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Articles

- i. Tackling Climate Change through Promotion of Transfer of Technology to Developing Countries: The TRIPS Agreement Option
A. A. Adedeji
- ii. Rules of Engagement in Tax Audits and Investigations under the Nigerian Personal Income Tax Act of 2004
M. T. Abdulrazaq
- iii. Relevance of Plea Bargaining in the Administration of Justice System in Nigeria
Oluseyi Olayanju
- iv. Guarding the Seas against Invasive Aquatic Species: Responses of the Law of the Sea Convention
Bose Lawal
- v. Transparency and Accountability in the Supervision of the Nigerian Insurance Industry: A Review of Statutory Provisions
Yeside Abiodun Oyetayo
- vi. Lawful and Ethical Use of the Media: A Veritable Tool for Good Governance in Nigeria
Maurice O. Izunwa
- vii. Introducing the Tort of Wrongful Birth/Life into Nigerian Law: Impact of Section 17(1) of Child Rights Act 2003 on Reproductive Technology
F. A. R. Adeleke
- viii. Remand Proceedings and the Right to Personal Liberty in Nigeria: Revisiting Supreme Court Decision in Lufadeju's Case
A. O. Yekini
- ix. The Law for the Establishment of the Committee for Blood Transfusion and Other Incidental Matters in Lagos State: A Critique
Lateef Ogboye
- x. Intestate Succession under Customary Law in Nigeria: Whither Women Empowerment?
Adetokunbo Animasaun
- xi. An appraisal of the 2008 Ogun State High Court (Civil Procedure) Rules
Olusesan Oliyide & Taiwo Odumosu
- xii. Are Shareholders' Claims Always Subordinated in Corporate Insolvency?
H. Y. Bhadmus
- xiii. An Overview of the Practice of Sharia and its Procedure in Nigeria Courts
Iyisa Ade Bello & Lateef Kelani
- xiv. The Right to Health in Nigeria: Turning Policy to Reality
Omowamiwa Kolawole
- xv. Carnal Knowledge in Sexual Offenses: The Criminal Liability of a Female Procurer
Okey Onunkwo & Ikenga Oraegbunam
- xvi. Forced Incarceration of Children with Convicted Mothers: Africa in Focus
Gbadebo Olagunju & Kevin Mandopi
- xvii. Reading Culture of Nigerian Law School Students: A Model for University Students
Harriet 'Seun Dapo-Asaju
- xviii. Legal Application of *Musharakah* Mode of Finance in Islamic Banking
Olatoye Kareem Adebayo

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Contents

i.	Tackling the Challenges of Climate Change through Promotion of Transfer of Technology to Developing Countries: The TRIPS Agreement Option—A. A. Adedeji.....	5
ii.	Rules of Engagement in Tax Audits and Investigations under the Nigerian Personal Income Tax Act of 2004—M. T. Abdulrazaq.....	18
iii.	The Relevance of Plea Bargaining in the Administration of Justice System in Nigeria—Oluseyi Olayanju.....	35
iv.	Guarding the Seas against Invasive Aquatic Species: Responses of the Law of the Sea Convention—Bose Lawal	46
v.	Transparency and Accountability in the Supervision of the Nigerian Insurance Industry: A Review of Statutory Provisions—Yeside Abiodun Oyetayo	57
vi.	Lawful and Ethical Use of the Media: A Veritable Tool for Good Governance in Nigeria—Maurice O. Izunwa	67
vii.	Introducing the Tort of Wrongful Birth and Wrongful Life into Nigerian Law: The Impact of Section 17(1) of Child Rights Act 2003 on Reproductive Technology—F. A. R. Adeleke	85
viii.	Remand Proceedings and the Right to Personal Liberty in Nigeria: Revisiting Supreme Court Decision in Lufadeju's Case—A. O. Yekini.....	99
ix.	The Law for the Establishment of the Committee for Blood Transfusion and Other Incidental Matters in Lagos State: A Critique—Lateef Ogboye	111
x.	Intestate Succession under Customary Law in Nigeria: Whither Women Empowerment?—Adetokunbo Animasaun.....	122
xi.	An appraisal of the 2008 Ogun State High Court (Civil Procedure) Rules —Olusesan Oliyide & Taiwo Odumosu	135
xii.	Are Shareholders' Claims Always Subordinated in Corporate Insolvency?—H. Y. Bhadmus	146
xiii.	An Overview of the Practice of Sharia and its Procedure in Nigeria Courts —Iysa Ade Bello & Lateef Kelani.....	155
xiv.	The Right to Health in Nigeria: Turning Policy to Reality—Omowamiwa Kolawole ...	170
xv.	Carnal Knowledge in Sexual Offenses: Contentious Issues on the Criminal Liability of a Female Procurer—Okey Onunkwo & Ikenga Oraegbunam.....	184
xvi.	Forced Incarceration of Children with Convicted Mothers: Time for a Review of the Practice in International Law: Africa in Focus —Gbadebo Olagunju & Kevin Mandopi	196
xvii.	Reading Culture of Nigerian Law School Students: A Model for University Students—Harriet 'Seun Dapo-Asaju	210
xviii.	Legal Application of Musharakah Mode of Finance in Islamic Banking —Olatoye Kareem Adebayo	218



IV.

Guarding the Seas against Invasive Aquatic Species: Responses of the Law of the Sea Convention

*Bose Lawal*¹

Introduction

DUE TO THE NEGATIVE EFFECTS THAT INVASIVE AQUATIC species have on the sea, biodiversity, and the general marine environment, there was the need to adopt international conventions for the purpose of guarding the sea against the threat posed by the species. One of these conventions is the UN Convention on the Law of the Sea, 1982 (LOSC).² This paper examines the laws guarding the seas against invasive aquatic species (IAS), in accordance with the provisions under the LOSC. This article discusses the nature of IAS, the provisions of the LOSC at safeguarding the seas, the jurisdictional limits, and the enforcement of obligations under the LOSC to safeguard the seas against IAS. The article concludes that if State parties to the convention could conscientiously enforce the LOSC provisions accordingly, the threat to the seas via IAS will be minimal, if not diminished.

The Nature of Invasive Aquatic Species

Various organisms of different species and pathogens exist in nearly all aquatic systems, both coastal and the high seas. There are numerous media through which these organisms may be introduced into the marine environment. These media include: hull fouling, ballast water, cargo, sewage and aquaculture escapes.³ When aquatic organ-

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2 UN Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 3, otherwise known as the Law of the Sea Convention (LOSC).

3 See U.S. Environmental Protection Agency, "Pathways for Invasive Species Introduction," <http://water.epa.gov>

isms are transported to another region, they are given different terminologies by various authors, IMO instruments, and in national policies. They are described as alien, foreign, new, non-indigenous, exotic, as well as established species. These descriptions are used interchangeably.⁴ The LOSC, in its Article 196 (1), describes AIS as “alien or new species,”⁵ but does not define these terms. Rather, it describes the consequence of introducing such species by obligating States to “take all measures necessary to prevent, reduce and control . . . the introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto.”⁶

That these species “may cause significant and harmful changes” means that the LOSC envisaged that not all exotic, alien, foreign, non-indigenous, or non-native organisms are harmful in nature to their host ecosystems, but that some are even beneficial to the host country.⁷ Thus, what the States are required to guard against are harmful aquatic species. Interpreting the intention of the LOSC with regard to the inclusion of the word “new” species, Moira L. McConnell,⁸ holds the view that the term suggests that the obligations of the States is not limited to pests and harmful organisms already identified, but includes the “broader issue of the introduction of nonindigenous or alien species that may cause significant changes in marine ecosystems.”⁹ So, the LOSC conception of alien species suggests that a species may be non-indigenous without being harmful. This situation may occur when such species pose no harm to the new locality it finds itself in, either as a result of its incapability to compete with native species or that it lacks ability to reproduce. According to Ruiz and Reid, some non-indigenous species exist but fail to establish self-sustaining populations in their new environments. They cite the example of the European flounder, which is non-indigenous to the North American Great Lakes but which has not established itself because “it cannot reproduce in a freshwater system such as the Great Lakes.”¹⁰

Identifying the importance of non-indigenous, foreign, exotic, non-native species, Rolim writes:

Some of the non-native species are extremely beneficial. Several aquatic non-indigenous species have significantly improved fishery harvest of wild catches or aquaculture (total yield, extension of fishing season, better quality and eco-

type/oceb/habitat/pathways.cfm.

4 UN Environment Program (UNEP), Subsidiary Body on Scientific, Technical and Technological Advice, *Invasive Alien Species: Status, Impacts and Trends of Alien Species that threaten Ecosystems, Habitats and Species*, <http://www.cbd.int/doc/meetings/sbstta/sbstta-06/information/sbstta-06-inf-11-en.pdf>.

5 Article 196(1) of the LOSC.

6 *Ibid.*

7 Some alien species are useful for aquaculture.

8 Professor of law, Schulich School of Law, Dalhousie University, Halifax, Nova Scotia, Canada.

9 Moira L. McConnell, *GloBallast Legislative Review—Final Report Globallast Monograph Series 1*, (London: IMO, 2002), 20. McConnell referencing M. Nordquist (ed. in chief), *UN Convention on the Law of the Sea 1982. A Commentary*, Vol. IV (Dordrecht: Martinus Nijhoff, 1991) notes at n. 49 that: “one of the difficulties that has arisen in connection with Article 196 relates to the distinction seemingly drawn in subsection 2 between this obligation and marine pollution. The negotiating history of Article 196 indicates that in the course of developing [the LOSC text], there were two distinct duties in mind, that of preventing pollution and the other (closer to the more recent biodiversity concept), maintaining the natural state of the marine environment.”

10 Gregory M. Ruiz & David F. Reid, “Current State of Understanding About the Effectiveness of Ballast Water Exchange (BWE) in Reducing Aquatic Nonindigenous Species (ANS) Introduction to the Great Lake Basin and Chesapeake Bay, USA: Synthesis and Analysis of Existing Information,” in Emily G. O’Sullivan, (ed.), *Ballast Water Management: Combating Aquatic Invaders* (New York: Nova Science Publishers Inc., 2010), 29.

conomic value of harvest). In addition, and perhaps more importantly, many non-indigenous species and their larvae play an important role in coastal food webs, serving as food source for native species.¹¹

On the other hand, where these organisms pose a threat to new ecosystem, they are referred to as stowaways, hitchhikers, noxious, aggressive, invasive, pests, nuisance, and harmful organisms or species.¹² The term “invasive” is commonly used; however, the term is capable of different meanings. Biologically, it means the ability of species to establish in a new area. According to MacDougall et al., species are “invasive” when they establish themselves and, subsequently, have negative or positive impact once established. Species are said to have established themselves when the species occur outside their normal range, having positive or negative impact on the ecosystems of their new range.¹³ This, in essence, means that all species that are outside their local range and are established are biologically referred to as invasive species, notwithstanding the impact they have in their host marine environment, whether beneficial or harmful. This view is different from the legal perspective of what invasive species are.

Legally, invasive in relation to species means species that are capable of endangering environmental and ecological aspects of marine ecosystems.¹⁴ A U.S. Executive Order defines an alien invasive species as “an alien species whose introduction does or is likely to cause economic or environmental harm or harm to human health.”¹⁵ It must be noted that the fact that a species is harmful in a host country where it was transported does not mean it has been harmful in its native ecosystem. In Japan, the Northern Pacific kelp (*Undaria pinnatifida*) which was introduced to Tasmania and Port Philip Bay in Australia is extensively cultivated as food plant and utilized either in fresh or dried form. However, in Australia where it was introduced, it competes with native seaweeds, thus becoming harmful to its host marine environment.¹⁶

The introduction of IAS into the sea could be regarded as pollution of the sea, a phenomenon the LOSC defines as:

... the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other le-

11 Maria Helen Fonseca de Souza Rolim, *The International Law on Ballast Water: Preventing Biopollution* (Leiden, Boston: Martinus Nijhoff Publishers, 2008), 16.

12 UNEP, supra note 4 at 6. Among the IAS are: alewife, rainbow smelt, round gobies (*Neogobius melanostomus*), Eurasian ruffe (*Gymnocephalus cernuus*), Eurasian water milfoil, sea lamprey, comb jelly, and zebra mussel. The most popular of them is the zebra mussel (*Dreissena polymorpha*). See National Research Council of the National Academies Great Lakes Shipping, Trade, and Aquatic Invasive Species (Washington, D.C.: Transportation Research Board, 2008), 1 and 48.

13 Lesley A. MacDougall et al., “Marine Invasive Species in North America: Impacts, Pathways and Management” (2006) 20, *Ocean Yearbook*, 435 at 437.

14 See Ruiz & Reid, 148.

15 Briony MacPhee, quoting Executive Order No. 13,112, 64 Fed. Reg. 6183 (Feb. 8, 1999), in Briony MacPhee, “Hitchhikers’ Guide to the Ballast Water Management Convention: An Analysis of Legal Mechanisms to Address the Issue of Alien Invasive Species” (2007), 10 *Journal of International Wildlife Law & Policy*, 29 at 30–31.

16 IMO, “Alien Invaders—Putting a Stop to the Ballast Water hitch-hikers,” <http://www.imo.org/OurWork/Environment/BallastWaterManagement/Documents/LINK%2014.pdf>.

gitimate uses of the seas, impairment of quality for use of sea water and reduction of amenities.¹⁷

According to Rolim, the introduction of IAS into the sea is regarded as “biological pollution” or “biopollution.” Adopting the definition under the LOSC for the purpose of defining IAS or “biopollution,” Rolim substitutes the word “substances” in the definition for “organisms” and “pathogens.” According to her:

a first approach to biopollution of the marine environment could be—the introduction by man, directly or indirectly, of organisms and pathogens or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the seas, impairment of quality for use of sea water and reduction of amenities.¹⁸

Erik Jaap Molenaar also thinks that

under the definition provided by the LOSC, only “substances or energy” can lead to pollution of the marine environment. . . . The expression “substance” would also comprise the introduction of alien organisms into the marine environment caused by ships. . . .¹⁹

With the knowledge that IAS or biopollution threatens marine ecosystems and environments, and bearing in mind that anything that desecrates or causes harm to marine life and human beings and living resources constitutes pollution,²⁰ there have been numerous conventions which impose obligations on States to protect their marine environments and biodiversity against threats. These instruments include the UN Convention on the Law of the Sea 1982,²¹ the Convention on Biological Diversity, 1992 (CBD),²² and the International Convention for the Control and Management of Ships’ Ballast Water and Sediments, 2004 (BWMC).²³ The LOSC provisions in relation to the obligations they impose on States to guard the sea against IAS are herein discussed.

Guarding against Invasive Aquatic Species under the Law of the Sea Convention

The LOSC resulted from the 3rd UN Conference on the Law of the Sea.²⁴ It was con-

¹⁷ Article 1(1)(4) of the LOSC.

¹⁸ Rolim, 15.

¹⁹ Erik Jaap Molenaar, *Coastal State Jurisdiction Over Vessel-Source Pollution* (The Hague, Boston, London: Kluwer Law International, 1998), 17.

²⁰ See note 17 above for the definition of “pollution” as contained under article 1(1)(4) of the LOSC.

²¹ LOSC, 2.

²² Convention on Biological Diversity of the United Nations Conference on the Environment and Development, June 5, 1992, 31 I.L.M. 818 [hereinafter, CBD].

²³ International Convention for the Control and Management of Ship’s Ballast Water and Sediments, IMO Doc. BWMC/CONF/36, February 16, 2004 [hereinafter BWMC]. This convention has not come into force, as the required number of parties to put it into force has not been realized.

²⁴ It is commonly called “UNCLOS III.”

cluded in 1982 and came into force November 1994. The State parties to LOSC, as of August 2012, are 162 countries and the European Community.²⁵ The convention is “the key source of State responsibility for protection of the marine environment,”²⁶ and it “introduced a holistic framework for addressing environmental rights and responsibilities.”²⁷ Part XII of the Convention deals with the protection and preservation of the marine environment. In particular, it imposes on States the general obligation “to protect and preserve the marine environment.”²⁸ According to Rothwell and Stephens, “one of the signal achievements of UNCLOS III was a development of a global legal achievement for the protection and preservation of the marine environment.”²⁹ In the enforcement of this general obligation, both flag and coastal States are required to adopt all necessary measures which are not inconsistent with the Convention to prevent, reduce and control pollution of the marine environment from any source.³⁰

In addition, Article 196 specifically requires States to “take all measures necessary to prevent, reduce and control pollution . . . or accidental introduction of species, alien or new, to a particular part of the marine environment which may cause significant and harmful changes thereto.”³¹ The measures must, among other things, protect and preserve “rare or fragile ecosystems, habitat of depleted, threatened or endangered species and other forms of marine life.”³² Taking cognizance of the fact that IAS may be introduced into the seas through shipping activities, Article 211(2) directs flag States to “adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels.”³³ In addition, there is an obligation on States to ensure that pollution caused by activities under their jurisdiction or control does not spread to other States.³⁴

As noted above, shipping activities and operations is one of the several ways through which IAS are introduced into the marine environments. This makes shipping activities to be covered by this section.³⁵ Thus, it is the duty of the flag States to make sure that ships flying their flags do not transport invasive species from one place to another.

The measures envisaged under Article 196, to be taken by States, must deal with all sources of pollution of the marine environment³⁶ and must include, *inter alia*, those

25 UN Treaty Collection (UNTC), “Status As At 08-08-2012 07:02:22 EDT,” http://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=X.

26 Moira L. McConnell, 29.

27 J. Charney, “The Marine Environment and the 1982 Law of the Sea Convention” (1994) 28, International Law 879, referenced in Moira L. McConnell, “Ballast and Biosecurity: The Legal, Economic and Safety Implications of the Developing International Regime to Prevent the Spread of Harmful Aquatic Organisms and Pathogens in Ships’ Ballast Water” (2003) 17, *Ocean Yearbook*, 213, 236.

28 Article 192 of the LOSC.

29 Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford and Portland, Oregon: Hart Publishing 2010), 338.

30 Article 194(1) of the LOSC.

31 *Ibid.*, article 196.

32 *Ibid.*, article 194(5).

33 *Ibid.*, article 211(2).

34 *Ibid.*, article 194(2).

35 See Michael Tsimplis, “Alien Species Stay Home: The International Convention for the Control and Management of Ships’ Ballast Water and Sediments 2004” (2005) 19:4, *International Journal of Maritime & Coastal Law*, 413.

36 This includes pollution of the sea through the introduction of IAS.

that are designed to minimize to the fullest possible extent “the release of toxic, harmful or noxious substances, especially those that are persistent, from land-based sources, from or through the atmosphere or by “dumping,”³⁷ “pollution from vessels, in particular measures for . . . preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels.”³⁸ These measures may be adopted jointly or individually as appropriate.³⁹ Thus, there is an obligation to prevent marine pollution and for States to take measures to address land-based and ship-source marine pollution.

To aid the protection of the marine environment, regionally and globally, States are also obliged to cooperate on a global basis, as well as on a regional basis, either directly or through competent international organizations, to formulate an elaborate “international rules, standards and recommended practices and procedures”⁴⁰ for the purpose of protecting and preserving the marine environment, taking into consideration differences in regional features.⁴¹ Furthermore, when a State is aware that the marine environment is in danger of being damaged, or has been damaged by pollution, such a State is obliged to notify the competent international organizations and other States that are likely to be affected by such damage. The latter shall jointly develop contingency plans for responding to pollution incidents in their marine environment.⁴² All the obligations regarding global and regional participation, as well as notification imposed on State parties of LOSC, reflect their obligations for the specific purpose of combating IAS, amongst others.

Generally speaking, States have jurisdictional right and obligation to protect the marine environment. Under the LOSC, coastal States have an obligation and jurisdiction to protect the waters under their jurisdiction, against IAS, in accordance with the provisions of the LOSC. But a fundamental question relates to the scope of the exercise of the authority this confers with regard to specific jurisdictional waters. This issue is the limit to which a coastal or port State can limit the entrance of ships into its coastal waters, or how it could regulate the discharge of substances containing IAS in order to protect its marine environment from invasion. This is considered next.

Jurisdictional Limits and the Enforcement of Obligations

The coastal State’s jurisdictional right relative to foreign ships in its waters, in order to avoid the introduction of IAS into its marine environment, depends on the location of the ship. For the purpose of this paper, the power of the coastal State shall be discussed in relation to internal waters, territorial sea, exclusive economic zones, and the contiguous zones. This is because States’ jurisdictions in these areas are not the same.

³⁷ Article 194(3)(a) of the LOSC. Sewages and other land-based sources which may eventually find their ways into the seas, thus constituting a source of marine pollution.

³⁸ *Ibid.*, article 194(3)(b).

³⁹ *Ibid.*, article 194(1).

⁴⁰ *Ibid.*, article 197.

⁴¹ *Ibid.*

⁴² *Ibid.* See generally, articles 198 and 199.

Internal waters

Except for archipelagic States, the internal waters of a State are “waters on the landward side of the baseline of the territorial sea.”⁴³ Within these areas, the coastal State has full sovereign authority to enact laws, regulate the use of the areas, and use any resources found there. There is no right of innocent passage of ships within internal waters except “where the establishment of a straight baseline has the effect of enclosing as internal waters areas which had not previously been considered as such.”⁴⁴ In addition, a State has powers to determine which of their ports shall be opened to international shipping, in order to avoid the introduction of IAS into its sea. A State may decide to close all its ports to international shipping when an epidemic disease occurs, probably as a result of the invasion of IAS or any other carriers. Confirming the rights of port States to deny access to international shipping, Churchill and Lowe opine:

The practice of denying the right of entry, grounded in the concept of sovereignty, dates back many centuries. In early English practice, the king often regulated trade by limiting or denying access to English ports. For example, on March 12, 1236, Henry III promulgated the order “Let no foreigner from greater France, or other power, go to England without license from the king. . . .” The same principle is prevalent in modern practice. For example, a Bulgarian Decree of October 10, 1951; and in China no foreign ship is allowed to enter or leave a port or harbor on a boundary river except . . . with the approval of the Chinese government.⁴⁵

Where certain requirements are imposed for purposes of entering into the ports or internal waters of a State, it is mandatory for that State to publicize the conditions and to communicate them to competent international organization, in most cases, the International Maritime Organization (IMO). This is required under the LOSC, which stipulates thus:

States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals, shall give due publicity to such requirements and shall communicate them to the competent international organization.⁴⁶

Thus, a port State has the power within its internal waters to restrict, for instance, the discharge of ballast water in any of its ports or determine by way of national laws the conditions under which such water can be discharged. This in essence it does for the purpose of protecting its water against any form of threat of IAS and to discharge its obligations of protecting its marine environment in accordance with the LOSC.

⁴³ *Ibid.*, article 8(1). See also part IV of the LOSC.

⁴⁴ *Ibid.*, article 8(2).

⁴⁵ RR. Churchill and A. Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Juris Publishing, 1999), 610–622.

⁴⁶ Article 211(3) of the LOSC.

Territorial sea

The territorial sea of a State is limited to 12 nautical miles from the baselines.⁴⁷ Within this area of sea, and subject to the right of innocent passage, the coastal State has power to make laws to regulate the use of the area and of any resources there. Thus, the coastal State is entitled to control foreign ships passing through or coming within its territorial water, with the aim to avoid the introduction of IAS through the ship's operations; for instance, the discharge of ballast water, within the area not designated for de-ballasting, subject to a right of innocent passage.

Article 211 of LOSC provides that—

Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. . . .⁴⁸

The essence of this provision, aside from generally requiring regulation of activities to prevent marine pollution in the territorial sea of a coastal State, is that foreign ships have the right of innocent passage⁴⁹ within this area⁵⁰ (unlike in the internal waters of coastal State where no such right exists).

In accordance with Article 19(1) of the LOSC, passage is considered innocent when it is not “prejudicial to the peace, good order or the security of the coastal State.”⁵¹ When a foreign ship within the territorial sea of a coastal State engages, amongst others, in any act of willful and serious pollution contrary to Chapter XII of LOSC or any other activity having no bearing on passage, then the ship's passage will not be considered as innocent.⁵² In this instance, the coastal State may adopt necessary steps to prevent the passage of such a ship.⁵³

Coastal States may also adopt laws for the preservation of its environment and the prevention, reduction and control of pollution⁵⁴ and in respect of conservation of living resources of the sea.⁵⁵ This obligation is connected with Article 192, 194 and 196 of the LOSC, as discussed above. This means that a coastal State could in principle adopt laws to regulate the ship operations, in order to prevent the discharge of harmful substances, including IAS into its marine environment and biodiversity. The law so adopted must be

⁴⁷ *Ibid.*, article 3.

⁴⁸ *Ibid.*, article 211(4).

⁴⁹ Generally speaking, passage means: navigation through the territorial sea for the purpose of traversing the territorial sea, “without entering internal waters; or calling at a roadstead or port facility outside internal waters or proceeding to or from internal waters or a call at the roadstead or port facility.” See article 18(1) of the LOSC. The passage through the territorial water must be in an expeditious and continuous manner, although passage also includes stopping and anchoring insofar as the stopping and anchoring “are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger of distress.” See article 18(2) of the LOSC.

⁵⁰ *Ibid.*, article 17.

⁵¹ *Ibid.*, article 19(1).

⁵² See generally, article 19(2).

⁵³ *Ibid.*, article 25(1).

⁵⁴ *Ibid.*, article 21(1)(f).

⁵⁵ *Ibid.*, article 21(1)(d). This obligation is necessary to this discourse because IAS introduced into a host ecosystem may adversely affect the marine living resources of the host ecosystem. Also, see article 21(1) for other instances where coastal states have jurisdiction to regulate.

adhered to by foreign ships passing through the territorial waters even when such laws are stricter than relevant provisions of the LOSC or other international conventions. However, the laws adopted must not be in relation "to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards."⁵⁶

Where any law or regulation relating to the innocent passage of ships within the coastal State's territorial water is adopted, due publicity must be given to the ships by such coastal State.⁵⁷ The LOSC further makes provision regarding the enforcement of these laws and regulations. According to article 220 (2) of the LOSC,

Where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of that State adopted . . . for the prevention, reduction and control of pollution from vessels, that State . . . may undertake physical inspection of the vessel relating to the violation and may, where the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws. . . .⁵⁸

In the context of regulation directed to preventing the potential introduction of IAS through ships, the LOSC provision means that, where a foreign ship is within the territorial sea of a State, it must abide by all laws adopted for the control and prevention of marine environment. The main constraint under the LOSC is that the laws and regulations must not affect manning, ship design, etc., unless giving effects to international standards. In the situation of a violation, the coastal or port State can exercise its enforcement powers under the LOSC to institute proceedings against the erring ship. The coastal State can as well regulate its own flag ships to its national standards.

Contiguous zone

The contiguous zone is a limit of 24 nautical miles from the baselines from which the breadth of territorial sea is measured,⁵⁹ or 12 nautical miles beyond the territorial sea of a coastal State. Not all States declare a contiguous zone. However, if a State declares a contiguous zone, then, within this area, it may exercise the control necessary to prevent, *inter alia*, infringement of its sanitary laws within its delineated territorial sea.⁶⁰ Where there is an infringement of the laws and regulations within its territory or territorial sea, the coastal State may also take action in the contiguous zone to punish for the infringement.⁶¹ Thus, if the regulation of ships to prevent the introduction of IAS is regarded as sanitary or quarantine matter, then arguably, action could be taken within the contiguous zone by States.

⁵⁶ *Ibid.*, article 21(2).

⁵⁷ *Ibid.*, article 21(3).

⁵⁸ *Ibid.*, article 220(2).

⁵⁹ *Ibid.*, article 33(2).

⁶⁰ *Ibid.*, article 33(1)(a). For example, Australia deals with this issue under a quarantine law. See Australian Quarantine Act 1908, No. 3, s.4(1)(b), <http://www.comlaw.gov.au/Details/C2011C00361>. See Australian Quarantine Amendment Regulations July 1, 2001, 1/154, <http://www.comlaw.gov.au/Details/F2001B00239>. See also, International Health Regulations, 1969, as amended by International Health Amendment Regulations, 2005.

⁶¹ Article 33(1)(b) of the LOSC.

Exclusive economic zone

The exclusive economic zone (EEZ) is “an area beyond and adjacent to the territorial sea”⁶² that does not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.⁶³ Within the EEZ, the coastal State has jurisdiction, among others, for the protection and preservation of the marine environment.⁶⁴

Although under Article 58, all States enjoy freedom of the high seas within the EEZ, such as those freedoms associated with the operation of ships, but in the exercise of the freedom, States must have due regard to the rights of the coastal State and must comply with laws and regulations adopted by the coastal State in accordance with the LOSC and other rules of international law.⁶⁵ Nevertheless, coastal States may adopt laws and regulations in respect of their EEZ for the purpose of preventing, reducing and controlling, inter alia, IAS emanating from the operations of vessels. The adopted laws and regulations must conform, however, with generally accepted international rules and standards.⁶⁶

In the event that the international rules and standards are inadequate to meet special circumstances as required by coastal State and it has reasonable grounds for believing that special mandatory or additional measures are necessary within its EEZ to prevent such pollution from vessels, it shall communicate this matter to the IMO and any other States concerned. Where the IMO determines that the conditions in the area warrant the required measures by the coastal State, then, coastal State will have the right to adopt additional laws and regulations regarding its EEZ to prevent, reduce and control invasion of its marine environments by IAS transported through vessels. But, as in the territorial sea, the law so adopted by a coastal State must not be in relation to the design, construction, manning or equipment of foreign ships, other than generally international rules and standards. It may however, relate, to discharge or navigational practices.⁶⁷

Under Article 73(1), a coastal State, in the exercise of its sovereign rights within the EEZ, has right to take measures, including boarding, inspection, arrest and judicial proceedings of any ship to ensure compliance with its laws and regulations, adopted in accordance with the LOSC.⁶⁸ Where a coastal State exercises its right of arrest or detention over a foreign ship, it must promptly notify the flag State of the ship of any action taken.⁶⁹ Consequently, a coastal State may adopt additional laws to regulate, for instance, the discharge of ballast water within its EEZ, in order to avoid the discharge of IAS alongside the ballast water, and any violation of this regulation by any foreign vessel may be sanctioned accordingly.

⁶² *Ibid.*, article 55.

⁶³ *Ibid.*, article 57.

⁶⁴ *Ibid.*, article 56(1)(b)(iii).

⁶⁵ *Ibid.*, article 58.

⁶⁶ *Ibid.*, article 211(5).

⁶⁷ *Ibid.*, see generally, Article 211(6).


⁶⁸ *Ibid.*, article 73(1).

⁶⁹ *Ibid.*, article 73(4).

Conclusion

The LOSC establishes an obligation on a State to adopt all necessary measures to protect and preserve the marine environment.⁷⁰ This obligation includes protecting the ecosystem,⁷¹ and prevention of the introduction of IAS into any part of the marine environment.⁷² The flag State is also obliged to regulate ships under its flag.⁷³ In addition, the LOSC provides general obligations on all ratifying States to take action as flag and coastal States to address activities that may cause adverse impact on the marine environment within their States or elsewhere.

As noted earlier, the problem regarding the introduction of IAS into the seas could be regarded as pollution, and it attracts the general provisions relating to pollution of the marine environment as defined by LOSC.⁷⁴ Some writers argue, however, that despite the various provisions of the LOSC obliging States to protect their marine environment, the convention is limited in its scope and application,⁷⁵ as it contains only one specific provision on IAS,⁷⁶ and the actions to be taken or guidelines to be enforced by States to prevent the transfer of IAS are also not stipulated. Not overruling this fact, it needs be noted that, as with other ship sources of marine pollution, the specific of the operational regulation to implement the obligations under the LOSC are left to be developed by the States, IMO and other international organizations.

It is therefore the duties of the contracting States to implement the various provisions of the LOSC as they relate to the protection of the marine environment against IAS, amongst other pollutions. Nevertheless, although many of the contracting parties have for long domesticated the provisions of the LOSC regarding the protection of the marine environment, the enforcement of these provisions is the major problem besetting the guarding of the seas against IAS. If all parties to the LOSC domesticate, implement and enforce the provisions of the convention accordingly, the invasion of the world's seas by IAS will be minimized, if not totally avoided and eradicated. 

⁷⁰ *Ibid.*, article 192.

⁷¹ *Ibid.*, article 194(5).

⁷² *Ibid.*, article 196(1).

⁷³ *Ibid.*, article 211(2).

⁷⁴ *Ibid.*, article 196(1) and 1(1)(4) read together.

⁷⁵ MacPhee, 40.

⁷⁶ See article 196(1).