

APEC: International Institution? A Pacific Solution

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The development of international institutions is often perceived as testimony to a successful creation and expansion of international law. Being component parts of the international legal system, international institutions (or organisations)¹ give rise to and reflect the rules, norms and standards of state expectations and behaviour.

As informal international relationships crystallise into regimes, organisations and conventions, we observe a process of increasing 'institutionalisation'.² In order to examine and make some critical assessment of international entities in a legal framework, we must examine the process of institutionalisation. The Asia-Pacific Economic Cooperation group [APEC] is a striking example of the process of institutionalisation. One commentator, writing of Asian contributions to the formulation of international law, concluded in 1990 that no 'regional government forum' had emerged from Asia; nor 'have new ventures in international organisation flourished' in the region.³ APEC is claimed now to represent:

the leading policy-making group to move regional cooperation forward in the Asia-Pacific and encourage regional institution-building ... to avert subregional trade wars and protectionism and stimulate trade creation.⁴

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1 The term 'institution' is often used to refer to different ideas. In its broadest sense it means the formal and informal system of rules that shape human interaction; thus the term has a sociological meaning. Another meaning is in the corporate sense: an institution is a formal organisation with some material identity. The term 'institutions' can be used to represent the detailed structure of a given organisation, to refer, for example, to a secretariat, assembly, and meetings. Although the separation between these different meanings is blurred, in the present context 'institution' will be used to refer to the concrete, or corporate manifestation, unless a contrary intention is evident. See for example C Archer, *International Organisations* (Routledge, 1992) pp 1-3.

2 R Keohane, *International Institutions and State Power* (Westview, 1989) p 7.

3 J Thomas, 'International Law in Asia: An Initial Review' (1990) 13 *Dalbusie Law Journal* 683 at 720, 724 respectively.

4 M Soesastro, 'The Pan-Pacific Movement: An Interpretative History' in B Bundy, S Burns & K Weichel (eds), *The Future of the Pacific Rim: Scenarios for Regional Cooperation* (Preager, 1994) p 18.

Thus, it is suggested that 'APEC can claim to be the first post-Cold War [international] institution'.⁵

If APEC can be considered to represent the pivotal intergovernment forum in the region, the prospects and limitations in its capacity to fulfil this role on the international stage must be recognised. What is the likelihood of further development as an international institution, and indeed the need for such a process to occur? Can APEC ever conform to the models proposed by international institution theorists?

This article describes the theoretical framework for study of 'institutionalisation', and the criteria by which APEC might be considered an international institution. It proposes that without a formal agreement, APEC lacks a characteristic that is typical of international institutions.

The nature and functions of APEC, and the extent of its organisational structure, are examined, highlighting APEC's current status. Impediments to greater formalisation, or institutionalisation, are then explained. The institutional limits of this organisation, which has evolved from a mixed 'corporate culture' that includes Asian and Anglo-European practices and values, are evaluated. This article then assesses the necessity for formalisation of international relations under the APEC banner, and argues that the very concept of an Asia-Pacific forum rests on the premise that such a manifestation of regional needs must develop gradually, without undue reliance upon Western notions of institutional strength.

The role and relevance of international institutionalisation must be tempered by the realities that underpin state expectations and behaviour. It is clear that international institutions are not simply those organisations with explicit rules, rights and roles. Despite few formal indications that it is an institution in the traditional legal sense, an evaluation of APEC demonstrates that it functions effectively as an international institution, guiding and creating economic cooperation and communication in the region.

5 'APEC: Second summit aims to set free trade deadlines' (1994) 3(20) *Insight* at 3. Fred Bergsten, the director of the Institute of International Economics in Washington, also believes that APEC represents the 'first big international institutional success of the post-Cold War era': F Bergsten, 'The Case for APEC: An Asian Push for World-Wide Free Trade' *The Economist* (6-12 January 1996) 76 at 77.

International Institutions: Competing Theoretical Frameworks

Is APEC an international institution? What criteria must it meet in order to be considered such?

Legal Model

Legal models in international law approach institutions by the analysis of legal norms, treaties and competencies. Thus, we often look for underlying agreements or treaties that identify common goals, the organs and structures within the institutions and the means of ensuring compliance, or at least dispute resolution.

Elaborate legal classifications can be applied to international institutions.⁶ Distinctions are drawn between private (non-governmental) and public (governmental) international bodies; global and regional organisations; organisations of political, administrative or judicial character; and also supranational and intergovernmental institutions.⁷

For each classification there are detailed 'requirements' with respect to the definition and recognition of any given international organisation. Despite the high level of analysis of international organisations, it is accepted that there is no universally established definition of these international entities.⁸ Even under the legal model, the definition of international organisations will vary, according to the context of the examination being made. Variables include whether one looks at the formal qualifications, or at the actual power to act autonomously and carry out independent functions.⁹

However, that is not to say that legal classification is a fruitless task. It continues to be a useful process, as it provides a baseline for the examination of an entity such as APEC. Does this forum 'qualify' as an international institution, and if so, under which category?

Schermers defines international organisations on a number of different levels. One important distinction drawn by Schermers is between public and private organisations. There are three basic requirements for an international organisation to be classified as 'public'. There

6 HG Schermers, (Sijthoff & Noordhoff, 1980) provides a cornucopia of classifications in ch 1. AM Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *American J of Int Law* 205 at 221-226, provides a detailed overview of the major themes in the literature of international law and international relations.

7 DW Bowett, *The Law of International Institutions* (Stevens & Co, 1982) pp 10-11.

8 Schermers, *International Institutional Law*, note 6 above, at p 5.

9 *Id* at p 6.

must be an international agreement, by treaty or informal agreement, between states. Organs, independent of any one nation's government, should be present. Finally, the organisation must be established under international law (this is normally fulfilled where there is an international agreement).¹⁰

Bennett identifies the essential characteristics of intergovernmental organisation (ie public international organisations in above terms, hereafter 'IGOs') as being:¹¹

- a permanent organisation to carry on a continuing set of functions;
- voluntary membership of eligible parties;
- a basic instrument stating goals, structure and methods of operation;
- a broadly representative consultative conference organ; and
- a permanent secretariat to carry on continuous administrative, research and information functions.

He goes on to add:¹²

IGOs are, additionally, established by treaty and usually, in order to safeguard state sovereignty, operate at a level of consent, recommendation, and cooperation, rather than compulsion or enforcement.

APEC appears to have most of the attributes required under these formulations. Of course, the missing element is the elusive APEC treaty. Under the legal model, this is considered an imperative, as it is the agreement which amounts to the 'instrument' of international law, giving rise to rights and duties within that legal system. Normally, only an organisation that comes within this definitional framework can be considered to have 'international personality', in the sense that it is an international person, and is a subject of international law, capable of possessing international rights and duties.¹³

Brownlie summarises the criteria of legal personality in international organisations as follows:¹⁴

- a permanent association of states, with lawful objects, equipped with organs;
- a distinction, in terms of legal powers and purposes, between the organisation and its member states;

¹⁰ Id at pp 8-15.

¹¹ A Bennett, *International Organisations* (Prentice Hall, 1991) pp 2-3.

¹² Ibid.

¹³ The United Nations was so described in *Reparations* case (1949) ICJ Reports 174 at 179.

¹⁴ I Brownlie, *Principles of Public International Law* (4th ed, Clarendon Press, 1990) pp 681-2.

- the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.

APEC lacks Brownlie's essential third limb. Thus, as an international organisation, APEC currently lacks the accepted indicia of international personality. This will be so until concrete, binding rights and duties are agreed to by APEC members, and become enforceable by APEC itself.¹⁵

International Relations Model

Beyond the legal classification system of international institutions, is the model applied in the broader field of International Relations (IR) theory. The study of the behaviour of states and non-state entities provides a wider field of inquiry, examining not only legal relationships, but also political, strategic, economic and cultural relationships. 'IR theory shows, moreover, that legal arrangements are only one of many ways by which states structure cooperation.'¹⁶

Conventional and novel categories arise under this broader inquiry.¹⁷ Archer defined an international organisation as:¹⁸

a formal, continuous structure established by agreement between two or more members (governmental and/or non-governmental) from two or more sovereign states with the aim of pursuing the common interest of the membership.

Keohane defines institutions as 'persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain activity, and shape expectations'.¹⁹ He suggests that international institutions assume one of three forms:²⁰

- 15 Id at p 682. Brownlie makes the interesting point that a multilateral convention may be institutionalised to some extent, by making provision for regular conferences, and yet not involve any separate legal personality. APEC is further along the path of institutionalisation than this example, by reason of its increasingly detailed organisational structure.
- 16 K Abbott, 'Elements of a Joint Discipline' (1992) 86 *ASIL Proceedings* at 169.
- 17 For a detailed examination of these classifications see A Judge, 'International Institutions: Diversity, Borderline Cases, Functional Substitutes and Possible Alternatives' in P Taylor & AJR Groom, *International Organisation* (Francis Pinter, 1978) pp 28-83. See also Archer, *International Organisations*, note 1 above, ch 2.
- 18 Archer, *International Organisations* at 37.
- 19 Keohane, *International Institutions and State Power*, note 2 above, at p 3. The concept of institutions is explored at length in ch 7.
- 20 Id at pp 4, 175. The term 'convention' is used here in the context of social theory, rather than international law.

- ‘*formal international organisations*’, ie bureaucratic purposive institutions with explicit rules and assignments of roles to participants, and the capacity for action;
- ‘*international regimes*’, ie specific institutions involving states/governments which relate to particular international issues, and exhibit explicit rules but have no capacity for the engagement of goal directed activities;
- ‘*conventions*’, ie informal institutions with implicit rules and understandings that facilitate coordination of participant’s behaviour.

Each of these three forms amounts to a means of managing cooperation between states. Typically, regimes in this model address a single issue or topic and are structures that are more fluid and more easily adjusted to changing conditions than international organisations. Thus, international organisations can ‘provide the legal setting for international regimes’.²¹ The practical differences between regimes and organisations may be minor:²²

[I]nternational organisations are embedded within international regimes: much of what they do is to monitor, manage and modify the operation of regimes. Organisation and regime may be distinguishable analytically, but in practice they may seem almost coterminous.

Keohane’s model of international institutions invites us to look not only at the formal, or traditional, indicia of institutions, that is explicit rules and ‘contractual solutions’,²³ but also at commonality of expectations and understandings amongst the participants.

Higgott points out that whilst APEC lacks ‘explicit rules - the hallmark of a regime’, it is possible to see ‘the evolution of a process of understanding ... and useable information ... about APEC members’.²⁴ It is for this reason that Higgott finds ‘APEC ... theoretically interesting in that it offers theoretical support to neoliberal institutional analysis’.²⁵

21 W Feld, R Jordan & L Hurwitz, *International Organisations: A Comparative Approach* (Praeger, 1994) p 251. This book also provides an interesting examination of the difference between regime and organisation (at pp 33-35) and the usefulness of the concept of international regimes in response to the critique of regime analysis (in ch 7). Further background to this can be found in a wide-ranging collection of writing, S Krasner (ed), *International Regimes* (Cornell University Press, 1983).

22 Keohane, *International Institutions and State Power*, at p 5.

23 Id at p 4.

24 R Higgott, ‘Competing Theoretical Approaches to International Cooperation: Implications for the Asia-Pacific’ in R Higgott, R Leaver & J Ravenhill, *Pacific Economic Relations in the 1990s: Cooperation or Conflict?* (Allen & Unwin, 1993) p 303.

25 Id at p 310.

In Keohane's model, APEC falls somewhere between a convention and a regime.

Definitions of institutions, drawn from international relations theories, are less onerous than legal models as they do not always require a treaty or formal agreement in order to pass an institutional test. It is important to recognise that 'the concept of international institutions is clearly broader than that of international law'.²⁶

One interesting analysis of international institutions takes an alternative view of the inquiry into institutionalisation. Burley points to a set of shared, analytical assumptions within the two disciplines of international law and international relations. That is they adopt a "top-down" analysis, beginning with standard Realist assumptions that unlike entities (states) can be treated as like for analytical purposes'.²⁷ Thus, Burley suggests that the 'Liberal Agenda' is a more promising bridge between the two disciplines, examining not just 'state-to-state interactions ... but ... an analytically prior set of relationships among civil society'.²⁸ This involves examining international relationships in the context of domestic, transnational and international law systems within, and applicable to, each nation state.²⁹

Under international relations theory, APEC falls somewhere between a convention and a regime, but it is an international 'institution'. However, the absence of a binding agreement is a deficiency which indicates that APEC does not qualify as an institution at international law.

The Nature and Function of APEC

Origins

Heads of Asia-Pacific states, senior ministers and departmental representatives have regularly gathered at a series of high level economic

26 Burley, note 6 above, at 222. She also points out at 206 that the emphasis by international relations theorists on the role and impact of "regimes"; the principles, norms, rules and decision-making procedures that pattern state expectations and behaviour' amounts to 'international law by another name'.

27 Id at 226. Burley examines the development of theories of institutionalisation or 'the Institutionalist Agenda' in international law and international relations theory. She warns of an overemphasis on 'the link between the level of institutionalization and international cooperation', as this precludes account of the evidence of peace and co-operation 'unrelated to institutions'.

28 Id at 206. Further examined at 226-239.

29 Id at 233. Burley proposes that, '[f]rom a liberal perspective, regimes governing liberal [democratic] states are likely to be more effective in accomplishing their stated aims than regimes governing liberal and nonliberal states'.

meetings since 1989. This consultative process goes under the description of 'Asia-Pacific Economic Cooperation'.³⁰

APEC has been variously described as a process, an initiative, a forum, an institution and even a 'multi-tiered wedding cake'.³¹ None of these terms adequately explains the status and nature of this series of meetings. In its own literature, APEC is described as 'a new forum to bring together decision-makers [of the region] at government level'.³² The forum developed out of a common concern amongst the political leaders, academics and business interests of the Asia-Pacific area, to 'establish a framework for regional economic cooperation'.³³

APEC's origins stem from the successful establishment of the Pacific Economic Cooperation Council [PECC], a non-governmental organisation comprised of business, academic and governmental representatives from over 20 Pacific Rim countries. PECC operates as an informal advisory body, composed of a series of member committees and task forces, encouraging regional consultation, and dissemination of information on trade, technology and investment. PECC's success in facilitating information exchange laid the groundwork for a formal consultative body of governmental status.³⁴ Formed in 1989, under the initiative of former Australian Prime Minister Bob Hawke, with the assistance of the Minister of Foreign Affairs, Gareth Evans, and the Secretary of the Australian Department of Foreign Affairs and Trade [DFAT],³⁵ APEC began as an informal intergovernmental forum, a series of meetings by senior officials and Ministers. It has, since then, evolved into something greater. According to ex-Prime Minis-

30 Currently APEC comprises Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Philippines, Singapore, Chinese Taipei, Thailand and the United States.

31 Attributed to Senator Gareth Evans in, *Insight*, note 5 above, at 3.

32 DFAT, *APEC Briefing Notes* (December 1994) at 1.

33 *Ibid.*

34 Overviews of efforts to develop regional organisations in the Pacific are found in D Crone, 'The Politics of Emerging Cooperation' (Spring 1992) *Pacific Affairs* at 68, and Soesastro, note 4 above. Detailed examination is found in LT Woods, *Asia-Pacific Diplomacy: Nongovernmental Organisations and International Relations* (UPC Press, 1993).

35 Despite some attempts by US foreign affairs commentators to claim APEC as a US initiative, it is generally accepted that the impetus arose out of Australian diplomatic efforts: R Higgott, A Cooper & J Bonner, 'Asia-Pacific Economic Cooperation: An Evolving Case Study in Leadership and Cooperation Building', in (1990) *International Journal* XLV 823 at 838. See also G Evans & B Grant, *Australia's Foreign Relations in the World of the 1990s* (Melbourne University Press, 1991) p 121. Japanese commentators have recently asserted Japan's role as APEC's 'inventor': see reports in *The Australian* (4 January 1996) at p 1.

ter Paul Keating, APEC represents 'an extraordinary new path for the Asia-Pacific region towards extraordinary new goals'.³⁶

The breakthrough in APEC's consolidation, and the point at which it appeared to gain some international credibility, occurred when a 'Leaders' Meeting' was hosted in 1993 by the United States President Bill Clinton, at the fifth Ministerial Conference in Seattle. Clinton's hosting of the governmental leaders of APEC member countries represented the first meeting of the Heads of State of the Asia-Pacific countries, under the banner of closer economic ties.³⁷ The Leaders' Meeting strengthened the immature APEC group and gave it a recognisable public persona and credibility. The leaders' mandate gave APEC the imprimatur of an international institution.³⁸

Aims

APEC's first formal document on its objectives, organisation, and indeed its activities, appears to be a booklet published by the APEC Secretariat in 1994.³⁹ This, along with the APEC Leaders' Declaration of Common Resolve (known as the 'Bogor Declaration', November 1994) and the Declaration for Action (known as the 'Osaka Action Agenda', November 1995), are manifestations of the common aims of APEC members. In these documents, the APEC members committed themselves to the pursuit of a policy of 'Open Regionalism'. This catch-all phrase encompasses economic liberalisation and cooperation in the Asia-Pacific region 'on the basis of equal partnership, shared responsibility, mutual respect, common interest and common benefit'.⁴⁰

Gibney defines 'Open Regionalism' more precisely as a 'policy furthering removal of trade barriers, with an eye on GATT disciplines, expanding subregional trading agreements and working towards mutual, nondisciplinary access to economies elsewhere'.⁴¹

36 Attributed to Australian Prime Minister Paul Keating, in 'A Dream of Free Trade' *The Economist* (19-25 November 1994) at 29.

37 K Kihwan, 'Pacific Economic Cooperation; Outlook & Agenda for the 1990s' in Bundy et al, *The Future of the Pacific Rim*, note 4 above, at p 52.

38 In 1992 Donald Crone wrote that 'the substance of APEC is thin and somewhat bemusing': note 34 above, at 80. The Leaders' Meetings, Bogor Declaration and Osaka Action Agenda might have laid to rest this sort of assessment of APEC. However, see R Manning & P Stern, 'The Myth of the Pacific Community' (1995) 73(6) *Foreign Affairs* at 79.

39 The Secretariat was formed in 1992; see further section headed 'Organisation and Structure of APEC: Secretariat' below.

40 Bogor Declaration, November 1994, at p 2.

41 F Gibney, 'Creating a Pacific Community' (1993) 72(5) *Foreign Affairs* 20 at 23.

This liberalisation objective is a commitment by all APEC leaders to free trade in goods and services in the region by a set date. Industrialised economies are to achieve this goal by removing tariff and non-tariff trade barriers by 2010, whilst developing economies should do so no later than 2020.⁴²

The free-trade objective which underpins APEC is intended to reflect a 'non-discriminatory' approach, in that the benefits of any trade liberalisation should be available to all countries, whether members of APEC or not. Thus, APEC is not to become a trade bloc, whereby members would remove inter-regional trade barriers leaving 'external' barriers with non-APEC countries. Open Regionalism includes the strengthening of the multilateral trading system, including the accelerated implementation of Uruguay Round commitments made under General Agreement on Tariffs and Trade, and active participation in the World Trade Organisation.⁴³

APEC is credited with a number of tangible achievements in facilitating economic cooperation. In aiming for open regionalism, APEC is essentially endeavouring to bring transparency, and exchanges of trade and technical information, to the top of the cooperative agenda. To this end, APEC has collected, analysed and disseminated economic and trade-related information, and has a steering role in the harmonisation of customs, standards and labelling.⁴⁴ APEC Ministers have adopted a 'Declaration on Trade and Investment Framework', which loosely defines APEC's work as improving flow of goods, services and technology within the region.⁴⁵ In addition, a non-binding code of investment principles has been agreed to (but not signed) by members.

Decision-Making

APEC operates by consensus, its credibility and success being dependent on the voluntary commitments of its members. There are currently no mandatory obligations imposed on or by members. This is the crucial aspect of APEC's aims and objectives; they remain non-binding. For example, the goal date of 2020 is flexible, dependent upon developing economies being 'ready' to meet the target.⁴⁶

42 Bogor Declaration, at p 2. The Osaka Action Agenda, Art 5 directs member governments to prepare concrete and substantive plans for implementation, to be submitted to the 1996 Ministers' Meeting.

43 Bogor Declaration, at p 7.

44 B Cummins, 'APEC: Region must work together to advance trade' (1994) 3(18) *Insight* at 4.

45 APEC Secretariat, APEC (1994) at 3.

46 'A Dream of Free Trade' *The Economist*, note 36 above, at 29.

The consensus-based decision-making process is perceived to be a weakness in that it prevents anything but the safest, slowest and necessarily the most conservative moves forward in the quest for 'Open Regionalism'. But this can equally be considered a strength, as members are more likely to have a genuine and equal interest in carrying out agreed initiatives. Similarly, given that APEC now includes a Leaders Meeting, one could expect a high level of political support for initiatives and commitments undertaken. The advantage of APEC's agenda is that it is aimed at, and operates on, the governmental level, thus giving rise to politically realistic goals. The recognisable weakness is that without any binding quality to APEC targets, the political willpower to meet targets may wane, particularly in relation to the 2020 deadline set in Bogor. In the words of one commentator, '[b]y that time, the leaders who put their signatures to the declaration ... will either be dead or in their dotage'.⁴⁷ This lack of binding obligation, and the concomitant lack of any dispute resolution mechanism, leads to questions of APEC's efficacy as a vehicle for regional cooperation, and indeed its status as an international institution.⁴⁸

Membership

Current membership stands at 18 'economies'.⁴⁹ Membership is not fixed; it is nominally extended to countries on the Pacific Rim, but does not at present include Russia, Indo-Chinese countries nor most Central American states. Membership is not restricted to developed or market economies. However, APEC is implicitly associated with the common interests of rapidly growing or well-established economies that have strong investment and trade ties.⁵⁰

One of the key issues for the development of APEC has been, and remains, that of broadening membership. Initial reluctance by Austra-

47 Ibid.

48 Senator Evans suggests that the non-binding approach, where participants are free to 'join a broadening consensus at their own pace without penalty', has considerable merit. However, he does not outline what those merits actually are, other than to refer to the successful outcome Australia and New Zealand experienced in their Closer Economic Relations Agreement negotiations. These negotiations utilised an incremental approach, whereby 'no end point was discussed initially, but, rather, each step was taken when the last was completed, and the final product is very successful integration': G Evans, 'Regionalism and Cooperation in the Asia-Pacific' in Bundy et al, *The Future of the Pacific Rim*, note 4 above, at p 90.

49 See note 30 above.

50 As it stands, APEC is composed, with few exceptions, of 'the strongest Asian economies, in concert with North America, a position that provides considerable leverage over future applicants and other economic groupings': Crone, note 34 above, at 79.

lian and South East Asian Nation (ASEAN) states to permit inclusion of the United States, and difficulties in including the Peoples Republic of China (PRC) together with Taiwan and Hong Kong, reflect an underlying tension within APEC. The former Soviet Union has been refused membership, due to concerns regarding the inclusion of an underdeveloped socialist economy, and fears of the strategic or political impact that country might develop in the Asia-Pacific region.⁵¹ The PRC is included, despite its socialist system, due to its improved economic growth, and potential to become a major economic power.

Importantly, membership of APEC is not composed of sovereign states, but rather, of member 'economies', to accommodate the political sensitivities of the three Chinas. Presently each of the APEC members (except Hong Kong), on any objective criteria, sustain characterisation as sovereign states. This is largely irrelevant where the APEC states cannot subjectively recognise the sovereign status of other members.⁵²

Structure

APEC has developed an elaborate structure, although this is not overtly bureaucratic. APEC Leaders' Meetings are planned annually for the foreseeable future, as are Ministers' and Senior Officials' meetings. Permanent committees and working groups are continually active in ongoing work, and a permanent Secretariat is situated in Singapore. APEC has a bureaucracy, regular meetings and permanent headquarters, and to this extent it has a formal structure with continuous operations.⁵³ APEC has developed from an informal dialogue group, arising out of the non-governmental work of PECC, into a international intergovernmental forum which demonstrates institutionalisation. That is, APEC seems to demonstrate the indicia of an international institution. Is this an accurate assessment? And, is it appropriate to attempt investigation of APEC's status in these terms?

51 Russia has embarked upon a campaign to join APEC, on the basis that the arguments against its inclusion (communist political system, underdeveloped economy and residual Cold War hostilities) are largely inapplicable today: *The Age* (27 May 1995) at p 6.

52 This is explored in more detail in the section headed 'Further Institutionalisation: What Prevents APEC from Formalising?' below.

53 The organisation, processes and activities of APEC are examined further in the section titled 'Organisation and Structure' below.

Organisation and Structure of APEC

In terms of creating institutional structures, such as a bureaucracy, regular meetings and permanent headquarters, APEC is increasingly institutionalised.

Secretariat

A permanent APEC Secretariat was established in 1992, based in Singapore. The Secretariat manages the budget,⁵⁴ coordinates work projects and facilitates communications between APEC members. It also distributes publications and documents produced by APEC Committees and Working Groups. The Executive Director of the Secretariat is drawn from the APEC member state which currently holds the Chair. Positions of Director and Chair are held for one year. The Executive Director of the Secretariat is succeeded to by the Deputy Executive Director, who is appointed by the member economy which is to assume the Chair in the following year. Staff in the Secretariat are seconded from member countries, and currently number approximately twelve professional staff. Support staff are financed by the host member.⁵⁵

Leaders', Ministers' and Senior Officials' Meetings

Meetings of the members' political leaders, foreign and trade Ministers, and senior officials (usually at head-of-department level), take place on an annual basis. Despite this, the Leaders' Meetings maintain a degree of informality. APEC Ministers from areas such as education, trade, finance, transport and environment have also met on an increasingly regular basis.⁵⁶ The aim of the Leaders' Meetings is 'for leaders to share their visions for cooperation in the Asia-Pacific region and provide direction to APEC's long term development'.⁵⁷

Leaders' Meetings have a wider function than this, providing a demonstration of the political will favouring APEC's ongoing success. These meetings are the manifestation of the process of the increasing institutional status of APEC. Without the imprimatur of the government heads of APEC's members, APEC would be merely a series of conferences or congresses. In the absence of any signed treaty or constitutive document, the demonstration of political will must be

54 Approximately US\$2.23 million in 1995: DFAT, *APEC Briefing Notes* (December, 1994) at 4.

55 *Ibid.*

56 Leaders' Meetings are planned for the Philippines in 1996, and Canada in 1997.

57 DFAT, note 54 above, at 3.

much more explicit than is usually the case for international actions. For member states to display their ongoing commitment to APEC's aims and objectives, heads of member states must not only approve, but be seen to approve.⁵⁸

APEC does not yet have permanent members' missions, so regular meetings of governmental Ministers, and Senior Officials are scheduled to implement decisions, and plan future recommendations. Annual Ministerial Meetings approve the work programme and budget, and make decisions on structure and membership.⁵⁹

Committees and Groups

Three permanent committees currently carry out the core work of APEC. The Economic Committee facilitates dialogue and research on economic data and developments in the region. The Budget and Administrative Committee advises on operational issues within APEC.⁶⁰ Finally, the Committee on Trade and Investment [CTI] manages the programme for liberalising and expanding trade and investment in the region. The CTI has established cooperative programmes and sub-committees on customs procedures, standards and conformance, investment and small and medium enterprise.⁶¹ Non-binding investment principles were developed by the CTI, and adopted by the Ministers in November 1994. The CTI also formulated options for a dispute mediation forum within APEC, presented for consideration at the 1995 Leaders Meeting.

APEC has established and funded ten practical working groups. These sectoral-based working groups were established to promote practical cooperation in areas such as trade facilitation, promotion and data review, industrial and technological information exchange, human resources development, scarce resource conservation, tourism telecommunications and transport issues. Through these working groups, members are developing information networks, technology transfer and policy development, leading to practical links and cooperation amongst APEC member representatives at government, business and

58 This may partly explain the frustration expressed by Prime Minister Keating, when Malaysia's Prime Minister did not attend the Leaders' Meeting in Seattle in 1993, and US President Clinton did not attend in 1995.

59 DFAT, note 54 above, at 3. Ministerial level meetings are to be held in the Philippines in 1996, Canada 1997 and Malaysia 1998.

60 DFAT, note 54 above, and APEC *Secretariat Booklet* (1994).

61 A small-and-medium-enterprise Ministers' Meeting took place in Adelaide in September, and a conference on intellectual property rights was held in Sydney in May.

academic level.⁶² The working groups reflect the kind of tasks undertaken by PECC, and typify APEC's 'pragmatic, evolutionary approach to effective and reasonably broad-based regional cooperation'.⁶³

Ancillary Groups

In 1992, an Eminent Persons Group [EPG] was formed, with the aim of developing a long-term vision of trade liberalisation in the region. The Group, consisting of non-governmental advisers, produced two reports,⁶⁴ which were instrumental in the development of workable strategies for achieving APEC's stated goals.⁶⁵

The Pacific Business Forum [PBF] was established in 1994 at the request of the APEC leaders. The PBF represented the interests of small, medium and large business interests, and reported directly to APEC leaders.⁶⁶ Its role was to identify issues to facilitate regional trade and investment, and development of business networks.

Ancillary bodies are an important element of APEC. They are not limited by any political or diplomatic restrictions.⁶⁷ This candour gives rise to realistic and tangible suggestions for action by APEC members. Specific recommendations by PBF have been made regarding schedules for tariff reductions, planned phasing out of investment barriers and facilitation of business travel between member countries, as well as a recommendation that an APEC dispute settlement body be established.⁶⁸

These consultative groups operate to influence and guide APEC governmental representatives as to the pragmatic concerns of the business and academic communities.

62 For instance, the Human Resources Development Group produced a number of reports on various education and management issues particular to the region: see *APEC Secretariat Booklet*, note 60 above, at p 11.

63 A Elek, 'Pacific Economic Cooperation: Policy Choices for the 1990s' (1992) 6(1) *Asia-Pacific Economic Literature* at 16.

64 Eminent Persons Group, *A Vision for APEC* (1993); *Achieving the APEC Vision* (1994). The EPG's work emphasised the interrelationship between APEC and existing regional trading arrangements, such as the North American Free Trade Agreement.

65 Bogor Declaration, at p 5. The mandate for the EPG was said to be to 'think big thoughts': Evans in Bundy et al, *The Future of the Pacific Rim*, note 4 above, at p 89.

66 Pacific Business Forum, *A Business Blueprint for APEC: Strategies for Growth and Prosperity* (1994).

67 This attitude was exemplified by Mr Les McGraw, PBF's co-chairman, who said recently: 'We're not politicians and we're not representing our governments. We're representing business interests' in 'Business Leaders tackle trade barriers' *United Press International* (27 May 1995).

68 *Ibid.*

Dispute Resolution Process

APEC currently lacks a forum for dispute resolution. Recommendations by the EPG and PBF, as well as the Committee on Trade and Investment, suggest that this issue must be addressed if APEC is to continue in its momentum towards regional economic cooperation. Archer has issued a warning:

A continuation of the present trends in economic ... IGOs seems to point to larger bureaucracies, more politicized and less effective organisations, and conferences forever defining problems and setting rules, but without the wherewithal to enforce decisions. As the *Titanic* sinks, the orchestra is quarrelling over which music should be played.⁶⁹

APEC members are wary of falling into this trap.⁷⁰

The lack of such a forum is tied to the non-binding quality of the Bogor Declaration, and APEC's aims in general. While APEC's goals remain open and the decision-making process is one of consensus, there is little point in establishing explicit compliance and enforcement mechanisms. Without binding rules or processes applicable to APEC economies, a dispute settlement system is of dubious value. This view of dispute resolution is predicated on an adjudicative model, anticipating that disputes must have a binding, enforceable determination in order to resolve disagreements. In its current form, APEC cannot impose this kind of dispute settlement system, as no member will subject itself to jurisdiction of this sort. There are two reasons for this. First, China refuses to enter into any agreement with Taiwan, or with any other state that attempts to do so. Second, binding decisions may be perceived as violations of state sovereignty.⁷¹ However, APEC could develop a mechanism which relies on non-binding mediation of disputes. There is an inherent weakness: parties would have to come to the table voluntarily, and mediation may not produce conclusive results. However, mediation, rather than arbitration or adjudication, would generate a means of reconciling the lack of structural certainty in APEC, whilst retaining the consensus-based process which is favoured within the region.⁷²

It is apparent that the relatively rapid development of organisational structures and processes is indicative of the ongoing formalisation of

⁶⁹ Archer, *International Organisations*, note 1 above, at p 183.

⁷⁰ The Osaka Action Agenda has acknowledged the desirability of a dispute resolution forum: Art 4.

⁷¹ Burley, note 6 above, at 236.

⁷² Osaka Action Agenda, Art 4; see also 'code of practice' proposed in the report prepared by the Australia-Japan Research Centre, by D Ryan (ed), *Implementing the APEC Bogor Declaration* (1995) at p 19.

APEC. These formal structures are representative of institutionalisation, but alone, they cannot amount to an international institution, in the legal sense of the term. Without a binding set of rules, the ability to carry out aims and some guarantee of compliance, APEC lacks the essential indicia of an autonomous structure that fulfils Schermers' requirements for Public International Organisations, or Keohane's Formal International Organisations.

Further Institutionalisation: What Prevents APEC from Formalising?

If institutionalisation is defined in legal terms, requiring concrete treaties, documentation and/or constitutive instruments, there are two clear limitations to the development of APEC in such a process.

The first is the specific issue of APEC's composition. APEC, by including the PRC, Taiwan and Hong Kong as participants, forgoes the possibility in the near future of making signed agreements regarding members obligations.

The second limitation is more general. As an organisation which fuses Asian and Anglo-European values and expectations, APEC must adopt a *modus operandi* which reflects a blended international culture. Currently, this corporate culture precludes imposed or majoritarian solutions, and all members must move at their own pace, on the basis of flexible consensus. This prevents the use of formalistic binding treaties in the traditional manner recognised under international law.

Participation and Composition

There are a number of issues regarding participation in APEC.⁷³ The membership issue which will create the greatest impediment to further institutionalisation, in the sense of an international treaty or agreement between states, is that the PRC will not countenance any suggestion that Taiwan and Hong Kong be accorded equivalent sovereign status, within APEC or any other international forum. A care-

⁷³ Crone, note 34 above, at 76-8. Malaysia in particular had strong objections to inclusions of economic powers such as the US, Canada and Japan, fearing domination by these countries, as well as submersion of ASEAN into APEC. Malaysian Prime Minister Mahathir bin Mohammed outlines these objections in a chapter titled 'Regional Groupings in the Pacific Rim: An East Asia Perspective' in Bundy et al, *The Future of the Pacific Rim*, note 4 above. Currently, reluctance to allow the former Soviet Union, the Indochinese states and the Central and South American states (aside from Chile and Mexico), are some of the issues on the membership agenda. There is a moratorium on membership until 1996, applicable to all countries interested in joining APEC: see Australian Trade Minister Press Release *APEC Russian Membership* (14 September 1995).

fully brokered deal was arranged to enable the PRC, Taiwan, and Hong Kong to join APEC simultaneously. This overcame serious political hurdles, allowing China and Taiwan, which do not accord one another diplomatic or political recognition, to meet and negotiate at an intergovernmental level. Indeed, the PRC has steadfastly refused to accept Taiwan's membership in any international forum (including GATT, the World Bank, the International Monetary Fund, and of course the UN) as long as Taiwan describes itself with names that imply the Taipei government's sovereignty over greater China, or even the existence of two Chinas.⁷⁴

The third APEC ministerial meeting in Seoul is said to be the first international meeting at which Ministers of the PRC and Taiwan sat together.⁷⁵ This success should not, however, be overstated. China continues to have deep reservations regarding further progress in accepting Taiwan as a qualified actor on the 'official' world stage. Taiwan's President, Lee Teng-hui, does not attend APEC Leaders' Meetings, on the basis of objections by China.⁷⁶

The inclusion of Hong Kong is said to be a critical achievement in regional diplomacy, representing a level of functional independence from Britain, its constitutional mentor, and the PRC, its imminent political master.⁷⁷ Continuing membership in APEC is contingent upon Hong Kong retaining a high level of functional economic autonomy. If, after the 1997 hand-over to the PRC, Beijing under-

74 A pre-APEC call for Taiwan to adopt greater flexibility in its acceptance of a neutral appellation was made: RA Brooks & AB Brick, 'An Advocacy Paper: Taiwan Should Move to Enter the Major International Economic Organisations' (1990) *The Republic of China Today* at 132. Taiwan's de facto sovereign status is examined by A Goodwin, 'Legal Aspects of Australia's Commercial Relationship with Taiwan' (1992) 4 *Bond Law Review* 41.

75 Address on February 24 by the Minister for Foreign Affairs and Trade, Senator Gareth Evans, to the Williamsburg Conference XIX, Sydney: 'Global and Regional Security After the Gulf' (1991) 62 *The Monthly Record* (Supplement to No 11, 12) at 39. Although, by 1990 the three Chinas participated in the nonformal PECC process as full members: Harris, note 79 below, at p 287.

76 This exclusion was recently reiterated by Japan's Prime Minister in 'Envoys expect Chinese bluster on Taiwan-US visit' *Reuters North America* (25 May 1995). Australia's Prime Minister said that President Lee's attendance in Osaka would be 'unproductive and pointless' in 'Tokyo gives commitment on APEC' *The Australian* (27 May 1995) p 4. His recent 'unofficial' visit to the United States led to strong protests by China's Foreign Ministry, cancellation of high-level visits to the United States by Chinese officials, and claims of 'grave consequences' for Washington: *The Australian* (9 June 1995) at p 9; see also B Jacobs, 'Why China fears Taiwan's President Lee': Id at p 13.

77 B Hook, 'The External Relations of Hong Kong' in S Yun-wing & L Ming-Kwan *The Other Hong Kong Report* (1991) p 523.

mines Hong Kong's economic independence, Hong Kong's participation at international fora, such as APEC, will be threatened.⁷⁸

The key to the diplomatic feat of successful incorporation of these states into APEC was their simultaneous entry, and the designation of members as 'economies'. The sticky issue of state recognition was avoided in this way. APEC's strength in this regard is that it was a flexible association, without formalised structure or the usual treaty or agreement document. This allowed the members' political and strategic differences to be appeased in the name of economic cooperation. It is, as Harris states, 'the non-formal nature of the process' which enabled the three Chinas to join APEC.⁷⁹ Yet this delicate arrangement, while it satisfies political sensibilities, is a fundamental impediment to greater formalisation of APEC. It effectively obstructs any ventures into explicit regulation of APEC members' rights, relationships and rules.

APEC's Corporate Culture

APEC blends Asian and Anglo-European expectations, values and organisational cultures. Within this cooperative melting pot are a number of competing tensions, demands and complexities. There are differences amongst Asian members, and between Asian and non-Asian members. Additionally, APEC must proceed at the pace of the most reluctant participants, on a consensual basis. These factors combine to render the progress of institutionalisation a gradual one. Indeed, the expectation of increased formality in APEC may not be attainable.

Pacific Diversity

It is commonly asserted that differences in language, culture, ethnicity and history in the Asia-Pacific have led to difficulties in regional efforts to form cooperative institutions.⁸⁰ Consequently, 'governments have been very reticent ... to institutionalise'.⁸¹ This

78 'US monitoring Hong Kong Transition', *United Press International Financial* (27 March 1995).

79 S Harris, 'Economic Cooperation and Institution building in the Asia-Pacific Region' in Higgott et al, note 24 above, at 287.

80 See R Manning & P Stern, note 38 above; R Higgott & J L Richardson (eds) *International Relations: Global and Australian Perspectives on an Evolving Discipline* (1991, Canberra Dept of International Relations, ANU) at 3.

81 Bundy et al, *The Future of the Pacific Rim*, note 4 above, at p 7. The concept that Pacific economic co-operation has grown from the bottom up, and not been imposed from the top down, is reiterated by Drake, 'Future Directions for Pacific Cooperation' in Bundy et al, *The Future of the Pacific Rim*, note 4 above, at p 226.

reluctance may be attributed to memories of the Second World War, fears of economic domination by the US or Japan and recent large-scale regional conflicts. When combined with disparate political and economic structures, and religious and cultural differences, reluctance is heightened. Harris assesses the Asia-Pacific as emerging 'only recently from colonialism, and even more recently from a post-colonial uncertainty, mistrust and lack of self-confidence'.⁸² In short, 'to organise the Pacific is to overcome enormous historical and political barriers'.⁸³

Perhaps the differences amongst countries in the region will not prevent cooperation while economic development remains a common goal. They do however highlight the importance of cooperative processes and institutions, and the evaluation of these institutions in terms beyond the Western paradigm of legal formalisation.⁸⁴ Thus, it is inappropriate to judge institutional and cooperative developments in the Asia-Pacific against a timeline of comparable developments in Europe. Such characterisation would fail to recognise the distinctive political and economic factors arising in Asia and in Europe, particularly the differing effects of the two World Wars.⁸⁵

Pacific Expectations

Another contrast in approaches to institutionalisation between East and West is in systems of governance. The separation between government, private sector and academia, characteristic of Western systems, is not evident in the Asian states of the APEC region.⁸⁶

The strongest call for increased institutionalisation comes from the United States.⁸⁷ APEC, as a consultative forum, is perceived to lack the

82 Harris in Higgott et al, *Pacific Economic Relations in the 1990s*, note 24 above, at p 286.

83 Bundy et al, *The Future of the Pacific Rim*, note 4 above, at p 7. Cf Gibney, note 41 above, at 24: 'It is time to lay to rest the tired argument that the great disparities of culture, tradition, race and religion among the Pacific nations make any close form of cooperation impossible...'

84 S Harris, 'Concepts and Objectives of Pacific Economic Cooperation' *Pacific Economic Papers* (Australia-Japan Research Centre, 1992) vol 213 at 13.

85 *Ibid.* This point is also made by K Mahbubani, 'The Pacific Way' (1995) 74(1) *Foreign Affairs* at 101.

86 Harris, note 84 above, at 13.

87 Sandra Kristoff, a US diplomatic coordinator on APEC affairs, reported that the results of the APEC Osaka meeting this year would be critical for the future of the group and its free-trade aim. She noted that Asian-Pacific leaders 'must prove they are serious by making firm commitments at Osaka': S Kristoff, 'US-Japan row won't stall APEC talks: US Official' *Reuters World Report* (26 May, 1995). This attitude was reiterated in 'A Great Leap Forward', *The Economist* (25 November-1 December 1995) at p 16.

status to deliver any productive negotiations on trade imperatives. Thus, statements are made intimating that, '[i]n a bottomline sense, little can be expected from APEC in its current status'.⁸⁸ Yet ironically, it is the strategic and economic power and position of the US, particularly in light of recent bilateral trade disputes between the US and Japan, which is said to threaten the success of APEC in meeting its stated objectives. For example, the Australian Prime Minister said:⁸⁹

The US-Japan relationship is the linchpin of regional stability and prosperity... [N]o-one can afford to allow bilateral trading differences between these key Asia-Pacific partners to jeopardise any part of political and security structure of our region or to imperil the sense of regional community which is now emerging.

Malaysia's Prime Minister, Dr Mahathir bin Mohamad, is well known in Australia for his initial reluctance to support APEC.⁹⁰ He argued that a 'US-dominated Asia-Pacific organisation is being created in order that East-Asian economies, with their powerful growth, will not be left to their own devices. US interests will always be safeguarded through the APEC mechanism'.⁹¹ Indeed the very indicia of institutionalisation reinforce his conclusion:⁹²

- 88 C Morrisson, 'The United States and Cooperation in the Asia-Pacific' (1994) 48 *Australian J of International Affairs* 63 at 70. Morrisson wrote that 'APEC has virtually no visibility in the United States', although he conceded that 'APEC will continue to have a symbolic, political function in bridging the Pacific...'. F Gibney characterised APEC as, 'small, obscure and undermanned': note 41 above, at 21. Clarke is more optimistic, noting that 'APEC does appear to offer some significant advantages for a modern American policy towards Asia. It fills the gap in Asian intra-state architecture between the global system represented by the [GATT] and the network of bilateral relationships... it provides the third leg for the three legged stool': J Clarke, 'APEC as a Semi Solution' (Winter 1995) *Orbis* 80 at 86.
- 89 Address at Keio University, Tokyo 25 May, 1995 at 3; reported in *The Australian* (26 May 1995) at p 1. This author does not propose to examine the issue of the US-Japan relationship at length. For a full exploration of the origins and problems in US-Japan trade relations see Higgott et al, *Pacific Economic Relations in the 1990s*, note 24 above, particularly chs 3, 4, 5 and 6. Higgott says at 398 that, '[n]otwithstanding aspirations in some quarters, there is little likelihood at this stage that APEC has sufficient institutional strength to mitigate tension in the economic war ... between the United States and Japan'.
- 90 Australia's High Commissioner to Malaysia, John Dauth, recently dismissed suggestions that Malaysia is a reluctant member of APEC: 'I think it is wrong to characterise Malaysia as an unenthusiastic APEC citizen... [Australia and Malaysia] have some differences, particularly about formalisation with[in] APEC ... but when it comes to the nitty-gritty, the hard work, the working groups, the work that has been done to push the APEC agenda forward, the Malaysian officials are actually among the most creative and best contributors': J Dauth, 'Asia: Australian relations with Malaysia at 40 year high' *Australian Associated Press* (3 May 1995).
- 91 Dr Mahathir bin Mohamad, 'Regional Groupings in the Pacific Rim: An East Asia Perspective' in Bundy et al, *The Future of the Pacific Rim*, note 4 above, at p 96. One of the main fears expressed in this chapter is the spectre of NAFTA constitut-

Despite assurances that the APEC organisation would not be formalised, already a secretariat has been established and proposals for permanent offices and meetings of heads of government have been made.

This attitude is not universal among Asian members of APEC, but illustrates differences in expectations within APEC: on one side, the call goes out for increased organisation, whilst on the other, there is complaint about the modest levels already in place.

Pacific Consensus

There is a real difference in the decision-making process of Asian and Western members of APEC.⁹³ The Asian approach can be described as 'a Confucian hesitance to rely on formal law and institutions for structuring society'.⁹⁴ Such an approach is reflected in reliance on general consensus, rather than formalised decision-making and enforcement structures that are more familiar to the Western observer. Davidson suggests that the process of decision-making through discussion and consultation, and the unanimous decision that flows from that process, reflect the traditional approach to decision-making in the South-East-Asian region.⁹⁵

The consensus approach 'relies to a large extent on personal interaction - in contrast to the Western way of depending on structures and their functions'.⁹⁶ This process is appropriate in a regional organisation which must accommodate significant diversity of history, government and national identity.⁹⁷

ing a trade bloc which will affect East-Asian access to the North American markets. Fears that NAFTA will negate the ASEAN members of APEC have led to establishment of an ASEAN Free Trade agreement, and the East Asian Economic Caucus, both institutional rivals to APEC's agenda.

92 Ibid.

93 In this context, this author uses such terms to indicate 'Asian' and 'Anglo-European' respectively. Ironically, in the Pacific region, these terms reverse the geographical reality so that those on the eastern rim are the 'Westerners', and those on the western rim are the 'Easterners' (bar Australia and New Zealand).

94 J Barton & B Carter, 'International Law and Institutions for a New Age' (1993) 81 *Georgetown L J* 535 at 552.

95 P Davidson, 'ASEAN: The Legal Framework for Its Trade Relations' (1994) 49 *International Journal* 588 at 595. Davidson refers to a Malay example of this process, demonstrating that the process is not limited to a 'Confucian' philosophy. The consensus approach has been characterised as 'the ASEAN way' by writers examining the institutionalisation of the Association of South East Asian Nations organisation: see id at 597.

96 Id at 596.

97 An interesting examination of East/West difference is offered by Mahubani, note 85 above. Cf Lingle, who warns against idealising Asian economic growth or cultural values: C Lingle, 'The Propaganda Way' (1995) 74(3) *Foreign Affairs* at 193.

It is clear that there will continue to be tensions based upon differences in the cultural and political styles of the Western and Eastern members of APEC, between the 'institution-building impulses of the Anglo-Saxon participants, and the consensus-building impulses of the Asian participants'.⁹⁸

Pacific Processes

Characterisation of differences in corporate culture, or approaches to the decision-making processes within APEC, has parallels with considerations, examined by Young, regarding international institutional bargaining. Young points to consensus building (the 'unanimity rule' as opposed to the 'majoritarian rule'), as a distinctive feature of the formation of international regimes or institutions. Thus, once an issue is defined (in this case, trade liberalisation) and the participants identified (which has largely been settled in APEC), then 'actors endeavouring to formulate the terms of constitutional contracts make a concerted effort to devise packages of provisions that all the participants can accept'.⁹⁹ Young continues with the statement that:¹⁰⁰

Actors endeavouring to reach agreement on the terms of constitutional contracts seldom make a concerted effort to perfect the information at their disposal ... before embarking on serious bargaining. They normally focus instead on a few key problems and seek to work out approaches to these problems that each of these participants can accept as fair...

There will remain amongst the APEC countries a preference for maintaining a 'loose consultative process'.¹⁰¹

The major impediments to formal treaty building in APEC can be characterised as inherent limitations, built into the operation and

98 K Mahbubani, note 85 above, at 110. However, Mahbubani warns that 'those who assume that East-West differences will be the main divide [in APEC] may be in for a surprise. ... The corporate cultures evolving ... are neither exclusively Western or Asian. A unique blend is emerging'.

99 O Young, 'Political Leadership and Regime Formation: On the Development of Institutions in International Society' (1991) 45 *International Organisation* 281 at 283.

100 *Ibid.* For example, regional leadership is perceived to be an important element of the institutional development of APEC. According to Higgott, '[t]he question of future institutional structure is ... very much contingent on successful, appropriate and acceptable leadership in the region in the 1990's': Higgott et al, *Pacific Economic Relations in the 1990s*, note 24 above, at p 305. Thus, the roles of the two main players of the region, the United States and Japan, will be important to APEC's institutionalisation.

101 R Higgott in R Higgott et al, *Pacific Economic Relations in the 1990s*, note 24 above, at p 389. Bergsten points out that APEC had evidently undertaken 'serious and successful negotiations' leading up to the Osaka Leaders' Meeting: F Bergsten, *The Economist*, note 5 above, at 77.

processes of the forum. There is always the possibility that as cooperative endeavours progress successfully on the economic level and beyond, the political will to create formal agreements may similarly increase. Paradoxically, where such a level of trust and transparency exists, the need for formalised relationships declines. Indeed, on the basis of this analysis, the very issues which initially appear to be an impediment to greater formalisation, may be a key to APEC's ongoing development as an international institution.

Conclusion

International law seeks to examine the rules that govern relationships between component parts of an international system. This examination must take account of informal agreements, or 'soft law'.¹⁰²

In many ways, APEC represents a new style of institution in international law, as contrary to expectation, inability to formalise does not delegitimise APEC's work in guiding the behaviour and expectations of its member states. Even without formal agreements, APEC members are working to meet their long-term goals, and each proceeds on the basis that other members have shared objectives, and will conform to APEC's stated aims. This is partially attributable to the commitment made by APEC leaders at Bogor and Osaka, since a 'commitment made by the head of state is the most visible and credible sign of policy intentions short of a ratified treaty'.¹⁰³

Any prospect of APEC's further institutionalisation are attached to the specific requirements and cultures of the heterogenous Asia-Pacific region, and the blended values and expectations that underpin regional cooperation in the Asia-Pacific. Higgott argues that:¹⁰⁴

even if formal cooperation and the level of institutionalisation in the Asia-Pacific region are still low, there is no necessary correlation between the degree of institutionalisation and its importance. Highly developed formal institutions ... can be of little real importance, whilst nascent institutions can become more important at a rate faster than their institutional growth would suggest.

102 O Young, 'Remarks' in 'International Law and International Relations Theory: Building Bridges' (1992) *ASIL Proceedings* 167 at 173. As Lipson stated, '[i]nformality is best understood as a device for minimising the impediments to cooperation, at both the domestic and international levels': C Lipson, 'Why are Some International Agreements Informal?' (1991) 45 *International Organisation* 495 at 500.

103 Lipson, note 102 above, at 498.

104 Higgott in Higgott et al, *Pacific Economic Relations in the 1990s*, note 24 above, at p 309.

This is a convincing proposition.

The search for institutionalisation is not an end unto itself. It forms the basis for assessing the success of international institutions, because evidence of institution-building is perceived as raising the credibility of commitments made by participants. But, where decision-making is based upon the consensus model, non-compliance can be a lower risk, as participants have unanimously agreed to the aims and objectives, and do so out of shared expectation of positive outcomes from the process. Thus, although APEC would appear to enjoy only nascent institutional status, it seems to have achieved a significant level of progress toward its objectives. APEC's standing in terms of international law theory has not hampered this progress.

An examination of APEC's development demonstrates that traditional legal classification of international institutions may no longer be appropriate for characterising a new generation of post-Cold War, co-operative, international organisations.