

*The South China Sea: Cooperation for Regional Security & Development
Third International Workshop
Hanoi, Vietnam, Nov. 3-5, 2011*

Regional Cooperation in the South China Sea

by Jon M. Van Dyke¹

The Duty to Cooperate in Semi-Enclosed Seas

The South China Sea is a semi-enclosed sea governed by Part IX of the Law of the Sea Convention,² which says in Article 123 that countries bordering such seas “should co-operate with each other in the exercise of their rights and the performance of their duties under this Convention” More specifically, they are instructed to “endeavor, directly or through an appropriate regional organization (a) to co-ordinate the management, conservation, exploration, and exploitation of the living resources of the sea” and also to co-ordinate their activities “with respect to the protection and preservation of the marine environment.” The countries bordering on the South China Sea have failed to create an effective regional organization, and their cooperation “directly” has been generally unsuccessful as well. The Coordinating Body on the Seas of East Asia (COBSEA) has been mostly dysfunctional and the Partnerships in Environmental Management for the Seas of East Asia (PEMSEA) has been modest in its accomplishments. No effective organization to manage the shared fisheries has been established.

¹Jon M. Van Dyke is Professor of Law and Carlsmith Ball Faculty Scholar at the William S. Richardson School of Law, University of Hawai‘i at Mānoa-- jvandyke@hawaii.edu. He gratefully acknowledges the research assistance provided by Lora L. Nordtvedt Reeve, Class of 2012, William S. Richardson School of Law, University of Hawaii at Manoa.

²United Nations Convention on the Law of the Sea, Dec. 10, 1982, Montego Bay, Jamaica, 1833 U.N.T.S. 397, 2 I.L.M. 1261 (1982), *entered into force on* Nov. 16, 1994.

The UNEP Regional Seas Programmes

The UNEP Regional Seas Programme was launched in 1974 and currently consists of 13 regional programmes,³ six of which are administered directly by UNEP,⁴ and it has links to five “partner” regional environmental bodies.⁵ These programmes emerged from the recognition that ocean regions differ dramatically and that unique ecosystems require individual conservation approaches, but it has also been recognized that many sources of marine pollution are global in nature and frequently uniform global standards and approaches are needed.⁶ Although some of these programs have thrived, others have stumbled because of a lack of interest, political disputes, mission uncertainty, and modest funding. The goal of these programs has also been questioned, because they were established with a single-sector focus on pollution, and today attention is given to multi-sector, integrated coastal and ocean management strategies.⁷

The regional seas programmes have been considered to be "brown" organizations because of their focus on pollution, in contrast to the modern "green" approach that examines all aspects of ocean areas through integrated ecosystem management. Should it be recognized that a new approach is needed for the regional seas programmes, and that organizations with a more holistic and integrated approach, and that address resource as well as pollution issues, should be developed to provide proper governance of ocean and coastal areas?

³ Black Sea, Wider Caribbean, East Asian Seas-COBSEA, Eastern Africa, South Asian Seas, Persian/Arab Gulf-ROPME Sea Area, Mediterranean, Northeast Pacific, Northwest Pacific-NOWPAP, Red Sea and Gulf of Aden, Southeast Pacific, Pacific-SPREP, and Western Africa.

⁴ Wider Caribbean, East Asian Seas, Eastern Africa, Mediterranean, Northwest Pacific-NOWPAP, and Western Africa.

⁵ Antarctic, Arctic, Baltic Sea, Caspian Sea, and Northeast Atlantic-OSPAR.

⁶ See for example, J.G.B Derraik, *The Pollution of the Marine Environment by Plastic Debris: A Review*, 44:9 MARINE POLLUTION BULLETIN 842 (Sept. 2002); M.S. Islam and M. Tanaka, *Impacts of Pollution on Coastal and Marine Ecosystems including Coastal and Marine Fisheries and Approach for Management: A Review and Synthesis*, 48:7-8 MARINE POLLUTION BULLETIN 624 (April 2004); and D.A. Holdway, *The Acute and Chronic Effects of Wastes Associated with Offshore Oil and Gas Production on Temperate and Tropical Marine Ecological Processes*, 44:3 MARINE POLLUTION BULLETIN 185 (March 2002).

⁷ See, e.g., BILIANACICIN-SAIN & ROBERT KNECHT, *INTEGRATED COASTAL AND OCEAN MANAGEMENT: CONCEPTS AND PRACTICES* (Island Press, 1998).

COBSEA

The Coordinating Body on the Seas of East Asia (COBSEA) was established pursuant to an Action Plan adopted in 1981 and revised in 1994.⁸ Its website states optimistically that "[t]here is no regional convention, but instead the programme promotes compliance with existing environmental treaties and is based on member country goodwill."⁹The participating states are Australia, Cambodia, China, Indonesia, Malaysia, the Philippines, Singapore, South Korea, Thailand, and Vietnam.¹⁰

From 2001 to 2006, COBSEA examined, among other things, the impact of sewage on the marine environment, in preparation for the 2001 “Regional Workshop on Protecting Coastal and Marine Ecosystems from Land-based Activities in the Asia-Pacific Region” in Toyama, Japan. This project was designed to raise awareness of the needs for regional guidelines and standards, innovative solutions, and state partnerships for sewage management. At the 2001 Regional Workshop on Identification of Pollution Hot Spots in the East Asian Seas Region in HuaHin, Thailand, catchments and major pollution sources were nominated as hot spots by the member countries. The participants at this meeting also confirmed the need for further regional cooperation for data and information sharing to identify major pollution sources, their management, and the use of modeling to predict pollution effects. This recognition resulted in the development of a project called “Determination of Pollution Loading Using Modeling and GIS,” which focused on the collection of data from selected catchments in the member countries,

⁸UNEP, *New Strategic Direction for COBSEA (2008-2012)*, UNEP EAS/RCU, Coordinating Body for the Seas of E. Asia Secretariat [COBSEA] (23 Jan. 2008), available at http://www.cobsea.org/documents/Meeting_Documents/19COBSEA/New%20Strategic%20Direction%20for%20COBSEA%202008-2012.pdf.

⁹ UNEP, <http://www.unep.org/regionalseas/programmes/unpro/eastasian/default.asp>.

¹⁰ The island of Taiwan is included in the map on the cover of the most recent governance document showing the member states, but the Republic of China (Taiwan) is not listed as a member, and Taiwan has not been able to participate directly in regional environmental programmes.

modeling pollution-loading from the major pollution sources, the establishment of a geographic information systems database of land-based nutrient pollution, and capacity-building. Through this activity, member countries were to be provided with a quantitative modeling tool for the estimation of nutrient pollution loading in catchment areas with no or limited data availability.

The COBSEA Action Plan was superseded in 2008 by the New Strategic Direction for COBSEA (2008-2012), which was adopted at the 19th meeting of the members in Siem Reap, Cambodia. That document includes an assessment of challenges, as well as objectives and strategies to:

1. Establish a knowledge base to provide information on programmes and projects, and the state of the coastal and marine environment in the East Asian Seas region, with information synthesis and reporting activities under the COBSEA Coordinating Centre;
2. Strengthen member capacity in responding to the growing pressures exerted on the coastal and marine environment, and the increasing need for sustainable management of their natural resources;
3. Assist members in identifying and addressing upcoming issues of priority to the East Asian Seas region; and
4. Implement a new strategic direction in collaboration with member countries and regional partners, and work to prevent duplication of efforts.¹¹

COBSEA has been relatively inactive since the adoption of the New Strategic Direction document in 2008, apparently because of a combination of insufficient funding, competition for professional expertise, member state inertia, and other factors. Current activity categories are listed as Information Management, Strategic and Emerging Issues, Regional Cooperation, and National Capacity Building. As of August 2011, the most recent event documented on the COBSEA website was the “COBSEA Forum on Marine Pollution-Related Multilateral Environmental Agreements (MEAs),” which took place in Guangzhou, China in June 2008.¹² China was slated to take the lead on the resulting project, called “Understanding the

¹¹*New Strategic Direction for COBSEA (2008-2012)*, *supra* note 8, at 5.

¹² COBSEA Forum on Marine Pollution-Related Multilateral Environmental Agreements (MEAs), June 10-

Status of Implementation of These MEAs,”¹³ designed to enable COBSEA to identify capacity building needs and propose solutions that will lead to more effective MEA implementation in member countries.”¹⁴ COBSEA Coordinator Dr. Elik Adler explained at a workshop held during the East Asian Seas Congress in 2009 in Manila, Philippines that his organization has “been actively implementing the [marine litter] programs covering the organization of workshops, meetings and International Coastal Cleanup campaigns, establishing data bases, developing monitoring guidelines and producing publications such as regional overviews on [marine litter], posters and brochures.”¹⁵

Over the last 15 years, COBSEA has been faced with major financial challenges.¹⁶ The organization operates and carries out activities and programs from contributions by member countries into a trust fund. Each member was originally required to contribute a set amount, based on the economic status of that country, toward a total of US\$170,000 per year. Even if that goal had been met completely, it would fall far short of the amount required to sustain the secretariat and carry out regional activities.¹⁷ UNEP also assisted with funding until 2006, when the UNEP Secretariat “decided that members should carry the financial burden if they wanted a viable organization.”¹⁸ This UNEP decision was based on the growing economies of member states such as China, Singapore, and South Korea, which increased abilities to contribute higher

11, 2008, *Report of COBSEA Forum on Marine Pollution Related Multilateral Environmental Agreements (MEAs)*, UNEP(DEPI)/MEAs1 WS.1 (25 July 2008).

¹³ The MEAs are: the Global Programme of Action on the Protection of the Marine Environment from Land-based Activities (GPA); the International Convention for the Control and Management of Ship’s Ballast Water and Sediments; the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC); the 1972 London Convention: Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter (LDC); the MARPOL Convention: International Convention for the Prevention of Pollution from Ships; and the United Nations Convention on the Law of the Sea.

¹⁴ COBSEA website, http://www.cobsea.org/activities/activities_national%20capacity%20building.html.

¹⁵ East Asian Seas Congress, Nov. 23-26, 2009, *Addressing the Transboundary Challenge in East Asia by Two UNEP Regional Seas Programs*, in *Proceedings of the International Conference on Sustainable Coastal and Ocean Development*, Workshop 4, at 5, EAS Congress/WP/2010/01 (2010).

¹⁶ Elik Adler, Coordinator, COBSEA (telephone interview, Aug.15, 2011).

¹⁷ *Id.*

¹⁸ *Id.*

sums to the organization's trust fund.¹⁹ Dr. Adler reported at the November 2009 meeting of COBSEA that "if no substantial change will occur in the support given to the Trust Fund either by UNEP or by increased contributions from the member countries, the Trust Fund will become completely depleted at the beginning of 2011."²⁰

In addition to funding shortfalls, other significant challenges for COBSEA include the diminishing interest among member countries for the organization, territorial disputes between the members,²¹ competition with other marine environmental organizations for funding and donor attention, and difficulties with the focal ministries in some of the member governments.²² Little progress has been made toward fulfilling the objectives of the New Strategic Direction document under these circumstances.²³ The Southeast Asian shared ocean areas have limited regional governance regarding resources. The Southeast Asian Fishery Development Center (SEAFDEC) has limited scientific competence,²⁴ and illegal, unreported, and unregulated (IUU) fishing is a major problem in the South China Sea.²⁵

Another challenge facing COBSEA is that it appears to be in competition with another East Asian marine conservation organization -- the Partnerships in Environmental Management

¹⁹*Id.*

²⁰ UNEP, *Report of the Twentieth Intergovernmental Meeting of the Coordinating Body on the Seas of East Asia (COBSEA)*, UNEP/DEPI/COBSEA IGM 20/15 (Nov. 5, 2009), at 3, ¶12.

²¹ China, Vietnam, Malaysia, and the Philippines have, for instance, a major dispute over the sovereignty of the Spratly Islands in the South China Sea and over the governance of the waters of the South China Sea. *See, e.g.*, MARK J. VALENCIA, JON M. VAN DYKE, AND NOEL LUDWIG, *SHARING THE RESOURCES OF THE SOUTH CHINA SEA* (Kluwer Law International/Martinus Nijhoff, 1997), reprinted in paperback form in 1999 by the University of Hawaii Press.

²² Adler Interview, *supra* note 16. Countries are members of COBSEA through their respective foreign ministries, but other interested ministries with power over marine issues confuse or dilute authority.

²³*Id.*

²⁴ *See* Southeast Asian Fisheries Development Center, <http://www.seafdec.org/cms/index.php>.

²⁵ M. Coll, S. Libralato, S. Tudela, I. Palomera, and F. Pranovi, *Ecosystem Overfishing in the Ocean*, 3:12 PLOS ONE e3881 (Dec. 2008), available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0003881>; for a discussion of global IUU fishing *see*, D.J. Agnew, H.J. Pearce, G. Pramod, T. Peatman, R. Watson, J.R. Beddington, T.J. Pitcher, *Estimating the Worldwide Extent of Illegal Fishing*, 4:2 3:12 PLOS ONE e4570 (Feb. 2009), available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0004570>.

for the Seas of East Asia (PEMSEA)²⁶ -- which was established in 1993 with funding from the Global Environment Facility (GEF) to promote coastal conservation:

PEMSEA is a partnership arrangement involving various stakeholders of the Seas of East Asia, including national and local governments, civil society, the private sector, research and education institutions, communities, international agencies, regional programmes, financial institutions and donors. It is also the regional coordinating mechanism for the implementation of the Sustainable Development Strategy for the Seas of East Asia.²⁷

PEMSEA's members are Cambodia, China, Indonesia, Japan, Laos, North Korea, Philippines, South Korea, Singapore, Timor-Leste, and Vietnam. Seven countries are thus in both COBSEA and PEMSEA, and each organization has several members that do not belong to the other.

The mission of PEMSEA overlaps with the goals of COBSEA, particularly relating to regional capacity building and partnership formation.²⁸ In 2010, PEMSEA moved from the UN Development Program (UNDP) to become an international organization with legal and financial status separate from the UNDP.²⁹ There appears to be competition for funding and professional expertise between the two organizations, as they both receive support from the GEF.³⁰

COBSEA has engaged an external, neutral consultant to investigate the organization's condition and to make recommendations to the members regarding its sustainability.³¹ At the next Intergovernmental Meeting of the member states, to take place in late 2011 or early 2012, the members will consider the recommendations and decide on a course of action.³² One of the options for the future could be to merge COBSEA with PEMSEA, giving the combined

²⁶ Partnerships in Environmental Management for the Seas of East Asia [PEMSEA], <http://beta.pemsea.org/>; see also *PEMSEA Accomplishment Report 2008-2010* (A GEF/UNDP Regional Programme, 2010).

²⁷ PEMSEA website, <http://beta.pemsea.org/about-pemsea>.

²⁸ *Id.*

²⁹ Adler Interview, *supra* note 16.

³⁰ *Id.* For information about the GEF, see Global Environment Facility (GEF), <http://www.thegef.org/gef/whatisgef>.

³¹ *Id.*

³² *Id.*

organization a platform under international law that PEMSEA no longer enjoys since its break with UNDP. Among the challenges to that solution are differences in the membership of the two organizations, and the unanimous agreement of all countries that would be required for such a merger.³³

Neither COBSEA nor PEMSEA govern the exploitation of living or nonliving resources, and it is necessary to think harder about how best to undertake these shared responsibilities. No robust fishery management organization exists for this region. Navigational freedoms have also become complicated, particularly regarding military activities, as China has challenged the United States on three occasions in the past decade. These challenges have concerned U.S. aerial surveillance (with the collision between the U.S. surveillance plane and a Chinese fighter jet in April 2001), U.S. maritime surveillance (in the *Impeccable* Incident of March 8, 2009), and U.S. hydrographic surveying (China challenged the surveying of the *USNS Bowditch* in September 2002) in the South China Sea.³⁴ These incidents may continue until a clear understanding regarding governance is established.

What Would a Robust Regional Seas Arrangement Look Like?

As Veerle Vandeweerd explained in 2005,³⁵ it is necessary to rethink the role of and the goals for the regional seas programmes. It is inefficient to put funds and energy into programmes that focus solely on pollution issues without examining the marine ecosystem as a whole, including resource exploitation and other uses of the sea. It is time to reinvigorate these

³³*Id.*

³⁴See, e.g., Jon M. Van Dyke, *The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone*, 29 MARINE POLICY 107-21 (2005).

³⁵14th Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols, Portoroz, Slovenia, 8-11 Nov. 2005, *Report of 14th Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols, Annex VII*, p. 13: Speech of Dr. Veerle Vandeweerd, Head of UNEP Regional Seas Programme and UNEP/GPA Coordinator, on behalf of Dr. Klaus Toepfer, Executive Director of UNEP, 9 Nov. 2005, Portoroz, UNEP(DEPI)/MED IG.16/13 (Nov. 30, 2005), available at <http://www.pap-theoastcentre.org/COP14-final%20report.pdf>.

programmes, to utilize modern thinking and management approaches to address the challenges facing our oceans.

The East Asian regional seas programmes have been particularly underfunded and lackluster in their projects and activities. They are limping along, while the shared oceans and marine resources of East Asia continue to face a significant range of environmental challenges requiring cooperation and careful management. Successful cooperative regional arrangements emerge in areas with “pre-existing habits of cooperation and institutional development...; national and regional leadership; clearly defined benefits to be gained through regional cooperation...; [and] public awareness and concern with a given issue or range of issues.”³⁶ The relative success of the Mediterranean and OSPAR Programmes, and to a somewhat lesser extent, the Western Caribbean Programme, are attributable in large part to the involvement of nongovernmental/civil-society organizations which bring ideas and information to these programmes and help set their agendas, and thereby put pressure on the members to provide proper funding for needed activities. The Arctic Council formalizes this nongovernmental input by having a category of “Permanent Participants” consisting of Arctic indigenous groups and a larger group of “Observers” that play a role in the Council’s activities, and the Council has begun the process of examining the whole range of issues that will require governance in the Arctic. The Mediterranean countries have negotiated a series of important protocols to address the range of pollution sources, and they have moved toward integrated ecosystem management. The focus on shared environmental concerns in the Mediterranean has enabled the countries to set aside their political disputes in order to protect their ocean resources for present and future generations.

³⁶ Mark J. Valencia, *Conclusions and Lessons Learned*, in MARITIME REGIME BUILDING 149, 160 (Mark J. Valencia ed., The Hague: Martinus Nijhoff, 2001).

In East Asia, by contrast, sharp political and historical disputes continue to stand in the way of regional cooperation, and nongovernmental organizations have not stepped up to promote a regional identity that could overcome contentious national passions. Although the countries of Asia have generally reached short-term pragmatic solutions to resource disputes,³⁷ they have failed to build robust regional ocean organizations.

Because the East Asian countries have not developed either strong regional fishery management or effective pollution-control organizations, it might make most sense for them to develop an organization that would have authority over both resources and pollution. Although the creation of such a combined organization might seem daunting, especially in light of the failure to create an effective organization of any sort thus far, it could prove to be easier to create a strong organization with resource-allocation responsibilities, because the practical gains from such an organization might be easier to recognize. Ideally, such an organization should be governed by a binding convention, ratified by all countries in the region; should be staffed by a well-funded secretariat; should have responsibility over resource exploitation (especially fishing), over land-based pollution, and pollution from ships; should govern coasts, estuaries, wetlands, rivers, and open ocean areas through integrated multi-sector ecosystem management techniques; should promote the establishment of marine protected areas; and should undertake active research projects to monitor and understand climate change. Although the countries and citizens of each region must ultimately take responsibilities for such regional organizations and ensure their success, it will also be useful for UNEP to provide strong international leadership, to

³⁷See Jon M. Van Dyke, *Northeast Asian Seas – Conflicts, Accomplishments, and the Role of the United States*, 17 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 397 (2002).

promote a more integrated approach that combines resource management with environmental protection, and thus to reconfirm the common shared goals of the Regional Seas Programmes.

Our shared ocean spaces are too valuable to let political squabbles among neighbors stand in the way of the vigorous cooperative management required to ensure that they remain viable for future generations. The UNEP Regional Seas Programmes were visionary in their time, but now it is necessary to reconceive them as multi-sector bodies, to fund them properly, and to give them the political support they need to address the challenges of the present and the future.

Governance of the South China Sea presents challenges. The countries of the region as well as those with interests in these regions must work together to manage and protect these shared ocean spaces for the benefit of present and future generations.