regulations of the regulations of the code. This Act generally contains the mandates and regulations of the Code, but has differences with the Code as well. In some cases, this Act goes beyond the scope of the regulations of the code and establishes mandates that do not exist in the Code itself, such as articles that deal with such matters as the necessity of forming a Committee to implement the Code and matters related to it, and penalties established for violating the regulations of the Code. Notwithstanding, there are some challenges in enforcement of certain articles of the Act like Articles 31 and 42 of the act relating to acquisition of security facilities and equipment, manpower and personnel, and the respective costs.

One feature of the Act is the formation of the ISPS Committee which is the subject of Article 34. According to the first clause of this Article:

“In order to deliberate and decide upon important matters concerning the security of ships on international voyage and port facilities, an international ship and port facility security committee (hereinafter referred to as "security committee")

shall be established under the command of the Minister of Oceans and Fisheries”¹⁸

The Security Committee can have up to ten members, which consists of one Chairperson and two Vice Chairpersons. The Chairperson of the Security Committee is the Vice Minister of Oceans and Fisheries.¹⁹ Other members of the Committee are representatives from the Ministry of Justice, the Ministry of Health and Welfare, the Ministry of National Defense, the National Intelligence Service, the South Korea Customs Service, the South Korea Coast Guard, and the National Police Agency. (Jeong, 2013, 19)

According to the second clause of this Article, the Security Committee is to deliberate in:

1. Matters concerning the formulation of national port security plans under Article 5;
2. Matters concerning the establishment and adjustment of levels of security under Article 6;
3. Matters concerning the securing and maintenance of security of ships and port facilities;
4. Matters concerning international cooperation relating to the security of ships and port facilities;
5. Other matters concerning the security of ships and port facilities, as prescribed by Ordinance of the Ministry of Oceans and Fisheries.²⁰

As observed above, some of the important mandates of the ISPS Code, such as determining an appropriate security level is assigned to the Security Committee.

¹⁸ Article 34.1, EDISPFSA.

¹⁹ Article 34. 3 & 4, EDISPFSA.

²⁰ Article 34.2, EDISPFSA.

Article 5 of this Act is about the national port security plan. The first clause of this Article elaborates that the goal of establishing this national plan is the efficient performing of security duties of port facilities and ships on international voyages.²¹ According to this Article Act, the responsibility of establishing and applying this plan lies with the Minister of Oceans and Fisheries. This plan is prepared for durations of ten years²² and after deliberation by the Security Committee, it provides and determines:

- “1. Basic policy for the security of ports;
2. Mid- to long-term policy direction for the security of ports;
3. Roles of administrative agencies concerning the security of ports;
4. Roles of the owners of port facilities concerning the security of ports;
5. Installation of security facilities and equipment and placement of security and search manpower in ports;
6. Plans for education and training of port facility security officers;
7. Measures for preparing for and responding to security incidents;
8. International cooperation over the security of ports;
9. Other matters necessary to ensure the security of ports”.

The objective of this plan, in a way, is to strengthen and coordinate maritime security measures at the national level. (Jeong, 2013, 17)

²¹ Article 5.1, EDISPFSA.

²² It seems that the first national plan ended in 2017 and another national plan was adopted for a new 10 years duration which lasts till 2027.

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The Act, in its Articles 47 through 52, deals with establishing penalties for violating regulations of this Act, while in the code itself, no effective penalty or sanction has been set for violating or breaching the regulations of the Code. Penalties set out in these articles are various and include punishments such as imprisonment with labor for up to three years (maximum), and fines up to 30 million Wons.

These penalties are, depending on the situation, may be applicable to private owners of port facilities, their executive managers, or to ship owners participating in international voyages, in case of violation of the regulations or responsibilities set out for them by this Act.²³

Furthermore, Article 51 of this Act elaborates on the possibility of considering a joint penalty in cases of a representative of a corporation, or its agent, employee, or any other person in connection with that corporation or individual, committing a violation when conducting affairs of that corporation or individual. In these cases, joint penalties are applied to both the violator, and the corporation or individual. In cases of joint penalty, Article 51 only speaks of fines as the penalty.

Articles 5, 34, and 47 through 52 of the Act, discussed above, reflect the distinguishing features of the Act when compared to the ISPS Code itself. These articles clearly demonstrate the position and actions of the Government of South Korea regarding the regulations of the ISPS Code and their implementation.

Notwithstanding, there are certain articles in the Act that could affect the sea trade along the South Korean coast lines. Article 31 of the Act is one of them. Article 31 of the

²³ Article 50, EDISPFSA.

Act leaves the acquisition of things needed for maintaining the security of the port, such as installing necessary security equipment and facilities, security checking of ships participating in international voyages, expanding equipment and facilities and their maintenance and repair, and also recruitment of security guard and personnel and manpower, all to the owners of port facilities. These are all costly, and these costs are also left to the owners. In fact due to the national budget deficit, the Government of South Korea has decided in accordance with its domestic legislation to leave all costs of managing and operating facilities not part of the public sector to the owners of the facilities and infrastructure to establish security mandates at their own expense. (Jeong, 2013, 18) This may lead to a fall in quality of security measures for facilities whose owners are from the private sector, and it increases the risk of incidents endangering the security of those facilities.

Article 42 of the Act permits the owners and operators of ports and port facilities to receive the costs of recruiting personnel and manpower and acquiring security equipment and facilities and generally any cost imposed upon them by Article 31, from port users. This may recover the costs imposed on the owners of port facilities, but has negative impact on the desire of port users to use the South Korean ports. At least those privately owned. As a consequence, the economic interests of South Korea, as a country whose trade is largely done by ports and sea, are affected adversely. As discussed earlier the costs involved in the implementation of the Code and its economic consequences is a challenge existing on the way of implementation of the ISPS Code. The Government of South Korea should try to mitigate the effects of these costs on its sea trade by amending its own domestic legislation and providing some

financial support to the owners of port facilities to cover the costs involved.

4.4. Overall Assessment of South Korean Practice in Implementing the Regulations of the ISPS Code

Generally speaking, the implementation of the regulations of the ISPS Code in South Korea has had positive effects on the proliferation of maritime security. As a result of implementing the regulations of the ISPS Code, until 2013 international ship security certificates had been issued for approximately 1191 vessels flying the South Korean flag which fell under the scope of the regulations of the code. Also, 177 port facilities located in the territorial waters of South Korea have been identified for implementation of the regulations of the Code. (Jeong, 2013, 24) In addition, as a result of implementing security measures to vessels flying the South Korean flag, unauthorized access to these vessels was reduced and security incidents related to smuggling and stowaways in ship/port interface has significantly decreased.²⁴ (Jeong, 2013, 28)

Implementation of the ISPS Code has led to an increase in the awareness regarding maritime security matters in South Korea. The Code has somewhat made the people of South Korea to realize that terrorist groups outside South Korea could also be a threat against the maritime security of the country and the threat is not all from North Korea. Furthermore, the ISPS Code has led to government and private sector officials to establish good cooperative relations in security matters. (Jeong, 2013, 27)

²⁴ Since 2003, more than 6100 people under the SKIMFT and more than 1500 people under the SKRS have passed training courses for ship security officers. Also 1476 of personnel have passed courses updating security information under the SKRS. (Jeong, 2013, 26).

These are examples of the achievements and successes of South Korea in implementing the regulations of the code. These examples all show that implementation of the regulations of the ISPS Code, despite all the challenges on the way of its full implementation, has resulted in enhancement of maritime security in South Korea.

5. Conclusion

Considering the ever increasing role of seas in trade, transportation and access to resources, maintaining the stability and security of the seas has become a main concern of the international community. With no stable and sustainable maritime security none of the legitimate uses of the seas can fully be put into effect. This is why international regulations have been essential in strengthening such security. The adoption of the SOLAS Convention has been the first step to ensure the safety of life at sea. However, the advance of terrorist activities in the world, particularly after the incident of 11 September 2001, indicated that terrorist activities may occur anywhere at any time. As far as maritime security is concerned, the main step forward to enhance such security after the aforementioned incident has been the adoption of the ISPS Code as part of the SOLAS Convention.

Since its entry fore in 2004, the enforcement of the ISPS Code worldwide has demonstrated remarkable positive effects on maritime security. While it needs to be strengthened and supplemented by, among others, inclusion of a comprehensive monitoring system and ensuring adequate and necessary sanctions, the ISPS Code can still play a significant role in achieving reliable and sustainable

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maritime security worldwide if their regulations are fully implemented by all Contracting Governments.

While effective implantation of the ISPS Code is dependent on the actions taken by the Contracting Governments in their national jurisdiction, they are all committed to obtaining its objectives in strengthening maritime security. The practices of the Contracting Countries indicate that they are not following the same pattern in their national domain but some of them have shown a great deal of responsibility to enforce the regulations of the ISPS Code as effective as possible in the domain of their national jurisdiction. Among these are Malaysian and South Korea located in East Asia. These countries have been, to a great extent, successful in fulfilling the regulations of the ISPS and their practices can be considered as proper in line with the objectives of the ISPLS Code. While the ISPS Code can be considered as the basic standard for ensuring maritime security, it is in discretion of the Contracting Government to provide a higher standard for this purpose. Malaysia and South Korea have been acting in this direction, among others, by considering sanctions against non-observance of the regulations of the Code.

By studying the Malaysian and South Korean practices in the implementation of the ISPSC Code, it can be emphasized that all countries members to the SOLAS and consequently to the ISPS Code should do the followings to enforce the regulations of the ISPS Code more effectively in order to strengthen maritime security worldwide:

1. Inclusion of the ISPS Code in their national legislation,

2. Establishment a particular body to supervise the enforcement of the ISPS Code by all sectors concerned,
3. Providing adequate and necessary sanctions to ensure the full enforcement of the ISPS Code, including civil and criminal penalties for violators of the regulations of the Code, and
4. Enhancement of public awareness of the regulations of the ISPS and their impact on the sustainable maritime security.

As a final conclusion, it should be stated that the efforts of Contracting Governments in implementation of the regulations of the ISPS Code worldwide demonstrate the considerable level of awareness and readiness of these governments to prevent occurrence of incidents endangering the security of ports and ships under their jurisdiction. This in turn increases the overall level of security of ships and ports, and consequently contribute to the growth of maritime trade and world economy.

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