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## **THE UNCLOS AND REGIONAL ACTION FOR PROTECTION OF THE MARINE ENVIRONMENT: PERSPECTIVES OF THE SOUTH ASIAN SEAS REGION**

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### **Abstract**

In very clear language the United Nations Convention on the Law of the Sea (UNCLOS) calls upon the parties to initiate regional action for protection of marine environment. Although the UNCLOS gives special recognition in various ways to developing countries, the South Asian developing countries continue to encounter some bottlenecks in complying with the provisions of the Convention relating to marine environment. Against this backdrop, this paper tends to examine the need for a regional approach towards conservation of marine environment. Moreover, the paper aims to explore possible ways to establish a regional legal framework for conservation of marine environment in South Asian region. In doing so, the paper critically examines existing mechanisms already in place including the South Asian Seas Programme and South Asian Seas Action Plan.

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## 1. Introduction

The coastal and marine environment forms an integrated whole that is an essential component of the global life-support system and a positive asset that presents opportunities for sustainable development.<sup>1</sup> However, the marine environment of the world is facing numerous threats from different sources.<sup>2</sup> In the last century, the global community experienced a proliferation of international treaties on marine environment, of which the United Nations Convention on the Law of the Sea 1982 (hereafter referred to as UNCLOS or the Convention)<sup>3</sup> is the most remarkable achievement. The UNCLOS singles out the duties and jurisdiction of States with respect to prevention of all major sources of marine pollution. Part XII of the UNCLOS deals with the issue of marine environment conservation. This part of the UNCLOS imposes a general obligation on States to protect and preserve the marine environment.<sup>4</sup> The UNCLOS provides States a sovereign right to exploit natural resources subject to protection of marine environment.<sup>5</sup> The Convention requires States to take all measures necessary for prevention, reduction and control of pollution of the marine environment from all main sources of pollution including land-based and coastal activities, continental shelf drilling, potential seabed

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<sup>1</sup> Chapter 17 of the Agenda 21, Article 17.1, *UNEP Doc. A/CONF.151/26*, Vol. II, 1992.

<sup>2</sup> GESAMP, "THE STATE OF THE MARINE ENVIRONMENT", *UNEP GESAMP Reports and Studies 39*, p. 88, 1990. The Group of Experts on Scientific Aspects of Marine Environmental Protection (GESAMP) is an advisory body sponsored by eight UN organizations which advises the United Nations (UN) system on the scientific aspects of marine environmental protection. This report stated that atmospheric sources contribute 33%, maritime transportation contributes 12%, dumping contributes 10%, offshore production contributes 1% and land based activities account for about 44% of the global marine pollution.

<sup>3</sup> United Nations Convention on the Law of the Seas, 1982 (UNCLOS); 21 I.L.M. 1261, 1982.

<sup>4</sup> UNCLOS Article 192.

<sup>5</sup> UNCLOS Article 193.

mining, ocean dumping, vessel-source pollution and pollution from or through the atmosphere.<sup>6</sup>

South Asian Seas Region comprised of five developing countries, Bangladesh, India, Maldives, Pakistan and Sri Lanka<sup>7</sup> is amazingly affluent in marine and coastal resources, but is notably poor in sustainable and environmentally friendly utilization of these resources. The marine environment of the South Asian Seas region is unique for its exceptional natural panorama and ecological value. Unfortunately, the region is facing some severe environmental degradation due to rapid population growth, oil pollution on account of hosting some busy sea routes, unplanned and heavy application of pesticide in agricultural activities, industrial pollution, unsustainable exploitation of marine living resources, and unplanned land utilization. As pointed out by the United Nations Environment Programme (UNEP), "[t]hese pressures have destroyed important habitat, driven many wildlife species near to extinction and altogether compromised the future of the people. In addition, the region faces a particular problem: the risk of losing a member country, namely, the Maldives due to changing climate and rising

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<sup>6</sup> See generally A. E. Boyle, "Marine Pollution under the Law of the Sea Convention", *American Journal of International Law*, Vol. 79, 1985, pp. 342-272; J. I. Charney, "The Protection of Marine Environment by the 1982 United Nations Convention on the Law of the Sea", *The Georgetown International Environmental Law Review*, Vol. 7, 1994-1995, pp. 731-738; L. A. Kimball, "The Law of the Sea and Marine Environmental Protection", *The Georgetown International Environmental Law Review*, Vol. 7, 1994-1995, pp.746-748; M. L. McConnell & E. Gold, "The Modern Law of the Sea: Framework for the Protection and Preservation of Marine Environment?", *Case Western Reserve Journal of International Law*, Vol. 23, 1991, pp. 83-105. The UNCLOS defines "pollution of the marine environment" as "the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities."

<sup>7</sup> Recently, two landlocked countries Nepal and Bhutan were also included in the South Asian Seas Region.

seas looms large on the horizon.<sup>8</sup> Moreover, according to UNEP a 1.5 meter rise in sea level could wash away 16 percent landmass of another country of the region, Bangladesh.<sup>9</sup>

In very clear language the UNCLOS calls upon the parties to initiate regional action for protection of marine environment.<sup>10</sup> Although the UNCLOS gives special recognition in various ways to developing countries,<sup>11</sup> the South Asian developing countries continue to encounter some bottlenecks in complying with the marine environment related provisions of the Convention. The

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<sup>8</sup> UNEP "South Asian Seas" available at: <http://www.unep.org>, accessed on 12 March 2007.

<sup>9</sup> UNEP, "Potential Impact of Sea Level Rise on Bangladesh", available at <http://www.grida.no/climate/vital/33.htm>, accessed on 12 July 2008.

<sup>10</sup> It provides: "States shall co-operate 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 and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features". UNCLOS Article 197, (emphasis added).

<sup>11</sup> Article 202 of the UNCLOS provides: "States shall, directly or through competent international organizations: (a) promote programmes of scientific, educational, technical and other assistance to developing States for the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution. Such assistance shall include, inter alia: (i) training of their scientific and technical personnel; (ii) facilitating their participation in relevant international programmes; (iii) supplying them with necessary equipment and facilities; (iv) enhancing their capacity to manufacture such equipment; (v) advice on and developing facilities for research, monitoring, educational and other programmes; (b) provide appropriate assistance, especially to developing States, for the minimization of the effects of major incidents which may cause serious pollution of the marine environment; (c) provide appropriate assistance, especially to developing States, concerning the preparation of environmental assessments. Again according to Article 203 of the UNCLOS: "Developing States shall, for the purposes of prevention, reduction and control of pollution of the marine environment or minimization of its effects, be granted preference by international organizations in: (a) the allocation of appropriate funds and technical assistance; and (b) the utilization of their specialized services."

Regional Seas programme of the UNEP is relatively unsuccessful in this region.<sup>12</sup> Although a national legal framework is potentially the most important tool for complying with international legal obligations, this paper will highlight regional mechanisms. The aim of this paper is to analyse challenges that these countries may encounter in their efforts to create an effective regional legal framework to comply with the marine environmental protection obligations under the UNCLOS. This paper also aims to propose a legally binding regional instrument for conservation of the marine and coastal environment of the South Asian countries.

## 2. Global and Regional Approach in Ocean Governance

Ocean regionalism can be generally defined as "the management of the oceans and their resources at the regional level."<sup>13</sup> A global-versus-regional approach in international relations is predominantly associated with regionalism in land. The issue of regionalism in sea received an impetus in the scientific world in 1977 when the Law of the Sea Institute, Hawaii organised its eleventh annual conference on the theme "Regionalism of the Law of the Sea."<sup>14</sup> Environmental problems of ocean areas are as diverse as the oceans themselves. Certainly, different regions face different types of problems. Generally, some issues such as land-based pollution, dumping and environmental protection of enclosed and semi-enclosed seas are primarily regional concerns and best handled by regional actions. Boczek summarises the suitability of regional actions for the protection of marine environment as follows:<sup>15</sup>

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<sup>12</sup> For UNEP Regional Seas Programme, see generally UNEP Regional Seas Programme website: <http://www.unep.org/regionalseas/>, accessed on 9 June 2008.

<sup>13</sup> L. Alexander, "Regionalism at Sea: Concept and Reality" in D. M. Johnston (ed.), *Regionalism of the Law of the Sea*, Ballinger Publishing Company, Cambridge, Massachusetts, 1978, pp. 3-16, p. 3.

<sup>14</sup> For pre-UNCLOS developments of ocean regionalism, see *Ibid.* The book is based on the proceedings of the Eleventh Annual Conference of the Sea Institute.

<sup>15</sup> B. A. Boczek, "Global and Regional Approach to the Protection and Preservation of the Marine Environment", *Case Western Reserve Journal of International Law*, Vol. 16, 1984, p. 53.

- First, a global approach to combat some types of pollution, such as that from land-based sources, is inappropriate because of the nature of the problem;
- Second, the heterogeneity of the oceans requires taking into account regional differences;
- Third, regionally organised anti-pollution mechanisms can be more readily made available in case of emergency;
- Fourth, the regional approach encourages maximum participation by the regional nations, especially less developed countries which might otherwise stay away from a globally organised and technologically advanced system. Regional cooperation may thus favour cost-effectiveness and transfer of technology to the developing nations; and
- Finally, a regional arrangement can serve as a forum for consultation and might even contribute to developing habits of cooperation eventually transcending matters to the protection of the marine environment.

Regional approach to the marine environment protection gives birth to a theoretical question - how is a marine region constituted? A region can be defined from a geographic perspective as an "area of the earth's surface which is set apart from other areas by existence of one or more distinctive characteristics."<sup>16</sup> The question of regional demarcation involves scientific, political and ecological aspects. There may be two basic nuances for ocean region building. A sea area may be "set aside from other part of the world ocean by some distinctive feature or features, such as the configuration of surrounding land area" which make it different from others. On the other hand, a group of countries in an area may have similar interest in ocean matters. These two propositions may overlap some times.<sup>17</sup> According to the father of marine geography, Lewis M Alexander, a marine region may be constituted by three factors namely physical, management and operational.<sup>18</sup>

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<sup>16</sup> L. M Alexander, "Regional Arrangements in the Oceans", *American Journal of International Law*, Vol. 71, 1977, p. 88.

<sup>17</sup> *Ibid*, p. 88.

<sup>18</sup> *Ibid*, p. 89.

(i) *Physical Region*

Physical marine region may be divided into two subgroups, namely ocean basin and semi-enclosed seas. As identified by Alexander, there are nine ocean basins in the world namely: the North and South Atlantic, the Indian, Arctic and Antarctic, and four units of the Pacific-North, South, West Central and East Central. Again, he describes a semi enclosed sea as a sea area partially surrounded by land areas, and three criteria have been suggested to determine a semi-enclosed sea. A semi-enclosed sea should have at least 50,000 square nautical miles area, be a primary sea rather than an arm of a larger semi-enclosed water body, and have at least 50 percent of its periphery occupied by land which is bordered by two or more States. In accordance with this definition, the following sea areas can be identified as semi-enclosed seas: Gulf of Aden, Arabian Sea, Andaman Sea, Baffin Bay-Davis Strait, Baltic Sea, Bay of Bengal, Bering Sea, Black Sea, Caribbean Sea, Celebes Sea, East China-Yellow Sea, Gulf of Guinea, Sea of Japan, Mediterranean Sea, Gulf of Mexico, North Sea, Sea of Okhotsk, Gulf of Oman, Persian (Arabian) Gulf, Red Sea, Solomon Sea, South China Sea, Sulu Sea and Timor-Arafura Sea.<sup>19</sup> As highlighted above, three of these semi-enclosed seas are within the South Asian Seas Region.

Although the UNCLOS provisions relating to regionalism will be discussed later, it is pertinent to mention at this point that the UNCLOS defines an enclosed or semi-enclosed sea as "a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States."<sup>20</sup> Under this criterion, some other areas such as Coral, Norwegian and Barents Seas, the Greenland Sea, the Bay of Biscay may be included in the list of semi-enclosed seas.<sup>21</sup>

(ii) *Management Region*

While physical marine region is a geographical concept, this type of marine region is functional in nature, which may or may not

<sup>19</sup> *Ibid* pp. 89-90.

<sup>20</sup> UNCLOS, Article 122.

<sup>21</sup> Boczek, *supra* note 15, p. 54.

conform to the limit of physical marine region. The functional regions evolved to respond to identifiable management issues such as fisheries, environmental control, scientific investigation and conservation of migratory species, which may be handled as discrete issues by the coastal States.<sup>22</sup>

### (iii) *Operational Region*

Operational region means a region where some sorts of regional management arrangements already exist. A physical or management region becomes operational if there is any regional arrangement that evolves. A management region exists because of an identifiable problem or issue and becomes an operational region when a regional arrangement comes into effect to address the issue. For example, the vulnerable semi-enclosed Baltic Sea is a pioneering operational region where two regional arrangements are in operation for conservation of the living resources and protection of the marine environment.<sup>23</sup>

Still, there are problems associated with formation of marine region such as what will be the status of land-locked States of a certain region and how non-coastal States contributing in land-based pollution in certain sea areas will be included in the process. Against this backdrop, the following part will discuss how far the UNCLOS recognises the regional approach in ocean governance.

## 3. Regional Approach and the UNCLOS

Although the UNCLOS does not define a marine region, it calls for its implementation at a regional level in various ways, either through the adoption of specific measures or through regional cooperation in general terms.<sup>24</sup> The UNCLOS endorses the regional

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<sup>22</sup> Alexander, *supra note* 16, p. 92.

<sup>23</sup> Boczek, *supra note* 15, p. 55; Alexander, *supra note* 16, p. 93.

<sup>24</sup> R. R. Churchill, "Levels of Implementation of the Sea Convention: An Overview", in D. Vidas and W. Ostreng (ed.), *Order for the Oceans at the Turn of the Century*, Kluwer Law International, the Hague, 1999, p. 320; also see generally E. Franckx, "Regional Marine Environment Protection Regimes in the Context of UNCLOS", *International Journal of Marine and Coastal Law*, Vol. 13, 1988, pp. 307-324.



approach with respect to protection of straits' environment,<sup>25</sup> duty to render assistance,<sup>26</sup> right of access to and from the sea and freedom of transit for land-locked States,<sup>27</sup> international sea bed authority,<sup>28</sup> the conservation and management of living resources,<sup>29</sup> the protection and preservation of the marine environment<sup>30</sup> and the development and transfer of technology.<sup>31</sup>

Although UNCLOS does not define a region, it does define semi-enclosed seas under Article 122. As Vallega points out:

"The concept of semi-enclosed and enclosed sea has been the reference basis for the development of marine policy on the regional scale consistent with the law of the sea, since no other concepts, including that of the regional seas, are considered in the UNCLOS convention. This justifies thinking that, in the present state of development of the legal framework, oceans are not regarded as proper grounds for promoting cooperation on the regional scale."<sup>32</sup>

Article 123 of the UNCLOS calls for States bordering an enclosed or semi-enclosed sea to endeavour, directly or through an appropriate regional organization: (i) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea; (ii) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment; and (iii) to co-ordinate their scientific research policies and undertake, where appropriate, joint programmes of scientific research in the area.

Part XII of the UNCLOS which deals with protection and preservation of marine environment explicitly takes into account the regional approach under Section 2 - Global and Regional Approach.

<sup>25</sup> UNCLOS Article 43.

<sup>26</sup> UNCLOS Article 93.

<sup>27</sup> UNCLOS Article 125.

<sup>28</sup> UNCLOS Article 156.

<sup>29</sup> UNCLOS Articles 61-64, 66, 69-70 and 118-119.

<sup>30</sup> UNCLOS Articles 197, 200, 207-208 and 210-212.

<sup>31</sup> UNCLOS Articles 268, 270, 272-273, 275 and 277.

<sup>32</sup> A. Vallega, "The Regional Scale of Ocean Management and Marine Region Building", *Ocean & Coastal Management*, Vol. 24, 1994, p. 22.

Article 197 requires States to cooperate on a global basis and, as appropriate, on a regional basis, for the protection and preservation of the marine environment, taking into account characteristic regional features. Article 207 (4) requires that States shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, taking into account characteristic, regional features, the economic capacity of developing States and their need for economic development. Again, under Article 208, to prevent pollution from sea-bed activities, States shall endeavour to harmonize their policies in this connection at the appropriate regional level and shall establish global and regional rules, standards and recommended practices procedures to prevent, reduce and control pollution of the marine environment from sea-bed activities. Under Article 210, States are required to take same sorts of regional cooperation against pollution by dumping.

Finally, under Article 276, States commit to promote the establishment of regional marine scientific and technological research centres, particularly in developing States, in order to stimulate and advance the conduct of marine scientific research by developing States and foster the transfer of marine technology. All States of a region shall cooperate with the regional centres therein to ensure the more effective achievement of their objectives.

From the discussion of regional approach, it is evident that defining a region may largely be a question of policy. A region may be built on the basis of a geographical and political area within which inter-related problems of marine and terrestrial environmental protection may be addressed most sensibly.<sup>33</sup> As Adalberto Vallega pointed out in 1994, "looking at twenty years of political efforts may well make us think that the development of the regional concept has not been stimulated by scientific thoughts but by the decision-making context and practice of the United Nations system."<sup>34</sup> Regional approach in marine environmental protection may in one sense be merely a policy for implantation of the environmental rules under UNCLOS; in another sense, regional approach may be an

<sup>33</sup> P. W. Birnie and A. E. Boyle, *International Law and the Environment*, (2<sup>nd</sup> Edition), London, Oxford University Press, 2002, p. 354.

<sup>34</sup> Vallega, *supra note* 32, p. 26.

inevitable physical or geographical reality. As observed by Birnie and Boyle:

“At one level, regional arrangements are simply a means of implementing policies which are necessary in the interests of specific community of states and which can be best tackled on a regional basis. Cooperation in cases of pollution emergencies, or in the exploration of fishing stocks are a good example, because the range of states affected is relatively limited. In other cases, such as enclosed or semi-enclosed seas or Arctic waters, physical characteristics may dictate the regional application of more onerous standards of pollution prevention than would suffice for oceanic areas. This factor is main justification for special regional rules governing the discharge of pollution from ships or the dumping of waste at sea.”<sup>35</sup>

The global community recognised the approach of regional action for protection of marine environment even before the adoption of the UNCLOS. In 1974, UNEP launched the regional seas programme to encourage regional initiatives for prevention of marine pollution and conservation of marine environment. The following part will briefly introduce the UNEP Regional Seas Programme.

#### 4. The UNEP Regional Seas Programme

The UNEP Regional Seas Programme, launched in 1974 following the 1972 United Nations Conference on the Human Environment is an “action-oriented programme having concern not only for the consequences but also for the causes of environmental degradation and encompassing a comprehensive approach to combating environmental problems through the management of marine and coastal areas.”<sup>36</sup> In 1976, UNEP established a ‘Task Force on Legal Instruments for Regional Seas’ and subsequently the

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<sup>35</sup> Birnie and Boyle, *supra* note 33, p. 355.

<sup>36</sup> UNEP, “Achievements and Planned Development of UNEP’s Regional Seas Programme and Comparable Programmes Sponsored by Other Bodies”, *UNEP Regional Seas Report and Studies No. 1*, UNEP, Nairobi, 1982, quoted in Vallega, *supra* note 30, p. 19.

Governing Council of the UNEP endorsed the Regional Seas Programme in 1978.<sup>37</sup> The main objective of the Regional Seas Programme is to tackle the increasing degradation of the global marine environment through stimulating regional action. This seeks to encourage different regional governments to adopt wide-ranging and definite measures to protect their shared marine and coastal areas.<sup>38</sup>

Each of the regional seas programmes are operated by their respective Action Plans. To support the Action Plan most of the regional seas areas have strong legal framework in the form of regional conventions. Moreover, as and when required, associated protocols targeted to particular environmental problems have been formulated. Most of these Action Plans share a similar approach, yet each has been customized by their own regional marine and coastal environmental challenges.<sup>39</sup> Regional seas programmes and their respective legal framework address diverse marine and coastal environmental issues. These include inter alia marine and coastal biodiversity, physical alteration and destruction of coastal and marine habitat, marine protected areas, large marine ecosystems, land-based marine pollution, vessel-source pollution, and other sea-based pollution.

Until now, 13 regional programmes in the Black Sea, Caribbean, East Africa, East Asia, the Kuwait Convention region, Mediterranean, North-East Pacific, North-West Pacific, Red Sea and Gulf of Aden, South Asia, South-East Pacific, South Pacific, and West and Central Africa have been established with the participation of more than 140 countries. There are also five partner programmes

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<sup>37</sup> P. Sands, *Principles of International Environmental Law*, (2nd Edition), Cambridge University Press, Cambridge, 2003, p. 400.

<sup>38</sup> E. Adler, "A World of Neighbours: UNEP's Regional Seas Programme", *Tropical Coasts*, July 2003, available at: <http://www.unep.ch/regionalseas/Library/neighbours.pdf>, accessed on 11 March 2007.

<sup>39</sup> UNEP, *Who We Are & What We Do*, available at: <http://www.unep.org/regionalseas/About/default.asp>, accessed on 11 March 2007.

for the Antarctic, Arctic, Baltic Sea, Caspian Sea, and North- East Atlantic.<sup>40</sup>

As mentioned, most Action Plans are supported by a strong legal framework in the form of a regional convention and associated protocols on specific problems. For example, the first Regional Seas Convention, the 1976 Barcelona Convention, was adopted to support the 1975 Mediterranean Action Plan. Subsequently, twelve of the eighteen regional programmes have incorporated legally-binding conventions to implement their Action Plans. No such convention has yet been developed for the South Asian Seas region.<sup>41</sup>

### 5. South Asian Seas Region

The South Asia region includes Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan, and Sri Lanka. According to an Asian Development Bank (ADB) report, the region has about 23% of the world's population and 15% of the world's arable land, but only about 2% of global gross domestic product, 1.2% of world trade, and less than 1% of global foreign investment and tourism revenues.<sup>42</sup> Despite recent rapid economic growth of some countries, the region is still home to about 410 million of the 720 million poor living in the Asia and Pacific region.<sup>43</sup>

The South Asian Association for Regional Cooperation (SAARC) was established in 1985 to promote active collaboration and mutual assistance in the economic, social, cultural, technical, and scientific fields and to strengthen cooperation among the member states in international forums on matters of common interests. However, tensions among two major countries, i.e., India and Pakistan, as well as the diversity of interests and opinions in the region contributed to the slow progress of regional cooperation initiatives under the

<sup>40</sup> Adler, *supra* note 38.

<sup>41</sup> UNEP, *Regional Seas Conventions*, available at: <http://www.unep.org/regionalseas/Programmes/Conventions/default.asp>, accessed on 11 March 2007.

<sup>42</sup> Asian Development Bank, *Regional Cooperation Strategy and Program: South Asia, 2006-2008*, available at: <http://www.adb.org/Documents/CSPs/South-Asia/2006/CSP-SA-2006.pdf>, accessed on 13 March, 2007.

<sup>43</sup> *Ibid.*

SAARC framework. Although SAARC initiative in the field of environment is not remarkable, the SAARC leaders in the 13th SAARC Summit (held in Dhaka, Bangladesh on 12-13 November 2005) adopted a 53-point Dhaka Declaration which contains some provisions concerning the environment.<sup>44</sup> The 13th SAARC summit:

- expressed deep concern at the continuing degradation of the environment and the need for collaborative action in the protection and preservation of the environment,
- underlined the need for collaborative action in the area of environment, including water conservation, to promote sustainable development, and
- decided to proclaim the Year 2007 as the “Year of Green South Asia”.

Again, in 2007, at the 14th SAARC Summit held in New Delhi, heads of governments of the region “reiterated their deep concern at the continued degradation of the environment and reaffirmed the need to further strengthen cooperation towards protection and conservation of the environment as a priority area.”<sup>45</sup>

Apart from SAARC, a cross regional organization, Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) comprised of 5 SAARC nations and Myanmar and Thailand,<sup>46</sup> is also an important institution from the perspective of regional ocean governance. Further, another organisation, the Bay of Bengal Programme Inter-Governmental Organisation (BOBP-IGO), has evolved from the erstwhile Bay of Bengal Programme of the Food and Agriculture Organisation of the United Nations. The BOBP-IGO Agreement was formally signed by the Governments of Bangladesh, India, Sri Lanka and Maldives in 2003. Although two countries of Bay of Bengal region, Indonesia and Thailand, attended the meeting, their plenipotentiaries did not

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<sup>44</sup> *Ibid.*

<sup>45</sup> Declaration of the Fourteenth SAARC Summit, available at: <http://www.saarc-sec.org/main.php>, accessed on 11 November, 2007.

<sup>46</sup> The SAARC countries of BIMSTEC are: Bangladesh, India, Sri Lanka, Bhutan and Nepal. BIMSTEC was established on 06 June 1997 with the major objectives of promoting free trade among member countries, increasing investments and tourism across their borders; and promoting technical cooperation.

sign the BOBP-IGO agreement. This organisation is mandated to enhance cooperation among member countries, other countries and organisations in the region and to provide technical and management advisory services for sustainable coastal fisheries development and management in the Bay of Bengal region.<sup>47</sup>

However, the South Asian Seas (SAS) Region does not include all the South Asian States and is not initiated under the framework of SAARC. The South Asian Seas Region is constituted by parts of the Bay of Bengal and the Arabian Sea in the northern Indian Ocean, as well as the seas bordering Bangladesh, India, Maldives, Pakistan, and Sri Lanka. Most recently, the SAS region included two landlocked countries of the region, Bhutan and Nepal, since they have a significant influence upon land-based pollution as a result of their geographic location.<sup>48</sup>

The coastal and marine areas of South Asian Seas Region contain diverse and productive habitats important for human settlement, development and local subsistence. The coastal and marine zone of South Asian Seas Region encompasses the region's most important and critical ecosystems that have a great conservation value including Gulf of Mannar, Coral Ecosystems of the atolls of Maldives, mangroves of Sundarbans in Bangladesh and India, Chilka Lake in India, Puttalam Lagoon in Sri Lanka and fringing reefs in the many parts of the region.<sup>49</sup> Many of the major cities of the region are situated in the coastal areas.

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<sup>47</sup> The SAARC countries of BIMSTEC are: Bangladesh, India, Sri Lanka, Bhutan and Nepal. BIMSTEC was established on 06 June 1997 with the major objectives of promoting free trade among member countries, increasing investments and tourism across their borders, and promoting technical cooperation.

<sup>48</sup> J. Samarakoon, "South Asian Seas" in UNEP *The State of the Marine Environment: Regional Assessments*, available at: [http://www.gpa.unep.org/documents/regional\\_soe\\_part\\_3\\_english.pdf](http://www.gpa.unep.org/documents/regional_soe_part_3_english.pdf), accessed on 12 November 2007.

<sup>49</sup> P. D. Abeyegunawardene, *South Asian Seas: An Introduction*, available at: <http://www.unep.ch/regionalseas/regions/sas/sasint.htm>, accessed on 12 November 2007.

Although coastal areas of the South Asia host some extraordinarily rich ecosystems, due to the high density of population and weak environmental management, these resources are rapidly dwindling. The coastal environment, although very dynamic, is in recent years showing signs of decay. The coastal and marine environment of the region is in a state of crisis. Therefore, it is necessary to examine how this region has responded over the years to the challenge of saving the coastal and marine environment. The regional regulatory system ought to be further strengthened and made more effective in the light of international instruments and the experience of other regions, and thereby ensure the conservation and sustainable management of the coastal and marine environment of the region.

A wide range of environmental problems overwhelmed South Asia which resulted from a wide range of human activities in urban and rural areas. Although the region is endowed with rich marine and coastal ecosystems, the coastal areas of this region are heavily burdened with a large population. A huge number of people in the region live in a condition of absolute poverty. These people are often deprived of basic human needs, caught in the everyday struggle for survival. Situations often force them to over-fish, practise unsustainable agricultural processes, and damage coastal and marine habitats. A vicious circle of overpopulation, poverty and illiteracy is one of the main catalysts for the degradation of marine and coastal environment in South Asian Region. The Region is also plagued with ethnic, religious and domestic political conflicts, which are contributing to the economic and political imbalance. Moreover, these conflicts are also contributing to the abuse of human rights, poverty, hunger, malnutrition, illiteracy, and environmental degradation.<sup>50</sup>

To address the critical marine and coastal environmental issues, UNEP Governing Council took the initiative for a South Asian Seas Action Plan in May 1982 when it adopted its decision 10/20 which requested the executive director of UNEP to enter into consultation

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<sup>50</sup> See generally J. Rehman, "Institutions of International Law and the Development of Regional Forum for Peaceful Dialogue in South Asia", *Asian Journal of Comparative Law*, Vol. 1, 2006, pp. 24-43.



with the South Asia Cooperative Environment Program (SECAP).<sup>51</sup> After over a decade of consultation, the South Asian Seas Action Plan (SASAP)<sup>52</sup> was adopted in March 1995. An independent regional intergovernmental organisation, the South Asia Cooperative Environment Programme (SACEP)<sup>53</sup> located in Sri Lanka, is now serving as the Action Plan Secretariat.

The SASAP elaborately underscores the guidelines for environmental assessment, environmental management, environmental legislation and institutional and financial arrangements, and then identifies the areas where priority activities need to be developed for conservation of marine and coastal environment. The SASAP focuses on integrated coastal zone management, oil-spill contingency planning, human resource development, and the environmental effects of land-based activities. Although there is no regional convention yet, it follows existing global environmental and maritime conventions and considers Law of the Sea as its umbrella convention to some extent.

## 6. Salient Features of South Asian Seas Action Plan (SASAP)

### *Objectives*

The overall objective of the SASAP is to protect and manage the marine environment and related coastal ecosystems of the region in an environmentally sound and sustainable manner. The objective is to be achieved through:

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<sup>51</sup> S.M.D. Hasan, "Land-based Sources of Marine Pollution Control in Bangladesh: A Legal Analysis", *Asia Pacific Journal of Environmental Law*, Vol. 7, 2002, pp. 69-85, p 77.

<sup>52</sup> South Asian Seas Action Plan, available at: [http://www.sacep.org/pdf/SAS%20Action%20 Plan.pdf](http://www.sacep.org/pdf/SAS%20Action%20Plan.pdf) accessed on 12 March, 2007.

<sup>53</sup> South Asia Co-operative Environment Programme (SACEP) is an inter-governmental organization, established in 1982 by the governments of South Asia to promote and support protection, management and enhancement of the environment in the region. SACEP member countries are Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. See: <http://www.sacep.org>, accessed on 12 March, 2007.

- establishing and enhancing consultations and technical cooperation among states of the region;
- emphasizing the economic and social importance of the resources of the marine and coastal environment; and
- establishing a regional cooperative network of activities concerning concrete subjects/priorities of mutual interest for the whole region.

### *Areas of Priority*

The SASAP identified the areas where priority activities need to be developed under the Action Plan. The priority activities are in the four specific areas namely Integrated Coastal Zone Management, Development and Implementation of National and Regional Oil Spill Contingency Plan, Human Resources Development through Strengthening Regional Centres of Excellence, and Protection of the Marine and Coastal Environment from Land Based Activities. In accordance with SASAS, the following activities have been selected for implementation by South Asian Seas member States for protection of marine environment from land based activities:

- development of strategy, including refinement of the Programme of Action, for the protection of the Marine Environment of the South Asian Seas from Land-based Activities;
- development of a regional programme for monitoring of marine pollution in the coastal waters of the South Asian Seas and the regular exchange of relevant data and information;
- development of pilot activities in countries of the South Asian Seas to control the degradation of the marine coastal environment from land-based activities;
- training of personnel involved in these pilot projects to control the degradation of the marine and coastal environment from land-based activities, including preparation of a training manual; and
- development of a regional programme to identify the special problems of the largest coastal cities, each having a

population of more than 10 million by the year 2000, and of the island States in the areas of: (i) disposal of domestic effluents; and (ii) collection and disposal of solid wastes.

But these soft commitments for protection of marine and coastal environment have been proved unsuccessful. Although this selection of activities can be treated as a positive development, the regime formation process has been very slow. The development and progression of activities is very minimal for control of land based sources of marine pollution. One of the major reasons of this dismal picture is that concerned governments classify the land based sources of marine pollution control as a low priority issue.<sup>54</sup>

### 7. Implementation of South Asian Seas Action Plan (SASAP)

One of the general goals of the SASAP is to promote policies and management practices for the protection and development of the marine and coastal environment on a national and regional level, including appropriate legislation at the national level. As described earlier, the SASAP also contains elaborate provisions for environmental assessment, environmental management, and environmental legislation as well as institutional and financial arrangements. Although in many parts, SASAP calls for appropriate legislation at a national level, nowhere does it call for an appropriate and effective legal framework at the regional level. However, this antipathy towards creating binding regional legal norms reflects the geo-political reality of the region. Moreover, long standing tension between India and Pakistan and unfriendly bilateral relations of some other countries in the region is hindering the process of making a South Asian Community on the basis of legally binding obligations. Not only for environment, but also in all other aspects, regional instruments of cooperation in this region are largely dominated by non-binding declarations and action plans or programmes. Another major problem in South Asia is that sea boundaries between some of the South Asian Countries are still unsettled, which is hindering the

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<sup>54</sup> Hasan, *supra* note 51, p. 77.

process of making any regional Convention for marine environment with specific rights and duties.<sup>55</sup>

The SASAP endorses that the efficient implementation of the Action Plan will be mutually dependent upon action at the national, sub-regional and regional levels. To avoid creating a regional legal instrument for protection of marine environment from land-based sources of pollution, the SASAP mentions under Article 1 of the Annex IV: "All the countries of the South Asian region are signatories to this umbrella Convention [UNCLOS] which regulates the activities of nations in the ocean sector both within and outside national jurisdiction. The Convention has specific provisions relating to the prevention, reduction and control of marine pollution from land-based activities." But, the provisions of UNCLOS on land-based sources of marine pollution are very general in nature and Article 207 of UNCLOS itself requires States to adopt laws and regulations to prevent, reduce and control marine pollution from land-based sources and to endeavour to establish global and regional rules, standards and recommend practices and procedures. Hence, without creating a regional legal instrument for protection of marine environment from land-based sources of pollution, using the generalise provisions of UNCLOS is not adequate to save the marine and coastal environment of the region.

Apart from the lax legal support, there are problems in the approach of the decision making at the regional level. As one expert identified, one of the shortcomings in acquiring appropriate understanding is the general tendency in the SAS Region to adopt an intellectual approach. The outcome is that most studies result in 'normative' solutions including guidelines, standards, and

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<sup>55</sup> See generally R. C. Sharma, "South Asia Maritime Issues", *Ocean & Shoreline Management*, Vol. 15 1991, pp. 325-336; M. H. Rahman, "The Law of the Sea: Prediction of Sea Battle in Bangla-Indo-Pak Sub-Continent", *Law and International Affairs*, Vol. 11, 1988, pp.117-135; M. H. Rahman, "Delimitation of Maritime Boundaries: A Survey of Problems in the Bangladesh Case" *Asian Survey*, Vol. 24, 1984, pp. 1302-1317; M. H. Rahman, "The Impact of the Law of the Sea Convention on the Regime for Islands: Problems for the Coastal State in Asserting Claims to "New-Born" Islands in Maritime Zones", *International and Comparative Law Quarterly*, Vol. 34, 1985, pp. 368-376.

instructions on what should be done. In this approach the main actors who can contribute to the solutions are usually left out. In the absence of adequate interventions many poor communities have demonstrated the capability to solve their local waste problems.<sup>56</sup>

Another management deficiency of South Asian Seas Programme is that it has not been initiated under the umbrella of SAARC and hence has failed to attract the attention of heads of the governments. Moreover, South Asian Seas Programme is represented by the Environment Ministries of the respective governments. Environment Ministries are regarded as low profile ministries in most of the South Asian countries, much like it is in many other developing countries. Therefore, it is not at all surprising that South Asian Seas Programme has failed to come with a legally binding regional instrument although more than a decade has elapsed since SASAP.

Again, questions may be raised about the formation of the South Asian Seas Region. South Asian Seas Region under the present setup does not include all countries in the Bay of Bengal region. According to Global International Waters Assessment (GIWA) Myanmar, western coast of Thailand, western peninsular Malaysia and minor part of Indonesia (eastern Sumatra) are also part of the GIWA sub-region of Bay of Bengal. But, none of these countries is a member of South Asian Seas programme. For better management of Bay of Bengal, semi-enclosed sea participation of these countries in South Asian Seas Programme is needed. Even when UNEP published a report on the state of the marine environment in the South Asian Seas Region in 1990, it included Myanmar (the then Burma), Western coast of Thailand and Malaysia in the South Asian Seas region, but these three countries did not participate in the South Asian Seas programme.<sup>57</sup>

Another approach of ocean region building is the large marine ecosystem (LMEs) approach. LMEs are regions of ocean and coastal space that encompass river basins and estuaries and extend out to the seaward boundary of continental shelves and the seaward margins of

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<sup>56</sup> Samarakoon, *supra* note 48.

<sup>57</sup> R. S. Gupta et al., "State of the Marine Environment in the South Asian Seas Region", *UNEP*, 1990, p. 1.

coastal current systems. The LME as an organisational unit facilitates management and governance strategies that recognise the ecosystem's numerous biological and physical elements and the complex dynamics that exist amongst and between them.<sup>58</sup> The Bay of Bengal has been identified as one of the world's sixty-four LMEs, which is bounded by eight countries including Bangladesh, India, Indonesia, Malaysia, Maldives, Myanmar, Sri Lanka and Thailand.<sup>59</sup>

In 2005, a report published by the UNEP identified the priority issues for the SAS Region as sewage, litter - solid waste (industrial and municipal), agricultural chemicals, oil hydrocarbons, sediment, and physical alteration and destruction of habitats.<sup>60</sup> Even beyond this report, it has been widely recognised in many other reports that threats to the coastal and marine environment of the region are increasing day by day.<sup>61</sup> Although the Action Plan Secretariat is undertaking its best efforts, albeit with inadequate resources, this Action Plan failed to create any ray of hope to the people of the region. After a decade of adopting the Action Plan, the people and marine environment of the region still continue to be exposed to the numerous environmental threats.

## 8. Some Recommendations

The following are a set of recommendations that seek to surmount the problems described earlier in this paper:

- A South Asian regional legal instrument in the form of a convention for the conservation and sustainable management of the marine and coastal area has to be adopted. The proposed convention must reflect the emerging international environmental law norms which include inter alia intergenerational equity, intra-generational equity, establishment of environmental standards, prior

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<sup>58</sup> See <http://www.oceansatlas.org>, accessed on 12 March, 2007.

<sup>59</sup> See <http://www.fao.org/fi/bolme/website/prospectus.html>, accessed on March 12, 2007.

<sup>60</sup> Samarakoon, *supra note* 48.

<sup>61</sup> A. Lakshmi & R. Rajagopalan, "A Comparative Review of Coastal Legislation in South Asia", *UNEP/GPA*, 2003, pp. 22-25.

environmental impact assessment, notification of activities having adverse effects, principle of sustainable, optimum and wise use, principle of common concern, principle of common heritage of mankind, polluters-pays principle, principle of preventive action, precautionary principle, principle of sovereignty over natural resources, no-harm principle and principle of common but differentiated responsibility.

- South Asian Trust Fund for Coastal and Marine Environment has to be created. At the same time, joint initiative is needed for realisation of the right to technological and financial help as given by the UNCLOS convention.
- Initiative has to be taken to include Indonesia, Malaysia, Myanmar, and Thailand in the South Asian Seas Region.
- For better and smooth regional environmental management, SAARC and SACEP may be merged into one organisation. SAARC and SACEP signed a Memorandum of Understanding (MOU) on 8 July 2004. According to a joint press release of SAARC and SECEP, the MOU will constitute a framework of cooperation between SAARC and SACEP in the area of environment protection consistent with the SAARC Charter and the mandate of SACEP. But as SAARC attracts more focus of the governments and people of the region, it will be better if these two organisations merged with each other and SACEP take the responsibilities of environment related regional intergovernmental initiatives in the SAARC region. In this way, South Asian Seas Programme will attract adequate attention.
- A South Asian Regional Research Centre for Marine and Coastal Area Management needs to be established. However, the proposed regional research centre must be supported by a network of national research centres.

## 9. Conclusion

As underscored by the former United Nations Secretary-General Kofi A. Annan in his 2004 environment day message:

“There is an urgent need for concerted action, on land and sea, at the national, regional and international levels. Mechanisms already exist, including the Global Plan of Action for the Protection of Marine Environment from Land-based activities, the United Nations Convention on the Law of the Sea, and the UN Food and Agricultural Organization action plans for fisheries. Nevertheless, the continuing depletion of the world’s fish stocks and the increasing degradation of the marine environment indicate that these and other instruments, binding or non-binding, are not being sufficiently implemented and enforced.”<sup>62</sup>

Long coast lines provide South Asia with a rich coastal area filled with unique and varied biodiversity. It has a great natural ecosystem value not only for its multiple renewable resources of direct economic benefit to the region, but also for its outstanding aesthetic value. Burdened with a large population lacking adequate natural resources on land, countries of the South Asian Region will have to depend more and more on its sea territories. Countries of the region must come forward with an effective regional legal framework for the conservation of its coastal and marine environment. Adoption of the South Asian Seas Action Plan is obviously a positive step. Moreover, like other regions, South Asia has to conceive of a legally binding instrument for the conservation of marine and coastal environment. However, it needs to be mentioned that the adoption of new laws is not, and in no way can be, a panacea. At the same time, a proper institutional mechanism for implementation of regional instrument has to be established.

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<sup>62</sup> Kofi A. Annan, *The United Nations Secretary-General-Message on World Environment Day*, available at: [http://www.unep.org/wed/2004/Downloads/PDFs/SG\\_message\\_E.pdf](http://www.unep.org/wed/2004/Downloads/PDFs/SG_message_E.pdf), accessed on 10 March 2007.