

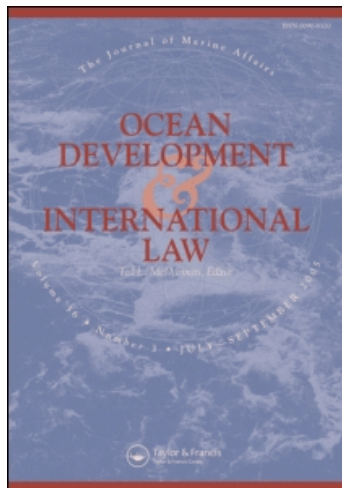
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Semi-enclosed Troubled Waters: A New Thinking on the Application of the 1982 UNCLOS Article 123 to the South China Sea

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Semi-enclosed Troubled Waters: A New Thinking on the Application of the 1982 UNCLOS Article 123 to the South China Sea

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Part IX of the 1982 United Nations Convention on the Law of the Sea deals with one particular kind of “special maritime situations and features”—“enclosed or semi-enclosed seas.” There are only two articles within Part IX. Article 122 provides a descriptive definition of these maritime features. Article 123 stipulates cooperation among States bordering an enclosed or semi-enclosed sea as a treaty obligation while putting forward three substantive “spheres” in which bordering States can coordinate among themselves to perform such a treaty obligation. The South China Sea fits this wording and is in need of a cooperative mechanism in order to reduce the potential tension and conflicts in the region. By examining the practices of cooperation among bordering States in two other semi-enclosed seas, the Mediterranean Sea and the Caribbean Sea respectively, this article draws certain lessons for the bordering States of the South China Sea to consider for their potential application of Article 123.

Keywords Caribbean Sea, Mediterranean Sea, regional cooperation, semi-enclosed seas, South China Sea

Introduction

Part IX of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)¹ deals with a particular kind of “special maritime situations and features”—the “enclosed or semi-enclosed seas”—with two articles, Article 122, Definition, and Article 123, Co-operation of States Bordering Enclosed or Semi-enclosed Seas.² The inclusion in the UNCLOS of this Part reflects the recognition of the drafters and negotiators of the special geographical

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situation of such seas as well as the relationship that can be envisaged between or among bordering States in managing activities and quality of the environment in such seas.³

The geographical reality of the South China Sea, the long-standing tension among the bordering States of the South China Sea, and the continual seeking of regional cooperation in the South China Sea all accentuate the importance of the provisions of this Part. The question of how to approach the issues of South China Sea, especially the issues of peace and development, deserves examination with a new view not simply from within the region or based on *realpolitik*, but from the lessons learned from other similar regions.

This article will first briefly present the provisions of Part IX, followed by a detailed examination on the practice of States pursuant to this Part, especially Article 123 as it is the substantive and operative provision, in two similar semi-enclosed sea regions, the Mediterranean Sea and the Caribbean Sea. The purpose is to extract lessons from these two semi-enclosed sea regions that may have application in the South China Sea. The article then turns to the current practice of Article 123 in the South China Sea and concludes by providing some new thinking on future cooperation in the South China Sea.

The Definition and Requirements of the UNCLOS With Respect to Enclosed or Semi-enclosed Seas

Article 122 of the UNCLOS defines a “enclosed or semi-enclosed sea” as follows:

For the purposes of this Convention, “enclosed or semi-enclosed sea” means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

Without doubt, the South China Sea (traditionally referred to in Chinese and by Chinese as the South Sea) geographically fits this definition and is a semi-enclosed sea.⁴ Similarly, the Mediterranean Sea and the Caribbean Sea fall into this definition.

An enclosed or semi-enclosed sea inevitably entails a situation in which the bordering States are competing for marine space and resources. From a marine space perspective, the bordering States may encounter difficulty of claiming a full 200-nautical-mile exclusive economic zone (EEZ) and continental shelf, or even a full 12-nautical-mile territorial sea, without the occurrence of overlapping claims with neighboring opposite or adjacent States. From a resources perspective, the bordering States share the same water body for land-based effluent discharge and the same marine resource base, both living and nonliving, for their livelihood and economic development. Thus, States bordering enclosed or semi-enclosed seas can be said to be “geographically disadvantaged States.”⁵

The geographical reality or limitation of enclosed or semi-enclosed seas requires the bordering States to develop “intraregional” mechanisms to reduce, mitigate, or eliminate competition and conflicts. The mechanism envisaged by the UNCLOS is described in Article 123.

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavor, directly or through an appropriate regional organization:

- (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;

- (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
- (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

The prescription of Article 123, with its wording “should cooperate with each other” and “shall endeavor to coordinate,” requires States bordering an enclosed or semi-enclosed sea to cooperate directly or through an appropriate “regional organization” in order to coordinate among themselves in three substantive spheres:

- (1) the management, conservation, exploration and exploitation of the living resources of the sea;
- (2) the protection and preservation of the marine environment; and
- (3) the scientific research policies and undertaking joint scientific research programs.

Subparagraph (d) envisages the involvement of “extra-regional” States or “international organizations” in the cooperation with enclosed or semi-enclosed sea States. These “extra-regional States” may well be user States in the enclosed or semi-enclosed seas while the international organizations may well be those having regional or global competence in the affairs or the spheres as set out in Article 123(a), (b), or (c).⁶

The Practice of Article 123 in the Mediterranean Sea Region: An Overview

The Mediterranean Sea is bordered by 21 countries of southern Europe, western Asia or the Arabian Peninsula, and northern Africa,⁷ three of which are highly industrialized countries on its northwestern coast, a few with limited industrial development located in the northern eastern part, and a number of developing countries on its eastern and southern coast.⁸ Through the Strait of Gibraltar, it connects with the Atlantic Ocean to the west. And through the Aegean Sea, Strait of Dardanelle, Sea of Marmara, and Strait of Bosphorus, it connects with the Black Sea, a nearly closed sea to its east.⁹ The Mediterranean covers an area of about 2.5 million square kilometers with a coastline of 46,000 kilometers and constitutes 0.7% of the global water surface. The existence of diversity in terms of economic development, let alone the other factors, has a significant impact on the efficacy of regional cooperation (see Figure 1).

The very narrow and only outlet of the Strait of Gibraltar to the Atlantic Ocean generates an oceanographically unique situation in the Mediterranean Sea in that it has a negative water balance, or with evaporation greatly exceeding precipitation and river runoff. High population growth, industrialization and urbanization, and active tourism in the region all create pressure on the protection of marine environment and living marine resources in the Mediterranean Sea.

Management of Marine Living Resources

Long before the 1982 UNCLOS or even prior to the 1958 four Geneva Conventions on the Law of the Sea,¹⁰ the Agreement for the Establishment of the General Fisheries Council for the Mediterranean (the GFCM Agreement) was approved by the United Nations Food and Agriculture Organization (FAO) Conference, under the provisions of Article XIV of the FAO Constitution,¹¹ on 24 September 1949 and entered into force on 20 February 1952.¹²



Figure 1. The Mediterranean Sea. (Source: Taken from <http://www.answers.com/topic/mediterranean-sea>, accessed 8 August 2009.)

The GFCM Agreement underwent several amendments in 1963, 1976, and 1997, respectively.¹³ The GFCM adopted two sets of amendments in 1997 that were approved by the FAO Council. One set of amendments concerned changes, inter alia, to allow for regional economic integration organizations that are members of FAO to become members of GFCM and to change the name of General Fisheries Council for the Mediterranean to the General Fisheries Commission for the Mediterranean. These amendments came into force upon the approval of the FAO Council. The second set of amendments concerned an autonomous budget for the functioning of the Commission, or a “budgetary de-link from the FAO,” involving new obligations for the Contracting Parties. This amendment came into force in 2004 upon acceptance by two-thirds of the members of the Commission.¹⁴

Article 1, paragraph 2 of the 1997 GFCM Agreement stipulates that the membership of the Commission is open to members and associate members of the FAO and nonmember States that are members of the United Nations, any of its Specialized Agencies or the International Atomic Energy Agency (IAEA), that are coastal States situated wholly or partly within the Mediterranean Region, or whose vessels engage in fishing in the Region for stocks covered by the Agreement, or regional economic integration organizations of which any State is a member that is either a coastal State of the region or a fishing State in the Region and to which that State has transferred competence over matters within the purview of this Agreement. The GFCM currently has 24 members, including 22 Mediterranean and Black Sea coastal States,¹⁵ 1 non-Mediterranean State (i.e., Japan), and the European Community.

The Region in the GFCM Agreement is defined in Article IV: “The Commission shall carry out the functions and responsibilities set forth in Article III in the Region as referred to in the Preamble” with the Preamble indicating the Mediterranean and the Black Sea and connecting waters.

Article III, paragraph 1 of the GFCM Agreement stipulates the purpose of the GFCM is “to promote the development, conservation, rational management and best utilization of

living marine resources, as well as the sustainable development of aquaculture in the Region.” ... In order to fulfill these purposes, the Commission has the functions and responsibilities as stipulated in Article III, paragraph 1(a) to (h).¹⁶

It is worth noting that Article III, paragraph 2 stresses the application of the precautionary approach to conservation and management decisions as well as the taking into account of the best scientific evidence available while, at the same time, it also highlights “the need to promote the development and proper utilization of the marine living resources.” This paragraph intends to strike a balance between conservation and the development and proper utilization of the marine living resources.

In order for the GFCM to discharge its functions, the Commission has established several subsidiary bodies, including: the Scientific Advisory Committee (SAC, established in 1997); the Committee on Aquaculture (CAQ, established in 1995); the Compliance Committee (CoC, established in 2006); and their respective subsidiaries along with a Secretariat based in Rome.¹⁷ As explained by a GFCM leaflet, the GFCM “enjoys the support of cooperative projects executed by FAO at sub-regional and regional level which enhance, in particular, scientific fishery cooperation and capacity building in participating countries in line with GFCM priorities and strategies” and “other cooperative projects in the field of aquaculture are executed by the Secretariat.”¹⁸ The cooperative projects include: Scientific Cooperation to Support Responsible Fisheries in the Adriatic Sea (ADRIAMED), Advice, Technical Support and Establishment of Cooperation Networks to Facilitate Coordination to Support Fisheries Management in the Western and Central Mediterranean (COPEMED), Assessment and Monitoring of the Fishery Resources and the Ecosystems in the Straits of Sicily (MEDSUDMED), and Mediterranean Fishery Statistics and Information System (MEDFISIS).¹⁹

Cooperation between GFCM and other regional fisheries management organizations (RFMOs) also occurs. At its twentieth session in 1994, GFCM endorsed the recommendations of the second GFCM/ICCAT (International Commission for the Conservation of Atlantic Tunas²⁰) Expert Consultations to establish the Joint GFCM/ICCAT *Ad Hoc* Working Group on Large Pelagic Species. The Working Group held its first meeting in September 1994 in Fuengirola, Spain. The GFCM Secretariat was entrusted with the administrative work while the ICCAT provided the technical secretariat. The eighth session of the Joint GFCM/ICCAT Working Group on Large Pelagic Species was held in Malaga, Spain, 5–9 May 2008.²¹

The bordering States of the Mediterranean Sea have demonstrated a mutual interest in the development and proper utilization of the marine living resources in the region, and have cooperated by drawing up a multilateral regional treaty and establishing a regional intergovernmental organization for such purpose. Through time, the number of Parties to the GFCM Agreement has increased. These Parties have tried to embody the developments in the major international fisheries instruments, such as the 1982 UNCLOS, Agenda 21 adopted by the 1992 United Nations Conference on Environment and Development (or the Rio Earth Summit),²² and the Code of Conduct for Responsible Fisheries adopted by the FAO Conference in 1995,²³ by incorporating concepts such as the precautionary approach and the best scientific evidence available into the GFCM Agreement and by including fishing nations from outside the region, such as Japan, into the GFCM regime.

Protection of the Marine Environment

Preceding the adoption of the 1982 UNCLOS, countries of the Mediterranean region began to deal with the marine pollution problems by adopting the Mediterranean Action Plan

(MAP) in 1975 under the auspice of the United Nations Environment Program (UNEP).²⁴ This Action Plan was the first plan adopted as a Regional Seas Programme (RSP) under UNEP's umbrella.²⁵

Early Phase of the Mediterranean Action Plan. The Action Plan to protect the Mediterranean from marine pollution was considered and adopted at the Intergovernmental Meeting on the Protection of the Mediterranean, convened by the Executive Director of the UNEP in Barcelona from 28 January to 4 February 1975.²⁶ As indicated in the Introduction texts of the Report of this Intergovernmental Meeting, the Meeting was convened as a response to decisions made by the UNEP Governing Council in 1974.²⁷ The Intergovernmental Meeting was clearly initiated as a part of an effort made by the UNEP. The Mediterranean countries were fortunate to have the support and endorsement of the UN system. This may not be the case in other semi-enclosed sea regions, although the involvement of the UN system does not necessarily guarantee the success of such a regional effort.

The 1975 Intergovernmental Meeting was attended by representatives of 16 Mediterranean States,²⁸ with extraregional States (i.e., the Union of Soviet Socialist Republics, the United Kingdom, and the United States) attending as observers.

During discussion, "[i]t was emphasized that the protection of resources should not be viewed as an obstacle to socio-economic development and examples of development projects which was perfectly compatible with the protection of the environment were given."²⁹ In view of the environmental diversities in the region and the differing national developmental priorities, the concept of "unity in diversity," or that "the Mediterranean eco-system was a common heritage and one of the most important assets of the Mediterranean eco-region," was stressed.³⁰ "The ecological and economic interdependence of the Mediterranean eco-system, defined as *the Mediterranean Sea with a narrow coastline*, and the rest of the Mediterranean eco-region" was also stressed (emphasis added).³¹ The concept of sea use corresponding to the concept of land use based on the characteristics and dynamics of the ecosystem was introduced in the elaboration of a plan covering the Mediterranean ecosystem. The plan would deal with: "(a) the optimum distribution of activities in the Mediterranean ecosystem; (b) the rational utilization and development of resources; and (c) *the classification into zones* assigned to exclusive activities (routes for oil and cargo ships) or to activities compatible with their environment, and also zones not subject to further degradation or pollution (emphasis added)."³²

As early as 1975, the Mediterranean countries used the concept of integrated development as a basis for discussion in pursuing a balanced approach to the protection of the marine environment and resources and the development of national economies.³³ It is clear that their discussion and the subjects included in the MAP prognosticated the concepts of "ecosystem-based management" and "ocean zoning."

A major achievement of the 1975 Intergovernmental Meeting was the preparation of regional legal instruments designed to "provide a legal basis for international co-operation to protect the marine environment in the Mediterranean."³⁴ Before Committee II were three draft legal instruments:

1. a draft framework convention for the protection of the marine environment against pollution in the Mediterranean prepared under the auspices of the FAO;
2. a draft protocol on cooperation in combating pollution of the Mediterranean by oil and other harmful substance prepared by a consultant from the Intergovernmental Maritime Consultative Organization (IMCO); and

3. a draft protocol for the prevention of pollution of the Mediterranean Sea by dumping from ships and aircraft prepared by the Spanish delegation.³⁵

It was decided that a Plenipotentiary Conference would be held in Barcelona in February 1976 for the adoption of these legal instruments and that a meeting of intergovernmental legal and technical experts would be convened in Geneva in April 1975 to consider the framework convention, protocols, and annexes.³⁶

The 1975 Intergovernmental Meeting not only adopted the MAP, but also substantively prepared for the soon-to-be adopted regional framework convention and its protocols for the protection of marine environment against pollution in the Mediterranean.

The Adoption of the Framework Convention and Protocols. A Conference of Plenipotentiaries of the Coastal States of the Mediterranean Region on the Protection of the Mediterranean Sea was convened by the Executive Director of the UNEP in Barcelona in 1976.³⁷ Eighteen Mediterranean coastal States were invited and 16 participated.³⁸ Again, the Soviet Union, United Kingdom, and the United States attended as observers. On 13 February 1976, the Conference adopted, along with 10 resolutions,³⁹ the Convention for the Protection of the Marine Environment Against Pollution in the Mediterranean (the Barcelona Convention)⁴⁰ and two protocols, the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft⁴¹ and the Protocol on Co-operation in Combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency.⁴²

The Convention and its two Protocols provided the legal basis for marine environment protection for the coastal States of the Mediterranean. Through the resolutions adopted, institutional arrangements were made. For example, the UNEP was assigned the secretariat functions for the three regional treaties,⁴³ a committee of experts was established to study the possibility of establishing an Interstate Guarantee Fund for the Mediterranean Sea Area,⁴⁴ a regional oil-combating center and subregional oil combating centers for the Mediterranean were established,⁴⁵ and an Intergovernmental Meeting was planned for 1977 to review the progress of the MAP.⁴⁶

The 1976 Barcelona Convention characterized the marine environment and the economic, social, health, and cultural value of the Mediterranean Sea Area as the “common heritage” that should be preserved for the benefit and enjoyment of present and future generations.⁴⁷ Article 1 defined the Mediterranean Sea Area as “the maritime waters of the Mediterranean Sea proper, including its gulfs and seas bounded to the west by the meridian passing through Cape Spartel lighthouse, at the entrance of the Straits of Gibraltar, and to the East by the southern limits of the Straits of the Dardanelles between Mehmetcik and Kumkale lighthouses” and as not including the internal waters of the Contracting Parties. The internal waters of the Contracting Parties as well as the Sea of Marmara and the Black Sea were excluded from the area of application of the Convention due to sovereignty and geographical considerations.

Article 4, “General Undertakings” of the Convention, obliged the Contracting Parties to:

individually or jointly take all appropriate measures in accordance with the provisions of this Convention and those protocols in force to which they are Party, to prevent, abate and combat pollution of the Mediterranean Sea Area and to protect and enhance the marine environment in that Area;

co-operate in the formulation and adoption of protocols, in addition to the protocols opened for signature at the same time as this Convention, prescribing agreed measures, procedures and standards for the implementation of this Convention”, while further pledge themselves to promote, within the international bodies considered to be competent by the Contracting Parties, measures concerning the protection of the marine environment in the Mediterranean Sea Area from all types and sources of pollution.

This Article required the Parties not only to cooperate among themselves to prevent, abate, and combat marine pollution in the Mediterranean Sea Area, but also to promote the same within other international bodies measures that would be instrumental in the protection of the marine environment of the Mediterranean Sea Area. The provision, along with Article 15, “Adoption of additional protocols,” envisaged the formulation and adoption of additional Convention protocols for other marine environment protection purposes.

Developments After the Adoption of the 1976 Barcelona Convention. Article 14 of the 1976 Barcelona Convention establishes Meetings of the Contracting Parties (MoCP) and bestows such meetings with the function of keeping under review the implementation of the Convention and its protocols. This function includes, inter alia: “to adopt, review and amend as required the annexes to this Convention and to the protocols;” “to make recommendations regarding the adoption of any additional protocols or any amendments to this Convention or the protocols;” and “to consider and undertake any additional action that may be required for the achievement of the purposed of this Convention and the protocols.”

Spurred by the 1992 UN Conference on Environment and Development (UNCED or the Earth Summit), a Conference of Plenipotentiaries adopted texts of four instruments along with five resolutions on 10 June 1995:⁴⁸

1. amendments to the Barcelona Convention;⁴⁹
2. amendments to the Dumping Protocol;⁵⁰
3. the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean⁵¹ (to replace the 1982 Protocol concerning Mediterranean Specially Protected Areas⁵²); and
4. the Barcelona Resolution on the Environment and Sustainable Development in the Mediterranean Basin.⁵³

The title of the Barcelona Convention was amended to be the “Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean,” which reflects the extension of the application of the Convention and protocols “to coastal areas as defined by each Contracting Party within its own territory.”⁵⁴ Several new articles were added concerning: conservation of biological diversity (Article 10), pollution resulting from the transboundary movements of hazardous wastes (Article 11), environmental legislation (Article 14), public information and participation (Article 15), the establishment of the Bureau (Article 19), and observers (Article 20).

The MAP Phase II was also adopted as Appendix I contained in the Annex to the “Barcelona Resolution on the Environment and Sustainable Development in the Mediterranean Basin” of Resolution I “Adoption of the Barcelona Resolution on the Environment and Sustainable Development in the Mediterranean Basin.”⁵⁵ Quite different from the

original MAP, which was presented in 5 pages, the MAP Phase II is 31 pages and has a complicated structure.

Through time, the Barcelona Convention has given rise to seven Protocols addressing specific aspects of Mediterranean environment conservation.⁵⁶

The MAP and its Phase II, as well as the Barcelona Convention and its associated Protocols, have created a complicated scheme for the protection of marine environment of the Mediterranean. The scheme consists of various programs, such as the scientific component of the MAP, the Long-Term Program for Pollution Monitoring and Research in the Mediterranean (MED POL), the MAP's socioeconomic component, the Blue Plan as well as the Coastal Area Management Program (CAMP), the Global Program of Action (GPA) for the Protection of the Marine Environment from Land-Based Activities, the Strategic Action Program (SAP), the Priority Actions Program (PAP), and various Regional Activity Centers (RACs) to facilitate or implement the various programs.⁵⁷

In 1975, the MAP was initiated by the UNEP as the first plan adopted as an RSP. The UNEP has continued to be deeply involved in the development and evolution of the regional legislation and legal framework in the Mediterranean. The MAP and framework Convention and its associated Protocols have widened their mandate to include integrated coastal zone planning and management, but also have created a complicated institution.

The Practice of Article 123 in the Caribbean Sea Region: An Overview

Caribbean Sea is another often-cited example of semi-enclosed sea. It is an arm of the Atlantic Ocean and washes upon: the South American countries of Venezuela and Colombia to the south; the Central American countries of Panama to the southwest; Costa Rica, Nicaragua, Honduras, Guatemala, Belize, and Mexico to the west; the Greater Antilles (Cuba, Jamaica, Hispaniola, and Puerto Rico) to the north; and the Lesser Antilles to the east. The Caribbean Sea is one of the largest saltwater seas with an area of about 2,754,000 square kilometers (1,063,000 square miles) (Figure 2).⁵⁸ Most of the countries bordering the Caribbean Sea are small-sized developing economies or small island developing countries. With limited human, institutional, and financial resources, it would be difficult for many of these States to deal easily with the issues of sustainable fisheries development and management and marine environment protection.

In the Caribbean Sea region, there is a political entity, the Caribbean Community (CARICOM), and an economic entity, the Caribbean Common Market, both established by the 1973 Treaty of Chaguaramas.⁵⁹ CARICOM currently has 15 member States (Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago) and 5 associate members (Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, and Turks and Caicos Islands).

Management of Marine Living Resources

With the support of Canadian Government, the CARICOM Governments in January 1991 launched the CARICOM Fisheries Resource Assessment and Management Programme (CFRAMP) to promote the sustainable use and conservation of the fisheries resources of CARICOM member States.⁶⁰ After a decade of operation, CFRAMP was superseded by the Caribbean Regional Fisheries Mechanism (CRFM) in 2003 through the signing of the Agreement Establishing the CRFM on 4 February 2002.⁶¹



Figure 2. The Caribbean Sea. (Source: Taken from <http://www.answers.com/topic/caribbean-sea>, accessed 8 August 2009.)

The CRFM is a regional body exclusively for the Caribbean countries as Article 3, paragraph 1 stipulates that the “Membership of the Mechanism shall be open to Member States and Associate Members of CARICOM.” The CRFM has 18 member States: Anguilla, Antigua and Barbuda, the Bahamas, Barbados, Belize, the British Virgin Islands, Dominica, Grenade, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, and Turks and Caicos Islands.

The objectives of the Mechanism are defined in Article 4 of the 2002 Agreement:

- (a) the efficient management and sustainable development of marine and other aquatic resources within the jurisdictions of Member States;
- (b) the promotion and establishment of co-operative arrangements among interested States for the efficient management of shared, straddling or highly migratory marine and other aquatic resources;
- (c) the provision of technical advisory and consultative services to fisheries divisions of Member States in the development, management and conservation of their marine and other aquatic resources.

In order to achieve these objectives, Article 6 sets up three organs within the Mechanism:

- (a) the Ministerial Council;
- (b) the Caribbean Fisheries Forum (the Forum); and
- (c) the Technical Unit.

The Ministerial Council, composed of the ministers of fisheries of each member of the Mechanism, determines the policy of the Mechanism⁶² while the Forum, composed of representatives of each member of the Mechanism and representatives of all interest bodies, organizations, or groups (or stakeholders), determines the technical and scientific work of

the Mechanism.⁶³ The Forum has an Executive Committee and can establish subcommittees as necessary.⁶⁴ The Technical Unit functions as the Secretariat⁶⁵ with the Director of the Technical Unit being the chief executive officer of the Mechanism and “shall exercise full responsibility for all aspects of the work of the Mechanism.”⁶⁶ The Technical Unit is, inter alia, to “provide technical, consultative and advisory services to Member States in the development, assessment, management and conservation of marine and other aquatic resources and, on request, in the discharge of any obligations arising from bilateral and other international instruments.”⁶⁷

Worth noting is that, through Article 20, the Agreement accords “full juridical personality” and “full capacity” to the Mechanism so that it can contract, acquire, and dispose of movable and immovable property, institute legal proceedings, and enter into agreements with member States, third States, and other international organizations for the achievement of its objectives. Article 19 and Articles 21 to 27 accord the Mechanism and its personnel varying privileges, immunities, and exemptions.

The CRFM is thus a multilateral, regional, intergovernmental fisheries organization without being named an “organization” but, more importantly, without a decisionmaking function on the management of fisheries. In addition, CRFM differs from most other regional RFMOs by having the Forum that engages various stakeholders in the decisionmaking process of the Mechanism. The operation of the Mechanism and the interaction among its three organs is set out in Figure 3.

Protection of the Marine Environment

The Adoption of the Action Plan for the Caribbean Environment Programme. As in the Mediterranean, the UNEP was deeply involved in the development and formulation of a regional environment program in the Caribbean.⁶⁸ UNEP convened the 1981 Intergovernmental Meeting on the Action Plan for the Caribbean Environment Programme in cooperation with the UN Economic Commission for Latin America (ECLA). The representatives from 22 States of the region adopted the Action Plan for the Caribbean Environment

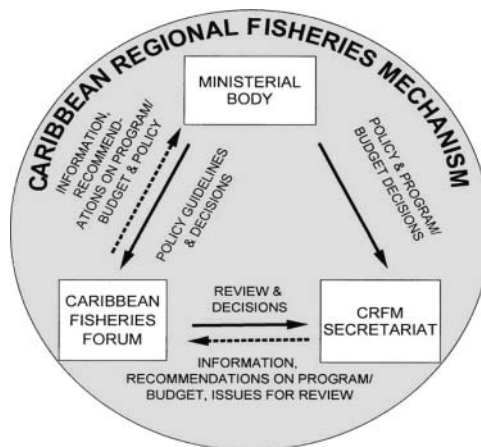


Figure 3. The operation of the Caribbean Regional Fisheries Mechanism (CRFM). (Source: Reprinted from *Marine Policy* 28, Figure 3 of Milton O. Haughton et al., “Establishment of the Caribbean Regional Fisheries Mechanism,” 351–359, at 356, Copyright (2004), with permission from Elsevier.)

Programme and a resolution dealing with: (a) program implementation, (b) institutional arrangements, and (c) financial arrangements related to the implementation of the Action Plan and the program priorities for the Action Plan.⁶⁹

The geographic region covered by this Action Plan is termed the “Wider Caribbean,” which comprises “the insular and coastal States and Territories of the Caribbean Sea and the Gulf of Mexico, including Bahamas, Guyana, Suriname and the French Department of Guiana, as well as the waters of the Atlantic Ocean adjacent to these States and Territories.”⁷⁰ The Action Plan is open to other countries as noted in paragraph 2 of the Preamble: “Other countries may participate in the Action Plan if they so desire, and, in accordance with United Nations procedures, they will be classified in terms of the nature of their participation.”

The Action Plan was formulated recognizing the diversities within the region. “The region is a geographical entity made up of States and Territories with diverse economic and political structures, natural resources, social systems, environmental characteristics and potential development capabilities. These diversities have been recognized in the formulation of this Action Plan.”⁷¹ The participating countries also recognized that: “[t]he island countries of the region have special needs owing to the fragility of their ecosystems and their particularly limited carrying capacities. These were specifically recognized in the Action Plan.”⁷²

Paragraph 4 of the Preamble of the Action Plan stated the objectives of the Action Plan:

The principle objectives of the Action Plan are to assist the Governments of the region in minimizing environmental problems in the Wider Caribbean through assessment of the state of the environment and development activities in environment management. Furthermore, the Action Plan will establish a framework for activities requiring regional co-operation in order to strengthen the capacity of the States and Territories of the Wider Caribbean region for implementing sound environmental management practices and thus achieve the development of the region on a sustainable basis.

In order to achieve these objectives, the Action Plan required a process of assessment and management and, at the same time, concentration of activities on the coastal areas with special reference to the interactions among terrestrial, coastal, and marine ecosystems.⁷³ The Action Plan is a 12-page document that contains a complicated structure and various components described as follows: “The components of the Action Plan are interdependent and constitute a framework for comprehensive action in order to contribute both to the protection and to the continued environmentally sound development of the region. No component is an end in itself.”⁷⁴

Unlike the MAP, however, neither the Caribbean Action Plan nor the 1981 Intergovernmental Meeting on the Action Plan for the Caribbean Environment Programme took a strong approach in calling for or preparing a framework convention and associated protocols as the legal basis for implementation. At the end of the Caribbean Action Plan, under the section of “Regional legal agreement,” it is stated that: “The Action Plan should be supported by a flexible and general Regional Agreement.”⁷⁵ The Resolution on the Action Plan for the Caribbean Environment Programme requested the Executive Director of the UNEP to convene, in early 1983, another intergovernmental meeting of the Caribbean States participating in the Action Plan to review the progress achieved in the implementation of

the Action Plan, to adopt the work plan and budget for the 1984–1985 biennium, and to consider the adoption of a regional legal agreement.⁷⁶

The Adoption of the Framework Convention and Protocol. With the mandate set forth by the 1981 Resolution on the Action Plan, the 1983 Conference of Plenipotentiaries on the Protection and Development of the Marine Environment of the Wider Caribbean Region adopted two instruments:⁷⁷ the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (the Cartagena Convention),⁷⁸ and the Protocol Concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region.⁷⁹ Both entered into force in 1986. Among the resolutions adopted was one concerning “pollution from land-based sources,” which requested UNEP to convene a working group of experts nominated by the Contracting Parties and Signatories to prepare a draft protocol on land-based sources of marine pollution and another resolution concerning “specially protected area and wildlife in the Wider Caribbean Region,” which requested UNEP to convene a working group of experts nominated by the Contracting Parties and Signatories to prepare a draft protocol on specially protected areas and wildlife in the Wider Caribbean Region.⁸⁰

The Cartagena Convention, is characterized by the UNEP Caribbean Environment Programme (CEP) as “a comprehensive, umbrella agreement for the protection and development of the marine environment” that “provides the legal framework for cooperative regional and national actions in the WCR (Wider Caribbean Region).”⁸¹ The UNEP CEP indicates that “[t]he Cartagena Convention is not the only Multilateral Environmental Agreement applicable in the region” since “[o]ther applicable agreements include the Convention on Biological Diversity, MARPOL 73/78, the Basel Convention and others”⁸² also apply to their respective Contracting Parties in the Caribbean region. It is its regional area of application that makes the 1983 Cartagena Convention an important complement to the other agreements.

In the Cartagena Convention, the “Wider Caribbean” region referred to in the Action Plan for the CEP was further defined as “the Convention Area,” which means “the marine environment of the Gulf of Mexico, the Caribbean Sea and the areas of the Atlantic Ocean adjacent thereto, south of 30 deg north latitude and within 200 nautical miles of the Atlantic coasts of the States referred to in article 25 of the Convention” but does “not include internal waters of the Contracting Parties.”⁸³ The Cartagena Convention dealt with five different sources of marine pollution from: ships (Article 5), dumping (Article 6), land-based sources (Article 7), seabed activities (Article 8), and airborne (Article 9). However, other than calling for the Contracting Parties to “take all appropriate measures to prevent, reduce and control pollution” from these different pollution sources, the Convention did not lay down substantive requirements or rules, except referring to “applicable international rules and standards.” This makes the Convention an umbrella agreement. The Convention does oblige its Contracting Parties to “individually, or jointly, take all appropriate measures to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species, in the Convention Area” by endeavoring to establish protected areas.⁸⁴

While the UNEP CEP characterizes the Cartagena Convention as an umbrella treaty, Article 4, paragraph 3 and Article 17 of the Convention together also make the Convention a framework convention since the former requires that: “The Contracting Parties shall co-operate in the formulation and adoption of protocols or other agreements to facilitate the effective implementation of this Convention” and the latter stipulates that: “The Contracting Parties, at a conference of plenipotentiaries, may adopt additional protocols to this Convention pursuant to paragraph 3 of article 4.” Pursuant to these clauses, two protocols

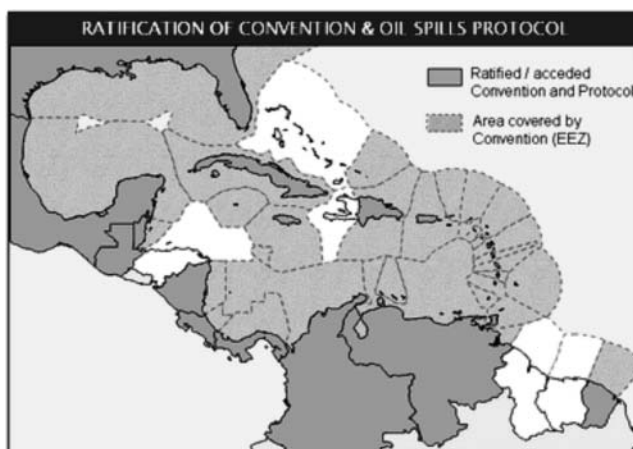


Figure 4. The Convention Area of the Cartagena Convention and its ratifiers. (Source: Taken from Web site of UNEP CEP at <http://www.cep.unep.org/cartagena-convention/convention-and-oil-spills.png/view>, accessed 11 August 2009.)

have been adopted: the Protocol Concerning Specially Protected Areas and Wildlife (SPAW) in the Wider Caribbean Region (adopted on 18 January 1990 and entered into force on 18 June 2000)⁸⁵ and the Protocol Concerning Pollution from Land-Based Sources and Activities (LBS Protocol) (adopted on 6 October 1999 and not yet in force).⁸⁶ There are 22 Parties to the 1983 Cartagena Convention and the Oil Spills Protocol.⁸⁷ Figure 4 shows the Convention Area of the Cartagena Convention and its ratifiers.

Lessons Drawn from the Mediterranean and Caribbean Sea Regions

After a detailed examination of the practice of Article 123 of the 1982 UNCLOS in the Mediterranean Sea and the Caribbean Sea, this section draws a number of lessons from the two cases based on academic assessments of the success and failure of the relevant outputs (Action Plans, conventions and associated protocols, mechanisms, and organization, etc.) and outcomes (i.e., things that have or have not changed) in the two case study areas. Such lessons may shed some light on the discussion of issues concerning regional cooperation in the South China Sea, especially from the perspective of the application of Article 123 of the UNCLOS in the region.

UNEP Regional Seas Programme and Marine Environment Protection

UNEP has been active and involved in shaping the mechanisms of marine environment protection in the Mediterranean Sea and Caribbean Sea regions, through its RSP. As indicated at the Web site of the UNEP RSP, the RSPs have several common elements:

The process of establishing a regional programme usually begins with the development of an Action Plan outlining the strategy and substance of a regionally coordinated programme, aimed at the protection of the common body of water. The Action Plan is based on the region's particular environmental concerns and challenges as well as its socio-economic and political situation.

It may cover issues ranging from chemical wastes and coastal development to oil spill preparedness and response and the conservation of marine species and ecosystems.⁸⁸

A typical Regional Seas Action Plan consists of the following chapters: Environmental Assessment, Environmental Management, Environmental Legislation, Institutional Arrangements, and Financial Arrangements.⁸⁹

In some cases, the role and value of the RSP has been praised highly. Peter Hulm has written that:

It is hard to think of another international forum where Libya will sit down with Israel, the US with Cuba or Iran with Iraq, and agree on a common solution to their collective problems. It is, in effect, an effort to beat the clock without beating ourselves: to preserve the marine environment without putting a stranglehold on economic and social development.⁹⁰

Hulm also noted a remark made by Lorne Clark, Director of the Canadian Department of External Affairs' Legal Operations Division that the "Regional Seas is the jewel in UNEP's crown."⁹¹ However, Hulm also indicated that financing has been the number one problem of UNEP since it could do no more than its budget permitted.⁹²

The similar approach taken by the UNEP in developing RSPs in various regions does not guarantee the same results and expected effectiveness of marine environment protection. UNEP has noted that "[s]ome of these regional instruments have proven extraordinarily effective" and that "the Cartagena Convention for the Caribbean and the Barcelona Convention for the Mediterranean have always been extremely active and visible."⁹³ Academic studies or assessments have often indicated the opposite.

An academic study assessing the environmental effectiveness of the Barcelona Convention after nearly 30 years concluded that:

From the data available it is not possible to measure if the Mediterranean Sea is cleaner than prior to the Convention. Even if it could be proved that it is cleaner, it is ambiguous whether this change can be attributed to the Convention or to other factors such as physical processes, introduction of cleaner technologies, etc.⁹⁴

This assessment argued that, although the "[o]rigins of the Barcelona Convention lie in the concern expressed by the scientific 'epistemic community' over pollution in the Mediterranean Sea," the availability of reliable scientific data is still in question and these data "can be neglected if they do not correspond with politically acceptable goals," and that the data, information, or assessments taken into account to produce National Diagnostic Analyses, National Baseline Budgets and National Action Plans "were not directly taken from the monitoring activities, but rather from other scientific assessments."⁹⁵ The 2008 assessment also argued that "institutional, rather than scientific, dimensions are driving the operation of MAP" and "there is no established mechanism in the Barcelona Convention for a science-policy interaction, . . . Even though legal texts of the Barcelona Convention and its related Protocols are highly technical in that they set scientific targets and do not directly address socio-economic issues, it is difficult to estimate the overall environmental effectiveness of the Convention."⁹⁶

In another assessment on the effectiveness of the Barcelona Convention and its related protocols, the Land-Based Sources Protocol⁹⁷ in particular, found that

Generally, due to lack of implementation, the Barcelona Convention has failed to combat increasing pollution and prevent further degradation of the Mediterranean ecosystem. As the system operates currently, it is apparent that the polluting processes that have been proven to cause severe environmental and health impacts are still flourishing in industrialized countries, and unhygienic methods of sewage disposal are still ongoing in developing countries. These issues bring into question the effectiveness of the implementation process of the LBS protocol, Barcelona convention as well as the MAP.⁹⁸

Moreover, “the LBS protocol which was designed to control the most significant cause of pollution would probably be categorized the least effective considering that most of the measures required to make the protocol operational have not been implemented.”⁹⁹

This assessment attributed the failure of the Barcelona Convention and its associated protocols to the lack of financial resources and technical expertise in some of the Mediterranean countries.¹⁰⁰ This situation may be shown further by the uneven distribution of designated marine protected areas in the Mediterranean Sea region. (See Figure 5.)

Studies on the Wider Caribbean Region have also shown that similar problems exist. For example, Marian Miller pointed out eight “challenges” that the Caribbean Environment

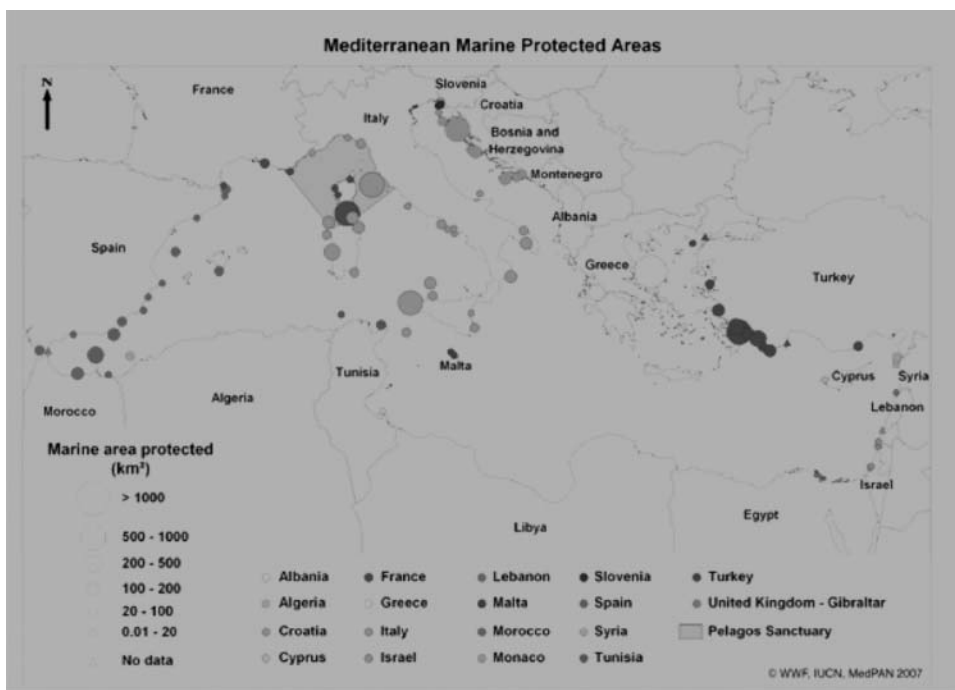


Figure 5. Distribution of Mediterranean Marine Protected Areas. (Source: Taken from Figure 2 in IUCN and WWF, *Status of Marine Protected Areas in the Mediterranean Sea: A Collaborative Study by IUCN, WWF and MedPAN* (2008), 39, available at http://www.medpan.org/_upload/1120.pdf, accessed 7 August 2009.)

Programme (CEB) was facing.¹⁰¹ Miller first indicated that “[a]lthough regional institution-building can count as a Programme achievement, its translation to the national level will be a major challenge for the Action Plan.”¹⁰² And then she indicated that “environment is not yet a first-order concern for many of these States and territories”; “[l]imited financial resources continued to challenge the Action Plan, impeding progress at both the national and regional level”; “[c]ounterpart contributions and contributions from other organizations . . . sometimes have to be targeted to satisfy the interests of the donor rather than the immediate concerns of the Caribbean Environment Programme”; and that the financial crisis of the United Nations also is adversely affecting the Programme.¹⁰³

In another paper written by Benedict Sheehy, in which he examined the success of the International Convention for the Prevention of Pollution from Ships (MARPOL Convention)¹⁰⁴ and the Cartagena Convention, the grade that he gave to the achievements and effectiveness of Cartagena Convention was an “F.”¹⁰⁵ A few passages can be cited from his paper.

Article 7 [of the Cartagena Convention] deals with land-based sources of pollution.

By 1993, sewage had been identified as by far the most significant pollutant. As noted in the RSP report, “the main problem affecting the Caribbean Sea are domestic sewage and solid waste.” The WCR [Wider Caribbean Region] sewage problem is caused by the large number of people living along the coast, tourism, industry and ship wastes. . . . Despite knowledge of the problem in the 1980s, the situation appears no different in 2003.

The WCR is one of the world’s leading oil producing regions. . . . Even basic monitoring responsibilities, created under the Cartagena Convention’s oil spill protocol of 1983, are not being fulfilled.

Article 8 of the Convention deals with sea-bed exploitation. . . . WCR seems to have had little success in dealing with its oil pollution problems whether caused by the industry itself or by ship related activities.

Article 10 requires the Parties to create specially protected areas. . . . Many of the parks created under SPAW are no more than “paper parks.”

Article 11 requires the development of contingency plans. This obligation was created in 1983. It has yet to occur.

Article 12 requires international consultation with respect to major development projects . . . no evidence of such consultations having occurred was uncovered in the course of researching this paper.

Article 14 requires the development of laws to address liability and compensation in the event of pollution damage. To date, this has not occurred.

Article 15 requires institutional development and integration. Such development and integration has not yet occurred to a significant extent.

Overall, as to the actual condition of the environment, there is little evidence that the situation today is different than it was twenty years ago when the Cartagena Convention was first ratified.¹⁰⁶

Sheehy’s concluding assessment is like the ones made regarding the Barcelona Convention and its associated protocols in the Mediterranean.

Sheehy attributed the failure in the Wider Caribbean Region to several causes: poverty leading to a lack of resources, unsustainable consumption patterns and financing problems,

failed efforts to management economic development, legislative gaps, corruption, and lack of political will to deal with the issues.¹⁰⁷

The UNEP RSP in the Mediterranean and Caribbean Sea regions has not yet achieved the goals or delivered the results that the RSPs and regional legal frameworks had envisaged.

The UNEP RSPs may have good intentions; however, the regions that each RSP intends to take care of seem too large, the issues that each RSP is designed to deal with seem too many, and the manner of operation seems too complicated. As indicated above, each RSP starts with a regional action plan (a soft law type of international instrument), followed by the establishment of a framework or umbrella convention and associated protocols (legally binding international instruments), and the creation of numerous coordinating units for each individual subprogram or activity. A typical organizational chart of an RSP is shown in Figure 6. This demonstrates the complexity of their operation and the associated costs.

The diversity among participating States in a UNEP RSP can further compromise its effectiveness. As has been observed: “[i]t became evident that large-scale monitoring, and the capacity thereof, did not yield desired results of immediate practical value to decision-makers.”¹⁰⁸ Put another way, the policy intention and the mechanism design of UNEP RSPs can overwhelm the capacity of at least some participating States. In addition, some participating States, especially those developing countries, might have too high an expectation on the UNEP for financial assistance.

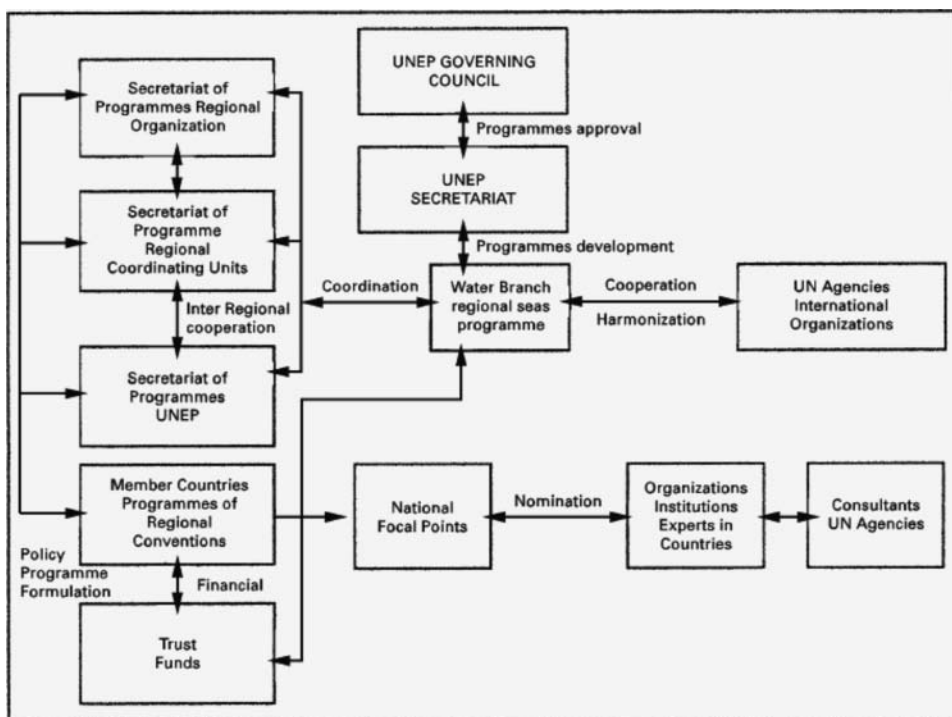


Figure 6. A typical organizational chart of a United Nations Environment Programme Regional Seas Programme (UNEP RSP). (Source: Reprinted from *Marine Policy* 22, no. 3, P. Akiwumi and T. Melvasalo, "UNEP's Regional Seas Programme: Approach, Experience and Future Plans," 229–234, at 232, Copyright (1998), with permission from Elsevier.)

FAO Regional Fishery Bodies and Fisheries Conservation and Management

With respect to marine living resources conservation and management, collective effort through regional cooperation is vital in a semi-enclosed sea. Similar to the marine environment protection, a regional mechanism is necessary, but too many such mechanisms are not helpful.

As stated in Article 4 of the CRFM Agreement,¹⁰⁹ the aim of the CRFM is to efficiently manage and sustainably develop shared, straddling or highly migratory marine and other aquatic resources. In other words, the CRFM is intended to deal with the management and sustainable development of a full spectrum of marine living resources. However, there are other regional bodies that have similar functions to the CRFM or overlapping competence over fisheries management and development in the same geographical area, such as the International Commission for the Conservation of Atlantic Tunas (ICCAT)¹¹⁰ and the Western Central Atlantic Fishery Commission (WECAFC).¹¹¹ Bisessar Chakalall et al. have indicated that ICCAT is a “full” RFMO covering the entire Wider Caribbean Region and beyond, but only for tunas and tuna-like species and focusing primarily on the large commercial species. And the WECAFC provides coordination of development, information gathering, and analysis for all the countries of the Wider Caribbean, but had no management decision-making function.¹¹² Chakalall et al. observed that the existence of overlapping and competing arrangements for various aspects of marine governance do not provide a coherent governance framework and that this situation is unlikely to lead to the emergence of a rational, integrated governance framework.¹¹³ Chakalall et al. termed this overlapping situation as an “institutional maze” and a figure in their paper (see Figure 7) vividly describes this “maze.”

Similarly, in the Mediterranean Sea region, while the GFCM possesses a decisionmaking function with respect to the conservation and management of marine living resources, ICCAT’s competence area also covers the GFCM region, even though ICCAT only deals with tunas and tuna-like species. The overlapping functions and membership between GFCM and ICCAT will inevitably create certain degree of confusion in terms of the “development, conservation, rational management and best utilization of living marine resources as well as the sustainable development of aquaculture in the Region.”¹¹⁴ This situation shows that the problem of institutional maze also exists in the Mediterranean Sea region regarding fisheries.

The Application of Part IX in the South China Sea

To the Chinese people and in Chinese language, the “South China Sea” is “Nan-Hai” or literally “South Sea” or “Southern Sea” since it is situated to the south of China.¹¹⁵ However, there is no official geographical definition for the South Sea.¹¹⁶

A book by Fu Chün (符駿) entitled *Nan-Hai Ssu-Sha Ch’un-Tao* (南海四沙群島 *The Four Sands Islands of the South Sea*) defined the South Sea as “starting from the south mouth of the Taiwan Strait to the north, then all the way to the south until the equator, a north-east to south-west oblique rectangle.”¹¹⁷ Yu Kuan-Tss (俞寬賜) defined the South Sea in his book entitled *Nan-Hai Chu-Tao Ling-T’u Cheng-Tuan chih Ching-Wei yu Fa-Li* (南海諸島領土爭端之經緯與法理 *The Warp and the Woof, or the Main Points, as well as the Legal Theory of the Territorial Disputes of the South Sea Islands*) as “situating within from three degree south latitude to twenty-five degree north latitude and from one hundred degree east longitude to one hundred twenty degree east longitude.”¹¹⁸ The former Director-General of the Department of Land Administration of the Ministry of the Interior,

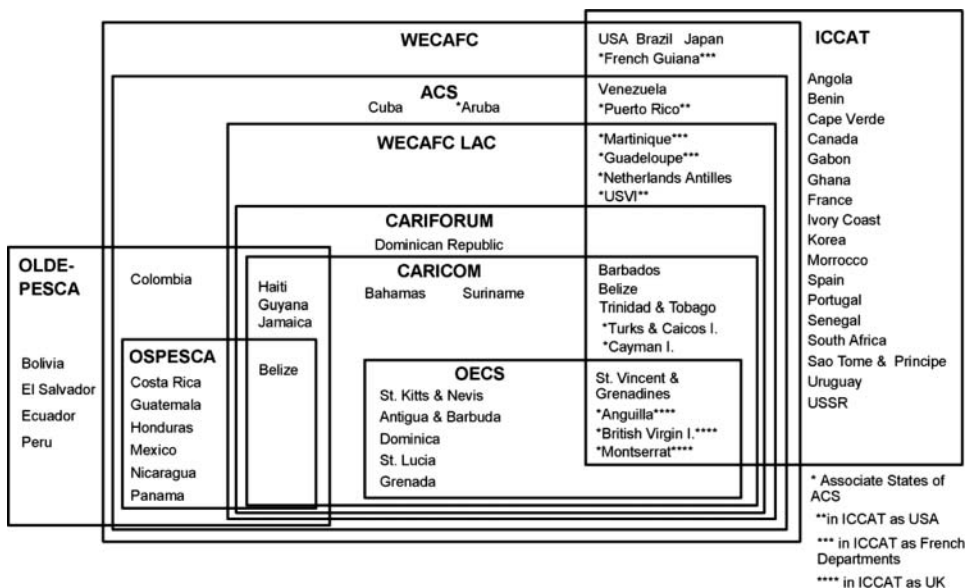


Figure 7. The membership of regional and international organizations with responsibility for fisheries management and development in the Wider Caribbean. Acronyms: WECAFC, FAO West Central Atlantic Fishery Commission; ACS, Association of Caribbean States; CARICOM, Caribbean Community and Common Market; OECS, Organization of Eastern Caribbean States; LAC, Lesser Antilles Committee; OLDEPESCA, Latin American Organization for Fishery Development; OSPESCA, Organización del Sector Pesquero y Acuicultura del Istmo Centroamericano; ICCAT, International Commission for the Conservation of Atlantic Tunas. (Source: Reprinted from *Fisheries Research* 87, Chakalall et al., "Governance of fisheries and other living marine research in the Wider Caribbean" 92–99, at 94, Copyright (2007), with permission from Elsevier.)

Chang Wei-I (張維一) offered another definition for the South Sea in his book entitled *Nan-Hai Tsu-Yuan K'ai-Fa yu Chu-Ch'uan Wei-Hu* (南海資源開發與主權維護 *The Resources Exploitation and Sovereignty Protection of the South Sea*):

starting from the east along 117°50'E, or the easternmost Seahorse (or Routh) Bank (海馬灘) of the Nan-Sha (Spratly) Islands, to the west along 109°30'E, or the westernmost Vanguard Bank (萬安灘); south to 3°40'N, or the southernmost James Shoal (曾母暗沙), and north to 21°58'N (Yu Kuan-Tss' writing suggesting 21°04'N), or the North Verker Bank (北衛灘) of the Tung-Sha (Pratas) Islands. The north-south length reaches about 1,800 and some km, and the east-west span is more than 900 km, with an area of more than 3,600 thousand square km.¹¹⁹

Due to his former in-charge position in the government, Chang's definition may be the most authoritative. And, more importantly, Chang's definition is close to the general geographical understanding or perception of Chinese people over the location and extend of the South Sea. It is also roughly similar to the geographical description of South China Sea (area 6.1) given by the International Hydrographical Organization for the limits and names of subdivisions of the oceans and seas.¹²⁰ In other words, to the Chinese people and in the Chinese language, South Sea is more or less the waters surrounded by nowadays Taiwan,

mainland China, Vietnam, Malaysia, and the Philippines, including the Gulf of Tonkin (東京灣或北部灣), but excluding the Gulf of Thailand (or Gulf of Siam) (泰國灣或暹羅灣).

Furthermore, a map entitled “The Location Map of the Islands in the South Sea” (南海諸島位置圖), carrying the issuance date on its left upper corner, “December of the Thirty-fifth Year of the Republic of China” (namely, December 1946), and the name of the agency that made this map on its left lower corner, “Made by the Department of Territories and Boundaries of the Ministry of the Interior” (內政部方域司製), shows the “famous” U-shaped 11 discontinued (or broken) lines with the named islands, islets, reefs, banks, and shoals within these lines and the bordering States as well.¹²¹ See this map in Nien-Tsu Alfred Hu, “South China Sea: Troubled Waters or a Sea of Opportunity?”, Figure 2, in this Special Issue. Worth noting is that the legend applied to the U-shaped lines is exactly the same as the national boundaries on land between China and Vietnam. The waters within these U-shaped lines and their adjacent waters also fit the mental image of the Chinese people on the geographical extend of the South Sea.

The South Sea fits the definition of a semi-enclosed sea as defined by Article 122 of the UNCLOS, although it possesses more than “a narrow outlet” to the seas and oceans. Like other semi-enclosed sea regions, the bordering States of the South Sea are also faced with the common problems of marine living resources conservation and management, protection of the marine environment, and joint efforts in marine scientific research. However, the problems existing in the South China Sea are further complicated by a different context from some other semi-enclosed sea regions. The South Sea has been characterized by many as a potential “flash point” due to the complexity of territorial and maritime disputes over the maritime features like islands, islets, banks, shoals, or submerged reefs. In addition, the Republic of China (or Taiwan), as one of the bordering States of the South Sea, and the one that has made early claims over all the maritime features within the U-shaped lines¹²² and that has long occupied the largest island, the Tai-Ping Island (太平島 in Chinese or Itu Aba Island in English), in the Spratly Islands of the South Sea, has been excluded from almost all intergovernmental fora or mechanisms that deal with the South Sea problems over the past four decades.¹²³

This section will briefly touch on the status quo in the South China Sea with respect to the efforts in relation to marine living resources conservation and management and the protection of the marine environment, followed by a discussion of new thinking on the potential to apply Article 123 of the UNCLOS in the region based on the lessons drawn from the Mediterranean and Caribbean Sea regions.

Management of Marine Living Resources

In the South China Sea region, there is no RFMO that deals with fisheries resources. The Asia-Pacific Fishery Commission (APFIC), a regional fishery body established in 1948 under the auspices of the FAO, has a wide “area of competence” that includes the “Asia Pacific Area” and covers both marine and inland aquatic resources of the Asia-Pacific area.¹²⁴ Its membership includes, inter alia, the People’s Republic of China, Malaysia, the Philippines, and Vietnam.¹²⁵ Since APFIC is an FAO body, Taiwan is excluded.¹²⁶

The APFIC Web site characterizes itself as a body designed “to improve understanding, awareness and cooperation in fisheries issues in the Asia-Pacific region.”¹²⁷ The Preamble of the Agreement for the Establishment of the Asia-Pacific Fishery Commission states the original intent was that: “The contracting Governments having a mutual interest in the development and proper utilization of the living aquatic resources of the Asia-Pacific area and desiring to further the attainment of these end through international cooperation by

establishment of an Asia-Pacific Fishery Commission.” However, other than the functions laid down in Article IV, the Agreement does not provide for resource management decision making. The APFIC is mainly a consultative and advisory body with no competence over the management of living marine resources in the South China Sea region.

The Western and Central Pacific Fisheries Commission (WCPFC), established by the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC Convention)¹²⁸ which is not an FAO agreement, was specifically created for the conservation and management of highly migratory fish stocks in the western and central Pacific region. Due to difficulties in negotiating the Convention, the RFMO has an undefined western boundary of its Convention Area¹²⁹ where the conservation and management measures adopted “shall be applied throughout the range of the stocks, or to specific areas within the Convention Area, as determined by the Commission.”¹³⁰ Theoretically, the WCPFC covers the South China Sea region if the regulated or targeted stocks migrate into this region; nevertheless, it deals only with the conservation and management of highly migratory species. The WCPFC was established after the adoption of the 1995 United Nations Fish Stocks Agreement;¹³¹ thus, its legal framework allows Taiwan to participate as a member in the capacity of “fishing entity” and under the designation of Chinese Taipei.¹³²

Protection of the Marine Environment

The UNEP RSP comes to the western Pacific under the East Asian Seas Programme. The UNEP has described the East Asia Seas as follows:

East Asia’s astonishing variety of political, economic and social systems is matched by its environment: ship-crowded straits, island groups, wide gulfs, shallow estuaries and some of the most heavily populated countries in the world, where millions rely on fish for much of their protein.

The threats to the region are just as varied, including erosion and siltation from land development, logging and mining, blast fishing in coral reefs, conversion of mangroves, overfishing, unimpeded coastal development and disposal of untreated wastes.

Seven areas of focus were identified for the region:

- Develop and maintain a regional database (later changed to a regional metadata base).
- Promote, improve, network and maintain marine protected areas in the region.
- Implement activities to restore marine habitats.
- Assist with State of Environment reporting for agencies preparing such reports and marine and coastal assessment.
- Implement activities to reduce land-based sources of pollution.
- Encourage monitoring and environmental assessment including mapping in the region.
- Encourage and implement projects to build capacity in the member countries to counter environmental degradation and to educate all members of the community in caring for the marine resources of the region.¹³³

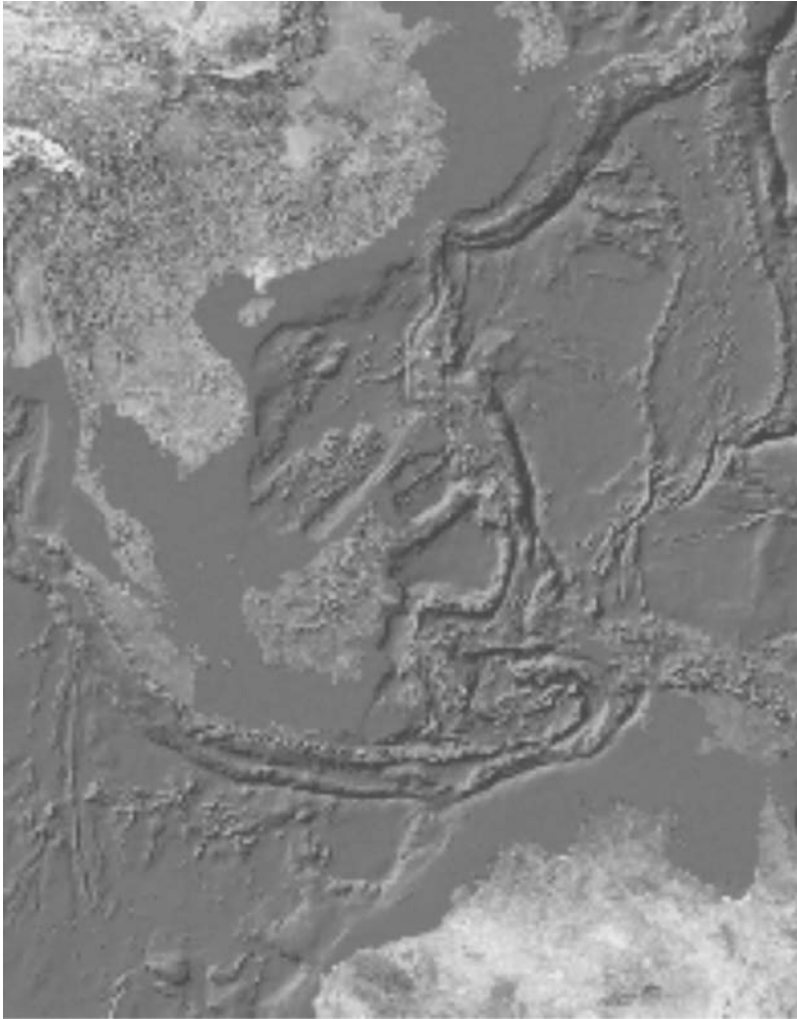


Figure 8. The area covered by the United Nations Environment Programme Regional Seas Programme (UNEP RSP) in the East Asian Seas. (Source: UNEP RSP Web site, at <http://www.unep.org/regionalseas/programmes/unpro/eastasian/default.asp>, accessed on 2009/7/19.)

The RSP covers a large area, shown in Figure 8, and the South China Sea is a subregion in the Programme.

An Action Plan for the Protection and Development of the Marine Environment and Coastal Areas of the East Asian Seas Region (the East Asian Seas Action Plan)¹³⁴ was developed and approved in 1981 stimulated by concerns on the effects and sources of marine pollution. Initially, the Action Plan involved five countries (Indonesia, Malaysia, the Philippines, Singapore, and Thailand). In 1994, it was revised to involve another five countries (Australia, Cambodia, the People's Republic of China, the Republic of Korea, and Vietnam) and to date the Action Plan still has ten member countries.¹³⁵ Thus, all the bordering States of the South China Sea, except Taiwan and Brunei, are members of the East Asian Seas Action Plan. The main components of the East Asian Seas Action

Plan are: assessment of the effects of human activities on the marine environment; control of coastal pollution, protection of mangroves, sea grasses, and coral reefs; and waste management.¹³⁶

Among the UNEP RSPs, East Asia has steered a unique course. There is no regional convention; instead, the Programme promotes compliance with existing environmental treaties and is based on member country's goodwill.¹³⁷

The East Asian Seas Action Plan is steered by the Coordinating Body on the Seas of East Asia (COBSEA). The COBSEA Secretariat is the lead agency of the United Nations for marine environmental matters in East Asia, responsible for coordinating the activities of all governments, nongovernmental organizations (NGOs), UN and donor agencies, and individuals in caring for the region's marine environment.¹³⁸

There is another marine environmental program for the East Asia Seas, the Partnerships in Environmental Management for the Seas of East Asia (PEMSEA) (1999–2004),¹³⁹ which was funded by the Global Environment Fund (GEF), implemented by UN Development Programme (UNDP) and executed by the International Maritime Organization (IMO). PEMSEA was designed to build partnerships of stakeholders at the local, national, and regional levels. The project built on the results of a pilot project called the Regional Programme for Marine Pollution Prevention and Management in the East Asian Seas Region (1994–1999).¹⁴⁰ PEMSEA involved demonstrating the application of an integrated approach to coastal area management at a series of sites. PEMSEA had 11 participating countries: Brunei Darussalam, Cambodia, the People's Republic of China, Indonesia, Malaysia, North Korea, the Philippines, Singapore, South Korea, Thailand, and Vietnam. The project facilitated the development and the signing of the UNEP Action Plan for the Seas of East Asia.¹⁴¹ PEMSEA's geographic coverage included the six subregional seas of the East Asian region, including the Yellow Sea, East China Sea, South China Sea, Sulu-Sulawesi and Indonesian Sea as well as the Gulf of Thailand. They are all semi-enclosed with a total sea area of 7 million square kilometers, a coastline of 234,000 kilometers, and a total watershed area of about 8.6 million square kilometers. These seas are ecologically and economically important both regionally and globally.¹⁴² Again, Taiwan has been excluded from participating in this project due to political reasons.

Other Mechanisms of Regional Cooperation in the South Sea Region

The potential for tension arising from territorial and maritime disputes over the insular features and the need for regional cooperation to deal with problems of common concern in the South China Sea region has given rise to the development of other regional mechanism. Tables 1 and 2 briefly describe some of the mechanisms, including nongovernmental (second track) and intergovernmental (first track) processes, that are relevant to but not directly focused on regional cooperation in marine living resources conservation and management, and marine environment protection.

New Thinking on the Future Cooperation in the South China Sea

Part IX of the 1982 UNCLOS, especially Article 123, was intended to provide an obligation of cooperation on Parties bordering an enclosed or semi-enclosed sea to manage the activities occurring in their shared and common marine environment and to deal with their interrelations. The bordering States of the South China Sea should apply this provision in managing this semi-enclosed sea. While certain things have been done and certain organizations or mechanisms have been established, the perspective of future cooperation in the

Table 1
Regional cooperation mechanism in the South China Sea: Nongovernmental

Second track	Date	Type	ROC	PRC	Vietnam	Malaysia	Philippines	Brunei	Other participating countries	Purpose
SEAPOL	1981 Defunct now	Nongov't network of scholars, gov't officials, and individuals	✓	✓	✓	✓	✓		The work covers Southeast Asia and APEC marine affairs	Facilitate the exchange of information and ideas related to current ocean law, policy, and management in Southeast Asia and APEC
Workshop on Managing Political Conflicts in the South China Sea	1990	Nonofficial network	✓	✓	✓	✓	✓	✓	Informal working group composed of individuals from South China Sea countries	Sponsor a series of Workshops on Managing Potential Conflicts in the South China Sea
CSCAP	1993	Nongov't network of scholars, gov't officials, and individuals	✓	✓	✓	✓	✓	✓	16 Other members	To submit policy recommendations to governments in the region, particularly in the promotion of confidence building

Abbreviations: ROC, Republic of China; PRC, People's Republic of China; SEAPOL, Southeast Asian Programme in Ocean Laws, Policy and Management; APEC, Asia-Pacific Economic Cooperation; CSCAP, Council for Security Cooperation in Asia Pacific.

Source: Information taken and modified from Table 5 of UNEP, *Review of the Legal Aspects of Environmental Management in the South China Sea and Gulf of Thailand*, UNEP/GEF/SCS Technical Publication No. 9 (2007), 20.

Table 2
Regional cooperation mechanism in the South China Sea: Intergovernmental

First track	Date	Type	ROC	PRC	Vietnam	Malaysia	Philippines	Brunei	Other participating countries	Purpose
ASEAN	1978	Sub-regional intergov't organization			✓	✓	✓	✓	6 Other members	ASEAN Environment Programme
PEMSEA	1994	Intergov't project		✓	✓	✓	✓	✓	6 Other members	ICM
UNEP/GEF South China Sea Project	2001	Intergov't project		✓	✓	✓	✓		3 Other members	Conservation of habitats; fisheries; land-based pollution
UNEP East Asian Seas Action Plan	1981	Intergov't programme		✓	✓	✓	✓		5 Other members	Coordinate the activities of governments, UN and donor agencies, and communities in marine environment of East Asian Seas
IOC-WESTPC	1979	Intergov't programme		✓	✓	✓	✓	✓	13 Other members	Marine scientific research; workshops; training, etc.
Plan of Action on Sustainable Fisheries	2001	Regional intergov't resolution			✓	✓	✓	✓	5 Other members	Sustainable/ responsible fisheries
ADB	1986	Intergov't organization	✓	✓	✓	✓	✓		56 Other members	ADB Environment Programme

Abbreviations: ROC, Republic of China; PRC, People's Republic of China; ASEAN, Association of Southeast Asian Nations; PEMSEA, Partnerships in Environmental Management for the Seas of East Asia; UNEP, United Nations Environment Programme; GEF, Global Environment Fund; IOC-WESTPC, Intergovernmental Oceanographic Commission (of UNESCO) Subcommission for the Western Pacific; ADB, Asian Development Bank; ICM, integrated coastal management.

Source: Information taken and modified from Table 5 of UNEP, *Review of the Legal Aspects of Environmental Management in the South China Sea and Gulf of Thailand*, UNEP/GEF/SCS Technical Publication No. 9 (2007), 20.

South China Sea region is not very promising, especially following the recent rounds of refutation between or among the bordering States with respect to their individual claims of outer continental shelf to the UN Commission on the Limits of the Continental Shelf (CLCS) during 2009.¹⁴³ Nevertheless, what lessons can be drawn from the experiences of practice in the Mediterranean and Caribbean Sea regions that may have application in the South China Sea?

One is that the involvement of the UN system, be it UNEP or FAO, will not guarantee the success of regional cooperation. This is more true in the South China Sea region since Taiwan, a substantive actor, will be automatically excluded from any activity of the United Nations or any of its Specialized Agencies.

Another lesson is that a large geographical coverage, a great number of participating States, and a high degree of diversity among participating States can result in difficulties in the operation of any regional cooperation program. The number of bordering States in the South China Sea is much fewer than in the cases in the Mediterranean and Caribbean Sea regions. Although diversity exists among the bordering States of the South China Sea, a small club is conceivably more likely to be successful than a big club. The solution to the South Sea problems seems better left to these fewer States to find.

At the same time, whether it is better to invite or allow the involvement of other interested States or international organizations, as envisaged by Article 123, paragraph 3 of the UNCLOS, is also questionable. Miller's comment on the Action Plan for the Caribbean Environment Programme is worthy of note: "Counterpart contributions and contributions from other organizations . . . sometimes have to be targeted to satisfy the interests of the donor rather than the immediate concerns of the Caribbean Environment Programme."¹⁴⁴ Since some extraregional interested States or international organizations will have their own agenda when participating in a regional cooperation program or mechanism, either from a financing or political perspective, the regional countries may suffer from the pull of these extraregional actors.

Another lesson from the Mediterranean and Caribbean Sea regions shows that a complicated mechanism with too many agenda issues and too high of an expectation with respect to lofty goals can overwhelm the capacities and political will of participating countries. Article 123 envisages regional cooperation "directly or through an appropriate regional organization." Thus, bilateral cooperation and multilateral regional approaches should not be mutually exclusive. An appropriate regional organization supported by a multilateral institutional agreement for simple issues or a single purpose may be desirable in the South China Sea region. In the initial stage, the issues being targeted should not be too complicated and the goals not too lofty. It is advisable that the bordering States in the South China Sea region start with issues of low political sensitivity, simplicity in implementation, and with a common need, such as conservation and management of fisheries resources, protection of the marine environment, and joint efforts in marine scientific studies.

The key question left unsolved is the political will of other bordering States of the South China Sea to treat Taiwan as an equal partner in bilateral or multilateral engagement in the region. If the limited number of partners possess a genuine political will to cooperate among themselves for the common good of the region and disallow the territorial or maritime disputes to hamper their desire for cooperation on the nonterritorial issues laid out in Article 123 of the UNCLOS, such as marine living resources conservation and management, marine environment protection, and joint marine scientific research, then there is a hope for regional cooperation and development.

Notes

1. United Nations Convention on the Law of the Sea, 1833 *U.N.T.S.* 397.
 2. Regarding the evolution of these provisions at the Third United Nations Conference on the Law of the Sea, see Satya N. Nandan and Shabtai Rosenne, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. III (The Hague: Martinus Nijhoff, 1995), 343–368. For a discussion on the weakness and problems of this Part, especially during the earlier stage of negotiations, see Budislav Vukas, “Enclosed and Semi-enclosed Sea,” in *The Law of the Sea: Selected Writings*, ed. Budislav Vukas (Leiden, the Netherlands: Martinus Nijhoff, 2004), 263–279.
 3. Nandan and Rosenne, *supra* note 2, at 343.
 4. Although Vukas, *supra* note 2, at 271, indicated that the Mediterranean Sea (and its parts: the Adriatic, Aegean, and Black Seas), the Caribbean Sea, the South China Sea, and several others were “most frequently cited as belonging to” the category of enclosed and semi-enclosed seas, the South China Sea has more than one outlet connecting to another sea or the ocean and, thus, may be said to deviate from the definition in Article 122.
 5. Art. 70, para. 2 of the 1982 UNCLOS, *supra* note 1.
 6. Budislav Vukas, “The Mediterranean: An Enclosed or Semi-enclosed Sea?” in Vukas, *supra* note 2, at 287, stated that “[t]he term ‘other interested States’ should be understood as meaning, in the first place, all other States users of an enclosed or semi-enclosed sea” and “as ‘interested international organizations’ competent universal as well as regional organizations should be considered.”
 7. The 21 States that have a coastline on the Mediterranean Sea are: Spain, France, Monaco, Italy, Malta, Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, Albania, Greece, Turkey, Cyprus, Syria, Lebanon, Israel, Egypt, Libya, Tunisia, Algeria, and Morocco.
 8. M. A. Massoud, M. D. Scrimshaw, and J. N. Lester, “Qualitative Assessment of the Effectiveness of the Mediterranean Action Plan: Wastewater Management in the Mediterranean Region,” *Ocean and Coastal Management* 46 (2003): 875–899, at 876.
 9. Whether the “secondary” seas, such as the Adriatic Sea, the Black Sea, and the Aegean Sea, should be considered as separate semi-enclosed seas or the constituent seas of the Mediterranean Sea is not pursued here. As noted by one author, “[a]lthough the Black Sea and its coastal States have been excluded from some forms of co-operation among the rest of the Mediterranean States (e.g. from the Mediterranean Action Plan), it is an undeniable fact that the Black Sea is only the most eastern part of the Mediterranean Sea.” See Vukas, *supra* note 6, at 284, especially n. 10.
 10. Continental Shelf Convention, 499 *U.N.T.S.* 311; Territorial Sea and Contiguous Zone Convention, 516 *U.N.T.S.* 205; High Seas Convention, 450 *U.N.T.S.* 11; and Fishing and Conservation of the Living Resources of the High Seas, 559 *U.N.T.S.* 285.
 11. The Constitution of the FAO is available at the Web site of the FAO Legal Office at www.fao.org/Legal/treaties/treaty-e.htm. Regional fishery bodies established under the FAO Constitution are categorized by the FAO as being FAO statutory (regional fishery) bodies.
 12. The text of Agreement for the Establishment of the General Fisheries Council for the Mediterranean (the 1949 GFCM Agreement), 126 *U.N.T.S.* 237. For the official record on the approval of the substantive provisions of the draft agreement for the establishment of GFCM, see *Report of the Conference of FAO, Fifth Session*, 21 November–6 December 1949, Washington, DC, available at www.fao.org/docrep/x5579E/x5579e0a.htm#vii, “VII. Constitutional, Administrative, and Financial Questions.” The full report can be found at www.fao.org/docrep/x5579E/x5579e00.HTM (accessed 20 June 2009, downloaded 17 March 2010).
 13. The 1963 revised version is available at eelink.net/~asilwildlife/medfish.html; the amendments of 1976 are available at untreaty.un.org/unts/1_60000/30/3/00058135.pdf; and the 1997 revised version of the Agreement of GFCM is available at ftp.fao.org/FI/DOCUMENT/gfcm/web/GFCM_Agreement.pdf (accessed 22 June 2009).
 14. See “About GFCM,” available at www.gfcm.org/gfcm/about/en; and under the item “status,” available at www.gfcm.org/gfcm/about/4/en (accessed 20 June 2009).
- For the prerevised version of the 1997 Agreement for the Establishment of the General Fisheries Council for the Mediterranean, see the *Report of the Twenty-second Session of the General Fisheries*

Council for the Mediterranean, Rome, 13–16 October 1997 (Rome: Food and Agriculture Organization of the United Nations, 1997), Appendix D: Agreement of GFCM, which can be downloaded as a pdf file available at the GFCM Web site at www.gfcm.org/gfcm/topic/16091/en (accessed 20 June 2009).

15. These 22 States are: Albania, Algeria, Bulgaria, Croatia, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Romania, Slovenia, Spain, Syria, Tunisia, and Turkey. See Web site of the GFCM at www.gfcm.org/gfcm/about/5/en (accessed 21 June 2009).

16. The 1997 GFCM Agreement, *supra* note 13, art. III, paras. 1 (a) to (h):

- (a) to keep under review the state of these resources, including their abundance and the level of their exploitation, as well as the state of the fisheries based thereon;
- (b) to formulate and recommend, in accordance with the provisions of Article V, appropriate measures:
 - (i) for the conservation and rational management of living marine resources, including measures:
 - regulating fishing methods and fishing gear,
 - prescribing the minimum size for individuals of specified species,
 - establishing open and closed fishing seasons and areas,
 - regulating the amount of total catch and fishing effort and their allocation among Members,
 - (ii) for the implementation of these recommendations;
- (c) to keep under review the economic and social aspects of the fishing industry and recommend any measures aimed at its development;
- (d) to encourage, recommend, coordinate and, as appropriate, undertake training and extension activities in all aspects of fisheries;
- (e) to encourage, recommend, coordinate and, as appropriate, undertake research and development activities, including cooperative projects in the areas of fisheries and the protection of living marine resources;
- (f) to assemble, publish or disseminate information regarding exploitable living marine resources and fisheries based on these resources;
- (g) to promote programmes for marine and brackish water aquaculture and coastal fisheries enhancement;
- (h) to carry out such other activities as may be necessary for the Commission to achieve its purpose as defined above.

17. For a more detailed description of the organization of the GFCM, see GFCM Web site, especially “Organigram,” available at www.gfcm.org/gfcm/about/6/en.

18. The leaflet can be downloaded from the GFCM Web site at ftp.fao.org/FI/DOCUMENT/gfcm/web/GFCM_leaflet.pdf.

19. The regional projects of the GFCM are explained at the GFCM Web site at www.gfcm.org/gfcm/topic/16108/en.

20. See the IATTC Web site at www.iattc.org.

21. See GFCM, 33rd Session, Tunis, Tunisia, 23–27 March 2009, “Intersessional Activities,” Doc. GFCM:XXXIII/2009/2, 2 and 3, available at 151.1.154.86/meetingdocs/2009/GFCM_33/pdf/GFCM33_2009_2_e.pdf (accessed 21 June 2009).

22. Agenda 21, adopted on 14 June 1992 by the UN Conference on Environment and Development, U.N. Doc. A/Conf.151/26, Vols. I–IV.

23. Code of Conduct for Responsible Fisheries, available at www.fao.org/docrep/005/v9878e/v9878eoo.htm.

24. The United Nations Environment Programme (UNEP) was established after the 1972 United Nations Conference on the Human Environment held at Stockholm from 5 to 16 June 1972 and through UN General Assembly Resolution 2997, adopted on 15 December 1972.

25. See the Web site of the UNEP Mediterranean Action Plan at www.unepmap.org/index.php, especially the entries of “About MAP” and “The Action Plan” (accessed 11 July 2009).

26. See *Report of the Intergovernmental Meeting on the Protection of the Mediterranean, Barcelona, 28 January to 4 February 1975*, Doc. UNEP/WG.2/5, 11 February 1975, available at 195.97.36.231/acrobatfiles/75WG2_5_Eng.pdf (accessed 11 July 2009). The 5-page Action Plan is an annex to this report. The style of the Annex looks like a combination of a resolution and a final act coming from an intergovernmental meeting.

27. The cited decisions are taken from the Decision 8(II), Approval of activities within the environment programme, in the light, inter alia of their implications for the Fund programme, Section A. I. Priority Subject Areas of the Programme, 4. Oceans, paragraphs (a), (b) and (c), especially (c) referring to the Mediterranean as the “high priority.” See *United Nations Environment Programme Report of the Governing Council on the Work of Its Second Session 11–22 March 1974*, 63, available at www.unep.org/resources/gov/prev_docs/74_05_GC2_report_K7409625.pdf (accessed 10 August 2009).

28. These 16 States were: Algeria, Egypt, France, Greece, Israel, Italy, Lebanon, the Libyan Arab Republic, Malta, Monaco, Morocco, Spain, the Syrian Arab Republic, Tunisia, Turkey, and Yugoslavia.

29. *Report of the Intergovernmental Meeting on the Protection of the Mediterranean*, supra note 26, para. 21.

30. *Ibid.*, para. 22.

31. *Ibid.*, para. 23.

32. *Report of the Intergovernmental Meeting on the Protection of the Mediterranean*, supra note 26, para. 24.

33. *Ibid.*, para. 18.

34. The quoted phrase is taken from *ibid.*, Action Plan, sec. III, subsec. A, para. 1.

35. *Ibid.*, para. 49.

36. *Ibid.*, para. 78.

37. *Final Act of the Conference of Plenipotentiaries of the Coastal States of the Mediterranean Region for the Protection of the Mediterranean Sea 1976*, available at 195.97.36.231/acrobatfiles/76CONF1_Final_Act_Eng.pdf (accessed 12 July 2009).

38. The 16 participating countries were: Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, the Libyan Arab Republic, Malta, Monaco, Morocco, Spain, the Syrian Arab Republic, Tunisia, Turkey, and Yugoslavia. Albania and Algeria were absent.

39. See *Final Act of the Conference of Plenipotentiaries*, supra note 37, at 5–6.

40. Convention for the Protection of the Mediterranean Sea Against Pollution (1976 Barcelona Convention), *I.L.M.* 15 (1976) 290.

41. Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, *I.L.M.* 15 (1976) 300.

42. Protocol on Co-operation in Combatting Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency, *International Legal Materials*, 15 (1976) 306.

43. See Resolution 2 Concerning Interim Arrangements, *Final Act*, supra note 37.

44. *Ibid.*, Resolution 4 Concerning the Establishment of a Committee of Experts on an Inter-State Guarantee Fund for the Mediterranean Sea Area.

45. *Ibid.*, Resolutions 7 and 8.

46. *Ibid.*, Resolution 9.

47. Paragraphs 1 and 2 of the Preamble of the Barcelona Convention, supra note 40.

48. See *Final Act of the Conference of Plenipotentiaries on the Amend[ement]s to the Convention for the Protection of the Mediterranean Sea Against Pollution, to the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft and on the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean*, available at 195.97.36.231/dbases/webdocs/BCP/95IG6_7_Eng.pdf (accessed 12 July 2009).

49. The 1995 amended Barcelona Convention is available at www.unep.ch/regionalseas/regions/med/t_barcel.htm. The amended Barcelona Convention entered into force on 9 July 2004.

50. See Amendments to Dumping Protocol, available at the Web site of the UNEP Mediterranean Action Plan at www.unepmap.org/index.php?module:content2&catid=001001001. The amendments are not in force.

51. Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, 2102 *U.N.T.S.* 203.

52. Protocol Concerning Mediterranean Specially Protected Areas, 1425 *U.N.T.S.* 160.

53. *Final Act*, supra note 48, at 13, para. 9, subpara. 6.

54. Article 1, para. 2 of the Barcelona Convention, supra note 49.

55. See MAP Phase II as Appendix I contained in the Annex to the Resolution I in the Final Act of the 1995 Conference of the Plenipotentiaries, supra note 48.

56. See the status of the Convention and the seven Protocols, available at www.unepmap.org/index.php?module=content2&catid=001001001 (accessed 19 July 2009).

57. See, generally, Massoud et al., supra note 8, at 882–884.

58. See the entry of “Caribbean,” available at the Web site of answer.com at www.answers.com/topic/caribbean-sea (accessed 8 August 2009).

59. See the Web site of the Caribbean Community (CARICOM) Secretariat, available at www.caricom.org/jsp/community/original.treaty.jsp?menu=community (accessed 8 August 2009). The Treaty of Chaguaramas, 946 *U.N.T.S.* 17, was signed by Barbados, Guyana, Jamaica, and Trinidad and Tobago on 4 July 1973 and came into effect on 1 August 1973. The Caribbean Community and the Caribbean Common Market replaced the Caribbean Free Trade Association in May 1974.

The Treaty of Chaguaramas created the Caribbean Community as a separate legal entity from the Common Market. The legal separation of these two institutions was emphasized by two discrete legal instruments: the Treaty Establishing the Caribbean Community and the Agreement Establishing the Common Market (which was later annexed to the Treaty and designated the Common Market Annex). This institutional arrangement facilitated States joining the Community without becoming Parties to the Common Market regime.

In addition to economic issues, the Community instrument addressed issues of foreign policy coordination and functional cooperation. Issues of economic integration, particularly those related to trade arrangements, were addressed in the Common Market Annex. Because of this juridically separate identity of the regional common market, it was possible for the Bahamas to become a member of the Community in 1983 without joining the Common Market.

In 2001, the original Treaty was revised and designated as the “Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy” in order to deepen regional economic integration through the establishment of the CARICOM Single Market and Economy (CSME).

60. For a brief history of CFRAMP, see Milton O. Haughton, Robin Mahon, Patrick McConney, G. Andre Kong, and Anthony Mills, “Establishment of the Caribbean Regional Fisheries Mechanism,” *Marine Policy* 28 (2004): 351–359, at 352–354.

61. The text of the Agreement Establishing the Caribbean Regional Fisheries Mechanism, 2002, is available at www.caricom-fisheries.com/website_content/main/agreement_establishing_the_crfm.pdf (accessed 8 August 2009).

62. *Ibid.*, art. 7, para. 3.

63. *Ibid.*, arts. 8 and 9.

64. *Ibid.*, arts. 10 and 11.

65. *Ibid.*, art. 12, para. 1.

66. *Ibid.*, art. 12, para. 3.

67. *Ibid.*, art. 13(a).

68. A short history about the UNEP’s effort in initiating and formulating a regional environment program in the Caribbean is provided in UNEP, *Action Plan for the Caribbean Environment Programme*, UNEP Regional Seas Reports and Studies No. 26, 1983, Preface, i–ii, available at www.unep.org/regionalseas/Publications/Reports/RSRS/pdfs/rsrs026.pdf (accessed 12 July 2009).

69. *Ibid.*, the Action Plan is at 1–12, and the Resolution is at 13–16.

70. *Ibid.*, at 1, para. 2.

71. *Ibid.*, at 1, para. 1.

72. *Ibid.*, at 1, para. 3.

73. *Ibid.*, at 2, paras. 5 and 6.

74. *Ibid.*, at 2, para. 8. The components of the Caribbean Action Plan are as follows:

Introduction

Environmental Assessment and Management

General, Pollution control, Coastal areas, Fisheries, Watersheds, Natural disasters, Energy,
Human settlements, Tourism, Environmental health

Education, Training and Development of Human Resources

Supporting Measures Institutional arrangements, Financial arrangements, Regional legal
agreement

75. *Ibid.*, at 12, para. 76.

76. *Ibid.*, at 14, para. 5.

77. See the Final Act of the 1983 Conference of Plenipotentiaries on the Protection and Development of the Marine Environment of the Wider Caribbean Region, available at www.cep.unep.org/pubs/legislation/cart2.html (accessed 12 July 2009).

78. Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (the 1983 Cartagena Convention), *I.L.M.* 22 (1983) 221.

79. Protocol Concerning Co-operation in Combatting Oil Spills in the Wider Caribbean Region, *I.L.M.* 22 (1983) 240.

80. See the Resolutions adopted by the Conference, *supra* note 77.

81. See "About the Cartagena Convention," available at the UNEPCEP Web site at www.cep.unep.org/cartagena-convention/ (accessed 12 July 2009).

82. *Ibid.*

83. Articles 1 and 2 of the Cartagena Convention, *supra* note 78.

84. *Ibid.*, art.10.

85. Protocol Concerning Specially Protected Areas and Wildlife (SPA) in the Wider Caribbean Region, 2180 *U.N.T.S. Reg. A-25974*.

86. See Protocol Concerning Pollution from Land-Based sources and Activities (LBS Protocol), available at cep.unep.org/repcar/lbs-protocol-en.pdf.

87. The Web site of UNEP CEP states that "The Cartagena Convention has been ratified by 23 United Nations Member States in the Wider Caribbean Region." However, after a careful counting of the States that have ratified or acceded to the Cartagena Convention and the Oil Spills Protocol, based on the table of "Status of the Cartagena Convention and Protocols" at the Web site, there are only 22 States that have ratified or acceded to the Convention and the Oil Spills Protocol. The table is available at www.cep.unep.org/cartagena-convention/about-the-cartagena-convention#status (accessed 11 August 2009).

88. See the UNEP Web site at www.unep.org/regionalseas/programmes/actionplans/default.asp (accessed 20 July 2009).

89. *Ibid.*

90. Peter Hulm, "The Regional Seas Program: What Fate for UNEP's Crown Jewels?" *Ambio* 12, no. 1 (1983): 2-13, at 2.

91. *Ibid.*, at 5.

92. *Ibid.*

93. See the UNEP Web site, *supra* note 86.

94. Sofia Frantzi and Jon C. Lovett, "Is Science the Driving Force in the Operation of Environmental Regimes? A Case Study of the Mediterranean Action Plan," *Ocean and Coastal Management* 51 (2008): 229-245, at 243.

95. *Ibid.*, at 242-243.

96. *Ibid.*, at 244.

97. Protocol for the Protection of the Mediterranean Against Pollution from Land-Based Sources, 1328 *U.N.T.S.* 119. The Protocol was amended in 1996. The revised is available at www.unep.ch/regionalseas/main/med/mlbsprot.html.

98. M. A. Massoud et al., *supra* note 8, at 894.
99. *Ibid.*, at 895.
100. *Ibid.*
101. Marian A. L. Miller, "Protecting the Marine Environment of the Wider Caribbean Region: The Challenge of Institution-Building," *Green Globe Yearbook 1996*, 37–45, at 42–43.
102. *Ibid.*, at 42.
103. *Ibid.*, at 42–43.
104. International Convention for the Prevention of Pollution from Ships, 1973, and the Protocol of Amendment, 1978, 1340 *U.N.T.S.* 61.
105. Benedict Sheehy, "International Marine Environment Law: A Case Study in the Wider Caribbean Region," *Georgetown International Environmental Law Review* 16 (2004): 441–472.
106. *Ibid.*, at 457–461.
107. *Ibid.*, at 461–464.
108. P. Akiwumi and T. Melvasalo, "UNEP's Regional Seas Programme: Approach, Experience and Future Plans," *Marine Policy* 22 (1998): 229–234, at 232.
109. CRFM Agreement, *supra* note 61.
110. See the Web site of ICCAT at www.iccat.int/en/ for its competence and convention area.
111. See the Web site of the UN FAO "Regional Fishery Bodies Summary Description" for a description of the WECAFC, available at www.fao.org/fishery/rfb/wecafc/en (accessed 8 August 2009).
112. Bisessar Chakalall, Robin Mahon, Patrick McConney, Leonard Nurse, and Derrick Oder-son, "Governance of Fisheries and Other Living Marine Resources in the Wider Caribbean," *Fisheries Research* 87 (2007): 92–99, at 95.
113. *Ibid.*, at 94.
114. The quoted phrase is the purpose of the GFCM on the FAO Web site, available at www.fao.org/fishery/org/gfcm_inst/en, or as provided for by Article III, paragraph 1 of the GFCM Agreement, *supra* note 13.
115. Similarly, the "East China Sea" is "Dung-Hai" or "East Sea" to the Chinese people and in the Chinese language.
116. In the remainder of this article, South Sea and South China Sea are used interchangeably.
117. Fu Chün (符駿), *Nan-Hai Ssu-Sha Ch'un-Tao* (南海四沙群島 *The Four Sands Islands of the South Sea*) (Taipei, Taiwan: San-Min Books, June 1982), 11.
118. Yu Kuan-Tss (俞寬賜), *Nan-Hai Chu-Tao Ling-T'u Cheng-Tuan chih Ching-Wei yu Fa-Li* (南海諸島領土爭端之經緯與法理 *The Warp and the Woof, or the Main Points, as well as the Legal Theory of the Territorial Disputes of the South Sea Islands*) (Taipei, Taiwan: National Institute for Compilation and Translation, 2000), 1.
119. Chang Wei-I (張維一), *Nan-Hai Tsu-Yuan K'ai-Fa yu Chu-Ch'uan Wei-Hu* (南海資源開發與主權維護 *The Resources Exploitation and Sovereignty Protection of the South Sea*) (Taipei County, Taiwan: P'an Shih Library, December 1994), 1.
120. See Chris Rahman and Martin Tsamenyi, "A Strategic Perspective on Security and Naval Issues in the South China Sea," in the next Special Issue II, for a more detailed description and related map.
121. With respect to the 1947 ROC South China Sea map, and the ROC's early claims over the South China sea, see Nien-Tsu A. Hu, "South China Sea: Troubled Waters or a Sea of Opportunity" in this Special Issue.
122. *Ibid.*
123. See, however, Yann-huei Song, "The South China Sea Workshop Process and Taiwan's Participation," in this Special Issue.
124. See a summary description of the APFIC available at the FAO Web site at www.fao.org/fishery/rfb/apfic/en (accessed 12 August 2009).
125. For all of the members, see *ibid.* Others include Australia, the People's Republic of Bangladesh, Cambodia, France, India, Indonesia, Japan, the Republic of Korea, Malaysia, Myanmar,

Nepal, New Zealand, Pakistan, Sri Lanka, the Kingdom of Thailand, the United Kingdom, and the United States.

126. Article 1, paragraph 2 of the Agreement for the Establishment of the Asia-Pacific Fishery Commission, 120 *U.N.T.S.* 59, states: "The Members of the Commission shall be such Member Nations and Associate Members of the Organization (note: here means the FAO) and such non-member States of the Organization as are Members of the United Nations, or any of its Specialized Agencies or the International Atomic Energy Agency that accept this Agreement in accordance with the provisions of Article X thereof."

127. APFIC Web site, available at www.apfic.org/ (accessed 13 August 2009).

128. The WCPFC Convention was adopted on 5 September 2000 and entered into force on 19 June 2004, *I.L.M.* 40 (2000) 278.

129. For the map of WCPFC Convention Area, see the WCPFC Web site at www.wcpfc.int/doc/convention-area-map (accessed 13 August 2009).

130. Article 3, paragraph 3 of the WCPFC Convention, *supra* note 126.

131. U.N. Fish Stocks Agreement, 2167 *U.N.T.S.* 3.

132. Regarding the legal concept and practice of the term "fishing entities," see *Ocean Development and International Law* 37, no. 2 (2006), Special Issue: The Concept of Fishing Entities in International Law: A Decade of Practice. For Taiwan's practice, see Nien-Tsu Alfred Hu, "Fishing Entities: Their Emergence, Evolution, and Practice from Taiwan's Perspective," in *ibid.*, at 149–183, and other articles in the same issue.

133. 1. See a summary description of the East Asian Seas Programme at the UNEP RSP Web site at www.unep.org/regionalseas/programmes/unpro/eastasian/default.asp (accessed 19 July 2009).

134. See the 1981 Action Plan for the Protection and Development of the Marine and Coastal Areas of the East Asian Region at www.cobsea.org/documents/action_plan/ActionPlan1983.pdf (accessed 13 August 2009).

135. The revised Action Plan is designated as the "Action Plan for the Protection and Sustainable Development of the Marine and Coastal Areas of the East Asian Region," available at www.cobsea.org/documents/action_plan/ActionPlan1994.pdf (accessed 13 August 2009).

136. Information retrieved from www.cobsea.org/aboutcobsea/background.html (accessed 13 August 2009).

137. *Ibid.*

138. *Ibid.*

139. See the PEMSEA Web site at pemsea.org (accessed 13 August 2009).

140. UNEP, *Review of the Legal Aspects of Environmental Management in the South China Sea and Gulf of Thailand*, UNEP/GEF/SCS Technical Publication No. 9, 2007, 19. This publication is available at www.unepscs.org/SCS_Documents/showdown/1959.html (accessed 30 July 2009).

141. *Ibid.*

142. Information available at the PEMSEA Web site at the page "The Seas of East Asia and PEMSEA Sites," *supra* note 136.

143. See relevant submissions made to the CLCS by bordering States of the South China Sea and reacting communications delivered to the UN Secretary-General and the CLCS at the CLCS Web site at www.un.org/Depts/los/clcs_new/commission_submissions.htm. Since Taiwan does not have access to the UN system, Taiwan's Ministry of Foreign Affairs made statements on behalf of the ROC Government. See, for example, Statement by the ROC Ministry of Foreign Affairs Concerning Malaysia-Vietnam Joint Submission to the CLCS, 11 May 2009, and Declaration of the Republic of China on the Outer Limits of Its Continental Shelf, 12 May 2009, available at www.mofa.gov.tw. See also Nien-Tsu A. Hu, "South China Sea: Troubled Waters or a Sea of Opportunity," in this Special Issue.

144. Miller, *supra* note 101, at 43.