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The Helsinki Water Convention: Implementation and Compliance in Asia

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Abstract

In 2013 the Convention on the Protection and Use of Transboundary Watercourses and Lakes ('the Helsinki Convention') became a global treaty, and is now open to all states, including in Asia. This article reviews the application of the Helsinki Convention in Asia, with a particular focus on implementation and compliance. This focus follows an outline of the main institutions and procedural provisions, and experience derived from the first and second assessments of transboundary waters. The development of a regime within the Helsinki Convention is needed because of the absence of formal reporting and compliance mechanisms, which are considered to be essential to modern multilateral environmental agreements.

I. Introduction

There are 41 Parties to the United Nations Economic Commission for Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and Lakes ('the Helsinki Convention') which came into force on 6 October 1996 after adoption in Helsinki on 17 March 1992.¹

Since 2013 it has been a global treaty,² and in focusing on transboundary water cooperation, is applicable to Asian as well as other states.³ This is significant for the following reasons: first, Asia contains the largest number of transboundary watercourses and lakes; second, there is a need to ensure environmental protection, and equitable and reasonable use of them; third, the potential for conflict based on state sovereignty⁴ is high, and cooperation is therefore essential; fourth, the Helsinki Convention is the only international water treaty with detailed substantive environmental provisions, and with a primary focus on environmental protection⁵; and fifth, Asia has grow-

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¹ Convention on the Protection and Use of Transboundary Watercourses and Lakes (Helsinki, 17 March 1992), 31 ILM (1992) 1312, in force 6 October 1996. See Attila Tanzi, 'Regional Integration and the Protection of the Environment: The UNECE Process on Water Law as a Model for the Global Dimension', in Tullio Scovazzi (ed) *The Protection of the Environment in a Context of Regional Economic Integration* (Università degli studi di Milano-Bicocca, 2001).

² United Nations Economic Commission for Europe, Convention on the Protection and Use of Transboundary Watercourses and Lakes, *The Global Opening of the 1992 UNECE Water Convention* (UNECE, 2013).

³ Ruby Moynihan and Bjørn-Oliver Magsig, 'The Rising Role of Regional Approaches in International Water Law: Lessons from the UNECE Water Regime and Himalayan Asia for Strengthening Transboundary Water Cooperation' (2014) 23 *Review of European, Comparative and International Environmental Law* 43.

⁴ See Julie Gjørtz Howden, 'Aspects of Sovereignty and the Evolving Regimes of Transboundary Water Management' (2015) 1 *Nordic Environmental Law Journal* 47, who, while making no mention of the Helsinki Water Convention, comments: '...conflict and competition over quantity and quality of water use will often occur between domestic groups or between transnational groups...'

⁵ For a comparison of the regimes with reference to China, see Patricia Wouters and Huiping Chen, 'China's 'Soft Path' to Transboundary Water Cooperation Examined in the Light of Two UN Global Water Conventions – Exploring the 'Chinese Way'' (2014) 22 *Water Law* 229.

ing experience with both this treaty and other agreements for transboundary cooperation,⁶ with potential for increased membership. Scholarly interest to date has, despite this, focused on the 1997 United Nations Convention on International Watercourses ('the New York Convention'), which has recently entered into force and has 36 Parties.⁷ This article, with a focus on the Helsinki Convention, is a modest contribution to address the imbalance.

The current Asian Parties to the Helsinki Convention are Azerbaijan, Kazakhstan, Russia, Turkmenistan and Uzbekistan. It is expected that other states will also join, including Georgia.⁸ Iran has furthermore expressed an interest,⁹ as has

Iraq,¹⁰ and most recently, Lebanon,¹¹ Jordan,¹² and Mongolia.¹³ There is hence a likely future overlap between the Parties to both the Helsinki and New York Conventions.¹⁴ As the potential for conflict, environmental harm and industrial accidents involving watercourses is high, the Helsinki Convention has the added advantage of inter-related linkages with the other UNECE treaties that address some of these issues.¹⁵ Asia has growing experience with both this treaty and these other agreements for transboundary cooperation, and there is clear potential for membership to increase further to avoid and resolve disagreements, pollution and accidents.¹⁶

The objective of this article is to review the application of the Helsinki Convention in Asia, with a particular focus on implementation and compliance. This focus is appropriate because implementation and compliance is acknowledged to be the weakest link in international en-

⁶ See for example Agreement on Cooperation for the Sustainable Development of the Mekong River Basin (Chiang Rai, 5 April 1995), unreported, in force 5 April 1995.

⁷ Convention on the Law of Non-Navigable Uses of International Watercourses (New York, 21 May 1997, by UNGA Res. 51/229), 36 ILM (1997) 700, in force 17 August 2014. There are eight Asian Parties to the New York Convention: Jordan, Lebanon, Palestine, Syria, Iraq, Qatar, Uzbekistan and Vietnam. The provisions of the Helsinki Convention are more specific, with the exception of the principle of equitable and reasonable utilization in the New York Convention. For differences between these regimes, see 'The Global Opening', above n 2, 9–10; UNECE, 'How the Two Global Water Conventions Support Transboundary Water Cooperation' – <http://programme.worldwaterweek.org/event/how-the-two-3637>; and United Nations Economic Commission for Europe / Attila Tanzi, *The Economic Commission for Europe Water Convention and the United Nations Watercourses Convention: An analysis of their harmonized contribution to international water law* (United Nations, 2015).

⁸ See United Nations Economic Commission for Europe / OSCE Environment and Security Initiative, *Draft Report of the National Working Group Meeting for Identification of the Legal and Institutional Needs for Accession and Implementation of the UNECE Water Convention by Georgia*, Tbilisi, 26 June 2009.

⁹ UNECE, 'Iran discusses the benefits of the UNECE Water Convention', press release, 23 January 2013.

¹⁰ UNECE, 'Iraq and Tunisia express interest in joining UNECE Water Convention', press release, 16 October 2013.

¹¹ UNECE, 'Lebanon to consider joining UNECE Water Convention following Beirut workshop', press release, 10 February 2015.

¹² UNECE, 'Jordan initiates study of the UNECE Water Convention', press release, 17 March 2015.

¹³ UNECE, 'New countries from outside the UNECE region express interest in the Water Convention', tenth meeting of the Working Group on Integrated Water Resources Management, Geneva, 24 and 25 June 2015.

¹⁴ Uzbekistan is however currently the only Party to both, with the Asian Parties to the Helsinki Convention primarily in central Asia and those to the New York Convention in western Asia.

¹⁵ Simon Marsden and Elizabeth Brandon, *Transboundary Environmental Governance in Asia: Practice and Prospects with the UNECE Environmental Agreements* (Edward Elgar, 2015).

¹⁶ In relation to China see for example, Patricia Wouters, 'The Yin and Yang of International Water Law: China's Transboundary Water Practice and the Changing Contours of State Sovereignty' (2014) 23 *Review of European, Comparative and International Environmental Law* 67.

vironmental law,¹⁷ and this is true also of Asia.¹⁸ This article will firstly outline the main institutions and explain the procedural provisions of the Helsinki Convention;¹⁹ it will secondly review current implementation in Asia based on information received as part of the assessment of transboundary watercourses, and growing capacity building efforts; it will thirdly, and most significantly, consider the work of the Legal Board in the establishment of the Implementation Committee to deal with compliance and compliance issues; finally, some conclusions follow at the end.

II. Institutions and procedures

The main institutions are the Meeting of the Parties (MOP), Bureau, Legal Board and Implementation Committee, the latter which as a non-compliance procedure (NCP) is intended to avoid rather than settle disputes.²⁰ The MOP is the main decision making body comprising

all Parties, the Bureau develops the workplan, and the Legal Board has focused on the development of authoritative guidance²¹ together with the formal compliance procedure administered by the Implementation Committee. There are also working groups on Integrated Water Resources Management and Monitoring and Assessment, task forces on Water and Climate and Water-Food-Energy-Ecosystems Nexus, and a Joint ad-hoc Expert Group on Water and Industrial Accidents.

While the Helsinki Convention establishes a general institutional structure to assist with implementation, compliance and further development, realisation of these matters depends on bilateral and multilateral agreements being concluded between riparian states that share the resource and the establishment of joint bodies to administer them.²² An absence of specific reporting and compliance mechanisms in the treaty has, as will be seen below, led to the work of the Legal Board, Implementation Committee and others, in developing such mechanisms. Part I duties of the Helsinki Convention are the more general and apply to all Parties; Part II duties are more specific and must be implemented via further agreements between the Riparian Parties; Part III provisions also apply to all Parties.

In relation to Part I, Article 2 contains obligations to 'take all appropriate measures to prevent,

¹⁷ See Carl Bruch and Elizabeth Mrema, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* (UNEP, 2006).

¹⁸ Note for example the role of the Association of South East Asian Nations (ASEAN), and the inability to resolve the haze pollution issue despite an international agreement on the matter; see Koh, KL and Karim, MS, 'South East Asian Environmental Legal Governance' in Alam, S, Bhuigan, MJH, Choudhury and Techera, EJ, *Routledge Handbook of International Environmental Law* (Routledge, 2013) 463.

¹⁹ The Convention also has two protocols, the Protocol on Water and Health, and the Protocol on Civil Liability, neither of which is discussed here due to space constraints. The latter is shared with the UNECE Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992) UNTS 2105 (1992) 457, in force 19 April 2000.

²⁰ See Tullio Treves, Attila Tanzi, Cesare Pitea, Chiara Ragni, and Laura Pineschi (eds) *Non Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press, 2009); Karen Scott, 'Non-compliance Procedures and the Resolution of Disputes under International Environmental Agreements', in Duncan French and Nigel White (eds) *International Law and Dispute Settlement: New Problems and Techniques* (Hart Publishing, 2010) 225.

²¹ United Nations Economic Commission for Europe, Convention on the Protection and Use of Transboundary Watercourses and Lakes, *Guide to Implementing the Water Convention* (United Nations, 2013) (*Implementation Guide*).

²² There are some similarities with other joint bodies operating in other regions of the Asia Pacific. See for example the role of the International Joint Commission in resolving issues of transboundary water and air pollution in North America; Jason Buhi and Lin Feng, 'Honoring the International Joint Commission's Role in the United States-Canada Transboundary Air Pollution Control Regime: A Century of Experience to Guide the Future' (2009) 11 *Vermont Journal of Environmental Law* 107.

control and reduce any transboundary impact',²³ including pollution 'with the aim of ecologically sound and rational water management, conservation of water resources and environmental protection.' Article 4 requires the establishment of monitoring programmes for transboundary waters, primarily to collect baseline data rather than to evaluate the outcomes of approved development proposals. Article 5 obliges cooperation in research efforts by the Parties to develop effective techniques to prevent, control and reduce transboundary impact. Article 6 provides for the 'widest exchange of information, as early as possible' in relation to issues of concern.

In relation to Part II, Article 9, supplementing Article 2(6) on cooperation in general, requires the preparation of bilateral and multilateral agreements between them.²⁴ Agreements are intended to include matters covered by the Helsinki Convention and other issues the Riparian Parties wish to include for the catchment area they specify within. Article 9(2) for example provides for the establishment of joint bodies between the Riparian Parties under the Helsinki Convention, one of the purposes of which (j) is 'to participate in the implementation of environmental impact assessments relating to transboundary waters, in accordance with appro-

priate international regulations'.²⁵ Because it is mandatory for such agreements to be prepared, this distinguishes 'the Water Convention from other international instruments in the field and is considered to be the main added value of the Convention.'²⁶

Other significant provisions in Part II include the Article 11 obligation which enables the collection of baseline data to evaluate practice, including 'the effectiveness of measures taken for the prevention, control and reduction of transboundary impact' (Article 11(3)). The Working Group on Monitoring and Assessment has an important role in preparing periodic assessments of the status of transboundary waters, promoting the exchange of data on environmental conditions, encouraging Parties to inform each other about critical situations with transboundary impact and verifying compliance with water-quality objectives and permit conditions. These assessments, while a means of considering implementation of Parties obligations under the Helsinki Convention, are not however the same as more formal reporting obligations required under other environmental treaties. They are a means of collecting baseline data rather than a way of demonstrating clear adherence to treaty obligations.

III. Implementation in Asia

Russia, Asia's largest state, is an example of a Riparian Party to have implemented the obligation to enter into agreements with under states under the Convention. Russia shares transboundary waters with both Asian Parties (Azerbaijan and Kazakhstan) and Asian non-Parties

²³ This is the codification of the 'no harm' customary international law rule and is a due diligence obligation focused on what is appropriate and proportional to the degree of risk and harm; see *Implementation Guide*, above n 21, 19–21. This was a key part of the decision by the ICJ in *Pulp Mills*; see Timo Koivurova, 'Transboundary Environmental Impact Assessment in International Law', in Simon Marsden and Timo Koivurova (eds) *Transboundary Environmental Impact Assessment in the European Union: The Espoo Convention and its Kiev Protocol on Strategic Environmental Assessment* (Routledge, 2011) 15, 23–25.

²⁴ These can be located in the document: Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *Second Assessment of Transboundary Rivers, Lakes and Groundwaters* (United Nations, 2011) (*Second Assessment*).

²⁵ This includes the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), 30 ILM (1991) 802, in force 27 June 1997.

²⁶ Other requirements to establish joint bodies and for institutional cooperation are also emphasized. See *Implementation Guide*, above n 21, 63–64.

(China, North Korea, Georgia and Mongolia). In the 1990s it entered into bilateral agreements with Kazakhstan (1992, replaced by an agreement in 2010), Mongolia (1995), China (2008) and Azerbaijan (2010). There is however no bilateral agreement between Russia and Georgia.

As three of the five current Parties are in central Asia (Kazakhstan, Turkmenistan and Uzbekistan) and another is in Caucasia (Azerbaijan) capacity building efforts to improve implementation of the Convention and compliance with it in, and related to, these sub-regions are particularly significant.²⁷ The UNECE notes that Phase II of the UNECE Programme, 'Regional Dialogue and Cooperation on Water Resources Management in Central Asia', aims to improve the capacity of the International Fund for Saving the Aral Sea (IFAS), including its organizations and institutions and to strengthen their legal basis.²⁸

IFAS was established by all five central Asian States to implement in a coordinated way the practical measures and programmes to overcome the impacts of the Aral crises and to improve environmental and socioeconomic conditions in the Aral Sea Basin. The Interstate Commission on Sustainable Development is a body of the IFAS which is in charge of coordinating regional cooperation on environment and sustainable development in central Asia. The UNECE also notes that the project is a component of the 'Transboundary Water Management in Central Asia' programme, which is carried out on behalf of the German Federal Foreign Office.²⁹ The protection

of the Aral Sea is a priority issue for the UNECE, as noted at a recent conference.³⁰

Vulnerable ecosystems are also a key area of Afghan-Tajik cooperation on environment and hydrology in the upper Amu Darya Basin, which the Convention supports, where steps have been taken to establish data exchange and assess the status of ecosystems.³¹ In the Chu and Talas River Basins, a project supported by the Global Environmental Facility and UNECE will expand the cooperation of Kazakhstan and Kyrgyzstan to water quality and biodiversity.³² In another example, this time in Caucasia, deterioration of water quality and degradation of ecosystems has brought Georgia and Azerbaijan together to develop a bilateral agreement on the shared water resources of the Kura River Basin as part of a joint UNECE-Organization for Security and Cooperation in Europe project under the Environment and Security Initiative.³³

In eastern Asia as part of the preliminary assessment exercise,³⁴ formal evaluations were completed by the Working Group on Monitor-

²⁷ See Chapter 8, 'Practice and Capacity Building in Central Asia' in Marsden and Brandon, above n 15.

²⁸ UNECE, 'UNECE cooperates with Interstate Commission on Sustainable Development to strengthen implementation of Rio+20 outcomes in Central Asia,' press release, 31 May 2013.

²⁹ Ibid.

³⁰ UNECE, 'UNECE Executive Secretary participates in conference on sustainable development in the Aral Sea Basin' press release, 29 October 2014.

³¹ UNECE, 'UNECE supports Afghan-Tajik cooperation on environment and hydrology in the Amu Darya Basin,' press release, 28 March 2013.

³² See UNECE, 'UNECE fosters cooperation between Kazakhstan and Kyrgyzstan to address water issues', press release, 2 June 2015; and Bo Libert, 'The UNECE Water Convention and the Development of Transboundary Cooperation in the Chu-Talas, Kura, Drin and Dniester River Basins' (2015) 40 *Water International* 168.

³³ UNECE, 'Water and Biodiversity: UNECE Water Convention puts ecosystems at the heart of water management', press release, 22 May 2013.

³⁴ United Nations Economic and Social Council, Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Working Group on Monitoring and Assessment, Eight meeting, Helsinki, 25–27 June 2007, Preliminary assessment of transboundary rivers discharging to Pacific Ocean and their major transboundary tributaries. ECE/MP.WAT/WG.2/2007/14. (*Preliminary Assessment*).

ing and Assessment for the Amur River Basin,³⁵ which is shared between China, Mongolia and Russia; and the Tumen River Basin, shared between China, North Korea and Russia.³⁶ In relation to the latter, regulation of which overlaps to an extent with the Tumen Agreements (which include South Korea as a Party also),³⁷ the assessment comments: 'The drawing up of a multilateral agreement between China, the Democratic People's Republic of Korea and the Russian Federation is of utmost importance. It should provide for joint measures on monitoring and assessment ... in order to decrease the overall human impact on the waters in the Tumen River basin.'³⁸

The Second Assessment of Transboundary Rivers, Lakes and Groundwaters, was completed in 2011.³⁹ Contributions were received from numerous states, not only Parties to the Convention, but also UNECE members who are not Parties, and experts from countries outside the UNECE region who share waters with UNECE

states: Afghanistan, China, Iran and Mongolia. Part III contains the major findings, with the Caucasus the subject of chapter 4 and central Asia chapter 5; drainage basins of the Aral Sea and other transboundary waters in central Asia are considered in part IV, chapter 3. In part IV, the drainage basins of the White, Barents and Kara Seas are however examined in detail in chapter 1; the Sea of Othotsk and the Sea of Japan in chapter 2;⁴⁰ and the Caspian Sea in chapter 4.⁴¹

As an example of some of the findings, part of the relevance of part IV chapter 1 is the Yenisey River, which flows entirely within Russian territory, although the upper part of the basin is transboundary, as it includes parts of the Selenga River, shared with Mongolia.⁴² This also consists of the Selenga River, Lake Baikal and the Angara River, where heavy metals and petroleum products have impacted water quality, which in the Selenga is concluded to be 'heavily polluted'.⁴³

³⁵ See Ariel Dinar, Shlomi Dinar, Stephen McCaffrey, and Daene McKinney, 'Case Study 4: The Aral Sea Basin' in *Understanding Transboundary Water Conflict, Negotiation and Cooperation* (World Scientific, 2013, second edition) 339–362.

³⁶ United Nations Economic and Social Council, Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Working Group on Integrated Water Resources Management, Sixth meeting Geneva, 4–5 May 2011; Working Group on Monitoring and Assessment, Twelfth meeting, Geneva, 2–4 May 2011.

³⁷ 1995 Agreement on the Establishment of the Tumen River Area Development Coordination Committee, signed in New York, 6 December 1995, unreported; 1995 Agreement on the Establishment of the Consultative Commission for the Development of the Tumen River Economic Development Area and Northeast Asia, signed in New York, 6 December 1995, unreported. See Simon Marsden, 'Developing Approaches to Transboundary Environmental Impact Assessment in China: Cooperation through the Greater Tumen Initiative and in the Pearl River Delta Region' (2010) 9 *Chinese Journal of International Law* 393.

³⁸ *Preliminary Assessment*, above n 34, para 25, 7–8.

³⁹ *Second Assessment*, above n 24.

⁴⁰ This includes the shared basins of the Amur River (shared by China, Russia, and in small part, Mongolia); the Argun/Hailaer River (shared by the same states); the Ussuri/Wusuli River (shared by China and Russia); the Khanka/Xingkai Lake (China and Russia); the Sujfun/Razdolnaya River (China and Russia); the Tumen/Tumannaya River (China, Russia, North Korea). *Second Assessment*, above n 24, 99–106.

⁴¹ For a summary of the numerous transboundary watercourses and international lakes in this sub-region which cross nine riparian states, see *Second Assessment*, above n 24, 131.

⁴² Other shared basins include the Ob River (shared by China, Kazakhstan, Mongolia and Russia); the Irtysh/Ertis (shared by Russia, Kazakhstan, and, with a very small part shared by China and Mongolia); the Tobol and Ishim/Esil sub-basins (shared between Russia and Kazakhstan). See *Second Assessment*, above n 24, 91–98.

⁴³ *Second Assessment*, above n 24, 90. While it also concludes that Lake Baikal serves as a natural barrier for the transboundary flow of pollutants, preventing their impact on the downstream part of the watercourse, it is however significantly impacted by mining activity and as such is being considered for inscription on the List of World Heritage in Danger under the World Heritage Convention. See: *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for

The Russian-Mongolian Joint Commission on the Protection and Use of Transboundary Waters is however in existence, which operates on the basis of the intergovernmental 1995 Agreement on the protection and use of transboundary waters, meets regularly.⁴⁴ To address current pressures, there are 19 surface water monitoring stations observing daily in the Selenga Basin in Mongolia. In the framework of the 'Strengthening Integrated Water Resources Management in Mongolia' project, 17 groundwater-monitoring wells are proposed to be established within the Selenga River Basin area.⁴⁵

IV. Establishment of the Implementation Committee and compliance in Asia

A NCP was recently established, known as the Implementation Committee. While not required under the original Convention text, it was initiated by the Legal Board at its seventh meeting based on experiences with the other UNECE treaties.⁴⁶ The Chair of the Legal Board recommended the body be of an 'advisory, consultative and facilitative nature and as such would serve as a dispute prevention mechanism'.⁴⁷ Participants from central Asia added that reporting could also serve as a benchmark for implementation.⁴⁸ It was accepted that non-state actors, especially

signature 16 November 1972, 11 ILM 1358 (entered into force 17 December 1975).

⁴⁴ The provisions of the Agreement include an exchange of information on transboundary waters.

⁴⁵ *Second Assessment*, above n 24, 90, and note the other governance mechanisms in place.

⁴⁶ United Nations Economic and Social Council, Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Legal Board, Seventh meeting Geneva, 15 and 16 April 2010; Report of the Legal Board on its Seventh Meeting, ECE/MP.WA/AC.4/2010/2, para II, 'Mechanism to facilitate and support implementation and compliance'.

⁴⁷ Legal Board, above n 46, para II.9.

⁴⁸ Legal Board, above n 46, para II.15.

the public, should have a role in bringing issues to the Implementation Committee.⁴⁹

Together with Meetings of the Parties and other arrangements, NCPs are an example of an 'autonomous institutional arrangement'; they are however, no longer a 'little-noticed phenomenon'.⁵⁰ There is also an increasing trend towards the judicialisation of such procedures,⁵¹ with a developing quasi-jurisprudence sometimes referred to as 'case law'.⁵² This is especially so in connection with public communications heard by the Aarhus Convention⁵³ Compliance Committee (ACCC), which frequently considers the link between environmental and human rights. The ACCC is the most advanced of these bodies in providing public access, with numerous communications to date from individuals and NGOs. It is therefore perhaps not surprisingly heralded as a precedent for other comparable bodies, with recent consideration given to transplanting some aspects of the ACCC into a more complex global context.⁵⁴

At the eighth meeting of the Legal Board, discussions of the drafting group (established

⁴⁹ Legal Board, above n 46, para II.25.

⁵⁰ Robin Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: a Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623.

⁵¹ Neil Craik and Timo Koivurova, 'Subsidiary Decision Making under the Espoo Convention: Legal Status and Legitimacy' (2011) 20 *Review of European Community and International Environmental Law* 258.

⁵² A Andrusevych, T Alge and C Konrad (eds) *Case Law of the Aarhus Convention Compliance Committee (2004–2011)*, 2nd edition (RACSE, 2011).

⁵³ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) 2161 UNTS 447, in force on 30 October 2001.

⁵⁴ Antonio Cardesa-Salzmann, 'Constitutionalising Secondary Rules in Global Environmental Regimes: Non-Compliance Procedures and the Enforcement of Multilateral Environmental Agreements' (2012) 24 *Journal of Environmental Law* 103.

to prepare the compliance procedure) were considered.⁵⁵ A distinctive feature was an advisory procedure, emphasising assistance where there was a lack of deliberate non-compliance. A Party or Parties could therefore request advice from the Committee about efforts to attempt to secure compliance.⁵⁶ It was not however proposed that the public directly make submissions, unlike under the ACCC. In relation to follow-up measures these were confirmed to be facilitative rather than punitive, and ranging from assistance to requests for action plans and progress reports. More serious measures could only follow MOP decisions, such as statements of concern, declarations of non-compliance, cautions or suspension of rights and privileges.⁵⁷

The ninth meeting of the Legal Board endorsed most of the previous recommendations, although referrals by the secretariat were considered unnecessary.⁵⁸ The need for a formal reporting mechanism was also discussed and the need to separate this from the compliance procedure.⁵⁹ Such reporting mechanisms typically are

based on the completion of questionnaires by the Parties which enable follow up by treaty bodies as appropriate; other information means, such as involvement of the public, often supplement such procedures. The tenth meeting approved the text of such a procedure and determined that the MOP would examine it further in November 2012,⁶⁰ when a draft decision was prepared for adoption.⁶¹ This was duly done, and the Implementation Committee commenced its work soon thereafter.⁶²

The Implementation Committee has since held five meetings, with members serving in a personal capacity rather than as state representatives. The first was in June 2013,⁶³ and the agenda included discussion of lessons learnt from other implementation and compliance mechanisms. In addition to procedures under various multilateral agreements these also included those es-

⁵⁵ United Nations Economic and Social Council, Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Legal Board, Eighth meeting Geneva, 24 and 25 February 2011. ECE/MP.WAT/AC.4/2011/2, para II.

⁵⁶ Legal Board, above n 55, para II.13.

⁵⁷ Legal Board, above n 55, para II.17. Note that performance reviews of individual states are another means by which the UNECE evaluates treaty compliance, or according to the UNECE is 'an assessment of the progress a country has made in reconciling its environmental and economic targets and in meeting its international environmental commitments'; most of the central Asian and Caucasian states have been through two cycles of performance reviews; see <http://www.unece.org/env/epr.html>

⁵⁸ United Nations Economic and Social Council, Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Legal Board, Ninth meeting Geneva, 1 and 2 September 2011. ECE/MP.WAT/AC.4/2011/5, para II.10.

⁵⁹ Legal Board, above n 58, para II.14.

⁶⁰ United Nations Economic and Social Council, Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Legal Board, Tenth meeting Geneva, 31 January and 1 February 2012. ECE/MP.WAT/AC.4/2012/2, para II.9. Annex I contains the text of the 'Mechanism to support implementation and compliance', and Annex II the 'Core rules of procedure of the Implementation Committee'.

⁶¹ United Nations Economic and Social Council, Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Sixth session, Rome, 28–30 November 2012, Item 4(a) of the provisional agenda, Draft decision on support to implementation and compliance. ECE/MP.WAT/2012/L.4.

⁶² United Nations Economic and Social Council, Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Sixth session, Rome, 28–30 November 2012, Report of the Meeting of the Parties on its sixth session. ECE/MP.WAT/37, Ad.2, 23 July 2013.

⁶³ United Nations Economic and Social Council, Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Implementation Committee, First meeting Geneva 5 June 2013. ECE/MP.WAT/IC/2013/2, para II.7.

tablished under the Aarhus and Espoo Conventions (and SEA Protocol⁶⁴), and the Convention Water and Health Protocol.⁶⁵ The relationship between compliance procedures and domestic remedies, periodic reporting and compliance procedures, the non-adversarial nature of the procedures, and the role of the secretariat, together with other issues, received particular attention.⁶⁶

The first meeting discussed at length the need for a formal reporting mechanism.⁶⁷ The work programme adopted at the 2012 MOP included 'Consideration of the need for reporting under the Convention', to be led by the Convention Bureau as supported by the Secretariat. The Working Group on Integrated Water Resources Management in consultation with the Committee was tasked to analyse the need for a reporting mechanism.⁶⁸ Concentrating on policy issues rather than data, such a reporting mechanism would therefore distinguish itself from related reporting procedures,⁶⁹ which had caused concern among certain Parties, and threatened the prospect of the establishment for other Parties, in particular those outside the European Union, such as in Asia.

The second meeting of the Committee in December 2013 began by examining issues raised by an environmental NGO in relation to Kazakhstan, where concern was expressed regarding difficulties in transboundary water cooperation in the Irtysh River Basin, shared by

Russia, Kazakhstan, China and Mongolia, and the situation in the Ili River Basin, shared by China and Kazakhstan. Among other matters, it also exchanged views on the possibility of detailing general criteria or factors to guide the determination of when a Committee initiative might be started, and how best to publicise the availability of the new compliance procedure.⁷⁰

The third meeting of the Committee took place in May 2014, and discussed further the matter in relation to Kazakhstan, as well as discussion about reporting requirements under the Helsinki Convention, and raising awareness of the NCP mechanism to facilitate and support implementation and compliance.⁷¹ In relation to reporting, the Committee noted that it 'should be on the implementation of Parties' cooperation obligations', it 'should be thematic (issue-based)', and that it 'should take into account other international or regional reporting obligations with a view to avoiding duplication of effort'.⁷²

The fourth meeting was held in December 2014 and the Committee noted that Kazakhstan and Russia had yet to respond substantively to the questions posed by it in connection with the

⁶⁴ Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (Kiev, 21 May 2003), unreported, in force 11 July 2010.

⁶⁵ Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and Lakes (London, 17 June 1999), UNTS 2331, 202, in force 4 August 2005.

⁶⁶ Implementation Committee, above n 63, para II.8

⁶⁷ Implementation Committee, above n 63, para II.13

⁶⁸ Implementation Committee, above n 63, para II.13.

⁶⁹ Implementation Committee, above n 63, para II.15.

⁷⁰ United Nations Economic and Social Council, Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Implementation Committee, Second meeting Geneva 12 December 2013. ECE/MP.WAT/IC/2013/4, 13 January 2014, paras II and IV.

⁷¹ United Nations Economic and Social Council, Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Implementation Committee, Third meeting Bologna 15 May 2014. ECE/MP.WAT/IC/2014/2, 18 June 2014, paras III, IV and V.

⁷² Implementation Committee, above n 71, para IV.12–14. See Economic Commission for Europe / Environment, Informal Network of the Chairs of compliance / implementation bodies under the Multilateral Environmental Agreements, Third Meeting, Geneva, 29 June 2015, 'Note prepared by the Chair of the Aarhus Convention Compliance Committee with the assistance of the secretariat'.

implementation of the principles of reasonable and equitable use and the 'no harm' rule. While it was grateful for the general information provided by them, it observed that 'cooperation per se was not the overall objective of the Convention.'⁷³ There was therefore a need for them to provide more comprehensive information on the Irtysh River Basin in relation to the development activity in the upstream part of the basin.

The fifth meeting was held in May 2015, and further discussed the situation in the Irtysh River Basin, deciding to gather information from other sources than the Parties.⁷⁴ The Committee also decided to approach Kazakhstan and Russia again for the information requested in earlier correspondence, and to explain to them that a Committee initiative may well be considered necessary to advance the process.⁷⁵ Among the usual business of considering any requests of advice, submissions, Committee initiatives and information gathering, Committee members were invited to share information about future possibilities to promote the mechanism to facilitate and support implementation and compliance, including an international water law event for the benefit of central Asian states in May 2016.⁷⁶ Two members of the Committee also reported on results of the meetings held by the Core Group on Reporting

held between December 2014 and March 2015, which was mandated to prepare a proposal for a reporting mechanism under the Convention; this was supported by the Committee.⁷⁷

It should be emphasised that the lack of an explicit legal basis for the NCP in the Convention text is not uncommon, and is consistent with the dispute avoidance objective of NCPs generally; a legal basis for such a provision would be difficult to support for many states. As suggested, the strongest NCP found in any of the UNECE treaties is the ACCC. In accordance with Article 15 of the Aarhus Convention,⁷⁸ the MOP is therefore required to establish 'optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention'. At its first session in October 2002, the Aarhus MOP adopted decision I/7 on review of compliance,⁷⁹ and elected the first Committee which has since been highly effective in its work.⁸⁰ Whether the Helsinki Convention Committee is able to operate as effectively, given the high political sensitivity surrounding transboundary water issues, remains to be seen. What is important is that any NCP is supported by a formal reporting procedure; while reporting was not originally foreseen in the Convention's text, current discussion on the possible introduction of a reporting mechanism shows that the Convention is evolving to meet emerging needs.

⁷³ United Nations Economic and Social Council, Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Implementation Committee, Fourth meeting London 4 December 2014. ECE/MP.WAT/IC/2014/4, 20 January 2015, para III, 7.

⁷⁴ United Nations Economic and Social Council, Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Implementation Committee, Fifth meeting Vienna, 5–6 May 2015. ECE/MP.WAT/IC/2015/2, 27 May 2015, Report of the Implementation Committee on its fifth meeting, para III.6.

⁷⁵ Implementation Committee, above n 74, paras III. 7 and 8.

⁷⁶ Implementation Committee, above n 74, para IV.10.

⁷⁷ Implementation Committee, above n 74, paras IV.11 and 12.

⁷⁸ See Aarhus Convention, above n 53. This is largely because of the possibility of public submissions. Note the Compliance Committee under the Protocol on Water and Health. The Compliance Committee noted at its meeting held in Geneva on 25 November 2014, that the first communication it had received was from a member of the public. See Implementation Committee, above n 73, para V.13.

⁷⁹ <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>

⁸⁰ See Cardesa-Salzmänn, above n 54.

V. Conclusions

The Helsinki Convention is well established in the UNECE region, and is now playing a major role in bringing states in the Caucasus, central, northern and eastern Asia together to resolve potential disagreements over water resources; other Asian states have also expressed an interest in joining. The global opening of the Convention has enhanced interest generally, and will assist further in capacity building efforts to develop implementation and compliance efforts in Asia; these are likely to extend to southern and western Asia as experience grows. The provisions of the Convention are advanced in providing both a framework and requiring further detailed agreement between Parties; significantly also, in mandating the establishment of joint bodies to, among other things, evaluate proposals with potential to impact detrimentally on transboundary watercourses. The Convention is furthermore aided by the broader transboundary environmental governance of the UNECE and its related treaties on environmental impact assessment, public participation and industrial accidents, which add value to its operation.

In relation to implementation and compliance, the Implementation Committee is leading this challenging task as the Committee work develops. This has already targeted instances where there is the potential for non-compliance by individual Parties, and it has contributed significantly to capacity building efforts more broadly. The relationship between compliance and reporting is also receiving increased attention, and benefits from the clustering of the environmental agreements that the UNECE has produced. Experiences learned in relation to the other treaties and protocols are therefore freely shared, and the fact that states are typically Party to one or more of these agreements means that they are familiar with the procedures that are contained within them. Ensuring domestic implementation and adherence to these procedural obligations is ultimately the responsibility of treaty bodies, Parties, the public and others in tandem. Yet assisting states to comply with these obligations, where there is either a deliberate failure or lack of capacity, is a very important role of the Implementation Committee. In Asia, where states have frequently avoided confrontation or legal challenge,⁸¹ it is all the more important.

⁸¹ See Simon Chesterman, 'The International Court of Justice in Asia: Interpreting the *Temple of Preah Vihear* Case' (2015) 5 *Asian Journal of International Law* 1, who finds that, where Asian states do pursue international litigation, they have a clear preference for bilateral settlement of disputes.