A South China Sea Regional Seas Convention: Transcending Soft Law and State Goodwill in Marine Environmental Governance?

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Structured Abstract

Article Type: Research Paper

Purpose—The absence of a regional seas convention (RSC) in the South China Sea is alarming for one of the world's most critical marine environments. Presently, a United Nations body coordinates East Asian marine environmental "policy" on the basis of participating states' goodwill. This contribution addresses this regional legal gap by examining RSCs elsewhere to understand whether state practice on marine environmental protection now includes the duty to conclude RSCs.

Design, Methodology, Approach—Using a comparative legal approach, the author purposely selected the Mediterranean and Caribbean regional seas programs (RSPs) to draw out practices that may be useful to marine environmental governance in the South China Sea.

Findings—The comparison confirms the author's hypothesis that the duty to protect the marine environment now includes a duty to conclude RSCs for the governance of the world's regional seas.

Practical Implications—This contribution explains that a model of marine environmental governance based purely on state goodwill endangers the South China Sea over the long term.

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Originality, Value—This contribution examines the exceptionalism of the East Asian RSP from the general trend towards the formalization of RSP legal frameworks elsewhere.

Keywords: marine environmental governance,
regional seas convention

Table of Acronyms

ASEAN	Association of Southeast Asian Nations
CBD	Convention on Biological Diversity
CEP	Caribbean Environment Programme
CIESM	International Committee for the Scientific Exploration of the Mediterranean
COBSEA	Coordinating Body on the Seas of East Asia
EAS	East Asian Seas
EEZ	Exclusive economic zone
GEF	Global Environmental Facility
GPA	Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities
ICJ	International Court of Justice
LBS	Land-based sources of pollution
LME	Large marine ecosystem
LOSC	Law of the Sea Convention
MAP	Mediterranean Action Plan
NSD	New Strategic Development for COBSEA
PEMSEA	Partnerships for the Management of the Seas of East Asia
ROK	Republic of Korea
RSC	Regional Seas Convention
RSP	Regional Seas Programme
SIDS	Small Island Developing States
SPAW	Specially Protected Areas and Wildlife
UN	United Nations Organization
UNCED	UN Conference on Environment and Development
UNDP	UN Development Programme
UNEP	UN Environment Programme
U.S.	United States of America
VCLT	Vienna Convention on the Law of Treaties
WCR	Wider Caribbean Region

Introduction: Treaty-Making Beyond the Numbers

Fourteen of the eighteen regional seas programs (RSPs) administered or connected with the United Nations Environment Programme (UNEP) are each governed by a legally-binding regional seas convention (RSC).[1] Running by this figure, one might immediately assume that RSCS are now standard treaties implementing duties of marine environmental protection and preservation under the Law of the Sea Convention (LOSC),[2] which enjoys almost universal ratification. Conversely, the figure makes the four[3] non–RSC RSPs seem like statistical oddities, and this is what this contribution seeks to invite attention to. Specifically, it examines one of these oddities—the South China Sea[4]—as the principal body of water in the China–Southeast Asia corridor. The purpose is to understand whether the choice to remain a non–RSC RSP is still consistent with the legal duty to protect and preserve the marine environment under the LOSC. To rephrase, do RSC hold-outs still reflect sound state practice on marine environmental protection?

Within the UNEP Regional Seas framework, the South China Sea falls under the East Asian Seas (EAS) region which "promotes compliance with existing environmental treaties and is based on member goodwill."[5] With the region's soft and informal approach[6] to compliance, marine environmental governance becomes subordinate to changes in EAS states' attitudes, national priorities, and imbalances in regional power relations. This is arguably not the intended outcome of Article 197[7] of the LOSC, imposing upon states a general duty to make or elaborate international rules, standards, and practices for marine environmental governance, albeit not expressly through an RSC. In this regard, UNEP Regional Seas has been recognized for its crucial role in the implementation of the wider purposes of the LOSC.[8]

This Article argues that a goodwill-based approach to compliance with marine environmental obligations over the South China Sea is now inconsistent with an evolutive reading of Article 197 of the LOSC. *Evolutive* refers to a mode of treaty interpretation which gives a term a meaning that changes over time.[9] Evolutive treaty interpretation finds basis in Articles 31(1)[10] and 31(3)(b)[11] of the Vienna Convention on the Law of Treaties (VCLT).[12] To contextualize this argument, this Article examines the Mediterranean and Caribbean Seas as models of RSC-governed RSPs.

This Article contains five sections, including this Introduction. The second section gives a brief background of the UNEP Regional Seas Programme, focusing on the distinctions between RSC- and non–RSC-governed RSPs to broadly assess the value of treaties as a modality of governing the world's seas. The third section is a comparative case study of the East Asian, Caribbean, and Mediterranean RSPs. The latter two, which are RSC-governed RSPs, were selected to draw out their promising practices which may be useful to marine environmental governance in the South China Sea. The fourth section puts forward broad proposals on the shape a prospective South China Sea RSC might take. This Article then concludes in the fifth sec-

tion with the dangers a state goodwill-based approach to marine environmental governance poses to the South China Sea.

Regional Seas: A Game of Jargon?

This section sifts through the terms employed in marine environmental governance to understand whether the distinctions arising from the choice between an RSC or a soft and informal action plan are only terminological or carry substantive implications on duties concerning the marine environment. The overarching context of this inquiry is Article 197 of the LOSC, which broadly establishes a duty among states to cooperate internationally or regionally "in formulating and elaborating international rules, standards, and recommended practices and procedures … for the protection of the marine environment, taking into account characteristic regional features." This section begins with a brief account of the development of the UNEP Regional Seas Programme.

The Programme was inaugurated in 1974 following the 1972 UN Conference on the Human Environment in Stockholm, Sweden.[13] The Stockholm Declaration adopted in that Conference influenced the codification of the international duty to protect and preserve the marine environment in the LOSC.[14] The Programme was born during a period of heightened international concern over marine pollution: the London Dumping Convention[15] was adopted in 1972 to address the deliberate disposal of wastes at sea. That treaty proved a useful beginning point to address the steady decline of the world's marine environments. Two years after the London Convention, the birth of the Programme rekindled enthusiasm for collaborative efforts to address marine environmental degradation, with a global high-water mark eventually reached in 1982 with the conclusion of the LOSC, particularly its Part XII titled "Protection and Preservation of the Marine Environment." In the following decades, RSCs were adopted, from the 1976 Barcelona Convention for the Mediterranean Sea to the 2002 Antigua Convention[16] for the North-East Pacific as the most recent possible addition.

The Programme was founded to promote a "shared seas" approach to addressing coastal and marine environmental degradation.[17] The underlying premise of this approach to marine governance is that countries surrounding a sea share common interests in the protection of its marine environment.[18] Operationally, the Programme serves as a global clearinghouse of marine environmental information and policy, as well as the principal implementing body of some regional seas action plans. It is also responsible for performing UNEP responsibilities to meet Agenda 21, Millennium Development Goals, and World Summit on Sustainable Development targets.[19] Three principal factors prompted the UNEP Governing Council's decision to adopt a regional approach to marine pollution and marine and coastal resources management:

> First was the continuing evidence of the further serious qualitative deterioration of semi-landlocked bays, gulfs and seas marginal to continents. Second was the real and perceived successes of the Helsinki Convention on the Baltic Sea—the first regional marine treaty to cover pollution from several distinct sources. The third was the realization that insufficient regional cooperation amongst governments was probably the single most important impediment to the implementation of effective management plans in such areas as the Mediterranean, Caribbean, Persian Gulf, and elsewhere.[20]

There are currently 18 RSPs[21] covering various regional seas with the participation of 140 states.[22] Among these, five[23] are directly administered by the UNEP.[24] Four of these RSPs[25] are classified as independent in the sense that they have not been established under UNEP auspices. The independent RSPs, however, "share experiences and exchange policy advice and support to the [emerging] RSPs" and thus form part of the Regional Seas family.[26] All RSPs have action plans adopted by member governments to outline "the strategy and substance of the [RSP], based on the region's particular environmental challenges as well as its socio-economic and political situation."[27] Typically, these action plans contain chapters on Environmental Assessment, Environmental Management, Environmental Legislation, Institutional Arrangements, and Financial Arrangements.[28] The section on environmental legislation usually provides for the basic elements of the framework regional convention and supporting technical protocols to be adopted separately and ratified individually by the contracting states.[29]

As mentioned above, 14 of the RSPs are covered by legally-binding RSCs that "express the commitment and political will of governments to tackle their common environmental issues through joint coordinated activities."[30] The development of RSCs is assumed to be the culmination of the UNEP Regional Seas Programme; once adopted, they become the principal legal instrument governing a broad spectrum of issues like coastal habitats and fishery management practices.[31]

Action plans and RSCs are generally supplementary to existing multilateral environmental programs and initiatives and are intended to create horizontal ties among RSPs and strengthen cooperation with international organizations.[32] Both are recognized regional platforms for implementing the principles of sustainable development, with emphasis on land-based sources of marine pollution, ship-generated marine pollution and oil spill preparedness, increased urbanization and coastal development, conservation and management of marine and coastal ecosystems, and marine environmental monitoring, reporting and assessment.[33]

Existing action plans and RSCs draw significantly from the Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities (GPA)[34] adopted in 1995 in Washington, D.C. The Washington GPA urges states to implement discrete national marine environment strategies or programs of action through the "governing bodies of the regional or sub regional agreements, conventions or arrangements as appropriate."[35] While not a categorical nod towards RSCs, the Washington GPA nonetheless encourages states to integrate regional programs of action and relevant regionally-applicable legal agreements.[36] This raises the fol-

lowing questions: (1) What constitutes "legal agreements" in the UN Regional Seas context?; and (2) Why would some states choose to implement their RSPs with or without an RSC?

On the first question, the multiple sources of obligations[37] under international law must be considered. The VCLT defines a "treaty" as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and *whatever its particular designation*."[38] Hence, the International Court of Justice (ICJ) once determined that even an exchange of letters between states constitutes an international legally-binding agreement creating rights and obligations.[39] The same reasoning was upheld in a case involving uninterrupted international toleration of one state's otherwise unilateral acts.[40] Arguably, regional seas action plans may be considered "formal binding agreements as they are adopted at the highest level of State representation at Diplomatic Conferences."[41] Notionally, therefore, the form of an international agreement bears little significance in binding states to certain commitments. But despite the broad definition of "legal agreement," a treaty or convention most explicitly signifies the consent of the ratifying parties to be bound by its terms.

The second question arguably relates to the enforcement of the commitments made in those agreements. For example, when the LOSC was concluded, no one questioned the mandatory tone of the duties of marine pollution regulation. Some, however, expressed concerns about the "insidious uncertainty" of the language of the LOSC, leaving open significant spaces for discretion and "the creative function of state practice" in developing the content and limitations of marine pollution obligations.[42] In marine biological diversity conservation, for instance, the paucity of state practice means that customary international law has developed only a few rules in this field.[43] Marine environmental policies remain subordinate to national economic or developmental concerns. Some argue that even with procedural norms of marine environment protection and preservation (such as cooperation and monitoring and reporting), a balance must be struck between national rights (such as permanent sovereignty over natural resources) and obligations within and beyond the state.[44] The choice whether or not to accede to RSCs may turn upon concerns over how ratifying them might impact current state practice and varying degrees of interest in the issues to be governed by RSCs.[45] For example, the United States' (U.S.) refusal to ratify the LOSC is primarily due to concerns, unfounded or otherwise, that it may be ceding critical aspects of its sovereignty:

> Contemporary [LOSC] criticisms are largely rooted in a [cautiousness] of U.S. participation in normative international governance entities on a relatively egalitarian footing *vis-à-vis* other states.[46]

But asking whether states give up certain aspects of sovereignty when they bind themselves through treaties ignores the fact that treaties do reflect certain self-serving state interests.[47] An RSC is certainly an articulation of the interests and priorities of a group of states in marine environmental governance.

Moreover, with or without an RSC, RSPs are all coordinated through a secretariat or a regional coordinating body.[48] This means that while duties under the LOSC to protect and preserve the marine environment are addressed primarily to states, RSP secretariats play a crucial role in the performance of those obligations. This is especially true in the case of the Secretariat of the Helsinki Commission, which supports Contracting States in implementing the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention) in addition to administrative and diplomatic functions.[49]

But other RSPs evolved differently. In the EAS region, the Coordinating Body on the Seas of East Asia (COBSEA) Regional Coordinating Unit is envisaged to function both as a coordinating secretariat and program and financial manager.[50] In practice, however, participating states generally dislike the prospect of an empowered secretariat because of vast differences in political, socioeconomic, cultural, and historical circumstances.[51] These circumstances significantly inform the region's preference for non-binding mechanisms of marine environmental governance.

The relative levels of economic development of neighboring states also figure significantly in the adoption of an RSC. States with advanced economies are more willing to bind themselves legally to make financial contributions to support a centralized secretariat or coordinating body. In the EAS, which spans a diversity of national economies, soft and informal marine environment governance mechanisms are based on partnership, voluntary participation and financial contribution rather than strict compliance with treaty commitments.[52] On the other hand, RSC-governed RSPs are not necessarily immune from the consequences of varying levels of national economic development. Political and economic differences across the Mediterranean impede technical and scientific integration in marine environment protection and preservation among Barcelona Convention countries despite a well-developed legal-institutional framework.[53]

But because of the voluntary, non-compulsory, and non–RSC framework for EAS governance, participating states often renege from the duty to finance the COBSEA's activities. As a result, the COBSEA has for many years faced serious financial challenges, with participating states failing to raise the rather modest total target amount of US$170,000 per annum—far insufficient to cover all of the COBSEA's needs—to fund its projects.[54]

Overall, the choice whether to adopt an RSC is not merely a matter of jargon. The non-adoption of an RSC is as much a political preference as it is legal because under Article 197 of the LOSC, soft and informal compliance mechanisms may fall within the meaning of "recommended practices and procedures consistent with the Convention." But in the EAS, the aversion towards concrete legal frameworks and strong regional institutions undermines and leaves uncertain many aspects of marine environmental governance. As is discussed further in this article, the informal character of non–RSC RSPs like the EAS region invites lukewarm national attitudes in complying with duties of marine environmental protection and preservation. If the UNEP Regional Seas Programme is fully committed to encouraging states to adopt and ratify RSCs,[55] then the "choice" to pursue a non–RSC trajectory appears, rather,

to be no choice at all. The question that now arises is what the non-adoption of an RSC currently means in terms of compliance with the obligations found in Part XII of the LOSC. This is addressed in the next section.

Regional Marine Environmental Governance in the South China, Mediterranean and Caribbean Seas

Article 197 of the LOSC mentions the need to "[take] into account characteristic regional features" in the duty of states to make and elaborate rules for marine environmental governance. The UNEP Regional Seas Programme performs its mandate through regional platforms that usually encompass a wide variety of political, economic, and ecological systems. Despite these, there is no general consensus as to what a region is, or what makes one. A number of factors—geography, a shared history, or trade and economic interdependence—motivate states to address certain issues at the regional level. In addition, when states do identify as belonging to a region, they do so in different ways. Some regions are more integrated than others in terms of institutions and practices. But whatever its form, a sense of common objective underlies efforts at concerted political action on anything at all. This section considers how three specific regions operationalize the duty to make and elaborate rules for marine environmental protection and preservation under Article 197 of the LOSC.

Whether the "region" is a universally suitable and exportable unit of governance for marine environments,[56] it deserves continued scholarly attention because it functions as a site for the specification of the content and extent of obligations of marine environmental governance. The region has been shown to be useful in bridging knowledge gaps in both science and policy and in improving conflict mitigation.[57] Region-building, however, is subject to competing tensions between being large enough to address cross-border marine environmental concerns and being overly expansive that the region is rendered ungovernable due to the absence of a sense of belonging within the grouping.

This section highlights the experiences of the South China, Mediterranean and Caribbean RSPS. The last two are governed, respectively, by the Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona Convention),[58] its Protocols and amendments,[59] and the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention)[60] and its Protocols. The purpose is to assess whether the RSC-form is a modality of marine environmental governance consistent with Part XII of the LOSC. The Mediterranean and Caribbean seas were purposively selected on the basis of the following characteristics shared with the South China Sea: (a) all are large seas encircled by a number of states; and (b) all seas are covered by UNEP-administered RSPs.

The South China Sea

The South China Sea is located around the geographical center of maritime Southeast Asia.[61] Spanning an area of 3.5 million square kilometers, it is home to the world's greatest biodiversity, with 1,027 species of fish, 91 species of shrimp, and 73 species of cephalopods in the Northern shelf and more than 520 fish species in the Southern shelf.[62] The South China Sea's distinctive ecosystem owes much to its complex coastal geography—its small islands, islets, rocks, and its uneven depth, ranging from 100 meters in the Sunda shelf to over 5,000 meters in the Philippine basin.[63] The sea faces serious marine pollution from untreated waste water flowing from the region's major cities such as Guangzhou, Hong Kong, Ho Chi Minh City, Bangkok, Manila, and Singapore.[64] Two related critical issues in marine environmental governance in the South China Sea include (1) a voluntary marine environmental compliance mechanism based on state goodwill; and (2) an overly extensive regional seas area.

While various political tensions complicate cooperation over the Mediterranean, Caribbean, and South China seas, regional cooperation in the South China Sea in particular is fraught with flash points that may ignite into violent conflict. Among these are longstanding overlapping maritime jurisdictional claims, Chinese interference in the exploration activities of Vietnamese- and Philippine-licensed mining operators, and confrontations between U.S. intelligence-gathering vessels in China's exclusive economic zone (EEZ).[65] The ambiguity in the region's maritime legal framework fuels episodes of tension in interstate relations that sustain mutual suspicions, arms build-ups, and uncertainty about the future.[66] This vagueness, for instance, encourages China to project its strategic agenda into the sea even in zones falling within the jurisdiction of smaller states under the LOSC. Hence, governing the South China Sea stands upon a fluid foundation of "Asian Regionalism" (in contrast to treaty-based European regionalism) which "remains basically a market-driven formation of tightly knit economic cooperation fostered between different actors."[67] The South China Sea nations' high prioritization of economic development over the marine environment has led critics to brand the sea as a true example of the "tragedy of the commons"[68]:

> Eighty (80) percent of [its] coral reefs have been degraded or under serious threats in some places from sediment, overfishing and destructive fishing practices (such as the use of poison and dynamite), pollution, and climate change. Consequently, its reefs have become the most threatened and damaged reefs in the world.[69]

Unlike the Mediterranean model discussed further in the next subsection, marine environmental governance in the South China Sea is subsumed under a larger EAS platform. The EAS bands the Philippine, Sulu, Celebes, Arafura, Andaman, Banda, Flores, South and East China, and Java Seas together with the Straits of Singapore, Malacca, and the oceans of Australia.[70] This vast expanse has practical consequences on effectively addressing the specific concerns of the distinct marine ecosystem of the South China Sea.

Regional marine environmental governance in the South China Sea has principally been through the 1981 Action Plan for the Protection and Development of the Marine Environment and Coastal Areas of the East Asian Region (EAS Action Plan). It is implemented by the Coordinating Body on the Seas of East Asia (COBSEA), a UN institution. The Action Plan was motivated by concerns over the effects and sources of marine pollution.[71] Originally, the Action Plan involved only five countries: Indonesia, Malaysia, the Philippines, Singapore, and Thailand. In 1994, Australia, Cambodia, China, the Republic of Korea (ROK), and Vietnam became participating states.[72]

The COBSEA's functions include facilitating Action Plan activities in concert with other regional and international organizations, supervising the implementation and assessment of COBSEA-sponsored projects and activities, and collecting and disseminating information among EAS countries and other regional and international organizations.[73] One of the features of the EAS Action Plan is its promotion of compliance with existing environmental treaties through "member country goodwill."[74]

The EAS Action Plan designates the COBSEA as its sole decision-making body. At COBSEA meetings, states that are members of the Association of Southeast Asian Nations ("ASEAN") are represented by their respective Senior Officials on the Environment while non–ASEAN states appoint National Focal Points.[75] The COBSEA makes policy decisions on substantive and financial aspects of the Action Plan, such as approving budgetary resources required to support work plans and their allocation, reviewing the program's progress, and evaluating the results achieved.[76] Paragraph 69 of the Action Plan provides that financial support for activities *may* come from contributions from participating governments to the EAS Trust Fund, contributions from non-participating governments, support from any UN body *on a per-project funding basis*, regional development banks, and any other source of funding agreed to by the participating governments. The non-binding character of the obligations, however, has adversely impacted the EAS Trust Fund. In particular, Australia's withdrawal from the COBSEA in 2010 drastically decreased contributions to the Fund.[77]

In 2008, COBSEA adopted a New Strategic Direction (NSD) for COBSEA (2008–2012).[78] The NSD is significant because it identifies some of the challenges encountered in the implementation of the EAS Action Plan. Some of these challenges are:

1. the absence of coordination in regional marine environmental initiatives, resulting in overlapping and inefficient use of human and financial resources;
2. the failure to address economic growth priorities and marine and coastal environmental issues sustainably; and
3. decreased UNEP support for EAS Regional Coordinating Unit operations has not been matched by a raise in participating governments' contributions to the EAS Trust Fund.[79]

To address these challenges, the NSD introduces four operative and interlinked strategies with a view towards transforming the COBSEA into "a regional coastal and marine environmental coordinating center."[80] These strategies involve information management (Strategy 1), national capacity building (Strategy 2), strategic and emerging issues (Strategy 3), and regional cooperation (Strategy 4). Overall, these strategies aim to reconfigure the COBSEA into a knowledge provider from past and current activities in the EAS region.[81]

Neither the Action Plan nor the NSD use mandatory language. Dang criticizes the Action Plan as being:

> vague [and lacking] any specific commitment. There are not enough pragmatic, temporally and spatially planned activities to manage the marine environment. The functioning of the Programme is essentially project-based, which has met with lots of difficulties due to lack of political and financial commitment from its participating States. UNEP has also offered poor leadership and little interest in regional activities of the Programme. Obviously, these attitudes would affect the capacity of COBSEA to undertake any complicated endeavor such as coordinating the development of a regional network of [marine protected areas].[82]

Despite its shortcomings, one of the COBSEA's notable achievements is a project called "Reversing Environmental Trends in the South China Sea and Gulf of Thailand" supported by the UNEP and the Global Environmental Facility (GEF).[83] Initiated in 1996, the Project ended in 2008 with the adoption of the Strategic Action Programme for the South China Sea (SAP). The Project's main thrust was the management and rehabilitation of marine habitats.[84] At base, the Project and SAP are designed to respond to the demands for a sustained stock of fish that forms the core of much of the region's diet.[85] Post-NSD, however, the COBSEA has been relatively dormant because of insufficient funding, competition for professional expertise, and diminishing member state inertia, among others.[86]

Additionally, the COBSEA is in apparent competition with another East Asian marine environmental organization, the Partnerships in Environmental Management for the Seas of East Asia (PEMSEA), established in 1993 with GEF funding.[87] The COBSEA and the PEMSEA have common country members, such as Cambodia, China, Indonesia, the Philippines, the ROK, Singapore, and Vietnam, and have significantly overlapping missions. Notably, Japan participates in the PEMSEA but not in the COBSEA. In 2010, the PEMSEA left the UN Development Programme (UNDP) to become a stand-alone international organization with its own legal personality and financial capacity.[88]

The combined effect of these circumstances has led to fears of a possible shutdown for the EAS RSP.[89] Such fears, however, fail to consider possible ways through which the current RSP structure might be improved. A good possible starting point is to recast the detailed provisions of the EAS Action Plan in mandatory terms within the framework of a binding RSC. Legally binding agreements for marine conservation between EAS countries are actually quite common, albeit mostly bilateral.[90] Some argue that the COBSEA and the PEMSEA would be better-off merged together in the future to give the resulting organization an international legal platform which

the PEMSEA lost since its separation from the UNDP.[91] With the above challenges of maintaining a non–RSC mode of marine environmental governance in the EAS, firming up the existing legal framework has now become an imperative in the context of an evolutive reading of Article 197 of the LOSC.

The Mediterranean Sea

The Mediterranean Sea spans 3,860 kilometers from east to west and has a total area of 2.5 million square kilometers.[92] Among its critical environmental issues are the flow of surface water through the Strait of Gibraltar and the Dardanelles, precipitation and river run-off, its being almost completely enclosed by land, and a water replacement cycle that exceeds a century.[93] From the Strait of Gibraltar eastward to the Suez Canal, the sea straddles three continents, a great diversity of social, political and economic systems, and a number of overlapping supranational governance structures. Despite this diversity, the Mediterranean RSP provides an interesting example of how marine environmental governance is operationalized within an extensively integrated regional setting.

Regional cooperation in the Mediterranean dates back to the 1908 founding of the International Commission for the Scientific Exploration of the Mediterranean Sea (CIESM).[94] The following decades saw the development of regional initiatives on freedom and security of navigation and fisheries management.[95] In 1975, the European Community and Mediterranean riparian states adopted a Mediterranean Action Plan (MAP) to address the challenge of marine pollution. Initially, MAP principally employed strategies to promote conservation, eco-development, combat marine pollution, and integrate planning of environmental development and protection.[96] By the 1980s, MAP's scope of "protection" extended to coastal areas, with a refocusing on integrated coastal management and harmonizing environment and sustainable development in the early 1990s.[97] From the mid–1990s to the present, MAP's focus has shifted toward strengthening participation and governance among states, local authorities, the business community, and non-government organizations (NGOs).[98]

The Barcelona Convention was adopted in 1976 as the pioneering RSC under the auspices of the UNEP Regional Seas Programme.[99] The UNEP's leading role in the development of the Barcelona Convention consolidated that body's authority in the area of regional water quality and marine resource management.[100] The adoption of the treaty was motivated by the Contracting Parties' desire to transcend the non-legally binding character of the MAP.[101] In 1995, the Barcelona Convention was amended significantly to reflect the sustainable development shift in Mediterranean marine environmental governance from an exclusively anti-marine pollution focus.[102] Marine environmental governance is now to be pursued considering "present and future generations in an equitable manner."[103]

The Convention is a framework treaty outlining a broad scope of marine environmental obligations.[104] Its content is specified through the Protocols, currently six, addressing marine pollution by dumping from ships, aircraft or incineration at

sea,[105] cooperation to prevent and combat pollution from ships in emergency cases,[106] pollution from land-based sources and activities,[107] specially protected areas and biodiversity,[108] pollution resulting from the exploration and exploitation of the continental shelf, seabed and subsoil,[109] and prevention of pollution from transboundary movements and disposal of hazardous wastes.[110] Taken together, the Barcelona Convention, its Protocols, and amendments are known as the Barcelona System.[111]

While designated a "system," Barcelona remains essentially a patchwork of discrete legal instruments. Contracting States are virtually free to select the version of the Barcelona Convention and the Protocols they wish to adopt.[112] Complications include Protocols taking too long to enter into force or states becoming parties to older or newer versions of an instrument.[113] These complications are telling of the limitations of the convention-protocol system in which any subsequent amendments are only binding upon ratifying states.

Article 26 of the 1995 Barcelona Convention presents an interesting illustration of these complications. This requires Contracting States to report to the UNEP (as regional secretariat under Article 17, 1995 Convention), not only the measures they took to implement the Convention, but also the effectiveness of those measures. In practice, Contracting States only report on measures pertaining to obligations contained in Protocols they have adopted *and* have entered into force. In addition, Contracting States are rather reluctant to submit Article 26 reports, making it almost impossible to assess national implementation of Barcelona System obligations[114] despite efforts at designing a Mediterranean framework for non-compliance patterned after major international multilateral environmental agreements.[115]

The Mediterranean's convention-protocol approach to marine environmental governance, combined with strong regional integration, provides a promising model for a South China Sea RSC. However, strong regional *institutional* integration (through the European Union and other supranational institutions in the Mediterranean) does not necessarily translate to the integration of the legal framework for marine environmental governance. While institutional integration may lay the groundwork for further legal integration, in practice differences in short-term national economic development needs and priorities across the Mediterranean create resistance against stronger legal integration. The ability of Mediterranean states to select favorable instruments to ratify within the Barcelona System undermines the effectiveness and complicates the applicability of obligations to protect and preserve the marine environment from state to state. If one of the assumed advantages of treaty-making is rendering uniform the legal standards for compliance, then the ability to select instruments to adhere to within a treaty system undermines that uniformity.

The Caribbean Sea

With an area of around 2.75 million square kilometers, the Caribbean Sea is one of the world's largest saltwater bodies.[116] It is dotted by several countries that

are Small Island Developing States (SIDS) and are often faced with financial challenges.[117] Numerous non-sovereign territories are also located in the region. For purposes of marine environmental governance, however, the expansive reconfiguration of the Caribbean Sea into a "Wider Caribbean Region" (WCR) encompasses four large marine ecosystems (LMEs), namely the Southeast Shelf LME off the Atlantic coast of the U.S. states of Florida, Georgia, and South Carolina; the Gulf of Mexico LME; the Caribbean Sea LME; and the North Brazil Shelf LME.[118] This translates to a total combined area of about 15 million square kilometers.[119] The WCR thus spans a wide range of capacities for governance shaped by differences in language, history, culture, and colonially-imposed administrative arrangements.[120] The Caribbean region is examined here in contrast to the strong tradition of regional integration of the Mediterranean model.

The WCR is administered by the UNEP Caribbean Environment Programme (CEP) through the 1983 Cartagena Convention and its Protocols.[121] Like the Barcelona Conventions, the Cartagena Convention is also a framework treaty, with specific obligations set forth through the Protocols, namely: Cooperation in Combating Oil Spills,[122] Specially Protected Areas and Wildlife (SPAW),[123] and Pollution from Land-Based Sources and Activities (LBS).[124] One of the Convention's goals is to respond to the inadequacy of institutional, legal, and policy frameworks or mechanisms in the management of the WCR's shared living marine resources.[125] At its inception, the Cartagena System had a strongly pro-development and anti–marine pollution focus.[126]

Similar to the Barcelona Conventions, the Cartagena Convention defines "Convention area" as excluding the internal waters of the Contracting States.[127] Other than the general obligation to prevent, reduce and control pollution within the Convention area,[128] the Cartagena Convention also contains similarly worded provisions touching on pollution from ships,[129] dumping at sea,[130] LBS,[131] seabed activities,[132] airborne pollution,[133] and SPAW.[134] So far, only the content of obligations touching on SPAW and pollution from ships (oil spills) and LBS have been specified through the Protocols. Article 15 of the Cartagena Convention similarly performs the function of Article 17 of the 1995 Barcelona Convention, designating the UNEP CEP as RSP secretariat for the WCR.

One of the notable achievements of the Cartagena System is the SPAW Protocol implementing Article 10 of the Cartagena Convention. The Protocol pre-dates the 1992 Convention on Biological Diversity (CBD) and provides significant guidance in harmonizing the main aspects of conservation in subsequent international conservation agreements, the CBD, and the 1992 Rio Declaration.[135] On the other hand, the LBS Protocol has been noted for its potential to holistically integrate Contracting States' endeavors in the consideration of both terrestrial and marine ecosystems, specifically in planning for nutrient reduction upstream and in coral reefs downstream.[136]

Despite this, the Cartagena System faces issues arising from states' ratification of select instruments within the system. The number of SPAW and LBS Protocols ratifications is only half that of the Cartagena Convention, suggesting that some Contracting States are either not interested in these Protocols' issues or that they

lack the capacity to participate.[137] To illustrate, Article 7(1) of the SPAW Protocol mandates Contracting States to "establish co-operation programmes within the framework of the Convention" for "the selection, establishment, planning, management and conservation of protected areas." Such protected areas, however, may be unilaterally established by a Contracting State under Article 4(1) of the SPAW Protocol. As the Protocol is silent as to when the actions covered in Articles 4(1) and 7(1) are deemed necessary,[138] the performance of these actions depend highly on the individual capacities of Contracting States. Again, with a wide range of governance capacities within the region, the promise of the Cartagena System rests upon an elusive "sweet spot" where national interest and financial capacity coincide. DiMento and Hickman comment:

> Cartagena is a notably strong Convention, but it is [administered] by a small, young, and poorly financed secretariat. Since its creation, there have been budget problems within the CEP [regional coordinating unit] that are exacerbated by financial problems in the UNEP. Efforts for protection in the form of [marine protected areas (MPAs)] and [integrated coastal management] have been hampered. For example, many MPAS have been created but a majority of the newly created MPAS lack a management plan.[139]

In a case study, Sheehy points out that as the second wealthiest Latin American jurisdiction, Mexico's failure to implement its Cartagena Convention duties on oil pollution prevention and aerial surveillance do not bode well about the Convention as applied elsewhere in the WCR.[140]

While the Cartagena System's region-specific approach is crucial to moving regional collaborative efforts to an ecosystem-based management of the WCR, the number of country subscriptions into the system remain less than ideal to produce integrative responses to the region's marine environmental issues.[141] This, arguably, may be an adverse consequence of an overly expansive legal definition of the Cartagena Convention area. It exposes the weakness of a treaty-created Caribbean "region" to which some Contracting States only identify as belonging at a high or general level of abstraction. Some have suggested that taking a global approach to ocean governance, in which states participate "at levels of capacity and commitment that are appropriate for their level of development" would be more appropriate for the WCR.[142] In such a global approach, one might imagine that all regional seas would come under a unified "World Ocean Programme" that does not differentiate among the "characteristic regional features" envisaged in Article 197 of the LOSC. Still, the WCR model is a good reminder that the determination of which states make up the regional platform for marine environmental governance is just as crucial as the selection of which instruments to ratify.

Marine Environmental Governance Without RSCs: Resistance, Not Uniqueness

The achievements and challenges of RSPS governed by RSCs complicate the question of whether Article 197, LOSC now means pursuing marine environmental

governance through codified treaty obligations. International environmental law-making has seen efforts to allocate functions and roles along regional and global lines—but without much success due to the failure to consider issues of legal and institutional fragmentation.[143] While "treaties" as objects of international law are conceptually distinct from state practice flowing from them,[144] changing marine environmental needs and regional relations demand thinking beyond the impulse that animated the conclusion of the LOSC in 1982. As the life of the law has not been logic, but experience,[145] the question of whether to adopt an RSC needs to be addressed in view of the achievements and shortcomings of an RSC-based model of marine environmental governance.

When states deliberately select protocols to adhere to within a treaty system, they undermine the scope and binding effect of the provisions and compromise the integrity of the convention-protocol model. But dismissing the convention-protocol model for solely this reason amounts essentially to a wholesale rejection of the intrinsic value of treaty-making and why it persists. Moreover, choosing specific protocols to ratify has significant legal consequences that carry interpretative implications for the framework RSC under Article 31(2) of the VCLT.[146] One possible implication is that the difference in the ratification status of related agreements (like protocols) amongst *all* RSP participants and those entered between *one or more* parties in connection with the principal treaty may give rise to problems of legal fragmentation within the treaty system in question. In the long-term, the deliberate selection of instruments undermines the integrity of the RSC as a tool for marine environmental governance.

In view of the general obligation to cooperate "in formulating and elaborating international rules, standards and recommended practices and procedures,"[147] the above discussions reveal a preference towards regional marine environmental rule-making and elaboration, with the LOSC acting as a "framework convention" for the development of specific RSCs.[148] The generality or specificity of the obligation to make and elaborate rules on marine environmental governance is immaterial to determining whether an treaty obligation was complied with based from a state's conduct after the ratification of a treaty. In one case, the ICJ held that the subsequent conduct of state parties to a treaty demarcating the boundary between them prevailed even over that treaty's precise definition of the boundary.[149] If treaties on a subject as restrictive as boundary delimitation can admit of evolutive interpretation, then more so should broad treaty commitments like those enshrined in Article 197, LOSC. The developments mentioned reveal that normative specification[150] happens even without Article 197 explicitly ordaining the making and elaboration of rules through a treaty.

Instead of state consent given in year X as the basis for its being bound by Treaty Y, it is better to examine the conduct of states in relation to that treaty over time to assess the consistency of state conduct with the treaty. This is why it is important to look at the promising practices of the RSPS featured in this section closely with their shortcomings.[151] Balancing those successes and failures together, the political choice of the South China Sea states to proceed without an RSC is a resistance to

the obligation to make and elaborate on rules related to regional marine environmental governance.

Certainly, regional soft law and mechanisms built on "state goodwill" are carefully formulated with normative expectations from and among participating states. But experiences from the drafting of the great contemporary multilateral treaties like the LOSC and the Statute of the International Criminal Court have significantly amplified the law-making function of treaties.[152] The implication for the EAS region is that its adherence to non-binding soft and informal mechanisms is not merely a matter of statistical uniqueness—especially as the COBSEA faces the possibility of a shutdown. The region, in refusing to adopt an RSC, forgoes the benefits of defined responsibilities and the allocation of rights and obligations under a concrete regional marine environmental legal framework.[153]

Transcending State Goodwill: Some Proposals

This section puts forward some broad proposals on a prospective South China Sea RSC. Its premise is that a foundation of state goodwill prevents the EAS RSP from taking more decisive actions for the protection of the South China Sea. More importantly, treaty-making is not inherently anathema to EAS states, many of which have concluded a number of bilateral agreements, mostly on fishing.[154] The challenge is how to transform bilateral efforts into a multilateral platform that functions on the basis of allocated competences and enforceable rights and obligations. This section makes four proposals.

The first pertains to defining the Convention area for a future South China Sea RSC to address the sea's specific marine environmental configuration. In this regard, regional platforms for marine environmental governance present a sufficiently practicable way of protecting and preserving marine environments, especially for developing states without much capacity to perform acts in remote areas beyond national jurisdiction. Defining a prospective Convention area must strike a fine balance between the cross-border character of marine environmental issues and the decidedly political exercise of selecting the region's constituents. This is to effectively address specific needs of regional seas, but without the least-common-denominator attitude that plagues many RSPS. The vast geographical coverage of the current RSP framework in the EAS stretches the limits of its governability and fails to consider the "characteristic regional features" of the South China Sea marine ecosystem. As mentioned previously, the South China Sea is but one of the many bodies of water covered by the present EAS Action Plan. Yet, as one of the world's most critical sites of marine megadiversity, the South China Sea barely receives the attention it needs from an expansive definition of the EAS region.

Region-building is an inherently political exercise. In the WCR, for example, the Cartagena Convention's overbroad definition of its Convention area creates a region that does not necessarily coincide with its members' imagination of what

that region might look like. Here, the experience in defining the Barcelona Convention area for the Mediterranean RSP is instructive:

> During the negotiations of the first [Barcelona Convention] … a proposal made by the former USSR to include the Black Sea within the scope of the Barcelona Convention was rejected so as to prevent any possible influence of the USSR in the region.[155]

A second proposal would be to rethink the UNEP's role in regional seas governance. The UNEP must be credited for its notable contributions in the development of RSCs. However, its eminent leadership role might inhibit the growth of a sense of ownership over those conventions. For one, the UNEP's success in steering the Barcelona Convention into conclusion in 1976 should not be taken as a development which is readily transplantable into places like EAS where colonial history and great imbalances in power relations mire even basic notions of trust. Regional seas action plans and conventions are then concluded in standard language and are adopted without much discussion and negotiation. The results are (1) a standard-form RSC that only attracts participation at high levels of abstraction and are unsuited to the specific circumstances of the relevant sea; and (2) the reluctance of participating states to accept a more empowered role for secretariats that are often seen as UN agencies rather than a genuine regional coordinating body. In this regard, COBSEA's thrust toward becoming a central repository of regional marine scientific information could potentially ease participating states into agreeing to clothe a future South China Sea regional coordinating body with wider-reaching competences.

Provisions in the Barcelona and Cartagena conventions committing those RSPs' secretariat functions to the UNEP mean that actions of consequence to those regions are decided elsewhere by virtue of another institution's supposed expertise in a specific region's marine environment. Yet, such claims of expertise ought to invite interrogation in view of standard-form RSCs. The privileging of external expertise over local or regional ways of knowing the sea has proven detrimental, especially to regions with developing states.[156] In considering a future South China Sea RSC, regional capacity-building must resist the tendency to focus on expertise learned from elsewhere, and instead inform itself through local knowledge of the sea. This does not mean complete separation from the UNEP Regional Seas Programme or ignoring valuable lessons that might be learned from other RSPs—some RSPs are institutionally independent from the UNEP but maintain close ties with the latter to exchange policy advice and experiences.

The third proposal is to merge the COBSEA and PEMSEA as earlier mentioned, but with a further proposal to specifically tailor the combined organization's capacities to the needs and circumstances of the South China Sea marine environment. This means that the pursuit of a South China Sea RSC will not have to start from scratch. Regional marine governance mechanisms do exist, but their success is hampered by poor coordination and little learning from each other's activities. Institutional consolidation will partly address the problems of fragmentation in regional marine governance over the South China Sea.

Lastly, a future South China Sea RSC must depart from its *ad hoc*, project-based focus and instead adopt a long-term outlook in the preservation and protection of the sea. In terms of funding, this means Contracting States committing to make regular contributions on an economic capacity or a "polluter-pays" basis, or both. More importantly, leaving the project-based mode will align the region to a more integrated approach to marine environmental governance which sustains state participation and interest beyond the termination of specific projects.

Conclusion

This concluding section sounds a cautionary note: the manifold challenges of transcending soft law and state goodwill in the EAS region will not nearly be met solely through blind faith in the law-making function of treaties. This is equally true of law-making in both municipal and international legal systems. As experiences from the Mediterranean, Caribbean, and South China Seas indicate, convention-protocol–type legal frameworks do not guarantee compliance; a host of other circumstances play into producing a desirable equilibrium for regional marine environmental governance. Taking legal action takes time, and in international environmental law it is usually (and unfortunately) the case that action is prompted only by situations involving egregious damage to the environment.

Yet, incrementally pernicious acts damaging the South China Sea mostly occur without consequence for the author(s) of those acts. These eventually amount to extensive marine environmental damage over the long term. While other regions have taken steps towards formalizing normative expectations in the form of RSCs, South China Sea states remain non-committal and evasive of their obligations to make and elaborate rules for marine environmental governance under Article 197 of the LOSC. Long-term marine damage in the South China Sea ought to spur a rethinking of the region's dubious premium on state goodwill: an overestimated benevolence that places the region at odds with evolving international marine environmental legal obligations.

Notes

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2. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397 (entered into force 16 November 1994) arts. 192–237 (*LOSC*).

3. The Arctic, the Northwest Pacific, the South Asian Seas, and the East Asian Seas.

4. This paper uses "South China Sea" as that sea's neutral hydronym as listed in International Hydrographic Organization, *Limits of Oceans and Seas* (Monte-Carlo: Imp. Monégasque, 1953), p. 32, even as the littoral states have given the sea official local or vernacular names.

5. Coordinating Body on the Seas of East Asia, "About COBSEA," *COBSEA*, 2005, http://www.COBSEA.org/aboutCOBSEA/background.html, accessed 10 September 2018.

6. Kim DoHyang Reimann, "Testing the Waters (and Soil): The Emergence of Institutions for Regional Environmental Governance in East Asia," in Saadia M. Pekkanen, ed., *Asian Designs:*

Governance in the Contemporary World Order (Ithaca, NY: Cornell University Press, 2016), p. 207, https://doi.org/10.7591/9781501706226–013.

7. "*Cooperation on a global or regional basis.* States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices consistent with this Convention."

8. Alan E. Boyle, "Marine Pollution Under the Law of the Sea Convention," *American Journal of International Law* 79(2) (1985), p. 371, https://doi.org/10.2307/2201706.

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11. "There shall be taken into account, together with the context … [any] subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

12. *Vienna Convention on the Law of Treaties*, 23 May 1960, 1155 U.N.T.S. 331 (entered into force 27 January 1980) (*VCLT*).

13. United Nations Environment Programme, *Regional Seas Partnership for Sustainable Development* (Malta: UNEP, 2005), p. 2.

14. Nilufer Oral, "Implementing Part XII of the 1982 UN Law of the Sea Convention and the Role of International Courts," in Nerina Boschiero, et al., eds., *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (The Hague: Asser, 2013), pp. 404–5.

15. *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 29 December 1972, 1046 U.N.T.S. 120 (entered into force 30 August 1975).

16. *Convenio de cooperación para la protección y el desarrollo sostenible de las zonas marinas y costeras del Pacífico Nordeste* (Convention on Cooperation for the Protection and Sustainable Development of the Marine and Coastal Zones of the Pacific North-East [author's translation]). Not yet in force as of this writing.

17. UNEP Regional Seas Programme, "Overview," *UN Environment*, undated, http://web.UNEP.org/regionalseas/who-we-are/overview, accessed 10 September 2018.

18. Roger D. Needham and Maureen Jedynack-Copley, "The United Nations Regional Seas Programme: General Guides and Principles," *Canadian Water Resources Journal* 14(2) (1989), p. 42, https://doi.org/10.4296/cwrj1402037.

19. Hugh Kirkman and Peter Mackelworth, "Defining Approaches to the Management of Large Marine Systems," in Peter MACKELWORTH, ed., *Marine Transboundary Conservation and Protected Areas* (New York: Routledge, 2016), p. 42.

20. Needham and Jedynack-Copley, *supra* note 18, p. 39 (citations omitted).

21. Namely the Antarctic, Arctic, Baltic, Black Sea, Caspian, Eastern Africa, East Asian Seas, Mediterranean, North-East Atlantic, North-East Pacific, Northwest Pacific, Pacific, Red Sea and Gulf of Aden, ROPME Sea Area, South Asian Seas, South-East Pacific, West and Central Africa, and Wider Caribbean.

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23. Wider Caribbean, Mediterranean, East Asian Seas, East Africa, Northwest Pacific, West and Central Africa, and Caspian Sea.

24. UNEP Regional Seas Programme, "Regional Seas Programmes," *UN Environment*, undated, http://web.UNEP.org/regionalseas/who-we-are/regional-seas-programmes, accessed 10 September 2018.

25. Arctic, Antarctic, Baltic Sea, and North-East Atlantic.

26. UNEP Regional Seas Programme, "Independent Regional Seas Programmes," *UN Environment*, undated http://web.UNEP.org/regionalseas/independent-regional-seas-programmes, accessed 10 September 2018.

27. UNEP Regional Seas Programme, *supra* note 24.

28. UNEP Regional Seas Programme, "Regional Seas Action Plans," *UN Environment*,

undated, http://web.UNEP.org/regionalseas/who-we-are/regional-seas-action-plans, accessed 10 September 2018.

29. Michael A. Jacobson, "The United Nations' Regional Seas Programme: How Does It Measure Up?," *Coastal Management* 23(1) (1995), p. 21, https://doi.org/10.1080/08920759509362254.

30. UNEP Regional Seas Programme, *supra* note 24.

31. Jacobson, *supra* note 29, p. 21.

32. Hugh Kirkman, "The East Asian Seas UNEP Regional Seas Programme," *International Environmental Agreements* 6 (2006), p. 306, https://doi.org/10.1007/s10784–006–9011–5.

33. UNEP, *supra* note 13, pp. 4–7.

34. *Global Programme of Action for the Protection of the Marine Environment from Land-based Activities*, UN Doc. A/51/116, Annex II (1995) (*Global Programme of Action*).

35. *Ibid.*, at para. 32(b).

36. *Ibid.*, at para. 32(f)(iv).

37. *Statute of the International Court of Justice*, 26 June 1945, 1 U.N.T.S. XVI (entered into force 24 October 1945) art. 38 (*I.C.J. Statute*).

38. *VCLT, supra* note 12, art. 2(1)(a) (emphasis added).

39. *Maritime Delimitation and Territorial Questions (Qatar v Bahrain) (Jurisdiction and Admissibility)* [1994] I.C.J. Rep. 112, p. 122 [30].

40. *Fisheries Case (United Kingdom v Norway) (Judgment)* [1951] I.C.J. Rep. 116, p. 138.

41. Nilufer Oral, *Regional Co-Operation and Protection of the Marine Environment Under International Law: The Black Sea* (Leiden: Martinus Nijhoff, 2013), p. 94.

42. Boyle, *supra* note 8, p. 357.

43. Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge, UK: Cambridge University Press, 2012), p. 314.

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52. *Ibid.*

53. Juan Luís Suárez de Vivero and Juan Carlos Rodríguez Mateos, "Marine Governance in the Mediterranean Sea," in Michael Gilekand Kristine Kern, eds., *Governing Europe's Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?* (Farnham, UK: Ashgate, 2015), p. 223.

54. Van Dyke, *supra* note 1, p. 100.

55. Kirkman, *supra* note 32, p. 307.

56. Ludger Kühnhardt, *Region-Building, Volume II: Regional Integration in the World: Documents* (Oxford: Berghahn Books, 2010), p. 3.

57. Michael Gilek, et al., "Science and Policy," in Michael Gilek and Kristine Kern, eds., *Governing Europe's Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?* (Farnham, UK: Ashgate, 2015), p. 150.

58. *Convention for the Protection of the Mediterranean Sea Against Pollution*, 2 February 1976, 1102 U.N.T.S. 27 (entered into force 12 February 1978) (*Barcelona Convention 1976*).

59. The Barcelona Convention is now formally known as the *Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean*, 10 June 1995, UN Doc. UNEP(OCA)/MED IG.6/7 (entered into force 9 July 2004) (*Barcelona Convention 1995*).

60. *Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region*, 24 March 1983, 1506 U.N.T.S. 157 (entered into force 11 October 1986) (*Cartagena Convention*).

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81. *Ibid.*, pp. 5–6.

82. Dang, *supra* note 45, p. 122 (citations omitted).

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87. *Ibid.*, p. 101.

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93. UNEP, *supra* note 13, p. 22.

94. Suárez de Vivero and Rodríguez Mateos, *supra* note 53, p. 215.

95. *Ibid.*

96. *Ibid.*, p 216.

97. *Ibid.*

98. *Ibid.*, p. 217.

99. UNEP, *supra* note 13, p. 25.

100. Jacobson, *supra* note 29, p. 20.

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103. *Barcelona Convention 1995, supra* note 59, art. 4(2) (emphasis added).

104. Kao, *supra* note 100, p. 267.

105. Adopted 19 February 1976; entered into force 1978; amended 10 June 1995.

106. Adopted 25 January 2002; entered into force 17 March 2004.

107. Adopted 17 May 1980; entered into force 17 June 1983; amended 7 March 1996.

108. Adopted 10 June 1995; entered into force 12 December 1999.

109. Adopted 14 October 1994 (not yet in force).

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128. *Ibid.*, art. 4(1).
129. *Ibid.*, art. 5.
130. *Ibid.*, art. 6.
131. *Ibid.*, art. 7.
132. *Ibid.*, art. 8.
133. *Ibid.*, art. 9.
134. *Ibid.*, art. 10.
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137. Kao, *supra* note 101, p. 270.
138. Milton O. Haughton, "International Environmental Instruments and the Ecosystem Approach to Fisheries in CARICOM States," in Lucia Fanning, Robin Mahon, and Patrick McConney, eds., *Towards Marine Ecosystem-Based Management in the Wider Caribbean* (Amsterdam: Amsterdam University Press, 2011), p. 288.
139. DiMento and Hickman, *supra* note 68, p. 147.
140. See generally, Benedict Sheehy, "Does International Marine Environment Law Work: An Examination of the Cartagena Convention for the Wider Caribbean Region," *Georgetown International Environmental Law Review* 12(3) (2004), pp. 441–72.
141. Mahon, Fanning, and McConney, *supra* note 93, p. 637.
142. *Ibid.*, pp. 670–1.
143. Philippe Sands, et al., *Principles of International Environmental Law* (Cambridge, UK: Cambridge University Press, 2012), p. 95.
144. Jan Klabbers, "Not Re-Visiting the Concept of Treaty," in Alexander Orakhelashvili and Sarah Williams, eds., *40 Years of the Vienna Convention on the Law of Treaties* (London: British Institute of International and Comparative Law, 2010), p. 31.
145. Oliver Wendell Holmes, Jr., *The Common Law* (New York: Little, Brown, 1881), p. 1.
146. "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."
147. *LOSC*, *supra* note 2, art. 197.
148. See, e.g., the findings of the International Law Commission Study Group on Treaties over Time on the *Fish Stocks Agreement* functioning to specify the general obligations in Part XI, *LOSC*, Georg Nolte, "Report 3: Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-Judicial Proceedings," in George Nolte, ed., *Treaties and Subsequent Practice* (Oxford: Oxford University Press, 2013), pp. 322–3.
149. *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] I.C.J. Rep. 6, pp. 33–4.
150. See, e.g., Christian Djefall, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge, UK: Cambridge University Press, 2016), p. 24. https://doi.org/10.1017/CBO9781316339558.
151. See Marcelo G. Kohen, "Keeping Subsequent Agreements and Practice in Their Right Limits," in Georg Nolte, ed., *Treaties and Subsequent Practice* (Oxford: Oxford University Press, 2013), p. 42.
152. Alan Boyle, "Reflections on the Treaty as a Law-Making Instrument," in Alexander Orakhelashvili and Sarah Williams, eds., *40 Years of the Vienna Convention on the Law of Treaties* (London: British Institute of International and Comparative Law, 2010), p. 28.
153. Brita Bohman and David Langlet, "Float or Sinker for Europe's Seas? The Role of Law in Marine Governance," in Michael Gilek and Kristine Kern, eds., *Governing Europe's Marine Environment: Europeanization or Regionalization of EU Policies?* (Farnham, UK: Ashgate, 2015), p. 55.

154. See, *e.g.*, agreements in 1955, 1963, and 1977 between China and Japan for the regulation of fishing activities in the East China Sea, Reimann, *supra* note 6, p. 220.

155. Oral, *supra* note 41, pp. 82–3 (citations omitted).

156. See generally, William Easterly, *The Tyranny of Experts: Economists, Dictators, and the Forgotten Rights of the Poor* (New York: Basic Books, 2013).

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