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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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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-

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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).

vironmental law, and this is true also of Asia. This article will firstly outline the main institutions and explain the procedural provisions of the Helsinki Convention, 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. 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 guidance 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. 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,
control and reduce any transboundary impact’, 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. 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 appropriate international regulations’. 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.’

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

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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.


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.\(^\text{27}\) 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.\(^\text{28}\)

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.\(^\text{29}\) The protection of the Aral Sea is a priority issue for the UNECE, as noted at a recent conference.\(^\text{30}\)

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.\(^\text{31}\) 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.\(^\text{32}\) 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.\(^\text{33}\)

In eastern Asia as part of the preliminary assessment exercise,\(^\text{34}\) 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, ‘UNEP cooperates with Interstate Commission on Sustainable Development to strengthen implementation of Rio+20 outcomes in Central Asia,’ press release, 31 May 2013.

\(^{29}\) Ibid.


ing and Assessment for the Amur River Basin, which is shared between China, Mongolia and Russia; and the Tumen River Basin, shared between China, North Korea and Russia. In relation to the latter, regulation of which overlaps to an extent with the Tumen Agreements (which include South Korea as a Party also), 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.’

The Second Assessment of Transboundary Rivers, Lakes and Groundwaters, was completed in 2011. 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; and the Caspian Sea in chapter 4.

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. 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’.

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{47} Participants from central Asia added that reporting could also serve as a benchmark for implementation.\textsuperscript{48} It was accepted that non-state actors, especially the public, should have a role in bringing issues to the Implementation Committee.\textsuperscript{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’.\textsuperscript{50} There is also an increasing trend towards the judicialisation of such procedures,\textsuperscript{51} with a developing quasi-jurisprudence sometimes referred to as ‘case law’.\textsuperscript{52} This is especially so in connection with public communications heard by the Aarhus Convention\textsuperscript{53} 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.\textsuperscript{54}

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


\textsuperscript{44} The provisions of the Agreement include an exchange of information on transboundary waters.
\textsuperscript{45} Second Assessment, above n 24, 90, and note the other governance mechanisms in place.
\textsuperscript{47} Legal Board, above n 46, para II.9.
\textsuperscript{48} Legal Board, above n 46, para II.15.
\textsuperscript{49} Legal Board, above n 46, para II.25.
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-


\(^{56}\) 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


\(^{59}\) Legal Board, above n 58, para II.14.


tablished under the Aarhus and Espoo Conventions (and SEA Protocol), and the Convention Water and Health Protocol. 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.

The first meeting discussed at length the need for a formal reporting mechanism. 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. Concentrating on policy issues rather than data, such a reporting mechanism would therefore distinguish itself from related reporting procedures, 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 Irtys 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.

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. 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’.

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

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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.
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.’

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. 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. 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. 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.

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, 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, and elected the first Committee which has since been highly effective in its work. 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.

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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.
80 See Cardesa-Salzmann, 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, it is all the more important.

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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.