CONFUCIUS AND CONSENSUS: INTERNATIONAL LAW IN THE ASIAN PACIFIC

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[This speech was delivered by Professor Gillian Triggs as her Inaugural Professorial Public Lecture at the Law School, The University of Melbourne, on 7 May 1997. States of the Asian Pacific region appear to have played little role in the development of modern international law. They avoid compulsory forms of international dispute resolution, are often not parties to major multilateral treaties and argue for an approach to human rights which adopts their religious and philosophical values. This lecture considers the attitudes and practices of Asian Pacific nations in relation to international law in the context of third party dispute resolution, cooperative joint arrangements for exploitation of disputed offshore petroleum resources, human rights and regional institutions. It is concluded that there are distinct contributions made by Asian Pacific states to international law in the region and that these nations are actively engaged in the techniques of diplomacy and international law in environmental pollution regulation, maritime and fisheries management and refugee, security and economic issues. This brief review suggests that Asian Pacific nations have, over the last 25 years, played a constructive role in creating new laws which better reflect their own regional interests. Indeed, recent engagement by Asian Pacific nations in the international legal system reflects their growing confidence and capacity to further their national interests.]

> From the Emperor down to the masses of the people, all must consider the cultivation of the person the root of everything else.
>
> Confucius[1]

I INTRODUCTION

I am pleased to have the opportunity to speak to you today about the role of international law in the Asian Pacific, but, before doing so, I should like to remember for a moment a fine international lawyer of the law faculty, Dr Hans Leyser. 'Old Doc Leyser', as he was always known, was with the Law School from the mid-1950s to 1967. He taught international law for many years and I was fortunate to be one of his students, sitting together (as the few female law students did in those days) in the front row of the lecture theatre. There were no modern casebooks on international law at this time, and Doc Leyser would type out his notes and run them off in pale blue ink on an old roneo machine, often handing them out damp from the press.

I found Doc Leyser's international legal world fascinating. I remember well his lectures on the Covenant of the League of Nations and his description of the new international laws which were to ensure that the 'Great War' was the last war. I was spellbound by his obvious distress at the invasion of Abyssinia by Italy in 1936 and the collapse of the peacekeeping system envisaged by the Covenant.

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1 Confucius, *The Wisdom of China* (1965) 7.

This, I knew, was the subject for me!

A career in international law was, thirty years ago, thought to be rather unusual, if not eccentric. Today, I believe Doc Leyser would be surprised to see the dramatic growth of international customary and treaty law and to observe the development of the subject at The University of Melbourne. One hundred and twenty undergraduate students study International Law or related subjects each year. At the graduate level there is the Diploma in International Law. The law school now has many members of staff who, in one way or another, study and teach aspects of international law, including international legal principles, human rights, forced migration, international institutions, international dispute resolution, international commercial law and the law of the sea.

I believe the work of Doc Leyser provided the foundation for the subject at this law school and it was certainly an inspiration to me as a teacher.

I would like to speak tonight about the role and development of international law in the Asian Pacific region.

My interest in this topic arose from experiences in international commercial practice in Singapore, Indonesia and Malaysia, where I observed a sharp contrast in the Asian Pacific Region between a research-based view of international law and the practical role of international diplomacy, law and regional organisations. A review of the literature and state practice suggests that states in the Asian Pacific have played little role in the development of modern international law, have a deep antipathy to any form of binding compulsory settlement of disputes through adversarial means, are usually not parties to the major international human rights or other multilateral treaties, and are quick to dismiss international law as a Western system of law which is antithetical to their interests. Certainly, there are very few international law journals published in the region and few texts or documents which analyse international legal issues from the perspective of a country within the Asian Pacific.[2]

These perceptions contrast with the daily realities of international legal and commercial practice. Asian Pacific nations actively engage in the techniques of diplomacy and international law to resolve regional problems such as environmental pollution, access to oil and gas in maritime zones, designation of archipelagic sea lanes, refugees, security and economic issues. Joint venture

[2] The body of literature is growing. See, eg, Symposium, 'Asia in the Twenty-First Century' (1992) 24 *New York University Journal of International Law and Politics* 1057; Jeremy Thomas, 'International Law in Asia: An Initial Review' (1990) 13 *Dalhousie Law Journal* 683; Virginia Leary, 'Human Rights in the Asian Context: Prospects for Regional Human Rights Instruments' (1987) 2 *Connecticut Journal of International Law* 319; Roda Mushkat, 'International Environmental Law in the Asia-Pacific Region: Recent Developments' (1989–90) 20 *California Western International Law Journal* 21; Raphael Lotilla, 'The Efficacy of the Anti-Pollution Legislation Provisions of the 1982 Law of the Sea Convention: A View from South East Asia' (1992) 41 *International and Comparative Law Quarterly* 137; Wang Tieya, 'The Third World and International Law' in *Selected Articles from the Chinese Yearbook of International Law* (1983) 6; Hungdah Chiu, 'Chinese Views on the Sources of International Law' (1987) 28 *Harvard International Law Journal* 289; R Anand, 'Role of the "New" Asian-African States in the Present International Legal Order' (1962) 56 *American Journal of International Law* 395; Ko Swan Sik (ed), *Nationality and International Law in Asian Perspective* (1990); Foundation for the Development of International Law in Asia, *Asian Yearbook of International Law* (1991–93) vols 1–3.

resource and infrastructure agreements are frequently negotiated throughout the region with states as parties.

Thus the questions arise:

- How is myth to be distinguished from reality in understanding the role of international law in the Asian Pacific?
- What are the attitudes and practices of nations in the Asian Pacific in relation to international law?
- Are there identifiable or special features of international law as it is applied and developed in the region?

Consideration of these issues is, I believe, important for Australia's future role in the Asian Pacific and for peaceful resolution of existing and potential conflicts in the region.

Recent challenges by Chinese naval vessels to the Philippines' claim to sovereignty in the Spratlys highlight the existing, and potentially destabilising, issues for the region posed, in particular, by territorial and maritime boundary disputes in the South China Seas, the Korean Peninsula and, most recently, in the Taiwan Strait.[3] Commenting on these kinds of disputes, Australia's Minister for Foreign Affairs, Alexander Downer, observed recently that few countries in the region see

> an adversarial stance as being central to any relationship with their neighbours ... East Asian governments — unlike their European counterparts — tend to have a preference for informal decision-making[.][4]

This address explores the reasons for, and the validity of, Mr Downer's view that Asian Pacific states prefer legal informality to adversarial procedures by examining the following examples of state practice:

- Binding third party dispute resolution;
- The law of the sea and cooperative joint arrangements;
- Human rights; and
- Regional organisations.

In considering these examples, this address hopes to raise questions about the role of international law in the Asian Pacific, rather than to provide an in-depth analysis of any one issue.

II INTERNATIONAL LAW AND THE NEW AND DEVELOPING STATES

The Charter of the United Nations was signed in 1945 by 50 nations, most of which were political allies with broadly similar cultural, historical, religious and

[3] Mark Baker, 'Manila takes on Beijing over Spratlys', *The Age* (Melbourne), 1 May 1997, 12. International relations and law in the region have also been preoccupied for many years by the 'two country' problem created by divided sovereignty, as in the 'two Koreas', the 'two Chinas' and the 'two Vietnams'.

[4] Alexander Downer, Minister for Foreign Affairs and Trade, Commonwealth of Australia, 'Asian Regional Security Issues' (Speech to the Netherlands Atlantic Commission, The Hague, 27 January 1997) 4–5.

legal backgrounds.[5] At that time, the community of nations, with its shared values, contemplated a future international legal order in which each state was sovereign and equal in relation to every other state. Through the 1940s, 1950s and early 1960s, it was possible to gain the consent of a clear majority of states to articulate and to develop a body of modern international law.[6]

Today, the United Nations is a very different international organisation. Since 1945 over 89 former colonies have achieved independence, most of them in the 1960s.[7] These former colonies now comprise a majority of the 185 members of the United Nations, bringing to the organisation the cultural and religious values of Islam, Hinduism and Confucianism and adopting economic and social priorities which are at variance with traditional Western values.

The aim of achieving and maintaining a truly international law of nations based upon the sovereign equality and consent of states was thought by so-called 'First World' nations to be under threat. One of the first signs of this threat came with the meeting of the Asian-African Legal Consultative Committee in Bandung, Indonesia, in 1955, at which the term 'the Third World' was coined.[8] The power of the emerging forces was demonstrated by the increasing activism of the General Assembly, which produced the Charter of Economic Rights and Duties of States in 1974 and with it the prospect of expropriation of national resources without adequate compensation.[9] The economic power of the Oil Producing and Exporting Countries ('OPEC') was demonstrated in the boycott of 1972, and throughout the 1960s and 1970s, China and the USSR threatened not to abide by what they termed 'unequal treaties'.[10]

5 See generally Coral Bell, 'The Fall and Rise of the UN' (1993) 37(7–8) *Quadrant* 50; Sydney Bailey, *The United Nations: A Short Political Guide* (1st ed, 1963).

6 Prominent examples of this body of law are the General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 187 ('GATT'); Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277; Geneva Conventions on International Humanitarian Law, 12 August 1949, 75 UNTS 31, 85, 135, 287; Geneva Conventions on the Law of the Sea, 29 April 1958, 516 UNTS 205, 450 UNTS 82, 599 UNTS 285, 499 UNTS 311; Antarctic Treaty, 1 December 1959, 402 UNTS 71, 19 ILM 860; Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 5 August 1963, 480 UNTS 43, 2 ILM 883; International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 UNTS 194; International Covenant on Economic, Social and Cultural Rights, 19 December 1966, 993 UNTS 3, 6 ILM 360 ('Social Rights Covenant'); International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, 6 ILM 368 ('Civil Rights Covenant').

7 See generally Gareth Evans, *Cooperating for Peace: The Global Agenda for the 1990s and Beyond* (1993) 26; Evan Luard, *The United Nations: How it Works and What it Does* (1979).

8 The notion of the 'Third World' was intended to convey that these states were aligned with neither the Communists nor the West. An observer from the International Law Commission has a standing invitation to attend meetings of the Asian-African Consultative Committee: Ivan Shearer (ed), *International Law* (11th ed, 1994) 13.

9 GA Res 3281, 29 UN GAOR, UN Doc A/Res/3281 (1974), reprinted in (1975) 14 ILM 251, especially art 2(c). Note that the arbitrator in *Texaco Overseas Petroleum Co/California Asiatic Oil Co and the Government of the Libyan Arab Republic* (1977) 53 ILR 389; 17 ILM 1, 30 considered that art 2 was put forward as *de lege ferenda,* not as a statement of law.

10 See, eg, James Hsiung, *Law and Policy in China's Foreign Relations: A Study of Attitudes and Practice* (1972) 244–5; Mikhail Kozhevnikov (ed), *International Law* (1961) 248; S Sinha 'Perspective of the Newly Independent States on the Binding Quality of International Law' (1965) 14 *International and Comparative Law Quarterly* 121; Hungdah Chiu, 'Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties' in Jerome Cohen (ed),

These and other developments reflected the view of many developing and socialist states that international law was little more than a system of rules designed to further the interests of powerful Western Christian capitalist nations against the poorer and weaker nations. This sort of rhetoric fuelled fears that there could no longer be a rule of law for the international community; that, indeed, there was no longer a 'community' in any real sense; that international law would become fragmented, regionalised and culturally relative; that the fine aspirations of the Universal Declaration of Human Rights[11] would cease to have any universal meaning.[12] In short, there was concern that new and developing states would reject the established system of international law, leading to insecurity and instability.

These dire predictions have not proved to be accurate. A Third World regime of international law has not evolved as a counter-force to established Western-founded international law.[13] Instead, new and developing states have found national and reciprocal advantages within the existing international legal system. Developing states have engaged actively in the diplomatic conferences, the treaty-making processes and the work of the International Law Commission in its progressive development of international law. Generally, they have played an inclusive and constructive role in creating new laws which better reflect their interests.[14] Indeed, it has been ironic that new and developing states have often proved to be the most stalwart supporters of traditional rules of international law, while older Western states strive to reform these laws and create new norms to reflect modern commercial or human rights concerns.

While it is generally true that nations in the Middle East, Latin America and Africa accept and work within the international legal system, what of the nations of the Asian Pacific? Have states of this region accepted the international law they played so small a role in creating? Have they learned to abide by the existing rules with a view to developing new ones or have they found a different path which better responds to their particular values and national interests?

III HISTORY OF ASIAN PACIFIC STATES AND INTERNATIONAL LAW

There is no cohesive 'region' of the Asian Pacific. Unlike Europe, it is not a continental land mass; rather, it is an area of great complexity in which each state

China's Practice of International Law: Some Case Studies (1972); Hungdah Chiu, *The People's Republic of China and the Law of Treaties* (1972) 72–120.

11 GA Res 217A, 3 UN GAOR, UN Doc A/Res/217A (1948).

12 Jonathan Charney, 'Universal International Law' (1993) 87 *American Journal of International Law* 529.

13 J Syatauw, *Some Newly Established Asian States and the Development of International Law* (1961); S Sinha, *New Nations and the Law of Nations* (1967); R Anand, *New States and International Law* (1972); Felix Okoye, *International Law and the New African States* (1972); Frederick Snyder and Surakiart Sathirathai (eds), *Third World Attitudes Toward International Law* (1987).

14 Note, for example, the role of 'new' nations in the development of the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514, 15 UN GAOR, UN Doc A/Res/1514 (1960) and the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (the first of the International Law Commission's law-making treaties in which new and developing states participated fully).

has its own history, culture, religion, law and political interests. Generalisations can therefore be difficult to make and, worse, can be misleading. Nonetheless, there are identifiable features of practices and interests within the Asian Pacific which justify consideration of these states as a regional group. For the purposes of this address, the states of the Asian Pacific include China, Taiwan, Japan, the Philippines, the two Koreas, Vietnam, Laos, Cambodia, Singapore, Malaysia, Indonesia, Burma, Thailand, Australia, New Zealand and other members of the South Pacific Forum.

An examination of international legal practices over the last 25 years or so indicates that Asian Pacific nations are little different from other new and developing states. They are similar in that they balance the costs of non-compliance with the political, economic, strategic, geographical and cultural benefits of compliance. Mostly, the judgment has been that existing international rules are appropriate and that to abide by them will further national interests. States in the Asian Pacific have accepted most precepts of international law, or at least do not actively deny them, because international law provides legal certainty, protection from stronger neighbours and a relatively predictable and orderly system which usually fosters their interests. While cultural factors remain important to the underlying values of states in the Asian Pacific, particularly in relation to human rights, these values have been overshadowed by political and economic interests.

There are already indications in the international legal practices of states in the Asian Pacific which suggest that they are prepared to take different and creative approaches to conflict resolution and to cooperation in resource and environmental management and economic issues which appear to reflect different economic, cultural and political values.

Scholars recognise the Asian contribution, since the writings of Sun Tzu in the sixth century BC,[15] to the underlying bases of international law, particularly in the humanitarian laws of war and in diplomatic and sovereign immunity.[16] Apart from a similarity of ideas, however, there is not thought to be any connection between these ancient principles and modern international law.

When the European powers arrived in Asia they dealt with established empires and sovereign entities in India, Siam, China and Japan. The Europeans entered into treaties and diplomatic relations with these states, recognising their equal sovereignty under international law.[17] Respective positions changed, however, in

[15] See, eg, Timothy McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in Timothy McCormack and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997) 31.

[16] Arthur Eyffinger, *The International Court of Justice 1946–1996* (1995) 201–20. Eyffinger notes (at 211–2) that, in the first millennium BC, for example, there were over 200 states in China claiming unlimited sovereignty and conducting relations on a perfectly equal footing. Furthermore, a conference on disarmament is thought to have occurred in China in the year 546 BC.

[17] R Anand, 'Attitude of the Asian-African States Toward Certain Problems of International Law' in Frederick Snyder and Surakiart Sathirathai (eds), *Third World Attitudes Toward International Law* (1987) 7. Note also *Right of Passage Over Indian Territory (Portugal v India) (Merits)* [1960] ICJ Rep 6, 35, where the ICJ concluded that a 1779 treaty between the Maratha Empire and Portugal was a valid transaction in the law of nations.

the early 19th century. The European countries became colonial powers. By the time of the Congress of Vienna in 1815, the earlier international personality of Asian nations was no longer accepted and they were required to 'apply' for recognition as states. From approximately this time, Asian nations ceased to play any independent role in the development of international law through the 19th and early 20th centuries, one of the most creative periods in international legal history.[18]

Five Asian nations participated in the Hague Peace Conference in 1899,[19] and 12 Asian-African countries took part in the League of Nations. With the exception of Japan, however, no Asian state had any effective voice in international affairs or law until after 1955 when, with independence, Asian states became participating members of the international community. It is important, then, to understand that the modern history of international law in the Asian Pacific has been a very short one.

IV DISPUTE RESOLUTION

A *Resort to the International Court of Justice or Other Forms of Binding Arbitration*

Mr Downer's observation that Asian Pacific states avoid an adversarial approach to decision-making is demonstrated by their extreme reluctance to submit disputes to any form of binding judicial resolution. Indeed, it has been rare for any dispute from this region to be considered by the International Court of Justice ('ICJ') or by any other form of judicial or arbitral body.[20]

B *Regional Dispute Resolution*

Dispute resolution procedures within Asian Pacific regional organisations typically emphasise consultation between the parties and some form of non-compulsory arbitration.[21] In the 1987 Manila Declaration of the Association of South East Asian Nations ('ASEAN'), it was agreed that '[i]ntra-regional disputes shall be settled by peaceful means in accordance with the spirit of the Treaty of Amity and Co-operation in South East Asia[22] and the United Nations

18 See generally Anand, 'Attitude of the Asian-African States', above n 17, 7–9.

19 Ibid 9.

20 Disputes submitted to the ICJ by India, Pakistan and Sri Lanka are excluded from this study, eg *Trial of Pakistani Prisoners of War (Pakistan v India) (Request for the Indication of Interim Measures of Protection)* [1973] ICJ Rep 328; *Right of Passage Over Indian Territory (Portugal v India) (Merits)* [1960] ICJ Rep 6; *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan) (Judgment)* [1972] ICJ Rep 46. It might also be noted that, even among Western states, the range of disputes which are subject to art 36(2) of the Statute of the ICJ (the 'optional clause') is narrow.

21 See generally Christine Chinkin, 'Dispute Resolution and the Law of the Sea: Regional Problems and Prospects' in James Crawford and Donald Rothwell (eds), *The Law of the Sea in the Asian Pacific Region* (1995) 251–3.

22 Treaty of Amity and Co-operation in South East Asia, 24 February 1976, 1025 UNTS 297 ('the Bali Treaty').

Charter.'[23] The 1985 South Pacific Nuclear Free Zone Treaty establishes a non-binding complaints procedure, with no third party power to make a binding decision.[24] The 1980 South Pacific Regional Trade and Economic Co-operation Agreement provides for consultation but again does not include any form of compulsion.[25] The 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region is unusual in that it contains an extremely detailed arbitration regime, although state consent is still required for it to apply.[26] Third parties have a right to intervene where they have an interest of a legal nature which could be affected by a decision.[27]

C *Bilateral Treaties and Dispute Resolution*

Bilateral treaties within the Asian Pacific region similarly reflect the preference for consultation, usually having no provision whatever for dispute resolution beyond a general exhortation to peaceful settlement. Most seabed and continental shelf boundary treaties, for example, make no provision for dispute resolution.[28]

A rare exception to the reluctance of Asian Pacific nations to resort to international tribunals to resolve disputes was the *Temple of Preah Vihear Case*,[29] in which the ICJ was asked to decide whether published maps (placing a disputed temple on the Cambodian side of the frontier with Thailand) were binding. This decision was made in 1962. Since that time there have been no further agreed submissions from states in the Asian Pacific to the ICJ.

D *Why are Asian Pacific States Reluctant to Submit Disputes to Binding Dispute Settlement?*

Various explanations can be hazarded for the lack of resort to the ICJ or other forms of binding arbitration:[30]

[23] ASEAN Manila Declaration, 15 December 1987, http://www.asean.or.id/history/leader87.htm (on 15 October 1997) [4].

[24] South Pacific Nuclear Free Zone Treaty, 6 August 1985, [1986] ATS 32, 24 ILM 1440, annex 4.

[25] South Pacific Regional Trade and Economic Co-operation Agreement, 14 July 1980, [1982] ATS 31 ('SPARTECA').

[26] Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, 24 November 1986, [1990] ATS 31, 26 ILM 38.

[27] Ibid, Annex on Arbitration, art 8.

[28] Examples are the Agreement between Indonesia and Thailand Relating to the Delimitation of a Continental Shelf Boundary between the Two Countries in the Northern Part of the Strait of Malacca and in the Andaman Sea, 17 December 1971, reprinted in Jonathan Charney and Lewis Alexander, *International Maritime Boundaries* (1993) 1455; the Treaty between Thailand and Malaysia Relating to the Delimitation of the Territorial Seas of the Two Countries, 24 October 1979, reprinted in Charney and Alexander, 1091; and the Agreement between Burma (Myanmar) and Thailand on the Delimitation of the Maritime Boundary between the Two Countries in the Andaman Sea, 25 July 1980, reprinted in Charney and Alexander, 1341.

[29] *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6.

[30] R Anand, 'Attitude of the "New" Asian-African Countries Toward the International Court of Justice' in Frederick Snyder and Surakiart Sathirathai (eds), *Third World Attitudes Toward International Law* (1987) 163; Robert Lutz II, 'Perspectives on the World Court, the United States and International Dispute Resolution in a Changing World' (1991) 25 *The International Lawyer* 675. Note the view of Julius Stone that Asian countries refuse to accept the compulsory jurisdiction of the ICJ because such jurisdiction might inhibit resort to the various methods of

(1) There is a perception that international law and the jurisprudence of the ICJ reflect a dominant Western philosophy which fails to recognise other cultural traditions.[31]

(2) There has been a signal lack of participation by Asian Pacific states in the ICJ. Over the 50 year history of the court, there have been 82 judges of 44 nationalities. Of these, there have been only three Asian nations represented on the court (the Philippines, China and Japan) and none from the Pacific except Sir Percy Spender of Australia. Of the 23 Advisory Opinions and approximately 76 judgments of the court in contentious cases, only the *Temple of Preah Vihear Case*,[32] the *Nuclear Tests Cases*[33] and the *East Timor Case*[34] have related directly to the Asian Pacific.

An obvious reason for a lack of resort to the ICJ is that few states of the Asian Pacific have accepted the compulsory jurisdiction of the court under art 36(2) (the so-called 'optional clause') of its statute. Of the 59 states which have currently accepted the optional clause, only six are from the Asian Pacific: Cambodia (then Democratic Kampuchea) (1957), Japan (1958), the Philippines (1972), Australia (1975), New Zealand (1977) and Nauru (1988).[35] Of these acceptances, most are subject to reservations. One major Asian Pacific nation, China, has been adamantly opposed to acceptance of the optional clause, having, in 1972, refused to recognise the earlier Chinese acceptance in 1946.

(3) Unsatisfactory results of the few cases which have concerned the region may have had a chilling effect on the willingness of Asian Pacific states to resort to the court. Examples include: the *Nuclear Tests Cases*,[36] where the matter was declared moot on the basis of the statements of the French President (and other ministers) that atmospheric testing would stop; the *Temple of Preah Vihear Case*,[37] where the ICJ allowed the temple in dispute to remain on the Cambodian side of the border on the basis of the equitable doctrine of acquiescence; the *East Timor Case*,[38] where Portugal was able to take advantage of Australia's

extra-legal pressure for later adjustment otherwise open to them; methods ranging from demands for renegotiation, repudiation, hostile propaganda and boycott, to outright confiscation and the tacit instigation of popular violence: Anand, 'Attitude of the "New" Asian-African Countries', above n 30, 165.

31 Manohar Sarin, 'The Asian-African States and the Development of International Law' in Frederick Snyder and Surakiart Sathirathai (eds), *Third World Attitudes Toward International Law* (1987) 33.

32 *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6.

33 *Nuclear Tests Cases (Australia v France; New Zealand v France)* [1974] ICJ Rep 253, 457. Note also the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case* [1995] ICJ Rep 288, which sought to invoke the requirement for an environmental impact assessment before carrying out any further nuclear tests.

34 *Case Concerning East Timor (Portugal v Australia) (Judgment of 30 June 1995)* [1995] ICJ Rep 90.

35 [1994-95] *Yearbook of the International Court of Justice*, ch IV pt II; *Report of the International Court of Justice 1 August 1995–31 July 1996*, 51 UN GAOR, UN Doc A/51/4 (1996), also at http://www.law.cornell.edu/icj/reports/report96.htm (on 15 October 1997), para 17.

36 [1974] ICJ Rep 253, 457.

37 [1962] ICJ Rep 6.

38 [1995] ICJ Rep 90.

acceptance of the optional clause to bring an inappropriate party before the court. Furthermore, in the highly charged environment of resumed below-ground nuclear testing in the Pacific in 1996, the court gave an Advisory Opinion that 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict ... [except perhaps] in an extreme circumstance of self-defence, in which the very survival of a State would be at stake'.[39]

As a final example of disenchantment with resort to the court, there is the costly 1992 application against Australia by Nauru in the *Certain Phosphate Lands in Nauru Case*[40] which was settled in 1993 on the basis of an *ex gratia* indexed payment by Australia of AUD$107 million.[41]

While each of these cases was, arguably, an exemplary application of international law, the perception of the role of the ICJ as a mechanism for resolving disputes in the region may be limited.

(4) Many disputes in the region are not amenable to strictly legal resolution because they involve sensitive questions of sovereignty and domestic policies. For example, territorial disputes are too important (and the consequences of a legal decision continue for too long) to ignore the values of 'good neighbourliness' and consensus. At base, an agreement to submit a dispute to the ICJ creates for each state the grave risk of being bound by the wrong result. Not only is there a risk that a court will fail to satisfy one party or the other, but also there is a risk that neither party will be satisfied, as occurred with the 1992 St Pierre and Miquelon arbitral award between Canada and France.[42]

(5) There appears to be a common regional preference for flexible, conciliatory legal procedures.[43] The reluctance of Asian Pacific states to accept the compulsory jurisdiction of the ICJ or of any other arbitral tribunal is but an indicator of a much more profound dislike for strict legal adversarial approaches to problems and of a preference for informal consensual dispute resolution. Various reform proposals to encourage submission of disputes to some form of binding determination are being considered in an attempt to find a more flexible and conciliation-based approach.

E *Some Indications of Change*

There have recently been some indications that Asian states are more willing to accept certain forms of compulsory dispute settlement.

(1) While I have argued that states in the region do not usually submit their disputes to binding judicial determinations, there are currently two territorial

[39] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996)* 35 ILM 809, [105(2)(E)].

[40] *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240.

[41] Agreement between Australia and Nauru for the Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru, 10 August 1993, 32 ILM 1474.

[42] *Delimitation of Maritime Areas (Canada and France)* (1992) 31 ILM 1149.

[43] See, eg, Anand, 'Attitude of the "New" Asian-African Countries', above n 30, 163–4.

disputes in South East Asia in relation to which agreements to submit to the ICJ are reported to have been made: between Malaysia and Singapore (in relation to Pulan Batu Puteh) and between Indonesia and Malaysia (in relation to Sitadan and Ligitan).[44] It is too early to conclude that these agreements reflect growing confidence in the ICJ, especially in relation to territorial sovereignty issues. However, acceptable results for the states involved may foster a willingness to resort to third party resolution of such conflicts in the future.

(2) While states in ASEAN, for example, do not use the dispute resolution procedures of GATT, a regional mechanism has recently been established by the Protocol Amending the Framework Agreement on Enhancing ASEAN Economic Cooperation.[45] This Protocol recognises the need to strengthen settlement procedures and, under its terms, Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam have agreed that disputes relating to ASEAN economic agreements will be subject to a consultation and dispute settlement procedure. Any dispute which cannot be settled by good offices, conciliation or mediation will be subject to an objective assessment by a panel established by a Meeting of Senior Economic Officials ('SEOM'). SEOM will make a ruling based on the views of the panel, from which an appeal may be made, if necessary, to the ASEAN economic ministers. Parties are bound to comply with any final ruling of the ministers or the senior economic officials.

(3) There is a trend throughout the Asian Pacific and indeed the world towards arbitration of international commercial disputes rather than formal judicial procedures.[46] Arbitral procedures are more flexible, the parties choose the arbitrators and generally retain greater control over the process and outcome, and the proceedings are private and usually far less expensive than formal judicial options. For example, many states have now adopted the 1985 Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law ('UNCITRAL'),[47] and regional arbitration centres are now being established in Kuala Lumpur, Hong Kong, Singapore and Beijing. China has recently created arbitration rules for the China International Economic and Trade Arbitration Commission ('CIETAC'),[48] which is developing a

[44] Information supplied by the Department of Foreign Affairs and Trade, Commonwealth of Australia, January 1997. There has not yet been formal confirmation of these agreements.

[45] Protocol on Dispute Settlement Mechanism, 20 November 1996, http://www.asean.or.id/economic/dsm.htm (on 15 October 1997).

[46] Michael Pryles, 'Institutional International Arbitrations' (November 1991) *The Arbitrator* 127.

[47] Michael Pryles, Jeff Waincymer and Martin Davies, *International Trade Law: Commentary and Materials* (1996) 649. The Model Law can be found at 24 ILM 1302 and also at http://ra.irv.uit.no/trade_law/doc/UN.Arbitration.Model.Law.1985.html (on 15 October 1997). Note that an unofficial list suggests that in the Asian Pacific region, only Australia, New Zealand and Hong Kong have adopted the Model Law: http://ra.irv.uit.no/trade_law/status/UN.Arbitration.Model.Law.1985.status.html (on 15 October 1997).

[48] The arbitration rules of 7 October 1994 are reprinted in 34 ILM 1663. In 1995, CIETAC arbitrated over 900 cases, about half of which were foreign investment disputes, making it the busiest arbitration centre in the world: L Curry, 'Arbitration: What Works?' (1996) 34 *China Trade Report* 1, cited in East Asia Analytical Unit, Department of Foreign Affairs and Trade, Commonwealth of Australia, *China Embraces the Market: Achievements, Constraints and Opportunities* (1997) 86.

reputation among law practitioners and their clients as increasingly competent and consistent.

(4) A representative of China on the Sixth Committee of the United Nations General Assembly is reported to have encouraged the inclusion of a provision for the ICJ's jurisdiction in treaty clauses and to consider making it possible for the Secretary-General to request Advisory Opinions from the Court.[49]

(5) There has been some acceptance by states in the Asian Pacific of the binding dispute resolution procedures under the 1982 United Nations Convention on the Law of the Sea ('UNCLOS').[50]

Despite a history of rejecting third party resolution, there are now indications that Asian Pacific nations accept the need for some form of dispute mechanism, but of a kind which is more flexible, informal and amenable to state controls.

V LAW OF THE SEA IN THE ASIAN PACIFIC

A *1982 United Nations Convention on the Law of the Sea*

In no other area is the willingness of Asian Pacific states to participate in and benefit from international law more evident than in relation to the negotiations for, and later adoption of, the United Nations Convention on the Law of the Sea.[51] States of the Asian Pacific have been quick to seize the benefits of UNCLOS[52] because they have had a great deal to gain from the articulation and development of the new regime,[53] notably the dramatic increase in their maritime and fisheries rights through the Exclusive Economic Zone ('EEZ'), confirmation of sovereignty over the continental shelf, development of the concept of the archipelagic state, clarification of the rules relating to innocent passage and control over sea lanes.

When one examines the enormous expansions of jurisdiction that UNCLOS recognised and defined, it is not surprising that all states in the region, except the United States,[54] have signed UNCLOS and many have ratified it.[55] All states in

[49] Eyffinger, above n 16, 218.

[50] Chinkin, above n 21, 250.

[51] United Nations Convention on the Law of the Sea, 10 December 1982, [1994] ATS 31, 21 ILM 1261 (entered into force 16 November 1994) ('UNCLOS').

[52] Ivan Shearer, 'Navigation Issues in the Asian Pacific Region' in James Crawford and Donald Rothwell (eds), *The Law of the Sea in the Asian Pacific Region* (1995) 199. See generally Jon Van Dyke, Lewis Alexander and Joseph Morgan (eds), *International Navigation: Rocks and Shoals Ahead?* (1988).

[53] For a description of the new regime, see Shearer, *International Law*, above n 8, 234–60.

[54] The United States could be considered part of the Asian Pacific in the context of the law of the sea, because of the numerous Pacific islands which it represents in the international community.

[55] As of 25 September 1997, these were Australia, Brunei, Burma (Myanmar), China, the Cook Islands, Fiji, Indonesia, Japan, Malaysia, the Marshall Islands, the Federated States of Micronesia, Nauru, New Zealand, Palau, Papua New Guinea, the Philippines, Samoa, Singapore, the Solomon Islands, South Korea, Tonga and Vietnam. For the status of participation, see http://www.un.org/ Depts/los/los94st.htm (on 15 October 1997). For comments on the difficulties which explain non-ratification by some Pacific nations, see Edward Wolfers, 'The Law of the Sea in the South Pacific' in James Crawford and Donald Rothwell (eds), *The Law of the Sea in the Asian Pacific Region* (1995) 41.

the region claim a 12 mile territorial sea as permitted by UNCLOS (with special exceptions in relation to Singapore and the Philippines). Of the 17 states in the world claiming archipelagic status, eight are in the Asian Pacific: Indonesia, the Philippines, Kiribati, Papua New Guinea, Solomon Islands, Fiji, Tuvalu and Vanuatu.[56]

No country in the region has denied the principle of transit passage through and over international straits, nor the regime of non-suspendable innocent passage. While the regime relating to sea lanes and rights of overflight are being observed, objections concern the designation of certain straits as international. Indonesia's closure of the Lombok and Sunda Straits for military manoeuvres, for example, led to strong protests, particularly from Australia.[57] There have also been recent objections by Australia and the United States over the designation of three north-south sea lanes and denial of the sea lane status of the east-west lanes, a matter which is currently before the International Maritime Organisation under art 22 of UNCLOS.[58]

B *Actual and Potential Maritime and Territorial Disputes in the Asian Pacific Region*

Despite the benefits of UNCLOS in the Asian Pacific and the active participation of these states in its negotiation, the new law has crystallised old disputes and defined new ones. Disputes concern EEZ and continental shelf boundaries, access to oil and gas resources in overlapping maritime areas, and environmental and fisheries management. Delimitation disputes in the region arise in the following places:[59]

- Gulf of Thailand (concerning Thailand, Cambodia, Vietnam and Malaysia);
- Sea of Japan (Russia, Japan, North Korea, South Korea);
- Area north, west and east of the Natuna Islands (Vietnam, Indonesia, Malaysia and China); and
- East and West China Seas (Japan, South Korea, Brunei, Malaysia, China and Vietnam).

Regrettably, Charney and Alexander have concluded, after a study of maritime boundary delimitations throughout the world, that 'no normative principle of international law has developed that would mandate the specific location of any maritime boundary line'.[62] Such a conclusion, based as it was on wide research, is both unfortunate for the development of the rule of law in maritime disputes

[56] *Law of the Sea: Report of the Secretary-General*, 51 UN GAOR, UN Doc A/51/645 (1996) [27], endnote 19, also available at gopher://gopher.un.org/00/LOS/SGREPORTS/A_51_645.TXT (on 15 October 1997). Tonga is also a potential claimant: Shearer, 'Navigation Issues in the Asian Pacific Region', above n 52, 199.

[57] Donald Rothwell, 'The Indonesian Straits Incident: Transit or Archipelagic Sea Lanes Passage?' (1990) 14 *Marine Policy* 491. See also Donald Rothwell, 'Coastal State Sovereignty and Innocent Passage: The Voyage of the *Lusitania Expresso*' (1992) 16 *Marine Policy* 427.

[58] See generally Ian McPhedran, 'Indonesia Softens Sea Lanes Stance', *The Canberra Times*, 16 April 1996, 3.

[59] For a general discussion of these maritime claims, see Douglas Johnston and Mark Valencia, *Pacific Ocean Boundary Problems: Status and Solutions* (1991) 104–44.

[60] Charney and Alexander, above n 28, xlii.

and surprising, for, in recent years, the primary occupation of the ICJ and other arbitral tribunals, in over 20 maritime boundary disputes, has been to develop the jurisprudence and methods of delimitation. There remain, nonetheless, hundreds of unresolved, and possibly irresolvable, maritime boundary disputes.

Maritime disputes are further exacerbated by unresolved territorial claims in the Asian Pacific. Hitherto insignificant islands above water at high tide can, under art 121 of UNCLOS, claim a 12 mile territorial sea, a 200 mile EEZ and a continental shelf, including the oil and gas resources which might lie within them.[61]

The following are examples of disputes over islands which are creating significant regional instability:[62]

- Spratlys (Vietnam, China, Taiwan, Malaysia, Brunei and the Philippines);[63]
- Paracels (China and Vietnam);[64]
- Kuriles (Russia and Japan);[65]
- Takeshima Islands in the Sea of Japan (South Korea and Japan);[66]
- Diaoyu/Senkaku Islands (Japan, Taiwan and China);[67]
- Sitadan and Ligitan (Indonesia and Malaysia); and
- Pulan Batu Puteh (Malaysia and Singapore).

C *China's Approach to International Law: The Spratly Islands*

Since the post-Mao period of the 1980s, the Chinese approach to international law has been less antagonistic.[68] China no longer complains about unequal treaties, instead emphasising the benefits of international law in achieving

61 Under UNCLOS, above n 51, art 121(3), rocks which cannot sustain human habitation or an economic life of their own do not attract an EEZ or continental shelf, although this provision does not appear to command any political or legal attention.

62 See generally Marwyn Samuels, *Contest for the South China Sea* (1982).

63 Ibid 63–9, 78–107, 168–72, 188–94; Johnston and Valencia, above n 59, 113–5; Choon-Ho Park, 'The South China Sea Disputes: Who Owns the Islands and the Natural Resources' (1978) 5 *Ocean Development and International Law* 27.

64 Samuels, above n 62, 68–110. In 1974 China and Vietnam fought a naval battle over these islands: Tao Cheng, 'The Dispute over the South China Sea Islands' (1981) 10 *Texas International Law Journal* 265.

65 See Victor Prescott, *Maritime Jurisdiction in Southeast Asia: A Commentary and Map* (1981); K Call, 'Southern Kuriles or Northern Territories? Resolving the Russo-Japanese Border Dispute' [1992] *Brigham Young University Law Review* 727; Peter Corne, 'The Status of the Kurile Islands (Northern Territories) at International Law' [1991] *Australian International Law News* 29.

66 See Johnston and Valencia, above n 59, 113–5.

67 See generally the papers presented to the International Law Conference on the Dispute over the Diaoyu/Senkaku Islands between Taiwan and Japan, I-Lan, Taiwan, April 1997 (on file with author); Jonathan Charney, 'Central East Asian Maritime Boundaries and the Law of the Sea' (1995) 89 *American Journal of International Law* 724, 739–40; Daniel Dzurek, 'The Senkaku/Diaoyu Islands Dispute', http://www.ibru.dur.ac.uk/docs/senkaku.html (on 18 October 1996); Choon-Ho Park, 'Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy' (1973) 14 *Harvard International Law Journal* 212, 248–58.

68 Hungdah Chiu, 'Chinese Attitudes Toward International Law in the Post-Mao Era 1978–1987' (1987) 21 *International Lawyer* 1127; Jeanette Greenfield, *China's Practice in the Law of the Sea* (1992).

cooperation among states, realising foreign and economic goals and encouraging foreign investment.[69]

China regards the dispute of sovereignty over the Spratlys (20 islands that protrude above sea level at high tide, with no permanent population, visited by local fishermen to fish and collect turtle shells) as an issue of legal rights and bases its claim upon original 'discovery' of the islands around 200 BC[70] (although a Western scholar puts Chinese discovery in the Yuan dynasty between AD 1282 and 1368)[71]. 'Discovery' as a basis for title has long been rejected at international law and was probably never fully accepted as grounds for sovereignty, even by the European powers in the 19th and early 20th centuries.[72]

Under modern international law a state must satisfy the principle of 'effective occupation' of the claimed territory.[73] It is ironic that new and developing states are often the most stalwart supporters of traditional international law. In this instance, China persists in employing the old 'discovery' doctrine in its claim to all islands of the Spratly group, without demonstrating that it has effectively occupied them. Such a legally fragile claim stands in stark contrast to rival claims to parts of the island chain by Vietnam, Taiwan, Malaysia, Brunei and the Philippines which are supported by attempts to demonstrate acts of effective occupation.[74]

D *Dispute Avoidance Mechanisms*

1 *Joint Development of Disputed Resources*

While it remains unlikely that the conflicting Spratlys claims or many other of the present boundary and territorial disputes will be submitted to any form of binding arbitration, it is notable that Asian Pacific nations have acted to avoid confrontation by agreeing, as a temporary arrangement, to joint development of oil and gas resources and to cooperative arrangements in overlapping EEZ and continental shelf areas.

The idea of joint management of resources, whether of fisheries or oil and gas, is not new.[75] What is new is that, in the Asian Pacific, the underlying problem has been one either of disputed sovereignty over islands or of disputed maritime boundaries, rather than of access to the resource itself. The concept of joint

69 East Asia Analytical Unit, above n 48.

70 Michael Bennett, 'The People's Republic of China and the Use of International Law in the Spratly Islands Dispute' (1992) 28 *Stanford Journal of International Law* 425, 434.

71 Martin Katchen, 'The Spratly Islands and the Law of the Sea: "Dangerous Ground" for Asian Peace' (1977) 17 *Asian Survey* 1167, 1178, cited in Bennett, above n 70, 434.

72 Friedrich von der Heydte, 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law' (1935) 29 *American Journal of International Law* 448; Gillian Triggs, *International Law and Australian Sovereignty in Antarctica* (1986) 4.

73 Triggs, above n 72, 4–30.

74 Johnston and Valencia, above n 59, 122–3; Bennett, above n 70, 437–40.

75 For example, marine joint management regimes exist in relation to parts of the North Sea, the Bay of Biscay and throughout the Middle East: see Hazel Fox *et al*, *Joint Development of Offshore Oil and Gas* (1989–90) vol 1, 3–5, 'Table of Joint Development Agreements'; Hazel Fox (ed), *Joint Development of Offshore Oil and Gas* (1989–90) vol 2; Gerald Blake *et al* (eds), *The Peaceful Management of Transboundary Resources* (1995).

development has been adopted in this region as a creative way to avoid the question of which nation owns the resource, in order to move on to the practical question of how to manage and exploit the resource to the mutual benefit of both disputing states.

Examples of regional joint development agreements are:

- South Korea and Japan (1974);[76]
- Australia and Indonesia in the Timor Gap (1989);[77]
- Malaysia and Thailand (1990);[78]
- Malaysia and Vietnam (1994);[79] and
- Continuing discussions on joint development between Thailand and Cambodia in the Gulf of Thailand.[80]

(a) What are the Main Features of a Joint Development Agreement?

These are the salient aspects of joint development agreements in the Asian Pacific region:

- the agreement will be 'sovereignty neutral', in the sense that it cannot prejudice the legal claims of either state;
- the agreement will be temporary, pending final determination;
- joint development is limited to the oil and gas resources of the continental shelf or disputed zone;
- a primary aim is to achieve optimum commercial exploitation consistent with good oilfield practices;
- there is equal sharing of the costs and benefits;
- sovereign rights are to be exercised through some form of joint authority.[81]

Such regimes can unlock the resources of the seabed and also create an environment of greater confidence to agree upon other issues of mutual concern

[76] Agreement between Japan and South Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, 30 January 1974, 1225 UNTS 113.

[77] Treaty between Australia and Indonesia on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia, 11 December 1989, [1991] ATS 9, 29 ILM 469 ('Timor Gap Treaty').

[78] Memorandum of Understanding between Thailand and Malaysia on the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea-Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, 13 May 1990, reprinted in Charney and Alexander, above n 28, 1111.

[79] Although the details of a 1994 agreement between Malaysia and Vietnam concerning joint development remain private to the parties, its existence has been affirmed by Malaysia (information provided by the Department of Foreign Affairs and Trade, Commonwealth of Australia).

[80] Note that, in anticipation of a treaty, tender documents for Conditional Petroleum Agreements between petroleum companies and the Cambodian government were drawn up as early as 20 November 1995 (on file with author).

[81] See generally Gillian Triggs, 'Joint Development Agreements in the Asian Region: A Creative Response to Maritime Boundary Disputes' (1997) 33 *International Law News* 9, 14–15; Mark Valencia and Masahiro Miyoshi, 'Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claim Areas?' (1986) 16 *Ocean Development and International Law* 211; Ian Townsend-Gault and William Stormont, 'Offshore Petroleum Joint Development Arrangements: Functional Instrument? Compromise? Obligation?' in Blake *et al*, above n 75, 51; David Ong, 'South-east Asian State Practice on the Joint Development of Offshore Oil and Gas Deposits' in Blake *et al*, above n 75, 77; Douglas Johnston and Phillip Saunders (eds), *Ocean Boundary Making: Regional Issues and Developments* (1988).

such as environmental and fisheries management.[82] It is notable that ASEAN, in its Declaration on the South China Sea in 1992, called on the parties

> to explore the possibility of cooperation in the South China Sea relating to the safety of maritime navigation and communication, protection against pollution of the marine environment, coordination of search and rescue operations, efforts towards combating piracy and armed robbery as well as collaboration in the campaign against illicit trafficking in drugs[.][83]

Yet another important strategy for cooperation to 'manage' issues of dispute in the South China Sea is the Codes of Conduct issued as Joint Statements by the Philippines and China in August 1995 and the Philippines and Vietnam in November 1995.[84] These Codes (which are similar) reiterate the critical relationship of peace and stability to economic prosperity in the region and agree to settle their bilateral differences in accordance with international law and UNCLOS. The emphasis was upon 'confidence-building' measures and a pragmatic approach to cooperation. Talks have taken place on fisheries and environmental issues between the Philippines and China and further consultations are expected.[85]

2 *Cooperative Regimes*

Joint development arrangements enable states to gain access to disputed oil and gas resources by avoiding resolution of maritime boundary issues. Other techniques for avoidance of existing or potential sovereignty disputes in the Asian Pacific region are treaties creating regimes for cooperation. The most recent example is the 1997 treaty between Australia and Indonesia establishing an EEZ boundary and certain seabed boundaries.[86] In the area of overlapping

[82] It should be remembered, however, that an agreement between two disputants cannot affect the legal rights of a third state: Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, 8 ILM 679, art 34. For example, there has never been any obligation on China to recognise the Japan-South Korea joint development agreement: see above n 76.

[83] Declaration on the South China Sea, 22 July 1992, reprinted in Ted McDorman, 'The South China Sea Islands Dispute in the 1990s — A New Multilateral Process and Continuing Friction' (1993) 8 *International Journal of Marine and Coastal Law* 263, 285. Note also the ASEAN Agreement on the Conservation of Nature and Natural Resources, 9 July 1985, http://www.asean.or.id/function/ agrcnr85.htm (on 15 October 1997): art 19(1) which provides that 'Contracting Parties that share natural resources shall cooperate concerning their conservation and harmonious utilization, taking into account the sovereignty, rights and interests of the Contracting Parties concerned in accordance with generally accepted principles of international law.'

[84] Joint Statement of the Philippines and the People's Republic of China on Consultations on the South China Sea and on Other Areas of Co-operation, 9–10 August 1995 (on file with author); Joint Statement on the Fourth Annual Bilateral Consultations between the Philippines and Vietnam, 7 November 1995 (on file with author).

[85] Information supplied by Department of Foreign Affairs and Trade, Commonwealth of Australia, 30 June 1997.

[86] Treaty between Australia and Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, 14 March 1997, http://www.austlii.edu.au/dfat/19970314.html (on 15 October 1997). Note that entry into force will be preceded by minor legislative amendments to the *Petroleum (Submerged Lands) Act* 1967 (Cth) and a new EEZ Proclamation under the *Seas and Submerged Lands Act* 1973 (Cth) and, in accordance with the new procedures, the treaty will be tabled in Parliament and examined by the Joint Standing Committee on Treaties: Department of Foreign Affairs and Trade, Commonwealth of Australia, *Explanatory Notes*.

jurisdiction (that is, where Australia has sovereignty over the continental shelf and Indonesia has sovereign rights over the EEZ), Australia retains sovereign rights to the seabed while Indonesia has sovereign rights over the water column. This is the first such sub-regional agreement Indonesia has entered into with any country outside ASEAN. The only international law precedent for this kind of cooperative regime is another successful cooperative agreement, the Torres Strait Treaty of 1978 between Australia and Papua New Guinea.[87]

3 *Track-Two Diplomacy*

Various other strategies are being employed to avoid sovereignty issues and to build confidence to resolve problems in the future. One such strategy is 'track-two' or 'second-tier' diplomacy.[88]

Traditional diplomatic initiatives involve meetings between accredited representatives of sovereign states working with draft texts in an attempt to achieve agreement. By contrast, track-two diplomacy does not necessarily have official standing. Informal meetings will include participants who, while they may in fact be experienced government officials, will not represent their governments. Other participants may include academics and non-government interest groups. Participants are free to voice any view or position they consider fruitful in achieving resolution, without committing their governments to any policy or approach. At the conclusion of a meeting, the relevant governments are in the 'happy' position of being able to dismiss any proposals they do not favour or to take up those which may prove to be useful.

There are many examples of this approach to problem solving. One that may prove to be of critical significance in the future is the South China Sea Project,[89] which concerns the Spratly group of islands. The South China Sea Project is a single ('non-aligned') project directed by Ambassador Hasjim Djalal of Indonesia (critically, Indonesia is not one of the claimants). While many of the sovereignty claims of the region seem insoluble, there are other interests and values which were previously being ignored, including threats to the environmental quality of the seas and the problem of overfishing.

[87] Treaty between Australia and Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, including the Area known as the Torres Strait, and Related Matters, 18 December 1978, [1985] ATS 4, 18 ILM 291; Dennis Renton, 'The Torres Strait Treaty after 15 Years: Some Observations from a Papua New Guinea Perspective' in James Crawford and Donald Rothwell (eds), *The Law of the Sea in the Asian Pacific Region* (1995) 171–80.

[88] Gordon Munro, 'The Management of Tropical Tuna Resources in the Western Pacific: Trans-Regional Co-operation and Second Tier Diplomacy' in Blake *et al*, above n 75, 475. See, with specific relevance to the South China Sea disputes, The South China Sea Informal Working Group at the University of British Columbia, 'Brokering Cooperation in the South China Sea', http://www.law.ubc.ca/centres/scsweb/project.html (on 15 October 1997) and 'Role of "Track-Two" Diplomacy in Ocean Affairs', http://www.law.ubc.ca/centres/scsweb/track2.html (on 15 October 1997).

[89] In 1990 and 1991, Indonesia hosted workshops for ASEAN states to discuss management of disputes in the South China Sea which resulted in an ASEAN Declaration on the South China Sea, 22 July 1992, http://www.asean.or.id/politics/pol_agr5.htm (on 15 October 1997), calling for peaceful resolution of sovereignty issues. See also McDorman, above n 83, 274.

Track-two diplomacy takes a functional approach to these issues by conducting informal workshops to develop cooperative approaches to regional issues such as the less threatening or sensitive questions of ecosystem management, marine scientific research, shipping, navigation and communications. Thus far, there have been workshops in Bali (1990), Bandung (1991), Yogyakarta (1992), Surabaya (1993), Bukittinggi (1994), Balikpapan (1995) and Batam (1996).[90] These meetings are continuing and, though it is too early to assess their legal value, the fact that discussions continue is a positive indication.

Another example of second-tier diplomacy occurs under the auspices of the Pacific Economic Cooperation Council ('PECC'), which includes representatives of government, the private sector and academia, and which was established in 1980 to encourage cooperative fisheries management between the Pacific Islands and South East Asia. This initiative has proved successful in creating the Western Pacific Fisheries Consultative Committee ('WPFCC') in 1988 for cooperation in fisheries between the Pacific and South East Asia, gaining access for research vessels into the waters of the Philippines and Indonesia in 1990.[91]

It can be expected that informal processes of this kind will continue to be developed within this region.[92]

VI HUMAN RIGHTS

A *Overview of Human Rights in the Asian Pacific Region*

An examination of disputes arising from territorial claims or from expanded maritime jurisdictions suggests that Asian Pacific nations respond to international law according to their assessments of economic, political and strategic interests. Economic goals and common regional interests are the critical factors.

This analysis is less true when we consider questions of human rights. And this, finally, is where Confucius comes in. What have his thoughts and those of other Asian cultural and religious figures to do with international law? It is in relation to international human rights issues that cultural and religious perspectives appear to play the strongest role. This is because the philosophies and religions of Islam, Hinduism and the teachings of Buddha and Confucius are pervasive in their influence on Asian Pacific nations' attitudes to international human rights.[93] Certainly, regional leaders such as Mr Lee Kwan Yu and Dr Mahathir repeatedly argue that Asian cultural values are distinct from those of Europe, and Dr

[90] See generally the South China Sea Informal Working Group at the University of British Columbia, http://www.law.ubc.ca/centres/scsweb/index.html (on 15 October 1997).

[91] Munro, above n 88, 483–5.

[92] Note, eg, the recent development of 'bilateral codes' between the Philippines and both China and Vietnam: above n 84.

[93] Eyffinger, above n 16, 201–2.

Mahathir has called for a revision of the Universal Declaration of Human Rights.[94]

This emphasis on Asian values is reflected in pressure for what has been described as 'cultural relativism' — that is, universal human rights should be modified or changed to reflect specific economic, religious or cultural circumstances.[95] For example, it might be argued that freedom of expression and association can properly be restricted in the interests of social order and economic progress for the community as a whole. This is an argument which will be rejected by many, probably most, theorists as an 'elitist' defence, on the ground that the right to free speech and association are universal and not variable according to economic, political or cultural priorities.[96] Whatever the theoretical position, it is the legal tension between fundamental rights and national priorities which has led to significant discord in diplomatic relations in the Asian Pacific region.[97]

Many of the philosophical assumptions of international human rights law have their origins in the European intellectual tradition, with the result that the Western emphasis upon the individual appears to conflict with Eastern cultures where individual rights may give way to community interests. Certainly, the West has striven to divorce law from religion, while, for Eastern nations, religion has remained an integral part of, indeed, the justification for, the law.[98]

[94] Bilahari Kausikan, 'Asia's Different Standard' (1993) 92 *Foreign Policy* 24, 26 asserts that 'there is a general discontent throughout the [Asian] region with a purely Western interpretation of human rights'.

[95] See generally Fernando Tesón, 'International Human Rights and Cultural Relativism' (1985) 25 *Virginia Journal of International Law* 869; Ahmad Ferrag, 'Human Rights and Liberties in Islam' in Jan Berting *et al* (eds), *Human Rights in a Pluralist World: Individuals and Collectivities* (1990) 133; Douglas Donoho, 'Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards' (1991) 27 *Stanford Journal of International Law* 345; Annette Marfording, 'Cultural Relativism and the Construction of Culture: An Examination of Japan' (1997) 19 *Human Rights Quarterly* 431; Yash Ghai, 'Human Rights and Governance: The Asia Debate' (1994) 15 *Australian Yearbook of International Law* 1; Michael Vatikiotis and Robert Delfs, 'Cultural Divide: East Asia Claims the Right to Make its Own Rules', *Far Eastern Economic Review*, 17 June 1993, 20; Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' in Frederick Snyder and Surakiart Sathirathai (eds), *Third World Attitudes Toward International Law* (1987) 341.

[96] Tesón, above n 95, 894–5. See also Gareth Evans, Minister for Foreign Affairs and Trade, Commonwealth of Australia, 'Dealing with Asia: National Interests, Democratic Rights' (Speech to the Asia Society, New York, 25 September 1991), reprinted in (1991) 62 *Australian Foreign Affairs and Trade: The Monthly Record* 565, 567: 'It is difficult to suggest that one is unconscionably interfering in a country's internal affairs when the subject of discussion involves universally accepted values ... There is certainly no credible argument that can be made on the basis of cultural relativism — namely, the notion that what is good and valuable depends wholly on what is accepted as such in a particular prevailing cultural environment.' Note, however, that consistency in human rights will often give way to a realist perspective in practice.

[97] See, eg, the policy of the Commonwealth of Australia in Commonwealth, *A Review of Australia's Efforts to Promote and Protect Human Rights*, Parl Paper No 378 (1994), especially ch 4, 'Aid and Trade and Human Rights'. Note the view that Australia has generally been reluctant to condemn unequivocally human rights violations of its closest neighbours such as Indonesia, preferring instead to stress those in Europe and Africa. For example, during the period 1990–91 only 42 bilateral representations made related to Asia, whereas 114 related to Africa, 84 to Latin America and 72 to Western Europe: Harry Reicher, *Australian International Law: Cases and Materials* (1995) 627.

[98] Eyffinger, above n 16, 201–20.

It is also true that, throughout the Asian Pacific, there is a strong collectivist tradition that considers economic and social values as at least interdependent on individual human rights. There is a fear that international human rights standards are overzealous of the rights of the individual, placing the community itself in jeopardy. The preference of Asian Pacific states has been for the development of new international laws which promote economic reform and raise the standards of living for more people.[99]

While it is possible to draw out different values in Asian Pacific approaches to human rights, there is nothing in the cultural traditions of the Asian Pacific region which either impedes adherence to international human rights law or which necessarily juxtaposes the rights of the individual against the interests of the group. Islam and Hinduism and the teachings of Confucius provide a code of conduct and a spiritual message which has an impact on how adherents view law, justice and equity, and which emphasises universalism, non-aggression and the importance of the individual.[100]

To the extent that there are impediments to human rights laws in the Asian Pacific, these lie in government assessments of priorities, in the determination that social and economic needs, political stability and order, both nationally and within the region, take precedence over individual rights. These observations highlight the need for further research and analysis on human rights implementation in the Asian Pacific and indicate that a clearer understanding of regional values and priorities could create greater confidence and a willingness to work towards achieving universal human rights.

B *Adherence to Human Rights Conventions*

Asian Pacific nations are notably often not parties to the major international human rights conventions and, if they have become parties, it has been with many formal reservations. The International Covenant on Civil and Political Rights,[101] for example, has 140 parties, of which only Cambodia, the two Koreas, Japan, the Philippines, Thailand, Australia, New Zealand and Vietnam are from this region.[102] With the exception of Thailand, and the addition of the Solomon Islands, these same states are some of the 137 parties to the International Covenant on Economic, Social and Cultural Rights.[103] Only Australia, New Zealand, the Philippines, Indonesia, South Korea, China and Cambodia are among the parties to the Convention Against Torture and Other Forms of Cruel,

[99] Donnelly, above n 95, 341–57; Adamantia Pollis and Peter Schwab (eds), *Human Rights: Cultural and Ideological Perspectives* (1979).

[100] Donnelly, above n 95, 341–57.

[101] International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, 6 ILM 368.

[102] For the status of participation, see http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html (on 15 October 1997).

[103] International Covenant on Economic, Social and Cultural Rights, 19 December 1966, 993 UNTS 3, 6 ILM 360. For the status of participation, see http://www. un.org/Depts/ Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_3.html (on 15 October 1997).

Inhuman or Degrading Treatment or Punishment.[104] Of the 124 parties to the Genocide Convention,[105] only Australia, Cambodia, China, the two Koreas, Fiji, Laos, Malaysia, Burma (Myanmar), New Zealand, Papua New Guinea, the Philippines, Singapore, Tonga and Vietnam are from the Asian Pacific.[106] The tendency to non-participation by Indonesia, Malaysia, Singapore, Brunei, Laos, Burma and the Pacific Island nations is also true for other human rights instruments.

Adherence to a human rights treaty does not necessarily protect human rights, and research into which states are parties to human rights treaties does not tell us much about the commitment of those states to this aspect of international law. We can, however, learn something about a state's approach to human rights by looking at the way it chooses to implement its treaty obligations. The practices of Japan provide an interesting example of the cultural approach to human rights implementation in that country.

C *Japanese Approach to Human Rights and International Law*

Japan is well known for its importation of foreign systems and models of law and has recently embarked on a program of internationalisation, including the implementation of treaty obligations.[107] Japan is a party to both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Its approach to implementing the obligations they impose demonstrates Japan's clear preference for the gradual, non-coercive style exemplified by the Social Rights Covenant, as distinct from the more rigid, strict legal orientation of the Civil Rights Covenant.[108]

When giving effect to certain obligations under another human rights treaty, the Convention on the Elimination of All Forms of Discrimination Against Women,[109] Japan enacted the *Equal Employment Opportunity Act* in 1985,[110]

[104] Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85. For the status of participation, see http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html (on 15 October 1997).

[105] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

[106] For the status of participation, see http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_1.html (on 15 October 1997).

[107] Kenneth Port, 'The Japanese International Law "Revolution": International Human Rights Law and Its Impact in Japan' (1991) 28 *Stanford Journal of International Law* 139; Marfording, above n 95; Adamantia Pollis, 'Cultural Relativism Revisited: Through a State Prism' (1996) 18 *Human Rights Quarterly* 316, 333–4. Note that Japan has signed only 8 of 24 human rights related treaties: Ronald Yates, 'Japan Seeks UN Security Council Seat', *Chicago Tribune,* 17 June 1991, section 1, 10.

[108] Yuji Iwasawa, 'Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law' (1986) 8 *Human Rights Quarterly* 131. Port, above n 107, 165, notes that the Civil Rights Covenant is part of Japanese law, because it is self-executing, however criminal procedures, for example, do not comply with the requirements of the Covenant. See also Lawrence Repeta, 'The International Covenant on Civil and Political Rights and Human Rights Law in Japan' (1987) 20 *Law in Japan* 1, 14–23.

[109] Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13, [1983] ATS 9, 19 ILM 33.

which called for voluntary changes in employer decision-making.[111] While a 'voluntary law' is a contradiction in terms to a Western lawyer, and the gradual approach to changing employment practices might not achieve the international standard immediately, this non-coercive legislation is reported to have been successful in substantially improving women's employment conditions.[112]

By contrast, there has been little attempt in Japan to give any direct effect to the Civil Rights Covenant, which contains legal rules which do not encourage change within the context of Japanese society.[113]

D *Trade and Economic Sanctions Against Burma*

A recent example of the tension in the Asian Pacific generated by human rights concerns is the decision by the United States to prohibit new investment in Burma and the decision by the European Union to ban Burmese leaders from travelling to its member states.[114] While all the evidence indicates that Burma is in serious breach of international human rights, Burmese officials argue that the opposition National League for Democracy is a lackey and minion of the West and that the economic sanctions are an attempt to deny Burma access to the technology and investment which are crucial to improve the standard of living of the Burmese people.[115]

Juxtaposed against the Western response is the quite different reaction from within our region. The Philippines is reported to have accused the United States and European Union of hypocrisy and a denial of democracy by excluding Burma from the international community.[116] The Philippines' Foreign Minister relied on the classical international rule embodied in art 2(7) of the UN Charter: no state shall interfere in the domestic matters of another state.

The minister argued that Burma should be left to sort out its own domestic problems, including containing insurgent terrorist groups within its territory and controlling the narcotics trade. Most significantly, the member states of ASEAN have opposed trade sanctions of any kind, are more willing to understand the defence and security priorities of the Burmese military rulers and recently reaffirmed their support for the induction of Burma as a full member of ASEAN later in 1997.[117]

The recent Burmese example of human rights practices in Asia indicates that Asian states are likely to respond to human rights challenges from the West by insisting on the primacy of sovereign rights over domestic matters and will go

110 Law No 45 of 1 June 1985. See generally Masako Kamiya, 'A Decade of the Equal Employment Opportunity Act in Japan: Has it Changed Society?' (1995) 25 *Law in Japan* 40.

111 Treaties are self-executing in Japanese law, but the Social Rights Covenant was thought by the Osaka High Court to require legislative changes: Port, above n 107, 154.

112 Ibid 169.

113 Ibid 165, 169–70. Cf Repeta, above n 108, 26–8.

114 Mark Baker, 'West bans on Burma dictatorial: Philippines', *The Age* (Melbourne), 5 May 1997, 10.

115 Ibid.

116 Ibid.

117 Ibid.

forward to include the offending state in regional cooperative arrangements rather than exclude it. The emphasis is on discussion, cooperation and seeking consensus and good neighbourly sympathy for domestic issues, rather than confrontation and insistence on the rule of law.

While it is important to understand a regional preference for gradual implementation of voluntary standards, it remains true that, as Australia's former Foreign Minister, Gareth Evans, recognised, there is

> no country which seriously suggests that the Universal Declaration [of Human Rights] does not apply to it. We do the victims of injustice no good to dress their tormentors in the respectable garb of cultural relativism.[118]

There is a core of rights from which no country either can or will claim to derogate, regardless of how pressing its economic priorities or unique its culture. A state will not usually deny that the rights not to be subject to genocide, murder, torture or slavery are rights which each of its citizens can claim. However, the rights to a fair and public hearing of criminal charges and to freedom of thought, conscience and religion are thought by many governments of Asia to be less definitively established as international law and more open to interpretation.[119]

The challenge for international human rights lawyers in this region is to maintain and expand acceptance of the core of human rights, while remaining sensitive to wider cultural, economic and social priorities. Australia's support for a regional secretariat for national human rights commissions, and for a regional approach to the removal of land mines, might prove to be positive steps toward regional commitment to basic human rights standards.[120]

An understanding of religious and cultural differences is important to the effective implementation of human rights in the region, and efforts to encourage this might usefully recognise the preference for voluntary consensus-based standards which are adopted gradually with growing confidence, education and experience. As a practical matter, it is likely that, with economic wealth, Asian Pacific nations will gain the political power to shape international laws which reflect more closely their values of community and economic and social well-being.

VII GROWTH OF REGIONAL INSTITUTIONS IN THE ASIAN PACIFIC

Asian Pacific states are now active participants in the development of regional institutions. While the relatively short history of Asian Pacific states in international law has been noted, there is now a greater willingness to be involved in international and, particularly, regional institutions and

[118] Gareth Evans and Bruce Grant, *Australia's Foreign Relations: In the World of the 1990s* (1991) 148.

[119] Note, eg, the response of Singapore to complaints by some US Congressmen about Singapore's detention of social workers and activists in 1987: Ghai, above n 95, 8–9; Henry Steiner and Philip Alston, *International Human Rights in Context: Laws, Politics, Morals* (1996) 232.

[120] Alexander Downer, Minister for Foreign Affairs and Trade, Commonwealth of Australia, 'Australia's True Role in Asia' (Speech at the Asialink launch, Canberra, 1 May 1997) 3.

conferences.[121] This may be explained by the practical fact that such cooperative efforts are capable of furthering national interests.

States are cooperating to resolve by treaty such regional concerns as environmental and fisheries conservation and management, communications, investment protection, economic and trade relations and security matters. Through the South Pacific Forum in particular, Pacific nations have negotiated several important regional treaties.[122] They recognise that, through such regional groups, Pacific nations are better able to share costs and experience and to influence global negotiations and law-making.[123] Moreover, through the process of communication and consensus decision-making, states can gain trust and confidence in each other so as to avoid disputes.

Regional groupings in relation to economic issues include ASEAN, which was intended to facilitate economic cooperation, though it now deals with political and security cooperation as well.[124] Other initiatives are being taken through ASEAN such as the ASEAN Free Trade Arrangements ('AFTA'). There are also the Pacific Economic Cooperation Council ('PECC'); the Asia Pacific Economic Commission ('APEC'), which seeks open regionalism; the Economic and Social Commission for Asia and the Pacific ('ESCAP'), which reports to the UN Economic and Social Council ('ECOSOC'); Closer Economic Relations between New Zealand and Australia, which aims to harmonise laws and practices and achieve greater economic cooperation; and the South Pacific Bureau for Economic Cooperation, which was established to encourage cooperation and discussion on trade, economic development, transport and tourism.

In addition to the economic institutions, Asian Pacific nations have negotiated several environmental and fisheries management treaties, including the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986,[125] the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping 1986,[126] the Convention for the Prohibition of

121 See, eg, ASEAN Bangkok Summit Declaration, 15 December 1995, 35 ILM 1063. Note also the ASEAN Framework Agreements on Intellectual Property Cooperation and on Services, 15 December 1995, 35 ILM 1072.

122 Joeli Veitayaki, 'The Peaceful Management of Transboundary Resources in the South Pacific' in Blake *et al*, above n 75, 491.

123 Ibid.

124 See, eg, the ASEAN agreements, above n 121.

125 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, 24 November 1986, [1990] ATS 31, 26 ILM 38. The South Pacific Regional Environment Programme (SPREP) has recently coordinated a project called 'Capacity 21' which concluded in August 1997. The project focused on the strengthening of institutional and environmental entities in the South Pacific countries, funded by the UN Development Program. A new project, 'Capacity Building for Environmental Management', will succeed the Capacity 21 project and will run to 2001 (information supplied by Department of Foreign Affairs and Trade, Commonwealth of Australia, 7 April 1997). See generally Joseph Morgan, 'Marine Regions and Regionalism in South-East Asia' (1984) 8 *Marine Policy* 299; Biliana Cicin-Sain and Robert Knecht, 'The Emergence of a Regional Ocean Regime in the South Pacific' (1989) 16 *Ecology Law Quarterly* 171.

126 Protocol for the Prevention of Pollution of the South Pacific Region by Dumping, 25 November 1986, 26 ILM 38.

Fishing with Long Driftnets in the South Pacific 1989,[127] the South Pacific Nuclear Free Zone Treaty 1985[128] and the Treaty on the Southeast Asian Nuclear Weapon-Free Zone 1995.[129] Fisheries management has been strengthened by the 1992 Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region.[130]

These regional treaties are important in developing regional cohesion and shared interests and values. They typically adopt consensus decision-making procedures and avoid any form of dispute resolution.[131]

VIII CONCLUSIONS

There are features which are distinctive to states of the Asian Pacific, features which have had a creative impact on international law and will contribute to the ability to coexist peacefully within the region. They are:

- a preference for consultation and consensus decision-making and good neighbourly relations;
- a dislike of confrontational/adversarial litigation of disputes, particularly third party dispute resolution before a court or tribunal;
- a preference for conflict avoidance mechanisms demonstrated by a trend towards workshops, joint management and development regimes, cooperation agreements and 'track-two' diplomacy as means of resolving disputes;
- a community and social welfare orientation to human rights issues;
- a strong emphasis on economic priorities in law-making and foreign policy.

Despite the relatively short history of many Asian Pacific states, they have actively participated in international law-making through multilateral and regional institutions and treaties over the last 25 years or so, especially where their interests have been furthered under the 1982 Law of the Sea Convention. Engagement by Asian Pacific states with the international legal system reflects growing confidence and experience in the techniques of diplomacy and international law, coupled with the practical, economic and technical skills to secure their national interests.

[127] Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, 24 November 1989, [1992] ATS 30, 29 ILM 1449.

[128] South Pacific Nuclear Free Zone Treaty, 6 August 1985, [1986] ATS 32, 24 ILM 1440.

[129] Treaty on the Southeast Asian Nuclear Weapon-Free Zone, 15 December 1995, 35 ILM 635.

[130] Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, 9 July 1992, [1993] ATS 31, 32 ILM 136.

[131] Chinkin, above n 21, 256, points out that while Australia has recognised, facilitated and worked with the regional preference for consensus and non-confrontation, there is little doubt that the government will resort to traditional methods where necessary. For example, when Indonesian vessels fished in Australian waters in 1989, contrary to a memorandum of understanding between Australia and Indonesia, Australia increased its coastal surveillance, seized the offending vessels and embarked upon legal proceedings for their destruction. This direct action led to renewed consultations with Indonesia and to yet another agreement on fisheries regulation on 29 April 1989.