

ASEAN FEATURES

MOVING TOWARDS OR TURNING AWAY FROM INSTITUTIONS?
THE FUTURE OF INTERNATIONAL ORGANIZATIONS IN ASIA
AND THE PACIFIC

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I. INTRODUCTION

At the annual meeting that marked the centenary of the American Society of International Law (ASIL) in March 2006, a panel entitled ‘The Move from Institutions?’¹ discussed the question whether there has been a move away from international organizations in international law to more informal modes of cooperation. Other commentators have also noted this trend, suggesting that “[o]ver the last few decades, international cooperation has increasingly been organized through mechanisms that were deliberately kept at the fringes of international law”.² In a slightly different vein, Anne-Marie Slaughter has argued that international cooperation takes place in loose networks of civil servants and other officials—thus, cooperation rather than regulation is the primary method of interaction.³ Most of the scholarship that has discussed this movement away from institutions has dealt with either global organizations or regional institutions in Europe or the Americas. For example, an article by Jan Klabbers entitled ‘Institutional Ambivalence by Design’ refers to the G7, the Organization of Security and Cooperation in Europe (OSCE), and its predecessor the Conference on Security and Cooperation in Europe (CSCE).⁴ Similarly, in listing the degrees of legalization of various international institutions and arrangements, an article published in the 2000 edition of *International Organization* concentrates on various global and northern

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¹ See “The Move from Institutions?” (2006) 100 American Society of International Law Proceedings at 287-302.

² Jan Klabbers, “Institutional Ambivalence by Design: Soft Organizations in International Law” (2001) 70 Nordic Journal of International Law 403 at 405 [Klabbers].

³ Anne-Marie Slaughter, “The Real New World Order” (1997) 76 Foreign Affairs 183. In a more recent work Slaughter recognizes that the world of government networks “would still include traditional international organizations ... although many of these organizations would likely to become hosts for and sources of government networks”: see Anne-Marie Slaughter, *A New World Order* (New Jersey: Princeton University Press, 2004) at 6; and Jose E Alvarez, “International Organizations: Then and Now” (2006) 100 American Journal of International Law 324 at 338 [Alvarez].

⁴ See Klabbers, *supra* note 2.

bodies.⁵ At the ASIL meeting in 2006, Maluwa widened the parameters of the debate to include developments in Africa.⁶

If there is a move away from institutionalization in the international community then it is logical that this move is replicated in Asia and the Pacific. It is perceived that states in this region prefer more informal methods of consultation to formal organizations,⁷ with an emphasis on mechanisms such as second tier diplomacy and informal workshops. When making such arguments, regional approaches to the Spratly Islands dispute and the management of fishery resources are frequently cited as case studies.⁸ The purpose of this article is to question whether the 'move away from institutions' is replicated in the Asian and Pacific organizations, or whether there has been a contrary move towards further institutionalization. In exploring this issue, Part II of this article examines the purported move away from international institutions and the matching trend towards negotiating more informal agreements in international relations. Part III briefly discusses the perceived characteristics of the regional approach to international law, before Part IV explores a range of developments in the region, including the decision by members of the Association of Southeast Asian Nations (ASEAN) to adopt the ASEAN Charter, the establishment of the Shanghai Cooperation Organization, and the endorsement of more formal methods of dispute resolution by the Pacific Islands Forum. This paper does not deal with all regional or subregional organizations in Asia and the Pacific, but will instead focus on examples which indicate this move to greater institution-building. The diversity of the organizations that are covered in this paper indicates that a broad definition of the region has been taken to include organizations of both Asia and the Pacific.

II. A MOVE AWAY FROM INTERNATIONAL ORGANIZATIONS?

The title of the panel at the ASIL meeting last year was a play on the title of an article written by David Kennedy in 1987, 'A Move to Institutions', in which he discussed institutionalization and the League of Nations.⁹ Since the establishment of the League and, more particularly, since the formation of the United Nations, international organizations have proliferated. The figures range from 37 organizations in 1909 to 246 international organizations in 2005, although the numbers vary depending on the classification system that is adopted.¹⁰ Alvarez notes that 'international lawyers and fellow travellers in international relations rarely see an [international organization], proposed or existing, that they do not like.'¹¹ This proliferation of international organizations has been accompanied by a greater emphasis on legalization within established international institutions, including more dispute resolution bodies such as tribunals and courts, more international agreements and treaties, and a greater concentration on methods of enforcement. If lawyers are not

⁵ Kenneth W Abbott, Robert O Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, "The Concept of Legalization" (2000) 54 *International Organization* 401 at 406 [Abbott *et al.*].

⁶ Tiyanjana Maluwa, "The Move From Institutions? Examining the Phenomenon in Africa" (2006) 100 *American Society of International Law Proceedings* 294.

⁷ Gillian Triggs, "Confucius and Consensus: International Law in the Asian Pacific" (1997) 21 *Melbourne University Law Review* 650 at 675 [Triggs].

⁸ See for example, William G Stormont, "Confidence Building for Cooperation in an Environment of Conflicting Claims to Jurisdiction", online: University of British Columbia <<http://faculty.law.ubc.ca/scs/cbm.htm>>; and Gordon Munro, "The Management of Tropical Tuna Resources in the Western Pacific: Trans-Regional Cooperation and Second Tier Diplomacy", in Gerald Blake *et al.*, *The Peaceful Management of Transboundary Resources* (London: Graham and Trotman, 1995) at 475.

⁹ David Kennedy, "The Move to Institutions" (1987) 8 *Cardozo Law Review* 841.

¹⁰ Niels Blokker and Henry Schermers eds, *Proliferation of International Organizations—Legal Issues* (The Hague: Kluwer Law International, 2001) at 2-14; and (2005) 5 *Yearbook of International Organizations* at 33.

¹¹ See Alvarez, *supra* note 3 at 339-340.

proposing new international organizations then they are working to correct the defects in the structures of existing organizations.¹²

More recently it has been suggested that international organizations are being bypassed in favour of other structures or frameworks that do not have the hallmarks of 'formal' institutions. Schermers suggests there has been a tendency in recent years to endow existing organizations with additional functions, rather than create new institutions.¹³ While the definition of an international organization is sometimes debated, most writers point to the necessity for an international agreement, a separate permanent organ, and a membership of states.¹⁴ Informal networks or 'soft' organizations may lack one or all of these elements, and are distinguished by the absence of legally binding commitments.¹⁵ Apart from the G7 and the OSCE (or more accurately, its predecessor, the CSCE), other examples that could be cited include the Summit of the Americas process, and in this region, the East Asia Summit (EAS) and the ASEAN Regional Forum (ARF). Furthermore, a number of organizations that would meet the criteria for the status of public international organization have adopted agreements such as recommendations or guidelines that are explicitly outside the purview of international law.¹⁶ This trend towards 'soft' law instruments has been pursued due to the perceived inadequacies of international customary law and treaties as methods of international law-making.¹⁷ Thus, the move away from institutions may be accompanied by a parallel shift away from legalization in international cooperation. Writers have defined the concept of legalization as "a particular set of characteristics that institutions may, or may not, possess."¹⁸ These characteristics have been defined in terms of obligation (whether a state or actor is legally bound by a rule), precision (the extent to which the rule is unambiguously defined), and delegation (the ability of third parties to "implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules").¹⁹ Although these elements may exist in a continuum, a high degree of legalization would assume a stronger stand on all three elements in an international arrangement.²⁰

Not all commentators would agree that there has been a trend away from legalization in all areas of international cooperation. For example, in the context of international economic law, Davidson argues that there is a tendency towards a greater reliance on international law, particularly with the establishment of the World Trade Organization and its Dispute Resolution Body.²¹ Other writers suggest that "[i]n many issue-areas, the world is witnessing a move to law", although the extent of legalization in different fields is variable.²² But for the most part, the drift away from establishing formal institutions would appear to be compatible with a desire to form fewer binding obligations under international law, if

¹² *Ibid.* at 339.

¹³ Henry Schermers, "The Birth and Development of International Institutional Law" (2004) 5 *International Organizations Law Review* at 7.

¹⁴ See Henry G Schermers and Niels M Blokker, *International Institutional Law* (Leiden: Martinus Nijhoff, 4th ed. 2003) at para 32; Philippe Sands and Pierre Klein eds., *Bowett's Law of International Institutions* (London: Sweet and Maxwell, 5th ed. 2001) at 16; and Felice Morgenstern, *Legal Problems of International Organizations* (Cambridge: Grotius, 1986) at 19.

¹⁵ See Klabbers, *supra* note 2.

¹⁶ For example, see *Abbott et al.*, *supra* note 5 at 410-411.

¹⁷ Christine Chinkin, "Normative Development in the International Legal System", in Dinah Shelton ed., *Commitment and Compliance—The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) at 22.

¹⁸ See *Abbott et al.*, *supra* note 5 at 401.

¹⁹ *Ibid.*

²⁰ *Ibid.* at 404.

²¹ Paul J Davidson, "The ASEAN Way and the Role of Law in ASEAN Economic Cooperation" (2004) 8 *Singapore Yearbook of International Law* 165 at 166 [*Davidson*].

²² Judith Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter, "Introduction: Legalization and World Politics" (2000) 54 *International Organization* 385.

only due to the fact that informal organizations are not created by an international convention between states. In listing the advantages of this move to informality in international cooperation, Lipson suggests that “informal bargains are more flexible than treaties”—he describes them as “willows, not oaks.”²³ Ease of amendment, the lack of a detailed ratification process, and the ability to sign such agreements in a less public setting are all cited as benefits of informality.²⁴ Law is seen as an impediment—it is not able to reflect political agreement and cannot accommodate political change in a flexible manner.²⁵ Whether or not these arguments are an accurate reflection of the advantages of informality and the move away from international organizations in the international community, they appear to have much in common with the approach to international law that is often attributed to Asian nations.

III. REGIONAL APPROACHES TO INTERNATIONAL LAW

In identifying whether there is a regional approach to international law that encompasses an area as diverse as Asia and the Pacific, it is first necessary to ascertain the borders of the geographical region that is being discussed. Triggs comments in relation to the ‘Asian Pacific’ region that:²⁶

There is no cohesive ‘region’ of the Asian Pacific. Unlike Europe, it is not a continental land mass; rather it is an area of great complexity in which each state has its own history, culture, religion, law and political interests. Generalizations can therefore be difficult to make and worse, can be misleading.

In the context of the debate concerning human rights and ‘Asian values’, Lee writes that “[t]he expression [Asian values] projects an image of a monolithic Asia with homogeneity of population, language, religion and culture. Nothing is further from the truth.”²⁷ This article seeks to cover a larger and more diverse area than Asia or the Asian Pacific, in that it deals with developments in other areas, including Central Asia, as well as the Pacific. Thus, Triggs’ comments regarding the problems of complexity and generalization are even more applicable when dealing with the developments examined below. Despite this difficulty, there are indications that there may be some features common to approaches to international law amongst states in the region based on historical, cultural, economic and political factors.

Kahler states that “[i]f Europe and North America provide an implicit benchmark for high legalization, the Asia-Pacific region offers an important example of low legalization and possibly an explicit aversion to legalization.”²⁸ As evidence of this trend, states in this region are said to prefer consultation between parties and informal decision-making rather than formal adjudication as a method of dispute resolution.²⁹ Multilateral and bilateral treaties between states in Asia and the Pacific rarely include provision for a formal dispute

²³ Charles Lipson, “Why are Some International Agreements Informal?” (1991) 45 *International Organization* 495 at 500.

²⁴ *Ibid.* at 500-501.

²⁵ See *supra* note 2 at 411.

²⁶ See *supra* note 7 at 654-655.

²⁷ Hoong-Phun Lee “Constitutional Values in Turbulent Asia” (1997) 23 *Monash University Law Review* 375 at 378.

²⁸ Miles Kahler, “Legalization as Strategy: The Asia-Pacific Case” (2000) 54 *International Organization* 549 [Kahler].

²⁹ See *supra* note 7 at 657; and Alexander Downer, “Asian Regional Security Issues”, Address given to the Netherlands Atlantic Commission, The Hague (27 January 1997), online: Department of Foreign Affairs and Trade (Australia) <<http://www.dfat.gov.au/media/speeches/foreign/1997/atlantic.html>>.

resolution body involving adjudication according to international law. For example, the *Treaty of Amity and Cooperation in Southeast Asia* (TAC) emphasizes the need to settle disputes through friendly negotiations, or if need be, by good offices, mediation, inquiry or conciliation,³⁰ rather than by a court or tribunal. Few cases in the International Court of Justice (ICJ) have involved two states from this region, although the more recent sovereignty disputes between Malaysia and Singapore and Indonesia and Malaysia over various islands may indicate that this reluctance to utilize the ICJ is a phenomenon of the past.³¹ It is said that states in this region have preferred to rely on track-two diplomacy (involving meetings between non-government representatives, or government officials who do not officially represent their countries), cooperative schemes such as workshops, and the use of joint development regimes in the maritime delimitation area.³²

The 'aversion to legalization' identified by Kahler has also permeated the area of human rights law. It has been noted in the past that Asian nations were slow to ratify the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).³³ And despite the recommendations of non-governmental organizations³⁴ and the adoption of non-binding declarations at the inter-governmental level,³⁵ Asia does not have its own human rights convention or its own human rights mechanism. However, de Varennes comments that the "Asia Pacific must not be mistaken for an arid ground in terms of legally binding treaties containing human rights guarantees."³⁶ He highlights that there are a number of treaties concluded between Western and Asian countries, and also between Asian states, which include provisions protecting rights.³⁷ Debates in the 1990s about human rights in the region were infused with the need to resolve competing claims for universality versus cultural relativity. Many of these disagreements appeared to revolve around the appropriate method of implementation of rights in the region, rather than the actual standards promulgated in the universal human rights instruments.³⁸ It should also be recognized that there is a variety of approaches to these issues in the region. For example, while some states in the region (most recently, Japan) have ratified the *Rome Statute for the International Criminal Court*, a treaty establishing a

³⁰ *Treaty of Amity and Cooperation in Southeast Asia* Indonesia, 24 February 1976, arts 13-15. Note also the *ASEAN Protocol on Enhanced Dispute Settlement Mechanism*, 2004.

³¹ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* (Merits) (2002) ICJ; and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)*. Public hearings in this case will begin in November 2007. See Triggs, as to possible reasons for this reluctance: *supra* note 7 at 657-659.

³² See Triggs, *supra* note 7 at 664-667.

³³ Australian Council for Overseas Aid, Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade's Inquiry, quoted in "Improving but ... Australia's Regional Dialogue on Human Rights" (1998) 96, online: Parliament of Australia: <<http://www.aph.gov.au/house/committee/jfadt/dialog/Reportinx.htm>>. An example of a recent and significant treaty action is Indonesia's accession to the ICCPR and the ICESCR on 23 February 2006.

³⁴ *Asian Human Rights Charter—A People's Charter* (1998), online: Asian Human Rights Commission <<http://material.ahrchk.net/charter/>>. This Charter resulted from an extensive consultation process led by non-governmental organizations. See also Pacific Charter of Human Rights (drafted under the auspices of LAWASIA).

³⁵ See *Colombo Declaration of the Heads of State or Government of the Member Countries of the South Asian Association for Regional Cooperation*, Colombo, Sri Lanka, December 1991 at para 7 and *Kuala Lumpur Declaration on Human Rights*, approved by the Second Plenary Session of the 14th General Assembly of the ASEAN Inter-Parliamentary Organization, Kuala Lumpur, 20-23 September 1993, in Fernand de Varennes ed., *Asia-Pacific Human Rights Documents and Resources—Volume 1* (The Hague: Martinus Nijhoff, 1998) at 98 and 107 [de Varennes].

³⁶ See de Varennes, *supra* note 35 at 3.

³⁷ *Ibid at*, 6 and 12.

³⁸ Sarah Pritchard, "Asian Values and Human Rights" (1996) Proceedings of the Fourth Annual Meeting of the Australian and New Zealand Society of International Law and the International Law Association 153 at 175.

court that will prosecute the most fundamental breaches of human rights and international humanitarian law, most states in Asia and the Pacific have failed to take this step.³⁹

This brief discussion of the approach of Asian nations to international law and human rights law leaves open the question whether there is a distinctive attitude towards the development and functioning of international institutions in this region. The establishment of institutions in this part of the world proceeded at a slower pace than in Europe or the Americas.⁴⁰ Whereas the Council of Europe and the Organization of American States were created quickly following the conclusion of World War II, the Bangkok Declaration, the founding instrument of ASEAN, was not signed until 1967 and the Pacific Islands Forum was not established until 1971.⁴¹ Following the pattern identified above, these organizations tended to have informal structures and favoured codes of conduct or statements of principles over precisely defined agreements.⁴² Western Pacific regionalism has also been described as “open, predominately private sector driven, and with government functioning as a facilitator and liberator.”⁴³ These characteristics were prevalent in the organizations of Asia and the Pacific. The founding members of ASEAN favoured principles that emphasized informal institution building, flexibility and consensus decision-making.⁴⁴ Such attributes have been described by both ASEAN leaders and commentators alike as the ‘ASEAN Way’.⁴⁵ Another institution in the region, Asia Pacific Economic Cooperation (APEC), was designed to be a method of facilitating economic cooperation between states, rather than a formal organization. Due to problems regarding the status of particular economies, it appears to have eschewed attempts to formalize its status through a binding treaty.⁴⁶ This is demonstrated by APEC’s preference for both carrying out its work through various committees and working groups including non-governmental representatives, and adopting non-binding declarations.⁴⁷ The ‘Pacific Way’ has been identified as a distinct approach to problem-solving in the Pacific islands, involving elements such as Pacific solutions to Pacific problems, unanimous compromise, and the primacy of political goals over administrative feasibility.⁴⁸ The

³⁹ The website for the International Criminal Court lists 12 states in the Asian region as having ratified or acceded to the *Rome Statute*: Fiji, Marshall Islands, Nauru, Cyprus, Cambodia, Mongolia, Jordan, Tajikistan, Timor-Leste, Samoa, Republic of Korea, and Afghanistan. Australia and New Zealand have also ratified the Statute (classified as Western European and Other States), online: International Criminal Court <<http://www.icc-cpi.int/statesparties.html>>. Most recently, Japan has announced that it will accede to the Statute—it will enter into force for Japan on 1 October 2007.

⁴⁰ See *Kabler*, *supra* note 28 at 549.

⁴¹ In the case of the Pacific, Rolfe claims “[i]nstitutionalized South Pacific regionalism is as old as that of Europe and considerably pre-dates that of Southeast Asia. It is, however, not as well known, partly because the region itself is not a major focus of academic study and partly because the institutions themselves do not play a significant role on the world stage.” See Jim Rolfe, “The Pacific Way: Where ‘Non-Traditional’ is the Norm” (2000) 5 *International Negotiation* 427 at 430 [Rolfe].

⁴² *Ibid.*

⁴³ Gareth Evans, “Regionalism and Cooperation in the Asia Pacific: The Role of Asia Pacific Economic Cooperation Governments”, in Barbara K Bundy, Stephen D Burns and Kimberley V Weichel eds., *The Future of the Pacific Rim: Scenarios for Regional Cooperation* (Westport: Praeger, 1994) at 85.

⁴⁴ Amitav Acharya, *Constructing a Security Community in Southeast Asia—ASEAN and the Problem of Regional Order* (London: Routledge, 2001) at 64 [Acharya]. The ten members of ASEAN are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

⁴⁵ Note discussion in *supra* note 44; and Koh Keng-Liam and Nicholas A Robinson, “Strengthening Sustainable Development in Regional Inter-Governmental Governance: Lessons from the ‘ASEAN Way’” (2002) 6 *Singapore Yearbook of International Law* 640 at 642-643.

⁴⁶ Melissa Castan, “APEC: International Institution? A Pacific Solution” (1996) 15 *University of Tasmania Law Review* 52 at 63.

⁴⁷ For example, at the 2007 APEC leaders’ meeting in Sydney a declaration was adopted regarding climate change. Although the leaders confirmed their commitment to the *United Nations Framework Convention on Climate Change* and adopted a number of principles, the declaration is not binding on APEC members, nor does it mention the Kyoto Protocol. See Sydney APEC Leaders’ Declaration on Climate Change, Energy Security and Clean Development, Sydney, Australia, 9 September 2007.

⁴⁸ See Michael Haas, *The Pacific Way—Regional Cooperation in the South Pacific* (Westport: Praeger, 1989) at 8-13; and *supra* note 41 at 434.

Pacific Islands Forum emphasized its informality in the past by describing itself (until very recently) as an organization that had “no formal rules governing its operations or the conduct of its meetings.”⁴⁹

This is not to suggest that states in this region are hostile to international law or international organizations, but rather that they use international law as a method for their protection and development.⁵⁰ But this description indicates that this region is ripe for a further move away from institutions. If the international community is turning away from formality, regulation and legality, then this should also be taking place in the home of decentralized, informal organizations. However, the evidence would appear to suggest a contrary trend.⁵¹ By examining three main areas: the creation of new structures within existing organisations, the development of dispute resolution mechanisms, and the adoption of human rights and democracy principles, the next section argues that, contrary to trends that have been identified elsewhere, there has been a move towards international organizations in this region.

IV. INSTITUTIONAL DEVELOPMENT IN ASIA AND THE PACIFIC

A. *The Creation of Formal Structures*

The first indication that there is a ‘move to institutions’ in the region is the desire amongst states to create formal organizations under international law. Whereas in the past there was a tendency to establish bodies that may not have fulfilled all the criteria of an international organization, recent initiatives in the region have demonstrated a preference for more formal structures. It should be emphasized that this paper is not arguing that all new governmental institutions in Asia and the Pacific are creatures of international law, or that the region has not seen a proliferation of less formal arrangements. In the last few years, a number of institutions or groups have been created in Asia and the Pacific which would not be classified as international organizations under the traditional definition outlined above.⁵² Since the establishment of ASEAN, APEC was founded in 1989 to facilitate economic cooperation and trade liberalization. More recently, ASEAN Plus Three,⁵³ the East Asia Summit,⁵⁴ the Asia-Europe Meeting (ASEM),⁵⁵ and the ASEAN Regional Forum (ARF)⁵⁶ have all

⁴⁹ “The Pacific Islands Forum and its Secretariat”, online: Pacific Islands Forum Secretariat <<http://www.forumsec.org/pages.cfm/about-us/>>. This page has recently been amended to remove this sentence. See discussion at *infra* note 84 and accompanying text.

⁵⁰ Manohar L Sarin, “The Asian-African States and the Development of International Law”, in Frederick E Snyder and Surakiart Sathirathai eds., *Third World Attitudes Towards International Law* (Dordrecht: Martinus Nijhoff, 1987) at 48.

⁵¹ Other commentators have also noted the increasing move to legalization in this region: see Locknie Hsu, “Towards an ASEAN Charter—Some Thoughts from the Legal Perspective”, in Rodolfo C Severino ed., *Framing the ASEAN Charter—An ISEAS Perspective* (Singapore: Institute of Southeast Asian Studies, 2005) at 45.

⁵² See *supra* note 14 and accompanying text.

⁵³ ASEAN Plus Three refers to the members of ASEAN, plus China, Japan and the Republic of Korea.

⁵⁴ The inaugural East Asia Summit was held in Kuala Lumpur in 2005. The participants in the Summit are the ten ASEAN countries, Australia, China, Japan, India, New Zealand and the Republic of Korea. See “The East Asia Summit”, online: Department of Foreign Affairs and Trade (Australia) <<http://www.dfat.gov.au/asean/eas/index.html>>.

⁵⁵ The Asia-Europe Meeting is an informal dialogue between the European Commission, members of the European Union and a number of Asian countries. The sixth summit of ASEM in 2006 was attended by the members of the European Union, the 10 members of ASEAN, China, Japan and the Republic of Korea. It was agreed that India, Mongolia, Pakistan and the ASEAN Secretariat would join the process. See ‘The Asia-Europe Meeting (ASEM)’, online: European Commission <http://ec.europa.eu/external_relations/asem/intro/index.htm>.

⁵⁶ The ASEAN Regional Forum is a forum for security dialogue in the region. It comprises 25 countries, including 10 ASEAN members, 10 ASEAN dialogue partners, Papua New Guinea, the Democratic People’s Republic of Korea, Mongolia, Pakistan and East Timor. See “Background to the ASEAN Regional Forum”, online: Department of Foreign Affairs and Trade (Australia) <<http://www.dfat.gov.au/arfb/background.html>>.

been set up. None of these entities has all the hallmarks of an international institution—instead, they are characterized by minimal institutionalization with an emphasis on forming cooperative relationships.⁵⁷ While proliferation may have its problems, not least the overlap of functions, commentators argue that the “existence of multiple fora, some of which may even compete with each other, is not necessarily an obstacle and may well turn out to be a positive factor in regional integration.”⁵⁸ This section will focus on the accompanying shift in some of the older organizations in the region to formalize their status pursuant to international law.

The clearest and also the most recent example of institutional development in Asia is the decision by ASEAN members in the Philippines earlier this year to adopt the report of the Eminent Persons Group (EPG) on the ASEAN Charter.⁵⁹ When ASEAN was founded in 1967 the *Bangkok Declaration* set out the desire of the original states for closer cooperation in the areas of economic growth and regional peace and stability and provided a structure for that continuing cooperation.⁶⁰ In the early years of the organization, summits were held intermittently and the Secretariat was deliberately kept small with most of its work assumed by ASEAN Secretariats within the foreign ministries of member states.⁶¹ Since 1967 a number of treaties had been negotiated under the auspices of ASEAN, notably the *Treaty of Amity and Cooperation in Southeast Asia*.⁶² During the 1980s and 1990s, as the organization expanded in membership to include all states in the Southeast Asian region, the level of formality and number and range of meetings in ASEAN also increased.⁶³ Despite moves in the economic sector to greater legalization,⁶⁴ the structure of ASEAN has never been formalized pursuant to international law. But it would appear that this lacuna is about to be remedied. The Cebu Declaration on the Blueprint of the ASEAN Charter, adopted in the Philippines in January 2007, states that the members are “committed to establish an ASEAN Charter as a crowning achievement of 40 years of ASEAN”.⁶⁵ The leaders envisage that the Charter will enable “ASEAN to meet future challenges and opportunities.”⁶⁶ The desire to establish an organization based on international law is expressly articulated in the EPG’s ‘Recommendations for Inclusion in the ASEAN Charter’.⁶⁷

The proposal articulated in the EPG’s report recommends a move to a more formal structure, containing the original organs of ASEAN and some new entities.⁶⁸ Although the new structure of ASEAN has yet to be determined, the EPG’s recommendations contain

⁵⁷ It should be noted that entry to the East Asia Summit requires a state to sign the *Treaty of Amity and Cooperation in Southeast Asia* (1967) and therefore it is not entirely accurate to characterize this entity as an organization outside the parameters of international law.

⁵⁸ Yiyi Lu and Chris Hughes, “The East Asia Model Towards Creating a Regional Community” *Straits Times* (24 December 2005), quoted in Frank Frost and Ann Rann, “The East Asia Summit, Kuala Lumpur, 14 December 2005: Issues and Outcomes”, online: Parliament of Australia <http://www.aph.gov.au/library/intguide/FAD/eastasia_summit.htm>.

⁵⁹ *Report of the Eminent Persons Group (EPG) on the ASEAN Charter* (“*Report of the EPG*”), online: ASEAN <<http://www.aseansec.org/19247.pdf>> [*Report of the EPG*]. In some respects this discussion is slightly premature, given that the final decision regarding the Charter and the new structure of ASEAN will be made in November 2007 at the 13th ASEAN Summit in Singapore.

⁶⁰ *Bangkok Declaration*, adopted at Bangkok, Thailand, 8 August 1967.

⁶¹ See *Acharya*, *supra* note 44 at 65.

⁶² Not all parties to the TAC are members of ASEAN. On the adoption of binding agreements by ASEAN see Rodolfo Severino, “Framing the ASEAN Charter—AN ISEAS Perspective” at *supra* note 51 at 5.

⁶³ See *supra* note 44 at 65.

⁶⁴ See *supra* note 21 at 175.

⁶⁵ *Cebu Declaration on the Blueprint of the ASEAN Charter*, adopted at Cebu, Philippines, 13 January 2007 by the Member Countries of ASEAN.

⁶⁶ *Ibid.*

⁶⁷ See *Report of the EPG*, *supra* note 59 at para 66. The Report states that ASEAN should have legal personality and should also ensure that member states recognise the separate legal personality of ASEAN within their territories.

⁶⁸ *Ibid* at para 62.

reference to three types of principal organs (the ASEAN Council, the Councils of the ASEAN Community and the Secretary-General) and numerous other bodies, including the ASEAN Secretariat, ASEAN Committees and ASEAN National Secretariats.⁶⁹ The EPG believes that the necessity for change is derived from the fact that the current framework is not able to accommodate issues that cross sectors and borders, such as avian influenza.⁷⁰ Such institutionalization appears to be closely modelled on other international and regional organizations. For example, the proposals of the EPG and their draft Charter have been described as a move to integrate Southeast Asia along the lines of the European Union. Certainly, some language in the Report, such as the need to form an “ASEAN Union” with “three pillars”⁷¹ sounds very similar to the *Treaty on the European Union*.⁷² While the draft Charter contained in the EPG’s Report currently falls short of this objective, it demonstrates that ASEAN members perceive that greater formality in their relationship will assist further integration in the region, as well as their participation in the international community.

Another organization that has seen a similar trajectory of development is the Pacific Islands Forum (‘the Forum’). The Forum started out in 1971 as an informal gathering of seven Pacific nations: Nauru, Western Samoa, Tonga, Fiji, the Cook Islands, Australia and New Zealand. The first communiqué of the Forum, issued at the 1971 Wellington meeting suggested that the various representatives met for a “private and informal discussion of a wide range of issues of common concern.”⁷³ At that time it was “considered premature to institute a formalized arrangement” and instead the representatives emphasized the importance of “the frank and informal inter-change of views”.⁷⁴ The value of “easy and informal exchanges” was repeated in the communiqué issued at the next meeting of the Forum in 1972.⁷⁵ The 1972 final press communiqué indicated discussion of a wide range of matters, including trade and economic cooperation, telecommunications, regional shipping and, significantly, nuclear testing in light of France’s recently concluded tests.⁷⁶ In that year the Forum established its first institution, the South Pacific Bureau for Economic Cooperation (later re-named as the Pacific Islands Forum Secretariat).

Since the members of the Forum first met, significant steps have been taken to give it a more formal structure. Different programmes and commissions have been established over the years. The South Pacific Nuclear Free Zone was established pursuant to the *Treaty of Rarotonga*.⁷⁷ The entry into force of this convention in 1986 indicated a reliance on international law in order to achieve desired outcomes. In 2000, the leaders decided to further enhance their relationship with the signing of the *Agreement Establishing the Pacific Islands Forum Secretariat*.⁷⁸ The Agreement identifies the functions of the Secretary-General of the Forum and the Secretariat’s staff. The purposes of the Secretariat are described in terms of facilitating, developing and maintaining “cooperation and consultation” on certain matters between member governments.⁷⁹ To this end, the Secretariat is given the “legal capacity of a body corporate in the territories of member governments”.⁸⁰ Although

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* at para 35.

⁷¹ *Ibid.* at para 23.

⁷² The *Treaty on the European Union (Maastricht Treaty)* (1992) established three pillars of European policy: the Community pillar, the Common Foreign and Security Policy, and the Police and Judicial Cooperation in Criminal Matters pillar.

⁷³ South Pacific Forum, Joint Final Communiqué, Wellington 5-7 August 1971. The name of the South Pacific Forum was changed to the Pacific Islands Forum in 2000.

⁷⁴ *Ibid.*, “Future Meetings”.

⁷⁵ South Pacific Forum, Communiqué, Canberra, 23-25 February 1972.

⁷⁶ South Pacific Forum, Final Press Communiqué (1972).

⁷⁷ *South Pacific Nuclear Free Zone Treaty* (1985) (‘*Treaty of Rarotonga*’), 6 August 1985, 1445 UNTS 177.

⁷⁸ *Agreement Establishing the Pacific Islands Forum Secretariat* (Tarawa October 2000) [2006] ATS 5.

⁷⁹ *Ibid.*, art III.

⁸⁰ *Ibid.*, art XI.

the Agreement is significant for the Secretariat, in itself it did not create an international organization with separate international legal personality.

In 2005, the leaders adopted a new treaty, the *Agreement Establishing the Pacific Islands Forum*.⁸¹ This new Agreement differs from the 2000 Agreement in that it not only focuses on the Secretariat, but is also concerned with the Forum as a whole. The Preamble emphasizes the intention of the leaders to formally “establish the Pacific Islands Forum as an international organization”. The 2005 Agreement confirms that the Forum Leaders’ Meeting is the pre-eminent decision-making body.⁸² It also contains details of the role of the Pacific Islands Forum Officials’ Committee (a body already established under the 2000 Agreement), the Secretary-General and the Secretariat. One of the most notable differences between the 2000 and 2005 Agreements is the definition of the Secretariat’s functions. Whereas in the past the Secretariat was limited to tasks such as the preparation of studies on political, security and legal issues,⁸³ the 2005 Agreement foresees a much wider role in regional integration. The new Agreement envisages that the Secretariat’s role will include the promotion of the identity and activities of the Forum, and the strengthening and deepening of links between countries in the region.⁸⁴ This change is reflected in the removal of a sentence on the Secretariat’s website indicating that the Forum lacked formal rules in relation to its operation and the conduct of its meetings.⁸⁵ Thus, the Forum sets out to achieve in the Pacific an institutional development that has also been visualized by members of ASEAN.

Similar developments have occurred on the other side of Asia. One relatively new institution created in the Central Asian region that fulfils the traditional criteria for an international organization is the Shanghai Cooperation Organization (SCO). The SCO arose out of a more informal gathering called the ‘Shanghai Five’, comprising Kazakhstan, Kyrgyzstan, China, Russia and Tajikistan.⁸⁶ Following the adoption of the 2001 *Declaration on the Establishment of the Shanghai Cooperation Organization*, these five states (together with Uzbekistan), adopted a Charter creating a new organization in 2002.⁸⁷ The *Charter of the SCO* contains a number of features indicative of the SCO’s status as an international organization. Article 2 lists the organization’s principles, including mutual respect for sovereignty, non-interference in the internal affairs of members, equality of members, and the “gradual implementation of joint activities in the spheres of mutual interest”.⁸⁸ The Charter also contains reference to a number of permanent bodies—the Council of Heads of State, the Council of Heads of Government, the Council of Ministers of Foreign Affairs, Meetings of Heads of Ministries, a Council of National Coordinators, and a Regional Anti-Terrorist Structure.⁸⁹ This last body is the only subject-specific structure in the SCO, indicating the importance of security issues in the organization’s framework.⁹⁰ The Charter explicitly provides that the organization has international legal capacity, including the ability to conclude treaties.⁹¹ Together with the establishment of a separate Secretariat and the appointment

⁸¹ *Agreement Establishing the Pacific Islands Forum*, Port Moresby, Papua New Guinea, 2005. Pursuant to art XI(4) this Agreement will come into force when it is ratified by all members.

⁸² *Ibid.*, art III.

⁸³ See *Agreement Establishing the Pacific Islands Forum Secretariat* (2000) art IX.

⁸⁴ *Agreement Establishing the Pacific Islands Forum* (2005) art VIII.

⁸⁵ ‘The Pacific Islands Forum and its Secretariat’, online: Pacific Islands Forum Secretariat <<http://www.forumsec.org/pages.cfm/about-us/>>.

⁸⁶ Mutlaq Al-Qahtani, “The Shanghai Cooperation Organization and the Law of International Organizations” (2006) 5 *Chinese Journal of International Law* 129 at 130 [*Al-Qhatani*]. For further information on the development of the SCO see Sun Zhuangzhi, “New and Old Regionalism: The Shanghai Cooperation Organization and Sino-Central Asian Relations” (2004) 3 *Review of International Affairs* 600.

⁸⁷ *Charter of the Shanghai Cooperation Organization* (2002) (*Charter of the SCO*).

⁸⁸ *Ibid.*, art 2.

⁸⁹ *Ibid.*, art 4.

⁹⁰ Note also the *Agreement on the Regional Anti-Terrorist Structure*, Saint Petersburg, 7 June 2002.

⁹¹ *Charter of the Shanghai Cooperation Organization*, art 15.

of a Secretary-General,⁹² these features indicate that the Shanghai Cooperation Organization has developed from an informal group of states to a structure established pursuant to international law.

B. *Development of Dispute Resolution and Enforcement Mechanisms*

The second indication of the move to institutions in Asia and the Pacific is the decision within various regional organizations to create third party dispute resolution procedures, rather than rely upon less formal measures such as negotiation between the parties. As is highlighted by Collier and Lowe, the decision to have recourse to legal processes to settle international disputes is optional.⁹³ However, increasingly “acceptance of a particular procedure for the settlement of disputes is regarded as an integral part of the parcel of rights and duties that make up the status of membership of a particular community.”⁹⁴ In terms of the concept of legalization put forward by Abbott and others, delegation is the term used to refer to the authority to “implement, interpret, and apply the rules” and to resolve disputes.⁹⁵ For these writers the highest degree of legalization is demonstrated when the parties subject themselves to third party procedures applying clear rules.⁹⁶ The procedures adopted by organizations in Asia and the Pacific do not necessarily mimic the detail and complexity of dispute resolution mechanisms found in other international or regional organisations, for example the European Court of Justice. There is no suggestion that a court will be established in any of the organizations discussed above, despite a recommendation that such a mechanism may overcome defects in dispute resolution procedures in at least one of the institutions.⁹⁷ Given the traditional reluctance of states in this region to be subjected to international judicial bodies, it is unlikely that such a regional body will be created. But that fact should not detract from other advances in third party dispute resolution in the region.

In recent years, some of the most prominent developments in dispute resolution mechanisms in Asia have occurred in the economic field. Mechanisms for a form of third party dispute resolution are contained in recent economic agreements concluded under the auspices of the South Asian Association for Regional Cooperation (SAARC)⁹⁸ and ASEAN. The *Agreement on South Asian Free Trade Area (SAFTA)*, negotiated under the auspices of SAARC, indicates that the first option for dispute resolution is bilateral consultations between the parties.⁹⁹ In the event that a Contracting State does not respond to a request for bilateral consultations, a Committee of Experts may meet to deal with the dispute.¹⁰⁰ The Committee of Experts comprises a nominee from each Contracting State “at the level of a Senior Economic Official, with expertise in trade matters”.¹⁰¹ A further appeal to the SAFTA Ministerial Council from a recommendation of the Committee of Experts is provided for by the Agreement.¹⁰² In the same year that members of SAARC adopted the SAFTA Agreement, ASEAN also bolstered the dispute resolution mechanisms to be applied in case

⁹² Bolat K Nurgaliev (Republic of Kazakhstan) took up the post of Secretary-General of the SCO in January 2007. See ‘Secretary-General’, online: Shanghai Cooperation Organization <<http://www.sectsco.org/html/00032.html>>.

⁹³ John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* (Oxford: Oxford University Press, 1999) at 9.

⁹⁴ *Ibid.* at 9-10.

⁹⁵ See Abbott *et al.*, *supra* note 5 at 404.

⁹⁶ *Ibid.* at, 415.

⁹⁷ See Al-Qabhtani, *supra* note 86 at 139.

⁹⁸ The members of SAARC are Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka.

⁹⁹ *Agreement on South Asian Free Trade Area (SAFTA)* (2004), art 20(1).

¹⁰⁰ *Ibid.*, art 20(4).

¹⁰¹ *Ibid.*, art 10(5).

¹⁰² *Ibid.*, art 20(9).

of disputes arising under a variety of ASEAN economic agreements. The *ASEAN Protocol on Enhanced Dispute Settlement Mechanism* replaced an earlier (1996) Protocol and provides for a variety of procedures, including good offices, conciliation or mediation.¹⁰³ Additionally, it enables the establishment of WTO-like panels to make “an objective assessment of the dispute” and set out findings and recommendations.¹⁰⁴ The Senior Economic Officials Meeting (SEOM) may then adopt the panel report (or decide by consensus not to adopt the report).¹⁰⁵ There is also the possibility of appellate review on issues of law by a body established by the ASEAN Economic Ministers. An Appellate Body report is adopted by the SEOM, unless it decides by consensus not to adopt the report.¹⁰⁶ Thus, the new procedures downplay the significance of consensus decision-making in ASEAN (by using consensus only in relation to a decision not to adopt a report) and provide mechanisms for the binding resolution of economic disputes.¹⁰⁷

There have also been developments outside the economic field in both Asia and the Pacific. At the 2000 meeting of the Pacific Islands Forum, the leaders adopted the *Biketawa Declaration*, thereby committing Forum leaders to certain principles and courses of action.¹⁰⁸ The principles include a commitment to good governance, equal rights, democratic processes, and equitable economic, social and cultural development.¹⁰⁹ Although recognizing that the Pacific Islands are a “family”, the Declaration commits members to certain action in a time of crisis. Such action includes the creation of a Ministerial Action Group, third party mediation and “necessary targeted measures.”¹¹⁰ The *Biketawa Declaration* was heralded by various leaders as a significant step for the Forum—in the words of the Australian Prime Minister—“a quantum leap forward”.¹¹¹ In 2003 it was recognized by Forum leaders as the basis for action in the Solomon Islands.¹¹² As Rolfe comments, the *Biketawa Declaration* indicates that “[t]he Pacific Way is potentially heading away from its roots towards the Western way.”¹¹³ He also highlights that it represents a move away from soft law instruments, including declarations, towards “hard law measures that commit parties to a program of suitable measures”.¹¹⁴ In accordance with the argument posited in this paper, it is a move towards institutions.¹¹⁵

The *Report of the EPG* on the new ASEAN Charter also indicates a preference for a more robust form of dispute resolution in ASEAN combined with the adoption of enforcement mechanisms. The EPG believes that dispute resolution mechanisms “in all fields of ASEAN cooperation” would enhance integration.¹¹⁶ These dispute resolution mechanisms include the High Council of the TAC (in relation to conflicts and disputes between ASEAN member

¹⁰³ *ASEAN Protocol on Enhanced Dispute Settlement Mechanism* (2004) art 4.

¹⁰⁴ *Ibid.*, art 7.

¹⁰⁵ *Ibid.*, art 9.

¹⁰⁶ *Ibid.*, art 12.

¹⁰⁷ In 2004 (prior to the new Protocol coming into operation) Davidson also pointed to the “remarkable strides in economic co-operation” in Southeast Asia since ASEAN was formed. See *Davidson, supra*, note 21 at 169.

¹⁰⁸ Thirty-First Pacific Islands Forum, Forum Communique 2000, Tarawa, Kiribati, 27-30 October 2000, attachment 1, “*Biketawa Declaration*”.

¹⁰⁹ *Ibid.*, para 1.

¹¹⁰ *Ibid.*, para 2.

¹¹¹ Quoted in Stewart Firth, “A Reflection on South Pacific Regional Security, mid-2000 to mid-2001” (2001) 36 *Journal of Pacific History* 277 at 279.

¹¹² Thirty-Fourth Pacific Islands Forum, Forum Communique, Auckland, New Zealand, 14-16 August 2003, para 13.

¹¹³ See *Rolfe, supra* note 41 at 435.

¹¹⁴ *Ibid.* at 443.

¹¹⁵ This suggestion is strengthened by the fact that in October 2006, the members of the Pacific Islands Forum agreed that “consideration be given to the establishment of an effective regional dispute resolution mechanism to deal with differences that may arise out of regional trade and economic agreements”. See Nadi Decisions on the Pacific Plan, Attachment D, in Pacific Islands Forum Secretariat, *The Pacific Plan for Strengthening Regional Cooperation and Integration*, November 2006.

¹¹⁶ *Ibid.* at paras 44-45.

states), the *ASEAN Protocol on Enhanced Dispute Settlement Mechanism*, and other mechanisms to be created in the future.¹¹⁷ Currently, the TAC provides that the “High Contracting Parties shall have the determination and good faith to prevent disputes from arising.”¹¹⁸ In the event that a dispute arises and negotiations fail, a High Council comprising a ministerial representative from each of the Parties may recommend appropriate methods of resolution, including “good offices, mediation, inquiry or conciliation.”¹¹⁹ The High Council can also offer its own services the parties to resolve the dispute and has the ability to make recommendations.¹²⁰ The EPG expands on the existing procedures by recommending that where a member does not comply with a decision of a dispute resolution mechanism then the matter should be referred to the ASEAN Council for action under the membership provisions.¹²¹ Thus far, the dispute settlement mechanisms listed are not radically different from those that already exist—the approach is, for the most part, to rely upon current procedures. There is certainly no suggestion of creating an ASEAN court. However, the reference to the ASEAN Council in the EPG’s report and, in particular, the range of options that may be adopted by the Council, indicate a radical departure from previous practice. The EPG proposes that in the event of a “serious breach” of ASEAN “objectives, principles, and commitments” then the Council should be able to recommend “any measure” including suspension, and possibly (in “exceptional circumstances”) expulsion from the organization.¹²²

Similar methods of enforcement, including membership sanctions, have already been included in the *Charter of the SCO*. As a whole, the Charter reflects the approach to international law and institutions traditionally attributed to Asian nations in that the only dispute resolution mechanisms listed in the Charter are consultation and negotiation.¹²³ The SCO also operates on the basis of the principle of consensus—article 16 of the Charter provides that “SCO bodies shall take decisions by agreement without vote and their decisions considered adopted if no member has raised objections”. The *Charter of the SCO* provides an exception to consensus decision-making in the event that a member faces suspension or expulsion.¹²⁴ Article 13 provides that if a member state violates the Charter’s provisions or “systematically” fails to meet obligations under other SCO treaties or instruments, then the member may be suspended. Additionally, the Council of Heads of State has the capacity to expel a member.¹²⁵

These enforcement measures raise two issues—the rejection of consensus decision-making and the use of membership sanctions. In the past, ASEAN has followed the principle of consensus, thus removing a reliance on formal voting. However, consensus decision-making does not sit well in an organization that can recommend measures against a particular member. The EPG’s proposal for the ASEAN Charter provides that a decision to sanction a member is to be made by a unanimous vote, without the participation of the member involved.¹²⁶ This move away from consensus decision-making is significant in representing a potential move away from the traditional ASEAN way. The use of membership sanctions also indicates a preference for a more rule-based organization. Suspension and expulsion from membership are two of the most drastic enforcement measures that an international

¹¹⁷ *Ibid.* at para. 64.

¹¹⁸ *Treaty of Amity and Cooperation in Southeast Asia*, art 14. In 1987 article 14 was amended by article 2 of the Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia to provide that article 14 “shall apply to any of the States outside Southeast Asia which have acceded to the Treaty only in cases where the state is directly involved in the dispute to be settled through regional processes”.

¹¹⁹ *Ibid.*, art 15.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² See *Report of the EPG*, *supra* note 59 at para. 61.

¹²³ *Charter of the SCO*, art 22.

¹²⁴ *Ibid.*, art 16.

¹²⁵ *Ibid.*, art 13.

¹²⁶ See *supra* note 59, at para. 61.

organization can take against a member.¹²⁷ It remains to be seen whether the sanctions already included in the *Charter of the SCO* will be adopted by ASEAN and, if so, whether they will apply to all principles articulated in the new ASEAN Charter. For example, it may be contentious to include provisions enabling a member to be suspended for violating democratic or human rights principles. Such provisions have been adopted in the constitutional instruments of other organizations, such as the African Union, the Organization of American States and the Commonwealth,¹²⁸ but may be difficult to implement in ASEAN given the organization's reluctance to interfere in the internal affairs of member states. It has yet to be seen whether ASEAN leaders consider it appropriate to adopt provisions enabling a member state to be suspended for a serious breach of democratic principles and, additionally, whether the SCO will ever utilise the powers laid down in its constitutional instrument.

C. Adoption of Human Rights and Democracy Principles

The adoption of human rights and democracy principles by international organizations is not a necessary measure by which to judge the degree of institutionalization of an international arrangement. In the context of Asia and the Pacific, this factor is used as a measure of the extent to which there has been a move to institutions on the basis that the inclusion of such standards in regional instruments represents a desire to abandon traditional principles of non-interference, and adopt a more robust standard by which to judge members' behaviour. Much has been written in the past about the tendency of governmental representatives in Asia to interpret or dismiss the international human rights regime in the context of 'Asian values'.¹²⁹ The principle of non-interference features in the Preamble in the Bangkok Declaration, adopted at a regional meeting in Asia prior to the 1993 Vienna World Conference on Human Rights.¹³⁰ The Declaration emphasizes the need to ensure a "balanced and non-confrontational approach in addressing and realizing all aspects of human rights."¹³¹ The principles of sovereignty and non-intervention have constrained ASEAN action in the past in responding to human rights violations in individual countries. The position articulated by governments in this Declaration can be contrasted with the approach of writers and members of civil society in the region. For example, the Asian Human Rights Charter, prepared

¹²⁷ See *supra* note 14 at para 1475.

¹²⁸ Article 9 of the *Charter of the Organization of American States* (1948) 119 UNTS 3 provides that:

A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.

Article 30 of the *Constitutive Act of the African Union* (2000) OAU Doc. CAB/LEG/23.15, provides that governments that come into power through unconstitutional means are prohibited from participating in the African Union's activities. The Commonwealth adopted the *Millbrook Commonwealth Action Programme on the Harare Commonwealth Declaration* in 1995 enabling it to suspend a member in the event of an unconstitutional change of government. This was extended in 2001 to include "serious or persistent violations" of the Harare Declaration: see *Report by the Commonwealth High Level Review Group to the Commonwealth Heads of Government* (2002), paras 21-2.

¹²⁹ See *supra* note 27. Linton also comments that "[t]he ambivalent approach of ASEAN States to the notion that there is a body of supranational universally binding legal norms that protect the human person from arbitrary encroachments by the State has been well and richly chronicled elsewhere". Suzannah Linton, "ASEAN States, their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children" (Paper delivered at the Inaugural Meeting of the Asian Society of International Law, April 2007) [forthcoming in *Human Rights Quarterly*] 2].

¹³⁰ Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, in Report of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok, 29 March—2 April 1993, A/CONF.157/ASRM/8, A/CONF.157/PC/59.

¹³¹ *Ibid.* at para 3.

under the auspices of the Asian Human Rights Commission, declares that “[i]n contrast to the official disregard or contempt of human rights in many Asian states, there is increasing awareness among their peoples of the importance of rights and freedoms.”¹³² Ghai points to a number of other voices in the debate about human rights in Asia, including indigenous peoples, ethnic minorities, intellectuals and non-governmental organisations.¹³³ Such debates include calls for a human rights mechanism in the region, including the development of an ASEAN Regional Mechanism for Human Rights.¹³⁴

Despite these debates at the governmental and non-governmental level, Thio suggests that in the 1990s there was a “sea change” in ASEAN regarding human rights issues.¹³⁵ Recently there appears to have been a further softening on regional governmental attitudes towards establishing a human rights commission in Asia and a growing recognition of the possibility of commenting on human rights issues in other countries in the region. For example, at the 10th ASEAN Summit in Vientiane, leaders adopted the ASEAN Declaration against Trafficking in Persons, Particularly Women and Children and suggested the creation of an ASEAN Commission on Women and Children.¹³⁶ In 2005, the Chairman’s Statement issued at the conclusion of the 11th ASEAN Summit called for Myanmar to expedite its Roadmap to Democracy and release detainees.¹³⁷ In the Pacific there have also been moves to adopt more robust standards through the *Biketewa Declaration*, including a reference to commitments to good governance, equal rights, and democratic processes.¹³⁸ The Pacific Plan, endorsed by the leaders of the Pacific Islands Forum, reinforces the importance of good governance and democracy by including within the priorities for immediate implementation (2006-2008), the development of a strategy for participatory democracy and “[w]here appropriate, ratification and implementation of international and regional human rights conventions, covenants and agreements and support for reporting and other requirements.”¹³⁹ In October 2006 the leaders in Nadi endorsed both priorities as essential mechanisms for supporting “improvements in institutional governance.”¹⁴⁰

Perhaps the most fundamental change in Southeast Asia is the announcement in July 2007 by ASEAN Foreign Ministers that they had reached a consensus that a provision should be included in the ASEAN Charter mandating the establishment of a human rights body.¹⁴¹ This is in accordance with the recommendation of the EPG that an ASEAN Charter should not only “reaffirm and codify” ASEAN’s fundamental principles,¹⁴² but also contain

¹³² See *supra* note 34 at art 1.6. See also the “Bangkok NGO Declaration on Human Rights”, March 1993, which stated that “the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty”.

¹³³ See Yash Ghai, “Human Rights and Governance: The Asia Debate” (1994) 15 *Australian Yearbook of International Law* 1 at 13.

¹³⁴ The Working Group for an ASEAN Human Rights Mechanism is a group of representatives from the governmental and non-governmental sector who call for the adoption of an ASEAN Human Rights Commission. See (Draft) Agreement on the Establishment of the ASEAN Human Rights Commission, online: Working Group for an ASEAN Human Rights Mechanism <<http://www.aseanhrmech.org/downloads/draft-agreement.pdf>>.

¹³⁵ Li-ann Thio, “Implementing Human Rights in ASEAN Countries: ‘Promises to keep and miles to go before I sleep’” (1999) 2 *Yale Human Rights and Development Law Journal* 1 at 2.

¹³⁶ See Chairman’s Statement of the 10th ASEAN Summit, Vientiane, 29 November 2004 at para 5; and Vientiane Action Programme, agreed at the 10th ASEAN Summit, Vientiane. On the proposed ASEAN Commission on Women and Children, see *supra* note 129.

¹³⁷ “One Vision, One Identity, One Community” (Chairman’s Statement of the 11th ASEAN Summit at Kuala Lumpur, 12 December 2005) at para 34.

¹³⁸ *Biketewa Declaration*, *supra* note 108 at para 1.

¹³⁹ See *supra* note 115 at 5-6. Priorities for immediate implementation are those that are already the subject of current activities or mandates in the Forum, at 5.

¹⁴⁰ See *supra* note 115.

¹⁴¹ Statement by His Excellency Alberto G Romulo, Philippines Foreign Affairs Secretary and Chairman of the 40th ASEAN Ministerial Meeting, 31 July 2007, online: Association of Southeast Asian Nations <<http://www.aseansec.org/AC-3.htm>>.

¹⁴² See *supra* note 59 at para. 60.

a number of additional principles. Included within the principles recommended by the EPG were the protection and promotion of human rights, the promotion of international humanitarian law, a commitment to uphold democracy, and the rejection of unconstitutional and undemocratic changes of government.¹⁴³ As is highlighted by Linton, the sixteen references to “human rights” and the five references to “international humanitarian law” in the EPG’s report are “startling”¹⁴⁴ in the context of ASEAN’s usual policy of maintaining a strict adherence to the principles of sovereignty and non-intervention in the internal affairs of member states.¹⁴⁵ An organization that wishes to strengthen its commitment to human rights and democracy within member states clearly indicates a dilution in the importance of the principle of non-intervention—a principle that has often been relied upon to deny international organizations the ability to act in situations which could be regarded as within the exclusive jurisdiction of a member state.

V. CONCLUSION

This paper argues that contrary to the trend described in other parts of the world, and perhaps contrary to the perception that states in the region prefer more informal methods of consultation, there has been a growing move towards the institutionalization of international cooperation in Asia and the Pacific. As was highlighted by Kahler in 2000, “[t]he Asia-Pacific region has recently shed its image as the home of informal and non-legalized institutions in favour of a more differentiated pattern.”¹⁴⁶ This comment has even more resonance in 2007. The trend has significance for the respect for human rights, the prospects for stronger regional dispute resolution mechanisms, as well as the legal design of international institutions more generally. Both the Pacific Islands Forum and the EPG’s draft ASEAN Charter include reference to human rights and democratic principles. The recognition of these standards indicates a move away from traditionally favoured principles of sovereignty and non-intervention in the internal affairs of member states. Significantly, the *Biketawa Declaration* explicitly links the violation of these principles to its dispute resolution mechanisms. The EPG’s report on the ASEAN Charter not only lists various human rights and democratic principles but also refers positively to the potential for developing a regional human rights mechanism. This recommendation has now been taken up by the ASEAN Foreign Ministers.

In listing the dispute resolution processes that are available pursuant to the various agreements reached within the organizations, there is still a common reliance on less formal measures, rather than regional or sub-regional judicial bodies. Both the Pacific Islands Forum and ASEAN recognize the possibility of a form of third party settlement. More significantly, the SCO and the draft Charter for ASEAN acknowledge that the use of enforcement action through suspension or expulsion from the organization may assist the organization in protecting its aims and principles and encourage compliance from members. There is controversy amongst international institutional lawyers as to the efficacy of measures that may remove a state from the pressures of an organization.¹⁴⁷ This tension is recognised through the EPG’s recommendations that expulsion would only be considered in the most exceptional circumstances. But the adoption of these procedures indicates that more rigorous measures of enforcement may be undertaken in the region if the members believe that the circumstances justify such a course.

¹⁴³ *Ibid.*

¹⁴⁴ See *supra* note 129 at 1.

¹⁴⁵ *Treaty of Amity and Cooperation in Southeast Asia*, art 2.

¹⁴⁶ See *supra* note 28 at 567.

¹⁴⁷ C F Amerasinghe, *Principles of the Institutional Law of International Organisations* (Cambridge: Cambridge University Press, 2nd ed, 2005), 123; and C Wilfred Jenks, “Expulsion from the League of Nations” (1935) 16 *British Yearbook of International Law* 155.

Of course, the existence of these organizations and their treaties does not guarantee that their aims will be fulfilled or that conflicts will be resolved in accordance with the appropriate dispute settlement mechanisms. Nevertheless, it demonstrates that states in this region believe that cooperation and also longer term regional integration are best achieved through the creation of formal institutions with instruments that are binding pursuant to international law. States in this region have also created new forms of cooperation, such as the East Asia Summit, which exist alongside these formal organizations. Ultimately, the regional approach demonstrates that there are limits to the extent that soft law organizations can achieve their objectives. Klabbers highlights that the move towards greater flexibility in international institutions and away from public scrutiny was seen as a method of making organizations more effective. He recognizes that this “is partly illusory, and may be difficult to accept for other reasons, relating to such things as legitimacy.”¹⁴⁸ States in this region perceive that the legitimacy of their organizations and their ability to accomplish desired aims is increasingly being connected to greater formality and the use of international legal frameworks.

VI. POSTSCRIPT

In November 2007 the ASEAN leaders met in Singapore and adopted the new Charter of the Association of Southeast Asian Nations. The Charter implements many of the key recommendations of the *Report of the Eminent Persons Group*, however, some of the more coercive enforcement mechanisms that were contained in the Group’s Report were not accepted. The Charter explicitly confers international personality on ASEAN (art 3) and outlines the primary organs of the organisation, such as the ASEAN Summit (comprising the Heads of State or Government) and the ASEAN Coordinating Council (the Foreign Ministers). The Charter reiterates the fundamental principles of respect for sovereignty and non-interference as found in the Treaty of Amity and Cooperation, but tempers these principles with new references in the sections on purposes (art 1) and principles (art 2) to democracy and the promotion and protection of human rights. To add weight to these commitments, article 14 refers to the establishment of an ASEAN human rights body. In terms of dispute resolution, the Charter points to existing mechanisms but also indicates that ASEAN will establish mechanisms “in all fields of ASEAN cooperation” (art 22) and suggests that a binding third-party mechanism such as arbitration may be appropriate in some situations (art 25). The primary methods of decision-making are listed as consultation and consensus (art 20), but the Charter also indicates that where consensus cannot be achieved then the “ASEAN Summit may decide how a specific decision can be made” (art 20(2)) It is the ASEAN Summit that has the ability to make a determination in the event that there is “a serious breach of the Charter or non-compliance” (art 20(4)). The final version of the Charter omits any mention of sanctions such as suspension or expulsion. Instead, it is for the Summit to determine the measures that may be taken against a defaulting member. It has yet to be seen whether action will be taken against a member and, in particular, whether alleged non-compliance with the listed principles of human rights and democracy will be referred to the Summit. But at this stage it would appear that the Charter represents a significant step forward in the development of international institutions in the region.

¹⁴⁸ See *supra* note 2 at 421.

