Leiden Journal of International Law (2024), **37**, 694–715
doi:10.1017/S092215652400013X

ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

Rewriting the law of international organizations: Whither the Asia Pacific?

Alison Duxbury*

Melbourne Law School, University of Melbourne, Australia
Email: a.duxbury@unimelb.edu.au

Abstract

The law of international organizations is often described in terms of both its universality and its unity. Writers in this field begin their texts with an acknowledgement that there are common legal principles that have been developed by, and can be applied to, a variety of international organizations. The idea that there are legal principles applicable to multiple organizations – whatever their membership, location, powers, technical functions, or financial resources – is also implicit in the reports of the International Law Commission discussing the immunities, responsibilities, and law-making capacity of international organizations. But despite this search for common principles, a question remains whether international institutional law is based on the practice of all, or at the very least, a range, of organizations. Writers in this field have tended to focus on the activities of organizations based in either Europe or North America, including the United Nations and its specialized agencies, the European Union, and Council of Europe. This article argues that the omission of the principles and practices of organizations outside Europe and the United Nations' system, specifically Asia Pacific organizations, undermines the claim of international institutional law to be universal. It explores the way in which a more inclusive approach – one that pays attention to the perspectives of Asia Pacific organizations – could illuminate certain features of the law and lead international lawyers to reconceive some of its central principles.

Keywords: ASEAN; Asia Pacific; international organizations; international organizations law; Universality

1. Introduction

In February 2021 it was announced that almost one-third of the members of the Pacific Islands Forum (PIF), the most important regional body in the Pacific islands, were planning to withdraw from the organization.[1] This unprecedented situation was the result of a dispute between Micronesian and Polynesian members over the process for electing the next Secretary-General. The announcement of this exodus excited some interest in the media,[2] but no comment from

*The author thanks Madelaine Chiam, Monique Cormier, Anna Hood, and Tan Hsien-Li for their conversations, over many years, on the ideas included in this article.

[1]Micronesian Presidents' Summit, 'Communiqué', February 2021, available at gov.fm/files/MPS_Leaders_Meeting_-_Communique_2021_Feb.pdf.

[2]For example, B. Doherty, 'Zoomed to Fail? Cracks Appear in Pacific Islands Forum as COVID Pulls Nations Apart', *Guardian*, 1 February 2021; B. Carreon and B. Doherty, 'Future of Pacific Islands Forum in Doubt as Palau Walks Out', *Guardian*, 5 February 2021; B. Carreon and B. Doherty, 'Pacific Islands Forum in Crisis as One-Third of Member Nations Quit', *Guardian*, 8 February 2021.

international lawyers. There were no blogposts on *Opinio Juris* or *EJIL:Talk!* and the international law Twittersphere, usually an active bunch of observers, was largely mute.[3] Any commentary was restricted to policy blogs or forums with a focus on the Asia Pacific region.[4] This silence amongst international lawyers about 'Micrexit'[5] is in stark contrast to the lengthy analyses of Brexit and the departures of Burundi and the Philippines (and the near withdrawal of South Africa) from the International Criminal Court. While the happenings in some international organizations attract the attention of international lawyers, others do not.

The withdrawal of a state from an international organization, formerly a rare occurrence, is a topic discussed in texts on international institutional law.[6] Books in this sub-discipline of international law traditionally begin with a statement acknowledging that while international organizations have their own, separate, legal regimes, they are subject to common rules given similarities in the 'institutional problems and rules of different organizations'.[7] The idea that there are principles that can be applied across multiple types of organizations – whatever their membership, location, powers, technical functions or financial resources – is also implicit in the reports of the International Law Commission (ILC) discussing the legal frameworks of international organizations. But despite this affirmation of the existence of common principles and the desire to apply those principles to all organizations, the question remains whether the law of international organizations is universal.

The PIF is not the only body absent from analyses of international institutional law – the Association of Southeast Asian Nations (ASEAN), Asia-Pacific Economic Cooperation (APEC), the South Asian Association for Regional Cooperation (SAARC), the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC), the Southern Common Market (MERCOSUR), and even the African Union (AU) and the Organization of American States (OAS), are also names and acronyms that rarely make an appearance. As a result, discussions of the international personality of international organizations, their powers and law-making functions, privileges and immunities and responsibility for wrongful acts have assumed a certain ideal (and exclusionary) model. This article argues that the failure to incorporate the principles and practices of organizations outside Europe and the United Nations' system, specifically Asia Pacific organizations, undermines the claim of international institutional law to be universal. It explores the way in which a more inclusive approach could illuminate certain features of the law and lead international lawyers to reconceive some of its central principles. The decision to focus on the Asia Pacific is not to suggest that organizations headquartered in other parts of the world are not missing from the literature. Instead, this article will consider the way in which an Asia Pacific perspective adds to, or indeed challenges, our understanding of the legal framework. It may be that a separate regional approach to international institutional law or that pluralist legal traditions in this sub-discipline of international law can be discerned. While not excluding these possibilities, this article does not pursue those questions. Instead, the aim is to highlight the absences in the origins, and continued discussions, of international institutional law and argue for a more inclusive approach.

[3]One exception is Jane McAdam's retweet of Carreon and Doherty, 'Pacific Islands Forum in Crisis', ibid.

[4]For example, P. Kaiku, 'What Went Wrong with Pacific Regionalism', *The Diplomat*, 16 March 2021; T. Kabutaulaka, 'Pacific Way(s) and Regionalism', *Devpolicyblog*, 25 March 2021, available at devpolicy.org/pacific-ways-and-regionalism-20210325-2/; O. Hasenkamp, 'Forum Split: International Aspects', *Devpolicyblog*, 14 April 2021, available at forum-split-international-impacts-20210414-1.pdf.pdf.

[5]As it was dubbed by Robert Underwood: see R. Underwood, 'Underwood: Let's Find Our Island Identity, Join Pacific Islands Forum', *Pacific Daily News*, 5 March 2021.

[6]See C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2005), 117–21; Henry G. Schermers and N. M. Blokker, *International Institutional Law* (2018), paras. 119–35; J. Klabbers, *An Introduction to International Organizations Law* (2015), 109–11. A note on terminology: while recognizing that some writers distinguish between the 'law of international organizations' and 'international institutional law', in this article they are used interchangeably: see note 80 and accompanying text, *infra*.

[7]See Schermers and Blokker, ibid., para. 7. See also P. Sands and P. Klein, *Bowett's Law of International Institutions* (2009), 16.

With that central aim in mind, this article is divided into two sections: Section 2 examines the origins of the law of international organizations, as well as more recent writings in the field, to consider 'how' and 'why' the practice of some organizations has been omitted. Section 3 analyses the practices of international organizations in Asia and the Pacific and argues that an understanding of these entities is not only essential from the perspective of universalist claims in this sub-discipline of international law, but could lead us to rethink the legal principles. For this purpose, two features are examined: the attention devoted to definition and international legal personality and the relative weight attached to the different law-making activities of international organizations. In choosing these features, this article borrows from David Bederman's reflections on a passage in *Reparation for Injuries Suffered in the Service of the United Nations* where the International Court of Justice (ICJ) connected 'the needs of the community', 'the requirements of international life' and the increase in 'instances of action upon the international plane by certain entities which are not States'.[8] For Bederman, '[t]he "action" of which the Court spoke was not the mere presence of entities [international organizations] as legal persons; it was their role in making international legal rules'.[9] This article draws on these two features – personality and law-making powers – to demonstrate why Asia Pacific organizations have been excluded from this sub-field of international law as well as the importance of their practices. Debates about these two concepts raise wider questions about the priority given to the concept of international legal personality over community by international lawyers and the methods by which the legal quality or legal authority of an organization and its work is assessed. Section 4 will conclude by reimagining a more inclusive, indeed a 'proper',[10] law of international organizations.

2. The development of the law of international organizations

The existence of a separate sub-discipline of international law, one that focuses on common legal issues across international organizations, is not without doubt.[11] Most writers recognize that there is a tension between viewing an international organization as an entity solely governed by its constituent instrument and recognizing the existence of general principles that apply across different organizations.[12] Despite this potential conflict, writers in the field assert that, notwithstanding differences, common legal characteristics can be discerned. Thus, in their classic and detailed text *International Institutional Law*, Schermers and Blokker state that:

> Although each organization has its own legal order, institutional problems and rules of different organizations are often more or less the same. In practice, an impressive body of institutional rules has been developed. These rules often bear strong resemblance to one another, or are even identical.[13]

Once this is acknowledged, a quick glance at texts demonstrates that, with a few quibbles about the European Union (EU) as a supranational organization, writers commonly assert that legal principles can be derived from, and subsequently applied to, a range of universal, closed (including regional) and specialist organizations.[14] In this work, there is a conscious desire to locate general principles and then apply them across many different organizations – as with so many areas of

[8] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, [1949] ICJ Rep. 174, at 178; D. J. Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel', (1996) 36 *Virginia Journal of International Law* 275, at 372.

[9] See Bederman, ibid., at 372.

[10] This term is taken from the title of C. W. Jenks, *The Proper Law of International Organisations* (1962).

[11] J. Klabbers 'The Paradox of International Institutional Law', (2008) 5 *International Organizations Law Review* 151.

[12] For example, Amerasinghe, *supra* note 6, at 15–18.

[13] See Schermers and Blokker, *supra* note 6, para. 7.

[14] For example, Amerasinghe, *supra* note 6, at 14, 22.

international law, the aim is to demonstrate the existence of universal principles. Although this universality is asserted, with some exceptions (notably Schermers and Blokker's book), work in this field focuses on the practice of the United Nations (UN) and its specialized agencies, European institutions (the EU and Council of Europe), and, to a more limited extent, international financial and trade organizations. The activities of entities based in Africa, Asia, the Middle East, the Caribbean, and the Pacific receive limited references in the literature. Sometimes there is a conscious desire to restrict a work to a particular type of organization,[15] but this is not always explicit.

Various reasons for this absence will be posited later in this part, but fundamentally, international institutional law retains its European origins.[16] Many different facets of this argument – from the formation of the discipline to the universality of the legal principles espoused in fields such as international human rights law and international investment law – have been explored previously.[17] But international institutional law has been remarkably impervious to such critiques. This does not mean that there has been an absence of critical or TWAIL accounts of specific international organizations or that there is a lack of theorizing in the discipline.[18] International lawyers have argued that the development of international law and international organizations not only excluded the developing world, but that such expansion depended on the 'colonial confrontation' between the European and non-European world.[19] For Antony Anghie, 'the inaugural encounter between international institutions and non-European territories' is situated in the Mandate system of the League of Nations.[20] This encounter was succeeded, in law, by the United Nations' Trusteeship system, but also by the international financial institutions in terms of the 'technologies of management' of Third World economies.[21] Scholars such as Anghie, B.S. Chimni and Sundhya Pahuja demonstrate the way in which these encounters have not only shaped international law, but also international organizations such as the UN and World Trade Organization (WTO).[22] More recently, Guy Fiti Sinclair has argued that such organizations 'came to be seen as vehicles for administrative reform in non-European societies and for the protection of European rationales and techniques of government as universally normative'.[23] Nevertheless, these accounts are, for the most part, concerned with the role and activities of specific organizations rather than the common legal framework that governs their work.

[15]For example, Alvarez states that in examining the law-making function of international organizations, his focus 'is on those inter-governmental organizations that aspire to universal participation and therefore to global reach': see J. E. Alvarez, *International Organizations as Law-Makers* (2005), xii.

[16]However, as Arnulf Becker Lorca has argued, a recitation of the European origins of international law should not be used to erase the contribution of non-Western international lawyers to the discipline's fundamental principles: A. Becker Lorca, *Mestizo International Law: A Global Intellectual History (1842-1933)* (2014). On the contributions of non-Western scholars to international institutional law see G. Fiti Sinclair, 'Towards a Postcolonial Genealogy of International Organizations Law', (2018) 31 *Leiden Journal of International Law* 842, at 861–3; K. Olaoye, 'Samuel Kwadwo Boaten Asante and the United Nations Centre on Transnational Corporations (1975–1992)', (2023) 34 *European Journal of International Law* 291.

[17]Two examples are D. Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law', (1997) 18 *Australian Year Book of International Law* 1; K. Miles, 'International Investment Law and Universality: Histories of Shape-Shifting', (2014) 3 *Cambridge Journal of International and Comparative Law* 986.

[18]For example, J. Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations', (2014) 25 *European Journal of International Law* 645.

[19]A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), 3. See also B. S. Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach', (2007) 8 *Melbourne Journal of International Law* 499.

[20]See Anghie, ibid., at 265.

[21]Ibid., at 263.

[22]Ibid.; B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', (2004) 15 *European Journal of International Law* 1; S. Pahuja, *Decolonising International Law* (2011).

[23]G. Fiti Sinclair, 'State Formation, Liberal Reform and the Growth of International Organizations', (2015) 26 *European Journal of International Law* 445, at 466; G. Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017).

What then of this sub-discipline of international law – the law of international organizations? What are its origins and how has it developed? There is general agreement that the law of international organizations is firmly rooted in Europe, although early writers in the field came from both sides of the Atlantic. In tracing the beginnings of the 'science' of international organizations, Louis Sohn commences by citing the work of two Americans: Paul Reinsch in 1911 (*Public International Unions: Their Work and Organization*) and Francis Sayre in 1918 (*International Administration*).[24] While these two writers were not based in Europe, the organizations that they discussed were all, with some exceptions,[25] established by European powers with headquarters in European countries. One of the exceptions – at least in terms of geographical location – the *conseil sanitaire, maritime et quarantenaire d'Egypte* was described by Reinsch as being created by European powers concerned about the possibility of the 'continued danger of infection' from countries outside Europe.[26] Leaving aside these two Americans, other early writers discussed by Sohn include Leonard Woolf, Benno Baron von Toll, and Peter Kazansky.[27] Although the names of writers changed, and despite the contributions of non-Western scholars to the sub-discipline,[28] recent histories of the law of international organizations have not deviated from placing its origins firmly in Europe.[29]

Despite the growth of international organizations outside Europe since these accounts were written, there has not been an attendant recognition in legal works. Following decolonization, international lawyers accepted the legal personality and the (formal) sovereign equality of former colonies, including those in the Asia Pacific, but this has not necessarily resulted in a recognition of the relevance of their organizations to international institutional law. The problem was recognized in the first volume of the *International Organizations Law Review* (*IOLR*) when Jan Wouters and Frederik Naert stated that a challenge in this area was 'the limited literature on less well-known organizations'.[30] In that context, it is not surprising that there are few articles in the *IOLR* devoted to, or engaging with, the practices of organizations headquartered outside Europe or North America.[31] Other continents are not necessarily absent from this literature, but they tend to be the site of the activities of universal organizations (for example, UN peace operations),[32] rather than a place where the practice of regional organizations has influenced the development of legal principles. There are articles and chapters in other journals and collections that examine the work of organizations such as the AU and ASEAN, for example, their contributions to human rights law or investment regimes. This work includes a series of monographs in the ASEAN Integration Through Law project, which examines ASEAN community-building in different areas of international law, such as environmental protection,

[24]L. B. Sohn, 'The Growth of the Science of International Organizations', in K. Deutsch and S. Hoffman (eds.), *The Relevance of International Law: Essays in Honor of Leo Gross* (1968), 251.

[25]These exceptions included the Pan-American Sanitary Union, the Pan-American Scientific Congress, and the International Union of American Republics: P. Reinsch, *Public International Unions: Their Work and Organization* (1911), 60–1, 71–3, 77–118.

[26]Ibid., at 59.

[27]See Sohn, *supra* note 24, at 254.

[28]See note 16, *supra*.

[29]See Klabbers, *supra* note 18, at 652–6, 673. See also Fiti Sinclair, *supra* note 16.

[30]J. Wouters and F. Naert, 'Some Challenges for (Teaching) the Law of International Organizations', (2004) 1 *International Organizations Law Review* 23, at 28.

[31]At the date of writing, there were approximately 11 articles focusing on organizations outside these parameters in the *Review*, with most focusing on African organizations. The lack of discussion of African institutions in the *Review* has been noted: see, e.g., Konstantinos Magliveras' book review: *The Southern African Development Community: The Organisation, Its Policies and Prospects*, (2007) 4 *International Organizations Law Review* 148. It is acknowledged that the *Review* may receive few articles on these organizations, although that still begs the question 'why'.

[32]For example, M. Zwanenberg, 'UN Peace Operations Between Independence and Accountability', (2008) 5 *International Organizations Law Review* 23; S. P. Sheeran, 'A Constitutional Moment? UN Peacekeeping in the Democratic Republic of the Congo', (2011) 8 *International Organizations Law Review* 55.

human rights, and economic co-operation.[33] This literature, as well as other recent scholarship on ASEAN's trade and investment regimes,[34] has assisted in understanding ASEAN's law and practice on these topics. However, the question for the purposes of this analysis is whether these, and similar, discussions have permeated another sub-field of international law, that is international institutional law – those 'rules of law that govern [international organizations'] legal status, structure and functioning'.[35]

This lacuna is replicated in the ILC's work on international organizations. The ILC has considered the law of international organizations in its reports on the status, privileges and immunities of international organizations and their officials, subsequent agreement and subsequent practice in relation to the interpretation of treaties, formation and evidence of customary international law, and most importantly, the responsibility of international organizations.[36] However, the ILC's use of the term 'international organization' has not resulted in a wide range of examples being considered. The ILC's Articles on the Responsibility of International Organizations (ARIO) are significant given that they seek to apply the (sometimes contentious) principles of responsibility to a wide range of organizations – encompassing universal, regional and specialized organizations – by using a broad definition of the term 'international organization'.[37] Despite this breadth, the limited practice contained in the commentaries to the articles is primarily derived from the UN and associated bodies, European organizations and European courts. In discussions on ARIO there were a few references to organizations in Africa and the Americas,[38] but no mention of those in the Asia Pacific. The limited practice is problematic given that the articles rely on concepts such as 'effective control' to attribute responsibility, possibly leading to reparations.[39] The absence of practice was keenly felt by the Special Rapporteur, Giorgio Gaja, when he stated that the absence 'could hardly be attributed to the lack of efforts deployed by the Commission to acquire knowledge of the relevant practice and take it into account'.[40] Yet, Hanqin Xue's comments that the ILC's work on responsibility 'focused excessively on the practice of the United Nations family and the European Union', which is not 'necessarily representative of the general pattern of behaviour of international organizations'[41] remain apposite. In the ILC's latest foray into the law of international organizations, 'settlement of disputes to which international organizations are parties', encouragingly, the Special Rapporteur's first report refers to a number of

[33]Details on this project are located at 'ASEAN Integration Through Law Book Series', available at cil.nus.edu.sg/research/asean-law-and-policy/book-series/.

[34]See S. Cho and J. Kurtz, 'Legalizing the ASEAN Way: Adapting and Reimagining the ASEAN Investment Regime', (2018) *American Journal of Comparative Law* 233; P. Hsieh, *New Asian Regionalism in International Economic Law* (2021); H. Tan, 'Intergovernmental Yet Dynamically Expansive: Concordance Legalization as an Alternative Regional Trading Arrangement in ASEAN and Beyond', (2022) 33 *European Journal of International Law* 341.

[35]See Schermers and Blokker, *supra* note 6, para. 7.

[36]See ILC, 'Texts, Instruments and Final Reports', available at legal.un.org/ilc/texts/texts.shtml.

[37]ILC Draft Articles on the Responsibility of International Organizations, 2011 YILC, Vol. 2 II (Part Two), Art. 2(a) states that, for the purposes of the articles, an international organization is 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities'. See discussion at the text accompanying note 84, *infra*.

[38]International Law Commission, Summary Record of the 2800th Meeting, A/CN.4/SR.2800 (2004), at para. 19 (the principle of effective control); and Draft Articles on the Responsibility of International Organizations, with Commentaries, in (2011)2(2) *Yearbook of the International Law Commission* 46, 73 (hereinafter *Commentaries to Draft Articles*) (decision of the OAS Administrative Tribunal).

[39]See W. Lotze and Y. Kasumba, 'AMISOM and the Protection of Civilians in Somalia', (2012) 2 *Conflict Trends* 17, at 23.

[40]Eighth Report on the Responsibility of International Organizations by Giorgio Gaja, Special Rapporteur, UN Doc. A/CN.4/640 (2011), at 5.

[41]Summary Record of the 2803rd Meeting, UN Doc. A/CN.4/SR.2803 (2004). See also comments by Sreenivasa Rao on the benefit of further 'examples drawn from practice' in relation to circumstances precluding wrongfulness: Provisional Summary Record of the 2878th Meeting, A/CN.4/SR.2878 (2006), paras. 9–10.

organizations.[42] The definition of international organization adopted by the Drafting Committee is also broad and replicates, to a large extent, that found in the ILC's work on responsibility.[43]

Xue's comments encapsulate an inherent problem in accounts of international institutional law. The focus on organizations situated in Europe and North America provides one reason for these absences, another depends on different understandings as to 'when' the law of international organizations emerged as a separate sub-discipline. Some writers date its beginnings to the formation of the international unions in the late nineteenth century, others to the interwar period, or more recently, to post-Second World War and the processes of decolonization.[44] It is only in this latter period, and beyond, that organizations such as the Organization of African Unity (1963), ASEAN (1967), and the South Pacific Forum (1971) were established. Arguably, the later the emergence of the field is dated, the more likely that organizations composed primarily of postcolonial states will be included. Other reasons for the absence of Asia Pacific organizations include a lack of knowledge of the region and its institutions, past difficulties in locating the practice of relevant organizations,[45] the 'constitutional turn'[46] in the field that excludes organizations established without a treaty,[47] and a preference for a managerial rather than an agora model of international organizations, which demonstrates a fondness for organizations that manage common problems over those that debate and exchange ideas.[48] The less 'institutionalized' an organization, the less 'competent' is it perceived as being.[49] This next section attempts to reverse this trend by considering the way in which the practices of Asia Pacific organizations challenge some of the premises of international institutional law.

3. The law of international organizations and the Asia Pacific

Given the diversity in a region as vast as the Asia Pacific it is difficult to generalize about approaches to international law and organizations.[50] Defining the geographical region under consideration is contentious as is the appropriate label – should it be Asia Pacific, Asia-Pacific or, more recently, Indo-Pacific?[51] Despite these difficulties, there has been a proliferation of literature

[42]First Report on the Settlement of International Disputes to which International Organizations Are Parties, by August Reinisch, Special Rapporteur, UN Doc. A/CN.4/756 (2023), at 18–22.

[43]Settlement of International Disputes to which International Organizations Are Parties – Titles and Texts of draft Guidelines 1 and 2 Provisionally Adopted by the Drafting Committee, UN Doc. A/CN.4/L.983 (2023), Draft guideline 2(a). This definition adds the requirement that an international organization possess a separate organ.

[44]See Fiti Sinclair, *supra* note 16.

[45]H. Tan, 'Regional Organizations', in S. Chesterman, H. Owada and B. Saul (eds.), *The Oxford Handbook of International Law in Asia and the Pacific* (2019), 37, at 38.

[46]D. Van Den Meersche, 'Performing the Rule of Law in International Organizations: Ibrahim Shihata and the World Bank's Turn to Governance Reform', (2019) 32 *Leiden Journal of International Law* 47, at 48.

[47]See, for example, G. Ulfstein, 'Institutions and Competences', in J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (2009), 45; C. F. Amerasinghe, 'The Law of International Organizations: A Subject Which Needs Exploration and Analysis', (2004) 1 *International Organizations Law Review* 9, at 20.

[48]See J. Klabbers, 'Two Concepts of International Organization', (2005) 2 *International Organizations Law Review* 277.

[49]See Tan, *supra* note 45, at 38.

[50]G. Triggs, 'Confucius and Consensus: International Law in the Asian-Pacific', (1997) 21 *Melbourne University Law Review* 650, at 654–5; S. Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present and Futures', (2017) 27 *European Journal of International Law* 945, at 946.

[51]For example, Chesterman uses the 53 members of the Asia-Pacific group at the UN to identify states within the region, while Alvarez cautions against the use of a hyphen in 'Asia-Pacific' on the basis that it 'does not begin to bridge the distance between these two groupings'. See Chesterman, ibid., at 946; J. Alvarez, 'Institutionalised Legalisation and the Asia-Pacific "Region"', (2007) 5 *New Zealand Journal of Public and International Law* 9, at 20. More recently, questions have arisen as to whether the term Indo-Pacific is reflective of 'a changing approach by many nations to security, economics and diplomacy': see R. Medcalf, *Contest for the Indo-Pacific: Why China Won't Map the Future* (2020), 11.

on Asia Pacific approaches to international law, more so in relation to Asia than the Pacific.[52] Such writing emphasizes aspects of states' preference for soft law over treaties, a tendency to be wary of binding dispute resolution, the desire to establish informal over formal international organizations and, as a consequence, to promote consensus decision-making.[53] In Southeast Asia, these features, when combined with a firm adherence to the principle of non-interference in the internal affairs of other states, are collectively referred to as the 'ASEAN Way'.[54] In the wider Asian region, the term 'Asian minimalism' has been used to explain the approach to 'organizationhood'.[55] In the Pacific, the umbrella-term 'the Pacific Way' describes characteristics such as Pacific solutions to Pacific problems, unanimous compromise and an equality of cultures.[56] Combining the two geographies, Amitav Acharya has coined the term the 'Asia-Pacific Way' to refer to 'the conscious rejection … of "imported models" of multilateralism' and a 'call for multilateralism to conform to local realities and practices'.[57] Nevertheless, he recognizes that such a notion may be 'over-generalized, instrumental and possibly counter-productive'.[58] This concern is echoed by Diane Desierto, who highlights distinctions between South Asian and Southeast Asian nations experiences of, and attitudes towards, international law.[59]

Recognizing the difficulties in generalizing about the characteristics of organizations in the region, this section will examine two aspects of the law of international organizations: definition and the concept of international legal personality and methods of law-making. These two areas have been chosen to illuminate how organizations in the Asia Pacific have been excluded from the law of international organizations, but also the way their practices may add to an appreciation of the legal principles. Debates about definition and international legal personality draw attention to the question whether Asia Pacific organizations 'exist'[60] pursuant to international law. Such disputes raise further questions about the value and weight attached to the concept of international legal personality. Methods of law-making by Asia Pacific organizations highlight the inadequacy of existing understandings of legal output, including the 'half-truth' that 'all the law-making powers of IOs are derived from explicit and enumerated treaty provisions'.[61] They also illustrate the way international organizations have 'reshaped … international law-making actors'.[62]

This section draws on the principles and practices of a range of organizations, including ASEAN, APEC, the Melanesian Spearhead Group (MSG), the Pacific Community, the Pacific Aviation Safety Office (PASO), the PIF, the Pacific Regional Environmental Programme (SPREP), SAARC, the Shanghai Cooperation Organization (SCO), and the South Pacific Regional Fisheries

[52]See Triggs, *supra* note 50; A. Duxbury, 'Moving Towards or Turning Away from Institutions? The Future of International Organizations in Asia and the Pacific', (2007) 11 *Singapore Year Book of International Law* 177; Alvarez, ibid.; Chesterman, *supra* note 50; A. Schifano, 'Organizationhood in the Light of Asian Minimalism', (2022) 21 *Chinese Journal of International Law* 201. ASEAN has received the most attention in the literature: see notes 33 and 34, *supra*.

[53]See Duxbury, ibid., at 180–1. The term 'international organisation-lite' has been used to describe these features in ASEAN: P. Kuijper et al., *From Treaty-Making to Treaty-Breaking: Models for ASEAN External Treaty Agreements* (2015), 1.

[54]P. J. Davidson, 'The ASEAN Way and the Role of Law in ASEAN Economic Cooperation', (2004) 8 *Singapore Year Book of International Law* 165; H. Katsumata, 'Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the "ASEAN Way"', (2003) 25 *Contemporary Southeast Asia* 104.

[55]See Schifano, *supra* note 52.

[56]J. Rolfe, 'The Pacific Way: Where "Non-Traditional" Is the Norm', (2000) 5 *International Negotiation* 427, at 430.

[57]A. Acharya, 'Ideas, Identity and Institution-Building: From the "ASEAN Way" to the "Asia-Pacific Way"', (1997) 10 *The Pacific Review* 319, at 327.

[58]Ibid., at 342.

[59]D. Desierto, 'Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia', (2008) 36 *International Journal of Legal Information* 387.

[60]For example, S. Chesterman, 'Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person', (2008) 12 *Singapore Year Book of International Law* 199.

[61]See Alvarez, *supra* note 15, at 587.

[62]Ibid., at 608.

Management Organisation (SPRFMO). This is by no means an exhaustive list of Asia Pacific organizations, but they have been chosen as they are representative of the issues that arise. Some have a broad membership, for example, APEC has 21 member 'economies' and the Pacific Community has 27 member states and territories. Others are much smaller: the SCO and SAARC each comprise eight members, with both organizations including the most populous state. A few Asia Pacific organizations espouse broad aims in the political and economic sphere (for example, ASEAN,[63] the MSG[64] and SAARC[65]), whereas many are more specialized: PASO focuses on 'aviation safety and security' and civilian aviation 'advice and technical assistance'[66] and SPRFMO's objective is to 'ensure the long-term conservation and sustainable use of fishery resources'.[67] Some organizations have structures for collaboration – for example, Pacific organizations are joined under the umbrella of the Council of Regional Organisations in the Pacific (CROP).[68] Many Asia Pacific organizations have been through a process of evolution by adopting new instruments, new institutions and new topics of concern. Examples include the decision to sign the ASEAN Charter and create the ASEAN Intergovernmental Commission on Human Rights, and SPREP and the PIF's increasing focus on climate change. Conversely, SAARC and the SCO have not substantially altered their functions or institutions since they were established. Despite differences, these organizations have been selected for two reasons: first, their structures, principles, and practices illuminate certain features of international institutional law as currently conceived, and second, their work rarely appears in discussions of this sub-field of international law.

3.1 The concept of international legal personality and Asia Pacific organizations

International legal personality means an entity possesses 'rights, duties, powers and liabilities etc. as distinct from its members or its creators', [69] enabling it to participate in the international legal system. The application of the concept to international organizations, has been described as 'circular', 'nebulous',[70] and as having inspired a 'luxuriant literature'.[71] As early as 1945 Jenks wondered whether the concept was necessary, although he decided that the answer was (regretfully) 'yes'.[72] Over 50 years later, Bederman also questioned the concept of legal personality,[73] contrasting a narrow focus on legal personality with the idea of an organization as a 'community of interest'.[74] For Bederman:

[63]ASEAN's purposes include to 'maintain and enhance peace, security and stability', 'create a single market and production base', and to 'strengthen democracy, enhance good governance and the rule of law': 2007 Charter of the Association of Southeast Asian Nations, 2624 UNTS 223, Art. 1.

[64]The MSG's purpose is to 'promote and strengthen' areas such as Melanesian trade, culture, values, and economic co-operation: 2010 Agreement Establishing the Melanesian Spearhead Group, 2658 UNTS 5, at Art. 2.

[65]The objectives of SAARC include 'to promote the welfare of the peoples of South Asia', 'to accelerate economic growth, social progress and cultural development', and 'to promote and strengthen collective self-reliance': 1985 Charter of the South Asian Association for Regional Cooperation, Art. I.

[66]2004, Pacific Islands Civil Aviation Treaty, available at paso.aero/wp-content/uploads/2019/11/PICASST_2005.pdf, Art. 7(1).

[67]2009 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, 2899 UNTS 211, Art. 2.

[68]Council of Regional Organisations of the Pacific, available at https://forumsec.org/council-regional-organisations-pacific-crop.

[69]See Amerasinghe, *supra* note 6, at 78.

[70]T. Gazzini, 'Personality of International Organizations', in J. Klabbers and Å. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (2012), 33, at 34.

[71]C. W. Jenks, 'The Legal Personality of International Organizations', (1945) 22 *British Yearbook of International Law* 267, at 271.

[72]Ibid.

[73]See Bederman, *supra* note 8, at 277–8, 374.

[74]Ibid., at 371–2. Bederman adopts this phrase from the *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder*, 1929, PCIJ Rep. Series A No 23, at 27.

> the tension between the notions of personhood and of community has defined international law's consideration of the role and status of international institutions. It has shaped some of the central and enduring questions of the discipline. Who can participate in the making of international law? Who is bound by its rules? What are the legitimate topics of international legal regulation?[75]

As '*the* organizing principle'[76] for the legal study of international organizations, reliance on international legal personality has led international lawyers to largely exclude Asia Pacific organizations from their consideration. This has occurred through an application of any one of the three main schools of thought on how international organizations acquire international legal personality: the 'will theory' based on the members' intentions, the 'objective' approach whereby personality is gleaned from the possession of certain attributes, and third, through the method in *Reparation for Injuries* whereby the ICJ examined the UN's features, powers and practice, and the members' intention.[77] Although the ICJ's reasoning in *Reparation for Injuries* was limited to the UN, these factors have been applied to other organizations.[78] As a consequence, personality remains the 'process through which [an] organization becomes a full subject of international law'.[79]

Leaving aside international legal personality, Asia Pacific organizations face a preliminary hurdle – for many writers they do not meet the description of an 'international organization'. Terminological differences over the phrase 'law of international organizations', potentially limiting the field to formal organizations, rather than 'international institutional law', including entities such as a conferences and meetings of state parties (COPS and MOPS), lead to difficulties.[80] While much has been made of the problem of formulating a definition that encompasses all international organizations,[81] international lawyers have used a remarkably common set of features when articulating the relevant characteristics. These include an international agreement (for some writers only a treaty will suffice), a separate organ, a membership of states (often with an allowance for the inclusion of other entities), and the ability to adopt norms directed at the organization's members. [82] The ILC has used the term 'inter-governmental organization' as interchangeable with 'international organization' in some of its work, drawing attention to the importance of state membership.[83] In the context of its work on responsibility and settlement of disputes, the ILC also required an organization to possess 'its own

[75]See Bederman, *supra* note 8, at 375.

[76]Ibid., at 374.

[77]For an analysis of the different approaches to international legal personality see Amerasinghe, *supra* note 6, at 79–83; see Klabbers, *supra* note 6, 46–50; Schermers and Blokker *supra* note 6, para. 1565; M. Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', (1970) 44 *British Yearbook of International Law* 111, at 112–22.

[78]See Schermers and Blokker, ibid., para. 1568; Chesterman, *supra* note 60.

[79]T. Gazzini, 'The Relationship between International Legal Personality and the Autonomy of International Organizations', in R. Collins and N. D. White (eds.), *International Organizations and the Idea of Autonomy* (2011), 196, at 196.

[80]See Klabbers, *supra* note 11, at 154.

[81]For example, M. Virally, 'Definition and Classification: A Legal Approach', (1977) 29 *International Social Science Journal* 58, at 59.

[82]See discussion in Schermers and Blokker, *supra* note 6, para. 33; F. Morgenstern, *Legal Problems of International Organisations* (1986), 19; Virally, *supra* note 81, at 59; Sands and Klein, *supra* note 7, at 16; M. Ruffert and C. Walter, *Institutionalised International Law* (2015), 5–6.

[83]See ILC Draft Articles on the Representation of States in their Relations with International Organizations and Commentaries, 1971 YILC, Vol. 2 I (Part One), at Art. 1(1); ILC Draft Articles on the Law of Treaties Between States and International Organizations or Between International Organizations with Commentaries, 1982 YILC, Vol.2 II (Part Two), at Art. 2(i); L. Díaz-González, 'Second Report on the Second Part of the Topic of Relations Between States and International Organizations, Status, Privileges and Immunities of International Organizations, Their Officials, Experts, Etc', 1985 YILC Vol. 2 I (Part One), at 15.

international legal personality',[84] thus making personality a criterion for identification as an international organization, rather than a consequence of its existence. The ILC's definition is also more permissive – recognizing that an organization may be established by an agreement 'on the international plane' (not limited to a treaty) and that membership can include entities apart from states.[85]

Asia Pacific organizations are sometimes viewed as falling short on the definitional hurdles articulated by international lawyers, leading to the Asia Pacific being described in 2000 as a region with 'few formal multilateral institutions'.[86] APEC identifies its members as 'economies' due to the inclusion of Hong Kong and Taiwan as members distinct from the People's Republic of China.[87] The Pacific Community's founding agreement adopts the terminology of 'participating governments' rather than states given that some members are (or were) administered by the signatory states.[88] ASEAN was not established by treaty, although it now has a conventional (in both senses of the word) constitution: the Charter of the Association of Southeast Asian Nations.[89] This raises the question whether ASEAN only became an international organization as of December 2008 – the date its Charter entered into force. Similar questions arise for the PIF and the MSG – both were created on the basis of co-operative principles rather than formal ties, before arrangements were later formalized through treaties 'establishing' the two organizations.[90] In this respect, SPREP comes closer to the mark: not only was it established by a treaty – the Agreement Establishing the South Pacific Environment Programme – but it explicitly states that the South Pacific Regional Environment Programme, later renamed the Pacific Regional Environment Programme, is 'hereby established as an international organisation'.[91]

Consequently, for many Asia Pacific organizations, definitional issues constitute the first obstacle, although for most entities these are not insurmountable. The possession of international legal personality is the second problem. Neither the Charter of the South Asian Association for Regional Cooperation (establishing SAARC) nor the Agreement Establishing the PIF refer to international legal personality. The SAARC Charter is silent on the organization's status,[92] whereas the PIF Agreement provides that the PIF shall 'enjoy the legal capacity of a body corporate within the jurisdictions of its members',[93] which entails recognition of domestic legal personality. The Agreement also lists the privileges and immunities traditionally associated with the staff and representatives of other organizations, suggesting some measure of international

[84]See notes 37 and 43, *supra*.

[85]See *Commentaries to Draft Articles*, *supra* note 38, at 7, 10; 'Settlement of International Disputes', *supra* note 43.

[86]M. Kahler, 'Legalization as a Strategy: The Asia-Pacific Case', (2000) 54 *International Organizations* 549, at 549.

[87]See M. Castan, 'APEC: International Institution? A Pacific Solution', (1996) 15 *University of Tasmania Law Review* 52.

[88]1947 The Canberra Agreement Establishing the Pacific Community, South Seas Commission Conference Papers 18, Art. III (as amended).

[89]ASEAN was established by the 1967 Declaration Constituting an Agreement Establishing the Association of South East Asian Nations (ASEAN), 1331 UNTS 235; see ASEAN Charter, *supra* note 63, Preamble.

[90]The South Pacific Forum did not have a formal founding document. At its first leaders' meeting it adopted a communiqué outlining its purpose: South Pacific Forum, 'Joint Final Communiqué', 7 August 1971. The Agreed Principles of Co-operation among Independent States of Melanesia emphasized 'co-operation' and 'friendship': 1998 The Agreed Principles of Co-operation among Independent States of Melanesia, available at www.msgsec.info/wp-content/uploads/msghistoricaldocuments/1988-14-Mar-Agreed-Principles-of-Co-operation-among-Independent-States-in-Melanesia.pdf. In both organizations, treaties were subsequently adopted: see 'Agreement Establishing the Melanesian Spearhead Group', *supra* note 64; 2005 Agreement Establishing the Pacific Islands Forum, available at https://forumsec.org/publications/treaty-collection.

[91]1993 Agreement Establishing the South Pacific Regional Environment Programme (SPREP), 1982 UNTS 4, Art. 1(1); 2004 Amendment to the Agreement Establishing the South Pacific Regional Environment Programme (SPREP), available at www.sprep.org/attachments/Legal/Files_updated_at_2014/Amendement_SPREP_agreement.pdf.

[92]In contrast, the SAARC Development Fund is provided with 'full juridical personality': 2008 Charter of the SAARC Development Fund, available at www.saarc-sec.org/index.php/resources/agreements-conventions/38-charter-of-the-saarc-development-fund/file, Art. 1(6).

[93]See Agreement Establishing the Pacific Islands Forum, *supra* note 90, Art. X(1).

personality.[94] The Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, creating the SPRFMO, the Charter of the Shanghai Cooperation Organization and the Pacific Islands Civil Aviation Treaty are more promising as 'legal personality in accordance with international law' (SPRFMO), 'international legal capacity' (SCO)[95] and 'international legal personality (PASO)[96] are explicitly conferred. For the SCO, this includes the capacity to conclude treaties[97] – a power perceived by the ICJ as confirming the UN's personality and which has been described as one of the 'minimum attributes of an international organization'.[98] Despite this capacity, the SCO has demonstrated a preference for non-treaty agreements, for example, it has signed memoranda of understanding with UN-associated bodies.[99]

The difference between stated objectives and powers on the one hand, and practice on the other, is also evidenced in the practices of other organizations. The ASEAN Charter includes explicit reference to ASEAN's intergovernmental status and its 'legal personality'.[100] However, after the Charter was adopted questions remained as to the extent of ASEAN's international legal personality.[101] These questions are not fully answered by the Rules of Procedure for Conclusion of International Agreements by ASEAN – a document which articulates the process for enabling ASEAN to conclude treaties.[102] The Rules of Procedure require ASEAN Foreign Ministers to endorse the text of an international agreement before it is signed by an organization, emphasizing the need for individual member agreement as an essential aspect of the process.[103] Like the SCO, ASEAN has largely eschewed treaties for articulating standards and has entered into few agreements with states or other international organizations in its own right.[104] The recognition of legal personality in the ASEAN Charter has not dramatically altered this practice.[105] The legal personality conferred on SPREP ('as is necessary for it to carry out its functions and responsibilities')[106] is broad, but the inclusion of the power to contract and acquire property suggests that the constituent instrument is referencing domestic, as distinct from international, legal personality. In terms of its practice, the Moana Taka Partnership, between SPREP and Swire Shipping,[107] could be an example of a contract, if that, given its designation as a memorandum of understanding or charter, rather than an treaty under international law. Nevertheless, the Partnership enables Pacific Island states to implement their obligations in relation to hazardous

[94]Ibid., Arts. X(2)–(3).

[95]See Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, *supra* note 67, Art. 6(3); 2002 Charter of the Shanghai Cooperation Organization, 2896 UNTS 209, Art. 15.

[96]See Pacific Islands Civil Aviation Treaty, *supra* note 66, Art. 4(3).

[97]See Charter of the SCO, *supra* note 95, Art. 15.

[98]See *Reparation for Injuries*, *supra* note 8, at 179; J. D. Fry, 'Rights, Functions and international Legal Personality of International Organizations', (2018) 36 *Boston University International Law Journal* 221, at 242.

[99]For example, the SCO has signed memoranda with the United Nations Office for Drugs and Crimes and the United Nations Educational, Scientific and Cultural Organization: see United Nations General Assembly, Cooperation between the United Nations the Shanghai Cooperation Organization, UN Doc. A/75/L.69 (2021).

[100]See ASEAN Charter, *supra* note 63, Art. 3.

[101]See Chesterman, *supra* note 60, at 47.

[102]2011 Rules of Procedure for Conclusion of International Agreements by ASEAN, available at www.biicl.org/documents/52_asean_treaty_report.pdf.

[103]Ibid., rules 7, 8(4). See also M. Cremona et al., *ASEAN's External Agreements: Law, Practice and the Quest for Collective Action* (2015), 30.

[104]See discussion in ibid., at 80.

[105]Ibid., at 28. See also the conclusion of Kuijper et al., *supra* note 53, at 87, that '[t[hus far, ASEAN member states have concluded their external trade agreements as plurilateral member state agreements. ASEAN, a separate international legal person, is not a party even where ASEAN's Secretariat has been conferred responsibilities in some of the agreements'.

[106]See Agreement Establishing the South Pacific Regional Environment Programme, *supra* note 91, Art. 8(1).

[107]2021 Moana Taka Partnership Charter, Rev 2.3, available at dcasvmrn70pnz.cloudfront.net/assets/Sustainability/The-Moana-Taka-Partnership-Charter-Rev-2.3-Non-commercial.pdf.

waste under two treaties, the Basel and Waigani Conventions,[108] perhaps providing it with some form of hybrid status. Given that few international organizations ratify treaties in their own right,[109] the practice of Asia Pacific organizations highlights that the absence of this criterion should not be determinative of legal status. Applying *Reparation for Injuries,* the practice of ASEAN, the SCO and SPREP suggests that international lawyers should give greater weight to the organization's subsequent practice over the text of the constituent instrument in determining international personality.

This analysis of the modes of establishment and operation of Asia Pacific organizations highlights that international lawyers have been overly focused on legal personhood and 'Western notions of institutional strength'[110] at the expense of other features or descriptions of international organizations. This is not to suggest that international legal personality should be abandoned, but rather to remember that it is not absolute – as recognized by the ICJ's statement in *Reparation for Injuries* that the UN's legal personality is not the same as that of a state.[111] A more flexible approach that analyses the practice and instruments of international organizations would highlight that the UN and EU are by no means representative of the forms that may be taken.[112] The structures and constituent instruments of Asia Pacific organizations emphasize that the possession of legal personality answers the question whether an organization is '*capable of* bearing rights and duties'.[113] It does not answer the question as to the extent of those rights and duties – this will depend on the powers of the organization.[114] Since it is the powers that give substance to international legal personality,[115] the next section will examine one type of power: law-making.

Before turning to law-making, a study of the international legal personality of Asia Pacific organizations provides another lesson for international institutional law: that a focus on legal personhood should not detract from other valuable metaphors for international organizations.[116] Returning to Bederman, the idea of an organization as a community of interest draws attention to the features of Asia Pacific organizations, some of which describe their roles precisely in such terms (the 'ASEAN Community' and 'the Pacific Family'). While other organizations use the terminology of 'community', formal agreements and methods of voting over informality and consensus decision-making tend to prevail. This is not to suggest some idealized version of regionalism in the Asia Pacific, only that the legal value of these different experiences should be recognized.[117] The situation in the PIF in 2021 demonstrates the way in which the concept of community assists in understanding why the election of the new Secretary-General was so fraught. In 2014, the last occasion on which a new leader of the PIF was chosen, it was reported that the prime ministers of the Solomon Islands and Papua New Guinea 'walked together under the trees

[108]1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 UNTS 125; 1995 Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region, 2161 UNTS 91 (hereinafter 'Waigani Convention').

[109]J. Klabbers, 'Sources of International Organizations' Law: Reflections on Accountability', in S. Besson and J. d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (2017), 987, at 994–5; A. Reinisch, 'Sources of International Organizations' Law: Why Custom and General Principles are Crucial', in Besson and D'Aspremont, ibid., at 1015.

[110]See Castan, *supra* note 87, at 53. See also Cho and Kurtz, *supra* note 34, at 247 (in relation to the ASEAN investment regime); Schifano, *supra* note 52, at 703 (arguing in his study of 15 Asian organizations that the differences in legal design 'may not be good enough justification to dismiss these international organizations as none'.)

[111]See *Reparation for Injuries*, *supra* note 8, at 179.

[112]J. Klabbers and G. Fiti Sinclair, 'On Theorizing International Organizations Law: Editors' Introduction', (2020) 31 *European Journal of International Law* 489, at 494.

[113]See Schermers and Blokker, *supra* note 6, para. 1570.

[114]Ibid.

[115]Ibid.

[116]See Bederman, *supra* note 8, at 377.

[117]Similarly, Hsieh argues in relation to international economic law that ASEAN is not necessarily the 'perfect model of regionalism' but that its experiences have 'legal value ... for developing countries': see Hsieh, *supra* note 34, 36.

on the island of Peleliu' to implement the 'gentleman's agreement' that the leadership would rotate between the three sub-regions of Melanesia, Micronesia and Polynesia.[118] It has been suggested that the impossibility of Pacific leaders meeting in the pandemic negated the trust created by personal connections, resulting in a fracture between members around the election for the role.[119] The failure to agree on a new leader of the PIF leads to questions as to whether consensus – the favoured form of decision-making in many Asia Pacific organizations – can operate when a community cannot meet in person to debate and resolve issues.[120] On this view, the election dispute did not depend on the PIF's 'rights and duties [as] an institution holding legal personality' (to use Bederman's words), [121] but rather was a consequence of the fact that members could not come together as a community. Such practices highlight that international organizations may have personality, but it is not the only description worthy of international lawyers' attention when examining an organization's method of operation.

3.2 Law-Making by Asia Pacific organizations

3.2.1 The Asia Pacific context

This section will move from the question, 'who are Asia Pacific organizations?' to 'what do they do?' and examine the exercise of law-making powers. The rise of law-making by international organizations is a response to the 'relative slowness'[122] of traditional forms of law-making in international law and has been accompanied by extensive debates about the difference between hard law and soft laws, the binding quality of international organizations' instruments, and the merits of such nuances in a community characterized by few compulsory dispute resolution mechanisms.[123] In this literature, the role of the UN specialized agencies and regional organizations based in Europe as law-makers has been extensively discussed.[124] Asia Pacific organizations have also utilized forms of law-making, including treaties, agreements, declarations, memoranda of understanding, blueprints and action plans. Despite this range of instruments – and perhaps because of the predilection for non-binding instruments – the region has been characterized as having 'low legalization and possibly an explicit aversion to legalization'.[125] As a result, some output of Asia Pacific organizations has been said to lack the status of 'informal international law'.[126] The exclusion of Asia Pacific organizations from these discussions can, in

[118]N. Maclellan, 'Who Will Lead the Pacific Islands Forum?', *The Diplomat*, 20 August, 2020.

[119]G. Wyeth, 'A Tiff at PIF? Pacific Islands Leadership Change Triggers Frustration', *The Diplomat*, 8 February 2021.

[120]Gian Luca Burci observed that in the world of COVID-19 'an online format ... can have serious consequences for decision-making in international organizations': G. L. Burci, 'COVID-19 and the Governance of International Organizations: Open Challenges', (2020) *International Organizations Law Review* 485, at 490.

[121]See Bederman, *supra* note 8, at 373.

[122]N. D. White, 'Lawmaking', in J. K. Cogan, I. Hurd and I. Johnstone (eds.), *The Oxford Handbook of International Organizations* (2016), 559, at 566–73.

[123]For example, D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2003); A. T. Guzman and T. L. Meyer, 'International Soft Law', (2010) 2 *Journal of Legal Analysis* 171, at 173–4; J. D'Aspremont, 'Bindingness', in J. D'Aspremont and S. Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (2019), 67.

[124]For example, see Alvarez, *supra* note 15, at 217–18; White, *supra* note 122; J. Alvarez, *The Impact of International Organizations on International Law* (2016), 190–261; T. Buergenthal, *Law-Making in the International Civil Aviation Organization* (1969); A. Kamradt-Scott, 'The International Health Regulations (2005): Strengthening their Effective Implementation and Utilisation', (2019) 16 *International Organizations Law Review* 242; I. Johnstone, 'Law-Making through the Operational Activities of International Organizations', (1998) 40 *George Washington Journal of International Law* 87; S. Kirchner, 'Effective Law-Making in Times of Global Crisis: A Role for International Organizations', (2010) 2 *Goettingen Journal of International Law* 267; J. Klabbers, 'The Undesirability of Soft Law', (1998) 67 *Nordic Journal of international Law* 381.

[125]See Kahler, *supra* note 86.

[126]For example, T. Suami, 'Informal International Lawmaking in East Asia: An Examination of APEC', in A. Berman et al. (eds.), *Informal International Lawmaking: Case Studies* (2012), 55, at 85.

part, be traced to a sense that 'the model of law-making by international organizations has not undergone any change since the days when organizations were first created'.[127] However, as many writers have argued, law-making by international organizations must now be viewed as significant in its own right.[128] In such debates, an appreciation of the legal output of Asia Pacific organizations could have two consequences: first it may contribute to the development of a specific areas of international law, second, it could give international institutional lawyers pause to consider their views of 'legal quality'.[129] It is the second consequence that is the focus here: the way in which law-making by Asia Pacific organizations could enhance debates on the role of the constituent instrument, the weight to be given to form over substance, and the difficulty in using labels such as soft law and hard law.

As well as their preference for adopting soft law instruments, one of the major differences between Asia Pacific organizations and other regional organizations is the absence of permanent courts and tribunals.[130] The decisions of judicial bodies of international organizations are viewed as a form of law-making by scholars and by the ILC, which refers to court decisions in its discussions of international institutional law.[131] In addition, the presence of a court with the power to enforce standards is often equated with an international organization's legal authority.[132] This is particularly pertinent in the fields of human rights law and international investment law.[133] On the other hand, it has also been recognized that there is not necessarily a strong correlation between the legal authority of standards and the choice of enforcement mechanism.[134] While the presence of court or tribunal may be a marker of legal integration, and there are calls for the addition of such an organ in at least one regional organization under study,[135] the lack of a judiciary in Asia Pacific organizations should not obscure other aspects of legal authority.

3.2.2 The role of the constituent instrument, form v. substance, and hard v. soft law

An international organization's ability to take binding action, at least in accordance with traditional sources of international law, can occur through its role as a forum for negotiating and hosting multilateral treaties or via an article in the constituent instrument enabling an organ to take mandatory decisions. Asia Pacific organizations have engaged in the first from of law-making by acting as forums for generating treaties,[136] although to a lesser extent than organizations

[127]J. Klabbers, 'The Normative Gap in International Organizations Law: The Case of the World Health Organization', (2019) 16 *International Organizations Law Review* 272, at 274.

[128]For example, see Alvarez, *supra* note 15; White, *supra* note 122.

[129]This phrase is used by Cremona et al. when examining ASEAN's external agreements: see Cremona et al., *supra* note 103, at 58.

[130]One exception is the Court of the Eurasian Economic Union: see 2014 Treaty on the Eurasian Economic Union, Art. 19, translation available at /www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf; K. Entin and E. Diyachenko, 'The Court of the Eurasian Economic Union: Not Just for Government-to-Government Dispute Settlement', in A. Aseeva and J. Górski (eds.), *The Law and Policy of New Eurasian Regionalization* (2021), 90.

[131]For example, see *Commentaries to Draft Articles*, *supra* note 38, at 58–60.

[132]L. Casini, 'The Development of International Legal Regimes: Models and Instruments for Legal Integration beyond States', in C. Closa and L. Casini, *Comparative Regional Integration: Governance and Legal Models* (2016), 154, at 193–4.

[133]See, for example, Directorate-General for External Policies, Policy Department, *The Role of Regional Human Rights Mechanisms* (2010), 11–12; C. C. Ajibo, 'The Role of Regional Courts in the Development of International Investment Law: The Case of NAFTA Chapter 11 Dispute Settlement Framework and ECtHR', (2018) 11 *Law and Development Review* 77.

[134]V. Röben, 'The Enforcement Authority of International Institutions', (2008) 9 *German Law Journal* 1965, at 1982.

[135]See H. D. Phan, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court of Human Rights* (2012).

[136]Examples of treaties negotiated or hosted under Asia Pacific organizations' auspices include the 1985 South Pacific Nuclear Free Zone Treaty, 1445 UNTS 177; 2015 ASEAN Convention against Trafficking in Persons, Especially Women and Children, available at asean.org/asean2020/wp-content/uploads/2021/01/ACTIP.pdf; 2005 Agreement for Establishment of SAARC Arbitration Council, available at www.saarc-sec.org/index.php/resources/agreements-conventions/28-agreement-for-establishment-of-saarc-arbitration-council/file; Waigani Convention, *supra* note 108.

elsewhere. Outside treaty-making, few constituent instruments include a power to bind members, let alone the ability to subject the power to judicial or quasi-judicial dispute resolution. An example that challenges assumptions about the lack of legal authority of the actions of Asia Pacific organizations, is the SPRFMO Commission – a regional fisheries management organization.[137] The SPRFMO Commission was established pursuant to the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean.[138] The Commission's powers include the adoption of conservation and management measures, establishing states' catch allocations and monitoring compliance with such measures.[139] Its decisions on matters of substance are binding unless a member objects within a specific time period and, even then, objections can only be made on limited bases.[140] The Convention provides for a dispute resolution mechanism and members have activated this mechanism, under the auspices of the Permanent Court of Arbitration (PCA), to challenge Commission decisions.[141] While the SPRFMO Commission, and the review of its decisions, has received attention in environmental and marine law and policy contexts,[142] this has not filtered through to international institutional law.[143]

However, practice in the Asia Pacific demonstrates that the ability to enforce an organization's standards is not necessarily restricted to formal treaty provisions and judicial bodies. For example, Tan argues that ASEAN's 'frequent institutional meetings at every level of the organizational hierarchy act as an informal "accountability and enforcement" mechanism by reminding members of their shared commitments'.[144] Thus, modes of enforcement can vary within organizations and between regions. At the more coercive end of the spectrum, participation sanctions have also been utilized by Asia Pacific organizations, despite the absence of such mechanisms in formal agreements. For example, the PIF applied the Biketawa Declaration of 2000, which authorizes members to take 'necessary targeted measures' in a time of crisis,[145] to suspend Fiji following a military coup. The Declaration enabled the PIF to take an escalating series of actions against the military government, before finally suspending Fiji's regime from participation in the Forum in 2009.[146] Rather than being an impediment, the Declaration's flexible nature enabled the PIF to take the ultimate sanction against a defaulting member in a situation where other international organizations, with formal treaty provisions, have been unable to act on

[137]See 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 296, Art. 118.

[138]See Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, *supra* note 67, Art. 8.

[139]Ibid., Art. 20.

[140]Ibid., Art. 17(1)–(2).

[141]Ibid., Ann. II. See The Objection by the Russian Federation to a Decision of the Commission of the South Pacific Regional Fisheries Management Organisation, Findings and Recommendations of the Review Panel, 5 July 2013, available at https://pca-cpa.org/en/cases/33/; The Objection by the Republic of Ecuador to a Decision of the Commission of the South Pacific Regional Fisheries Management Organisation, Findings and Recommendations, 5 June 2018, available at pcacases.com/web/sendAttach/2400.

[142]For example, H. S. Schiffman, 'The South Pacific Regional Fisheries Management Organization (SPRFMO): An Improved Model of Decision-Making for Fisheries Conservation?', (2013) 3 *Journal of Environmental Studies and Sciences* 209.

[143]An examination of the PCA process in *The Objection of the Republic of Ecuador*, *supra* note 141, can be found in J. Levine and C. Pondel, 'There Are Not Plenty of Fish in the Sea: PCA Case No 2018-13 on Ecuador's Objection to a Decision of the Commission of the South Pacific Regional Fisheries Management Organisation', (2018) 24 *Australian International Law Journal* 221.

[144]See Tan, *supra* note 34, at 345.

[145]Thirty-First Pacific Islands Forum, Forum Communiqué, 30 October 2000, Attachment 1, 'Biketawa Declaration', para. 2, available at https://forumsec.org/publications/biketawa-declaration.

[146]Pacific Islands Forum Secretariat, 'Statement by Forum Chair on Suspension of the Fiji Military Regime from the Pacific Islands Forum', Press Statement No. 21/09, *Solomon Times*, 2 May 2009. For further details of the PIF's action see A. Duxbury, *The Participation of States in International Organizations* (2011), at 200–1.

members' violations of fundamental principles.[147] A second example of a novel participation sanction in the region can be found in the 2005 statement by ASEAN Foreign Ministers that Myanmar had 'decided to relinquish its turn to be the chair of ASEAN in 2006 because it would want to focus its attention on the ongoing national reconciliation and democratisation process'.[148] Although it was Myanmar's turn to rotate into the Chair role, the Foreign Ministers viewed Myanmar's failure to implement democracy as impacting on 'ASEAN's solidarity and cohesiveness'[149] – problematic in an organization that defines itself as a 'family'.[150] As with the PIF, ASEAN was able to act because its constituent instruments enabled it to adapt to changing circumstances.

Participation sanctions can also include the failure to recognize or seat a member's representative. Representation is concerned with the question whether 'the governmental authority will be considered generally as the international agent of the state'.[151] Usually the identity of a state's representative is clear. However, where there are rival claimants there may be a choice between a legitimate (elected) government and one that is in effective control of territory (for example, the leaders of a coup).[152] Following the widely condemned military coup in Myanmar in February 2021, ousting the National League for Democracy, ASEAN and other international organizations faced this dilemma. In the UN, the General Assembly's Credentials Committee deferred the question of whether the military regime or the civilian government should be seated.[153] This deferral followed the unedifying spectacle of a representative of the military regime speaking at the UN Human Rights Council.[154] A different approach was taken in ASEAN. In October 2021 the Chair of the ASEAN Foreign Ministers' Meeting (Brunei Darussalam) announced that a non-political participant from Myanmar would be invited to ASEAN summits rather than a representative of the military regime.[155] Conflicted in its desire to include all members of 'the ASEAN family',[156] while at the same time recognizing the international outcry against the military regime, the Chair chose a middle ground – neither the military nor the ousted government would be seated. Seating a military regime – not least one that was engaged in widespread violence against civilians and ethnic minorities – was not feasible in a community where at least one member was calling for ASEAN to take a stronger stance.[157] On the other hand, it would be a violation of ASEAN's underlying norm of non-interference to fail to include any representative of Myanmar. In practice, Myanmar has, for the most part, been

[147]For example, much has been written about the EU's difficulty in implementing membership sanctions when faced with the violation of its principles. See M. T. Veber, 'Safeguarding Fundamental Values of the EU Through the Adoption of Sanctions', (2021) 4 *University of Vienna Law Review* 37.

[148]'Joint Communique of the 38th ASEAN Ministerial Meeting, Vientiane' by the ASEAN Foreign Ministers', Laos, 26 July 2005, para. 70, available at asean.org/joint-communique-of-the-38th-asean-ministerial-meeting-vientiane/. See Duxbury, *supra* note 146, at 195–6.

[149]See 'Joint Communique of the 38th ASEAN Ministerial Meeting', *supra* note 148.

[150]See note 156 and accompanying text, *infra*.

[151]F. Jhabvala, 'The Credentials Approach to Representation Questions in the UN General Assembly', (1977) 7 *California Western International Law Journal* 615, at 620.

[152]See Schermers and Blokker, *supra* note 6, para. 260.

[153]United Nations General Assembly, Report of the Credentials Committee, UN Doc. A/76/550 (2021), para. 9.

[154]L. D. Johnson, 'What is Wrong with this Picture? The UN Human Rights Council Hears the Military Junta as the Legitimate Government of Myanmar', *EJIL:Talk!*, 31 March 2021, available at www.ejiltalk.org/whats-wrong-with-this-picture-the-un-human-rights-council-hears-the-military-junta-as-the-legitimate-government-of-myanmar/.

[155]Ministry of Foreign Affairs of Brunei Darussalam, 'Statement of the Chair of the ASEAN Foreign Ministers' Meeting', 16 October 2021, available at www.mfa.gov.bn.

[156]Ibid.

[157]Ministry of Foreign Affairs, Malaysia, 'Statement by the Minister of Foreign Affairs, Dato' Sri Anifah Aman in Response to the ASEAN Chairman's Statement on the Humanitarian Situation in the Rakhine State', 24 September 2017, available at www.kln.gov.my.

unrepresented at high-level ASEAN meetings as the military will not send another participant.[158] Nevertheless, ASEAN's approach provides an alternative way forward for representation in international organizations where there has been a coup. Both the PIF and ASEAN's practice demonstrates that international organizations can enforce their values in a variety of different ways, and that flexibility and the absence of a judicial body does not necessarily equate with a lack of action.

International organizations engage in law-making through a range of other measures, including directives, initiatives, programs of action and policy instruments.[159] The label 'soft law' encapsulates a range of documents that are not binding by virtue of the organization's constitution, but nevertheless can exhibit a strong pull towards compliance.[160] The use of such instruments is particularly significant where there is a lack of treaty provisions specifying an organization's law-making powers. A declaration is one such instrument – usually adopted in order to clarify, or potentially challenge, a legal principle or factual situation.[161] For example, in the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise,[162] the PIF's members set out their interpretation of principles relating to the review of maritime zones in the United Nations Convention on the Law of the Sea (UNCLOS). Although not formally binding by virtue of the Agreement Establishing the Pacific Islands Forum, the Declaration's language and intent is clear – to 'record' Forum members' compact that maritime boundaries should not be subject to review once reported to the UN Secretary-General.[163] The Declaration has been described as 'a political declaration', but one that 'should be seen as a response to a legal question'.[164] It could be viewed as a subsequent agreement or practice by some of UNCLOS' parties relevant to the interpretation of the treaty, or an example of state practice for the purposes of establishing a customary international law rule.[165]

These types of instruments are not limited to declarations. In the Asia Pacific, the practices of two other organizations highlight the difficulty with the hard law versus soft law binary and the importance of the substance of commitments over legal form. The first example arises from ASEAN's commitment to an ASEAN Community with three pillars: the ASEAN Economic Community (AEC), the ASEAN Political-Security Community (APSC) and the ASEAN Socio-Cultural Community (ASCC).[166] The communities' aims are articulated in three Blueprints – first drafted in 2008–2009 and then re-drafted in 2015.[167] While the Blueprints differ in terms of their commitments, language, and timelines all include implementation and review sections, suggesting the need for compliance.[168] The AEC Blueprint is the most comprehensive in terms of goals and

[158]In January 2024, the permanent secretary of Myanmar's Ministry of Foreign Affairs attended the ASEAN Foreign Ministers' Retreat in Laos: See S. Strangio, 'Myanmar Junta Sends Representative to ASEAN Foreign Ministers' Meeting', *The Diplomat*, 29 January 2024.

[159]See Bederman, *supra* note 8, at 372; D. Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law"', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2003), 1, at 12.

[160]See White, *supra* note 122, at 560.

[161]See Schermers and Blokker, *supra* note 6, paras. 1244–1245.

[162]Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, Pacific Islands Forum 2021, available at https://forumsec.org/publications/declaration-preserving-maritime-zones-face-climate-change-related-sea-level-rise.

[163]Ibid.

[164]F. Angaddi, 'Establishment, Notification, and Maintenance: The Package of State Practice at the Heart of the Pacific Islands Forum Declaration on Preserving Maritime Zones', (2022) 53 *Ocean Development and International Law* 19, at 20.

[165]See discussion in ibid., at 31.

[166]See ASEAN Charter, *supra* note 63, Preamble.

[167]The 2025 Blueprints for three ASEAN communities are located in 'ASEAN 2025: Forging Ahead Together', November 2015, available at asean.org/asean-2025-at-a-glance/. For a brief description of the process leading to the adoption of the three blueprints see A. Duxbury and H. Tan, *Can ASEAN Take Human Rights Seriously?* (2019), at 152–3.

[168]See the 'Implementation and Review' sections in Blueprints: ASEAN Secretariat, 'ASEAN Political-Security Community: Blueprint 2025', March 2016, at para.14, available at www.asean.org/wp-content/uploads/2012/05/ASEAN-APSC-Blueprint-2025.pdf; ASEAN Secretariat, 'ASEAN Economic Community Blueprint 2025', November 2015, paras. 81–91, available at

methods for monitoring performance.[169] It provides that ASEAN members '*shall* translate milestones and targets of the AEC Blueprint 2025 into national milestones and targets'.[170] In addition, it establishes the ASEAN Economic Community Council[171] to 'monitor and *enforce* compliance of all measures' in the Blueprint.[172] While the form of the AEC Blueprint is strictly non-binding, the language and structures for compliance suggest its goals are mandatory. Recent studies of ASEAN have detailed the development of monitoring and dispute resolution mechanisms following the ASEAN Charter, particularly in economic co-operation.[173] These mechanisms, with their different compulsory and non-compulsory options, demonstrate that their legal value, as well as reasons for ASEAN members' compliance, come in many forms.[174]

SPREP's practice also highlights the importance of substance over form in the practice of international organizations. SPREP's Cleaner Pacific 2025: Pacific Regional Waste and Pollution Management Strategy 2016–2025 (CP2025) and the Pacific Regional Action Plan: Marine Litter 2018–2025[175] use language that indicates obligation rather than guidance. The CP2025 states that SPREP, Pacific Island Countries and Territories and their partners 'shall develop and enforce national policies, strategies, plans and legislation and strengthen institutional arrangements' for best practice management of waste, chemicals and pollutants (WCP).[176] They 'shall' also 'remediate contaminated sites and WCP stockpiles in accordance with best practices'.[177] The Marine Action Plan envisages the development and application of model legislation on materials such as single use plastics and the implementation of the Moana Taka Partnership.[178] The Plan includes sections on timeframes, funding and key performance indicators.[179] Neither document is phrased in terms of recommendatory language with both instruments emphasizing the pressing nature of these problems for the Pacific region. Together with the AEC Blueprint, such instruments highlight that discussions about the inconclusive nature of the distinction between hard law and soft law should take into account Asia Pacific practices and move to more nuanced understandings of legal effect and compliance.[180] Such an examination may demonstrate that the hard law is not the norm in international organizations, but rather the exception.

As is highlighted by Bederman, when international organizations make international law through these 'relatively informal operations, directives and initiatives ... they are acting less as persons, and more as communities'.[181] Nowhere is this more true than in the Asia Pacific where the desire for cohesion motivates both the content of the organizations' decisions as well as the form they may take, including the preference for non-treaty instruments and the use of consensus

asean.org/book/asean-economic-community-blueprint-2025/ (hereinafter 'AEC Blueprint'); ASEAN Secretariat, 'ASEAN Socio-Cultural Community Blueprint 2025', March 2016, paras. 22–42, available at www.asean.org/wp-content/uploads/2012/05/8.-March-2016-ASCC-Blueprint-2025.pdf.

[169]See AEC Blueprint, *supra* note 168. For a comparison of the language and goals set out in the three blueprints see Duxbury and Tan, *supra* note 167, at 157–60.

[170]See AEC Blueprint, ibid., para. 82 (emphasis added).

[171]Ibid., para. 81.

[172]Ibid., para. 82 (emphasis added).

[173]S. Chesterman, *From Community to Compliance: The Evolution of Monitoring Obligations in ASEAN* (2015); R Beckman et al., *Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments* (2016).

[174]See Beckman et al., ibid., at 99–100.

[175]For a discussion of these documents see J. Peel et al., 'Regional Solutions: Export Measures for Plastic Recyclables to Reduce Marine Plastic Pollution in the Pacific', (2021) 11 *Journal of Law and Legislation* 8.

[176]Secretariat of the Pacific Regional Environment Programme, 'Cleaner Pacific 2025: Pacific Regional Waste and Pollution Management Strategy', 2016, at 45, available at www.sprep.org/attachments/Publications/WMPC/cleaner-pacific-strategy-2025.pdf.

[177]Ibid., at 46.

[178]Secretariat of the Pacific Regional Environment Programme, 'Pacific Regional Action Plan: Marine Litter 2018–2025', 2018, at 24, available at www.sprep.org/sites/default/files/documents/publications/MAP-Digital-small.pdf.

[179]Ibid., at 23–6.

[180]See White, *supra* note 122, at 566.

[181]See Bederman, *supra* note 8, at 372.

decision-making. An examination of the practice of Asia Pacific organizations offers international lawyers the opportunity to move beyond a 'nineteenth century' model,[182] or a soft law versus hard law understanding of legal quality. While writers have recognized this need when studying ASEAN's approach to international economic law,[183] this understanding of the contribution of organizations in the region has not permeated international institutional law more generally. The focus should be on the ways in which organizations promote compliance with their standards and ensure accountability absent explicit powers in their constituent instruments and absent the possibility of adjudication. This brief excursion into law-making by Asia Pacific organizations demonstrates that international institutional law needs to grapple more explicitly with the significance of substance over form in determining the authority of an instrument as well as the potential for enforcing decisions absent a judicial institution.

4. Conclusion: A proper law of international organizations?

One year after the Micronesian members announced their withdrawal from the PIF, they 'temporarily rescinded' their decision.[184] As a result of an agreement reached in Suva, formalizing the previous 'gentleman's' understanding on selection of the PIF Secretary-General, the Micronesian nations retained their membership.[185] Informality in the Pacific family had reached its limits. While President Taneti Maamau initially broke with this decision, Kiribati was quickly back in the fold in a display of unity proclaimed as an example of the 'Pacific Way'.[186] In the last two years, much attention has been focused on the region: Pacific security is now a matter of concern to many states,[187] the PIF's declaration of a 'climate emergency'[188] has led to further interest in its activities, and President Biden announced the United States' commitment to the Pacific leaders' position that their countries would never lose their statehood or UN membership as a result of the climate crisis.[189] The ICJ's decision in late 2023 to allow the MSG, the PIF and the Pacific Community to participate in proceedings relating to the climate change advisory opinion may herald a more progressive approach.[190] It recognizes the organizations' expertise on the topic as well as their status as international organizations for the purposes of Article 66 of the ICJ Statute. This attention may lead to further interest in the Pacific region and its activities by international institutional lawyers.

[182]See Klabbers, *supra* note 127, at 274.

[183]For example, see Cho and Kurtz, *supra* note 34; Hsieh, *supra* note 34.

[184]G. Rickey, 'Micronesia Stay in the Pacific Islands Forum Fold — For Now', *The Interpreter*, 24 February 2022.

[185]See discussion of the 'Suva Agreement' in Pacific Islands Forum, Fifty-First Pacific Islands Forum, Suva, Fiji, 11–14 July 2022, available at https://forumsec.org/publications/report-communique-51st-pacific-islands-forum-leaders-meeting.

[186]K. Lyons, 'Kiribati Withdraws from Pacific Islands Forum in Blow to Regional Body', *Guardian*, 10 July 2022; L. Lewis, 'Puna and Maamau Embrace as Pacific Unites Once Again', *RNZ*, 23 February 2023, available at www.rnz.co.nz/international/pacific-news/484729/puna-and-maamau-embrace-as-pacific-unites-once-again.

[187]R. Gramer, M. Young and J. Detsch, 'US Raises the Ante in Pacific Islands After Chinese Swoop', *Foreign Policy*, 14 July 2022.

[188]S. Dziedzic, 'Pacific Leaders to Declare "Climate Emergency" in PIF Statement, Praise Australia's Move to Lift Emissions Reduction Target', *ABC News*, 15 July 2022.

[189]'Biden Tells Pacific Leaders He Hears Their Warnings about Climate Change and is Committed to Act', *PBS Newshour*, 25 September 2023, available at www.pbs.org/newshour/world/biden-tells-pacific-islands-leaders-he-hears-their-warnings-about-climate-change-and-is-committed-to-act.

[190]ICJ Press Release, '*Obligations of States in Respect of Climate Change* (Request for an Advisory Opinion) – The Court Authorizes the Organisation of African, Caribbean and Pacific States, the Melanesian Spearhead Group and the Forum Fisheries Agency to Participate in Proceedings', No 2023/48, 20 September 2023; ICJ Press Release, '*Obligations of States in Respect of Climate Change* (Request for an Advisory Opinion) – The Court Authorizes the Pacific Community to Participate in Proceedings', No 2023/70, 24 November 2023; ICJ Press Release, '*Obligations of States in Respect of Climate Change* (Request for an Advisory Opinion) – The Court Authorizes the Pacific Islands Forum and the Alliance of Small Island States to Participate in Proceedings', No 2023/76, 20 December 2023.

As noted at the outset, this article is consciously not a piece about regional approaches in the law of international organizations. Nevertheless, it is recognized that this analysis may be used to argue that there is an Asia Pacific international institutional law or that there is no law of international organizations because it is not (and cannot) be universal. While the possibility of a distinct Asia Pacific approach or different (possibly, plural) legal traditions in international institutional law is not discounted, that is an argument for another time and perhaps another author. The aim of this article has been to support the position of many writers in the field that there are legal principles that can be applied across many different international organizations. The only caveat is that in articulating these principles, the practices of organizations in the Asia Pacific should be a part of the story.

The Introduction indicated that this section would reimagine a more inclusive, a 'proper' law of international organizations.[191] Of course, this is a slight misuse of Jenks' terminology. When he wrote *The Proper Law of International Organisations* in the series on the 'Law of International Institutions', he was employing the term in a private international law sense – that is, the law, either domestic or international, that governs the legal relations and transactions of international organizations.[192] Here, the word is used to convey the idea of a 'suitable', 'appropriate' or 'genuine' law of international organizations.[193] In arguing for an appropriate or genuine law of international organizations, this article has made several claims. First, that international institutional law relies on the principles and practices of a narrow range of organizations – those in the UN system or otherwise based in Europe. The two most well-known institutions headquartered in these regions, and those that gain the most attention are the UN and EU.[194] International organizations not made in their image, including those based in the Asia Pacific, are infrequent visitors to the pages of international institutional law texts. Despite the importance of the UN and EU, they may not serve as 'models' or an 'inspiration'[195] for the future. As well, they do not serve as examples of the typical structure or powers of international organizations. The examples raised in this article demonstrate that there is a diversity of practices that need to be recognized and incorporated into the legal framework.

This leads to the article's second claim: that a genuine law of international organizations should be grounded in the principles and practices of a wider range of organizations. The reasons for this are two-fold: first, writers maintain that there is a 'common law' that can be applied across international organizations, whatever their type and wherever they are headquartered. As stated earlier, this article does not attempt to debunk this idea. However, if we accept the pull of universality, then it is but a short step to argue that the applicable legal principles must be based on the practices of a broad range of organizations. For example, if the ILC adopts an inclusive definition of the term 'international organization' in the ARIO to ensure that the principles of responsibility encompass a wide range of international organizations, then the articles attributing responsibility to international organizations must be derived from the practices of a similar range of institutions.[196]

The third claim is that the principles and practices of Asia Pacific organizations must be a part of this story. This article has drawn on debates surrounding personality and law-making powers ('who are international organizations' and 'what do they do'?) to sketch the ways in which Asia Pacific organizations have been excluded from the development of the legal framework and the way in which their principles and practices may add to our understanding of the law. This discussion has raised questions about the preference given by international lawyers to the

[191]See Jenks, *supra* note 10.

[192]Ibid., at xxxiv.

[193]*Oxford English Dictionary* (2007), 'proper'.

[194]In addition, since the COVID-19 pandemic there has been much focus on the World Health Organization.

[195]See Klabbers, *supra* note 6, 14–15.

[196]See note 41, *supra* (Xue's comments). See also J. Alvarez, 'Revisiting the ILC's Draft Rules on the International Organization Responsibility', (2011) 105 *ASIL Conference Proceedings* 344.

constituent instrument over the practice of an international organization, the weight attached to the concept of international legal personality, and the normative authority exercised through documents and activities that are not binding pursuant to traditional sources of international law but nevertheless demonstrate a strong pull towards compliance. By focusing on the adoption of instruments such as the SPREP Moana Taka Partnership and declarations negotiated within the PIF or ASEAN, international lawyers may question the ways in which international legal personality is established. By examining the language of blueprints, strategies, and other instruments of Asia Pacific organizations, rather than their form, a more nuanced understanding of legal quality and authority could be developed. The diverse practices of Asia Pacific organizations demonstrate that implementation and enforcement action can take several forms outside judicial adjudication. Rather than focus on what these organizations lack, international institutional lawyers should focus on the relevance of their practices. In this respect, this article is not intended to be comprehensive of the work of Asia Pacific organizations – rather it is a first step and call for further research and understanding by those working in the field.

Finally, the considerable diversity, as well as commonality in the region must be recognized. For example, there is a world of difference between the powers of the SPRFMO and SAARC, but the approach of the PIF and ASEAN to enforcing their values against a defaulting member demonstrates some parallels. Labels for regional organizations that emphasize a lack of legal form and substance and fail to recognize this diversity of practice should be avoided. The proper law of international organizations imagined in this article is one that takes an inclusive rather than an exclusive approach to the instruments of international organizations, that seeks to document, understand, and incorporate their work, and that understands that legal authority and legal quality can take a number of forms. The proper law is one where the actions of Pacific leaders, walking under the trees on the island of Peleliu to implement their agreement on the election of a new Secretary-General of the PIF, would be recognized as contributing to those principles and practices.

Cite this article: Duxbury A (2024). Rewriting the law of international organizations: Whither the Asia Pacific? *Leiden Journal of International Law* **37**, 694–715. https://doi.org/10.1017/S092215652400013X