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Permanent Secretariat of the Alpine Convention

Environmental Protection and Mountains

Is Environmental Law Adapted to the Challenges Faced by Mountain Areas?

Edited by Patricia Quillacq and Marco Onida

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Lessons from European Ranges

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Introduction

This collection of essays discusses and tries to answer the question whether environmental law is sufficiently adapted to respond to the specific environmental challenges faced by mountain ecosystems. This issue was the subject of an international conference held in April 2010 that gathered all the contributors in Innsbruck (Austria) on the initiative of the Permanent Secretariat of the Alpine Convention in cooperation with the Institute for European and International Law of the University of Innsbruck and with the support of the Slovenian Ministry for the Environment and Spatial Planning (Presidency of the Alpine Convention 2009-2011), the Austrian Ministry for the Environment (*Lebensministerium*) and the Province of Tyrol.

The theme is complex and both the discussion at the conference and corresponding written papers represent an important contribution to the legal reflection applied to mountains protection. Beneath the main question, another appears in each of the contributions, either for the Alps or for other European mountain ranges: how can a country with mountain regions fulfill the challenge of combining a multi-layered legislation to protect that part of its territory? Mountainous regions do not, in fact, necessarily correspond to administrative and political borders. This is indeed one of the reasons why a specific Treaty was crafted and adopted in 1991 for the Alps (the Alpine Convention) and a similar one in 2003 for the Carpathians (the Carpathian Convention). It is important to discuss what the role of such mountain-based treaties is and whether there is a need to extend this approach to other mountain ranges (e.g. the Pyrenees).

Each contribution in this volume presents an element of the puzzle. To set the scene, the first section provides an historical perspective on environmental legislation, recalling important features in that field, which are either not known or easily forgotten. Cristina Joanaz de Melo uncovers some of the reasons for the timing of State intervention through forestation in the Alpine environment in the 19th century, such as Nation-State consolidation processes, the need to find solutions to torrential floods or to reduce river poisoning and improve workers'welfare. Ludwig Krämer presents an insightful analysis of the treatment of mountains in the short history of nature conservation law, leading to some conclusions about the usefulness and form of new instruments to protect specifically mountainous areas and ecosystems.

The second part of the volume enters deeper into the subject of the adequacy of international and European environmental law to deal with the specific problems and challenges faced by mountainous regions. Karl Weber examines the value of the 2000 European Union (EU) Water Framework Directive (WFD) for the Alps, and takes a precise look at its benefits and gaps by assessing the relevant Austrian legislation through the lens of the WFD provisions. Astrid Epiney and Jennifer Heuck address the interesting yet little known topic of the relationship between the Swiss approach to mountain protection and the EU legal framework, focusing on transport. The development and use of genetically modified organisms (GMOs) in agriculture opens infinite and fascinating discussion on the role of science and technology, and about the friction and incongruence between environmental law and trade law, especially in the context of the European Union. Gerd Winter pinpoints delicate issues regarding the use of GMOs in the Alps, where plots have modest dimensions, where products are strongly linked to the territory and tradition, and where the minimum distance requirements between GMO-based crops and traditional farming are difficult if not impossible to ensure. Another example of conflicting interests between environmental protection and economic activities, and the difficulty for law to provide instruments to balance those interests is given in the contribution of Borut Šantej, who discusses the role of spatial planning and land use decisions, particularly to help prevent and remedy rural sprawl in mountainous and hilly areas in Slovenia. Elisa Morgera's contribution concludes the second section by questioning and comparing the provisions of the Alpine Convention and the Convention on Biological Diversity intended to ensure mountain populations obtain a fair economic gain for themselves without exhausting the natural resources, or even better, through their conservation, paving the way to sustainable development.

The third part of this publication focuses on the "range-approach", which concerns the adoption of international treaties that have as their territorial scope the entire area of the mountain range they seek to protect. The Alpine Convention was a benchmark in this sense, opening the way to others. Marco Onida highlights the weaknesses but also the strengths of the Alpine Convention and its implementing Protocols, pointing in particular to their wide and inter-sectoral scope of application. Pier Carlo Sandei presents the specificities of the Carpathian Convention, a "sister" convention of the Alpine Convention, underlining its own specific methods, which differentiate the two international treaties beyond the fact that they share the range approach and sustainable development goals. The exercise of comparing the methods, approaches and tools of these two regimes could be of great use to those planning new mountain-based treaties, such as in the Dynaric-Balkan regions, or the Pyrenees, as presented respectively by Tanja Bogotaj and Agustín García-Ureta, in both cases with rich

references to the specificities of those ranges and the need for legal protection. Mountain ranges face common threats, but every mountain chain is unique due to its internal political divisions, cultures, languages, and economic development characteristics. The existing mountain conventions and the ones in gestation demonstrate that solutions have to be specifically crafted in and for each mountain region.

The last part of the book concentrates on several case-studies concerning the Alps, looking at how national law applies and complies with international norms such as those codified in the Alpine Convention. In Ewald Galle's article, Austria appears as a fore-runner in terms of implementation, compliance with, and enforcement of the Alpine Convention, as national courts and public authorities consider the Treaty to be directly applicable in the domestic legal order. The Austrian case embodies in a promising way what international environmental law can do for mountain protection. Werner Schroeder, takes us back to the complexities of tackling such a transversal and economically-interwoven issue as that of heavy goods road traffic in the Alps. Efforts to limit and shift increasing road traffic towards an inter-modal system, applying the specific provisions of the transport Protocol, face significant obstacles. Transport of goods is not the only sector where international rules stumble upon implementation and compliance difficulties. Sebastian Schmid illustrates a similar problem in the field of protected areas, and Liliana Dagostin and Jennifer Heuck in the use of motor vehicles for leisure purposes, including that of helicopters. Finally a summary, by Patricia Quillacq, of the challenges of implementation of a non-binding document, like the Action Plan of on Climate Change in the Alps, completes the picture of what an international regime may bring to environmental protection in a trans-frontier mountainous region.

The April 2010 Conference was intended to offer lawyers and professionals a chance to reflect on the adequateness of environmental law regarding the situation of mountainous regions, a process of reflection that is much needed. Although most international documents and scientific reports underline the preciousness of mountain areas, mountains are still not a political priority at European or international level. There is a clear need further to explore ways of economic gain *through* nature conservation, not just economic gain that has in mind positive side effects for nature. Hopefully, this publication will contribute to raising awareness of the much greater effort needed to address properly the environmental challenges in mountain areas – including through legislation and international and regional cooperation.

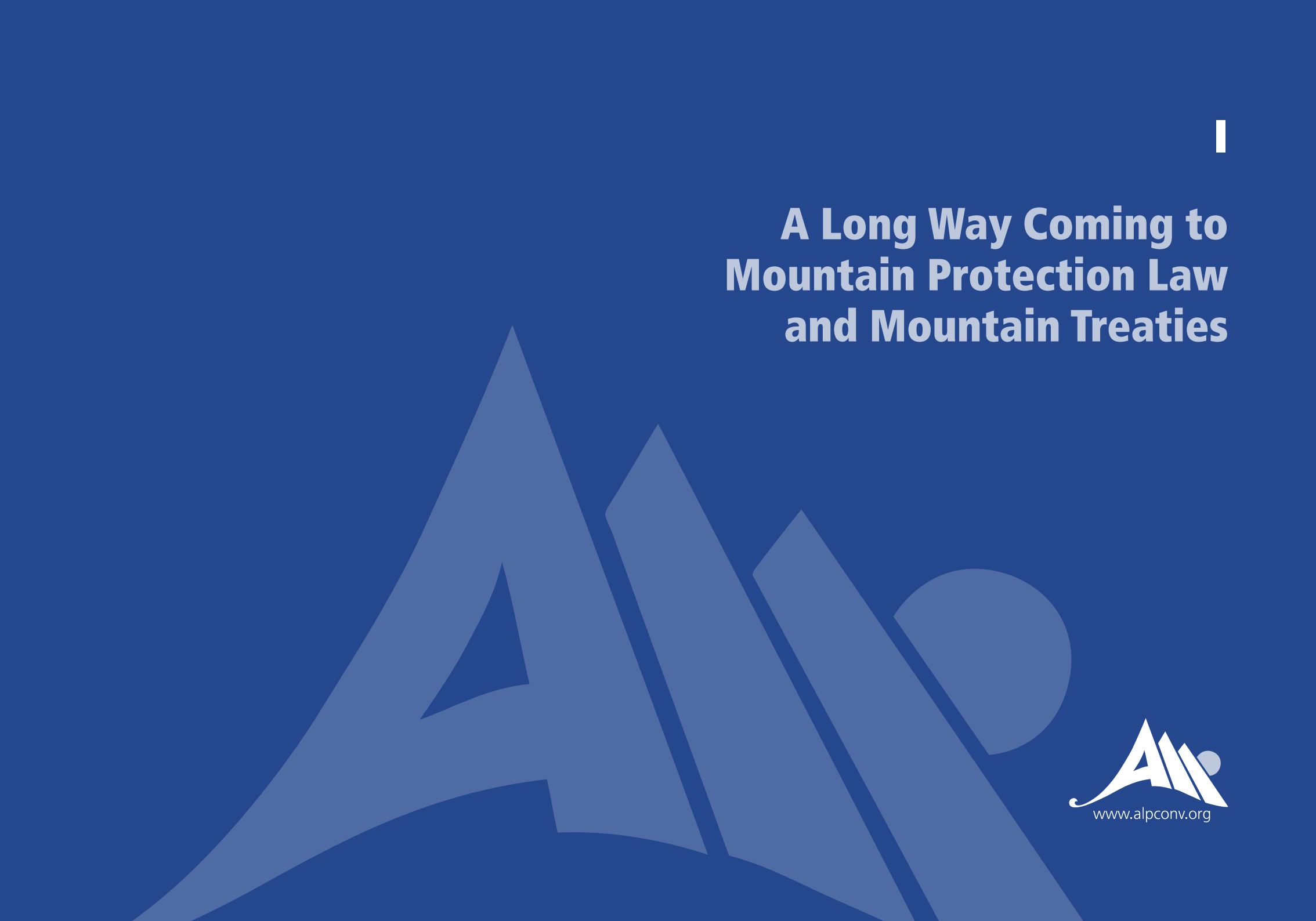
Thank you to all those who actively participated in the conference and who provided their written contributions, making this publication possible.

List of abbreviations

ACE	Alpine Crossing Exchange (Alpentransitbörse)
ATE	Alpine Transit Entities
ATR	Alpine Transit Rights
CBD	Convention on Biological Diversity
CDN	Codice della Navigazione (Italian Civil Aviation Law)
CTP	Comunidad de Trabajo de los Pirineos/ Communauté de Travail des Pyrénées
e.r.a.	Environmental Risk Assessment
EC	European Community
ECHR	European Convention of Human Rights
ECR	European Court Reports
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EEA	European Economic Area
EEA	European Environment Agency
EU	European Union
GM	Genetically Modified
GMOs	Genetically Modified Organisms
LFG	Luftfahrtgesetz (Swiss Civil Aviation Law)
MEAs	Multilateral Environmental Agreements
MLPs	Mountain Landing Places
NGO	Non Governmental Organisation
OTA/LVA	Overland Transport Agreement (Landverkehrsabkommen)
OSIA	Ordonnance sur l'Infrastructure Aéronautique (Aeronautical infrastructure act)
PRTHV	Perfomance Related Toll on Heavy Goods Vehicles
SCAs	Special Conservation Areas
SPAs	Special Protection Areas
UNFCCC	United Nations Framework Convention on Climate Change
UNECE	United Nations Economic Commission for Europe
TFEU	Treaty on the Functioning of the European Union
WFD	Water Framework Directive

I

A Long Way Coming to Mountain Protection Law and Mountain Treaties



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Breaking the Whiteness in the Alpine Landscape: An Heritage of the Nation-State Building Process (19th century)

Cristina Joanaz de Melo

I. Forest Legislation in Alpine States

In the early 19th century, torrential rains and floods occurred in the river basins of the Lint, the Rhine, the Rhone and the Po[1]. The hydrologic masses and violent mud-flows provoked situations of public calamity by dragging and devastating cultures, infrastructures and populations.

Once these situations had been verified, rulers supported scientific investment to find the causes and solutions for torrential rain hazards. In the lowlands stagnant waters were the major channels for diseases spread[2]. Public health became a sector of major concern for public authorities[3]. Already in the first two decades of the nineteenth century, hydraulic works were developed to drain waters from wetlands. But the problem of regular floods had kept repeating annually since the 1830s, in France and other countries, provoking devastating damages in agriculture and infrastructures, due to an increase of torrential rains. In order to control this hydrological situation, the French government betted on finding solutions to block the torrential regime at its origin: in the mountains. In 1841, the French engineer Surrel presented forestation of the highlands as the solution both to prevent and to control torrential regimes.[4] However, (with the exception of Bavaria), it was only in the second half

1. Speich, D., "Draining the Marshlands, Disciplining the Masses: the Lint Valley Hydro Engineering Scheme (1807-1823) and the Genesis of Swiss National Unity" in *Environment and History*, Vol. 8, nº4, November 2002, pp. 429-447; Cioc, M., *The Rhine: An eco-Biography 1815-2000*, Washington University Press, 2002; Whited, T.L., *Forests and Peasant Politics in Modern France*, Yale University Press, New Haven & London, 2000; Hall, M. "Restoring the Mountains: Finding Blame for Piedmont's Floods.18-20th Century" in *Disboscamento Montano e Politiche Territoriale*, (a cura di A.Lazzarini), Milano, Franco Angeli ed., 2002.
2. Speich, D., " op.cit. note 1; Derex, J.-M., *La Gestion de l'Eau et des Zones Humides en Brie (Fin de l'Ancien Régime - Fin XIXème Siècle)*, Préface d'A. Corvol, Paris, L'Harmattan, 2001.
3. Speich, D., op.cit. note 1.
4. Meyer, R., *Noções de Hidráulica Florestal*, Alcobaça, Direcção Geral dos Serviços Florestais e Aquícolas, 1941.

of the 19th century that forestation laws were promoted for a large part of the alpine range. This contribution intends to present some lines of explanation for such late policy response to an environmental problem.

Table 1: Forestation laws, floods and definition of political borders in the Alps

State/nation	*Quercus castanea* Altitude	Forestation	Rain/floods	Borders
France	1500 m	1860	1830-40s 1855-1856	*France and Italy 1860*
Monaco	1500 m	1859 (*)	(1855-1856)	
Bavaria/Germany	1500 m	1852	1857-1859	*Germany and Austria 1866-70-81*
Liechtenstein	1500 m	1876 (*)	(1852-1868)	
Switzerland	1500 m	1876	1852-1868	*Switzerland and Italy – 1874*
Italy	1500 m	1877/1882		*Italy and France – 1860* *Italy and Austria – 1866* *Italy and Switzerland – 1874*
Slovenia (Austrian Empire)	1500 m	1884 (*)	(1852-1859)	

Sources[5] [Dates with an (*) bear some uncertainty due to lack of data]

5. Bruggemeier, J.-F., "New developments in Environmental History", *Proceedings, 19th International Congress of Historical sciences*, Oslo, 2000; Corvol, A., *L'Homme aux Bois. Histoire des Relations de l'Homme et de la Forêt XVIIème-XXème Siècle*, Paris, 1987; Corvol, A. (dir.) *Les Eaux et Forêts du 12ème au 20ème siècle*, Editions du CNRS, Paris 1987; Derex, J.-M., *La Gestion de l'Eau et des Zones Humides en Brie*, op. cit. note 2; Eça, Bento Fortunato de Moura Coutinho de Almeida acerca do *Regímen do Tejo e Outros Rios ao Ministério das Obras Públicas nos Anos de 1867 e 1872 pelo Engenheiro Bento Fortunato de Moura Coutinho de Almeida d'Eça*, Lisboa, Imprensa Nacional, 1877; Guerra, M. J., "Reconhecimentos Feitos no Rio Tejo na Occasião das Cheias que tiveram Logar em 1855", Extractos de Estudos Feitos no Mesmo Rio, Sobre que se Fundam os Projectos de Obras Propostas para Melhoramentos dos Campos Inundados", *Boletim do Ministério das Obras Públicas Commércio e Indústria*, vol. 12, Lisboa, Imprensa Nacional, 1856, pp. 455-468; Mather A.S., Fairbairn J. "From Floods to Reforestation: The Forest Transition in Switzerland" in: *Environment and History*, November 2000, Vol. 6, nº4, 2000, pp.399-421; Mehlum, H., Miguel, E., Torvik, R., Rainfall, *Poverty and Crime in the 19th Century*, Germany, Memorandum 04/2004, University of Oslo, Department of economics, <http://www.oekonomi.uio.no/memo7> ; De Morais, J.C. *Relatório da Administração Geral das Matas Relativo ao Ano Económico de 1879-1880*, Imprensa Nacional, Lisboa, 1881; Regulamento Para a Execução da Lei de 6 de Março de 1884 Aprovado por Decreto de 2 de Outubro de 1886, Lisboa, Imprensa Nacional, 1887; Rosenthal, J.-L., *Property Rights, Litigation, and French Agriculture, 1700-1860*, Cambridge, Cambridge University Press, 1992; Sansa, R., "Il Mercato e la Legge: la Legislazione Forestale Italiana, nei Secoli XVIII e XIX", in *Ambiente e Risorse nel Mezziogiorno Contemporaneo*, a cura di Piero Bevilacqua e Gabriella Corona, Meridiana Libri, Roma, 2000; Weiss, G., "Mountain Forest Policy in Austria: A Historical Policy Analysis on Regulating a Natural Resource", in *Environment and History*, Vol. 7, nº3, August 2001, pp. 335-355; Whited, T.L., op. cit. note 1.

In Bavaria and Switzerland, legislation on this matter had been published in 1852,[6] in Piedmont in 1859 and 1872. However the approval of legislation doesn't mean its immediate and efficient implementation. Actually, Historiography considers these measures as the first attempts to intervene locally but tends to give crucial importance to the National Forestation Laws promulgated in France (1860), Switzerland (1876), Italy (1877) and Austria (1884).[7] These pieces of legislation would have marked the moments for the crucial change of environmental policies in the Alps.

Giving for granted that biodiversity hasn't always been equal all over the cordon of mountains, which present different altitudes, shapes and diverse geological fails with different sun-orientation, the 24 years distance between the first and the last piece of legislation may help explaining different Alpine biodiversity between the 1500 and the 3000 meters of altitude in those different nations. Still, nothing explains why national politic units sharing frontiers and contiguous territories developed the promulgation of forestation laws in so different chronologies.

It is known that there was a real effort from rulers at that time to support forestation in the regions, most likely to reduce torrential regimes. Nevertheless we cannot ignore that a complex set of geopolitical and economic interests attached to the implementation of territorial management were at play in areas that frequently changed sovereignty between 1815 and 1919.

Our conviction is that one of the reasons, if not the main reason to explain differences on managing forest in the Alps was the instability of borders in the entire alpine chain, from France to Austria, during the period of the Nation-State building process and the continuous inherent redesigning of political frontiers.

II. Political Framework: The Swing of Borders

The "La Palice" like statement that one can make about Europe in 19th century is the following: the territories belonging to the nations we've been accustomed to see in a political map for the second half of the 20th century were much different in the 19th century. Like the revolution (always in motion), the redesign of frontiers was in constant progress or redefinition. Between 1850 and 1919, especially in the Alps, frontiers kept changing like tides between France and Italy (1859-1860), Italy and Austria (1866, 1919), Italy and Switzerland (1574-1874), Bavaria and Prussia (1866-1871), Bavaria and Austria (1866-1871) and the United Germany (1881) and Austria.

6. Speich, D., op. cit. note 1; Hall, M., Earth Repair: George Perkins Marsh and the Restoration Tradition, University of Virginia Press, 2005.
7. Bruggemeier, J.F., op. cit. note 5.

II.1. France

In 1851 France occupied Savoy. The territory changed ruling State from Italy to France, provisionally for nine years. Its definitive inclusion under the French borders took place only in 1860. The law for the (French) Alps forestation took place in 1860. In the case of France, a direct correlation can be established between political stability in the borders and promulgation of forest legislation, especially if we compare this situation with what happened in the Pyrenees, between the French and Spanish border.

If we trace back the history of French forestry laws, we end up concluding with some historians that the success of the Pyrenees forestation was due precisely to somehow different reasons. France had inaugurated the first national forestry code in 1827 in Europe, which postulated the rules for management of French State forests. In 1828, the central government tried to implement forestation in the Pyrenean uplands. This attempt failed, due to the guerrilla opposition of the mountaineer's communities, which became known as the "*War of demoiselles*"[8]. Such historical event is important as it suggests that the fact that forestation didn't take place as early as intended was due to internal opposition, rather than to Spanish intervention. Almost twenty years later, in 1846, under Guizot's government, forestation was finally conduced, with the army protection. It was successful and from that moment on the forestation of the French Pyrenees was developed regularly[9] (see table 2).

No equivalent measure was taken in the Alps under the Empire of Napoleon III, between 1851 and 1860. This time, the rulers' decision of not interfering with forest rights in the territory of Savoy was due to a strategy of soft administration to persuade these populations that belonging to France was better than being part of the kingdom of the Italian ruler. According to the French public discourse, the Savoy dynasty hadn't improved people's life conditions and the French administration would provide them facilities to ameliorate their lives.[10]

In reality, the French Emperor feared a political implosion from the Savoyard people. It would have been unwise to force forestation in the Savoy mountains unless the borders would have been consolidated. The conquest of the Piedmont by Napoleon III over the King Vittorio Emmanuele II took place in 1851. It was uncertain for how long it would remain under French sovereignty, at least until the 1860 agreement. France needed the cooperation of the Italian population to keep peace in the border and avoid a *coup d'État* that would swing Savoy back to Italy; as soon as the treaty of this region was signed between the two States (by Napoleon III and Garibaldi), the law for the Alps forestation was proclaimed.[11]

8. Shalins, P., *Forest Rites. The War of the Demoiselles in Nineteenth-Century France*, Harvard University Press, Cambridge, Cambridge USA, 1994; Whited, T.L., op. cit., note 1.
9. Whited, T.L., op.cit., note 1.
10. Idem, Ibidem.
11. Idem, Ibidem.

Table 2: Forest laws, political events and electoral regimes in France

Year	Forestation	Political events
1789		Liberal Revolution
	Forest keepers institution	
1827	Forestry Code	
1828	Pyrenees forest law - I – implementation failed	
1830-1845	Torrential rains and floods in the Alps and Pyrenees	
1846	Pyrenees forest law – Implementation achieved	(Borders established between France and Spain)
1850-1870		Napoleon III Empire
1851		Invasion of Savoy
1855	Torrential rains and floods in the Alps and Pyrenees	
1860	Alps forestation law – over State and commons	Savoy formal annexation
1861	Attempts of forest law implementation and social conflicts	
1864	Draw back in State capacity of ruling over commons	
1870		End of Napoleon III Empire
1871		II Republic
1882	Forestation of water basins law over all property regimes- implemented	Universal suffrage

Sources[12]

II.2. Italy

In the process of Italian unification, which started in 1860, Italy lost Savoy to France, but in 1866, it took back from the Austrian Empire the territories of Alto Adige, Venetia Giulia and Friuli.[13] It was only in 1919 that it recovered the Trento and Trieste regions. This succession of events means that the attempts to forest the Po river basin, lead ahead by Piedmont in 1859,[14] and the Canal Cavour in 1860,[15] in the low plain of the Padana

12. See note 5.
13. Taylor, A. J. P., *The Struggle for Mastery in Europe, 1848-1918*, Oxford, Oxford University Press, 1984.
14. Hall, M., *Earth Repair: George Perkins Marsh and the Restoration Tradition*, University of Virginia Press, 2005.
15. Agnoletti, M., "Le Sistemazione Idraulico-forestali dei Bacini dall'Unità d'Italia alla Metà del XX secolo", in Lazzarini A. (coord.), *Disboscamento Montano e Politiche Territoriali. Alpi e Appennini dal Settecento al Duemila*, Franco Angeli ed., Milano, 2002, pp. 389-416.

Region, were only a half accomplished job. The middle part of the water basin of the Po, was located in mountains belonging to Austrian Administration, in Lombardy, Trento and Alto Adige.

Only after these territories had been incorporated in the Italian political and bureaucratic unified State, could they become a target of Italian intervention. Therefore, an Italian national forest law, for the Alps forestation, could only be promoted after the existence of Italy itself. After 1870, the Italian leaders, dealing with the process of the internal political and territorial unification, had to structure a set of legislation to homogenise the bureaucracy in the country and dilute previous administrative organization of former independent kingdoms. Due to geopolitical matters and the internal process of unification it is understandable that the Italian law for the Alps forestation was delayed until 1877.[16]

Table 3: Forest laws and political events in Italy

Year	Forestation law	Political events
1859	First attempt for Cuneo forestation	Rain and floods in Piedmont
1859		Loss of Savoy
1860		Start up of the Unification
1866		Recover of Austria Italian States in the Alps
1870		End of territorial – military political unification
1872	Forestation of Cuneo	
1877	Forest national law over State properties and communal land- National Forestry guards implementation (poorly implemented)	
1881		Universal suffrage
1882	Forestation national law in water basins over all property regimes	

Sources[17]

16. Sansa, R., "Il Mercato e la Legge: la Legislazione Forestale Italiana, nei Secoli...", op.cit., note 5.
17. See note 5 and Serge Noiret Ed., *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries*, Verlagsgesellschaft, Baden-Baden, 1990.

II.3. Switzerland

The case of Switzerland further underlines the importance of the frontiers being established in order to allow forestation policy. The location of the border in the canton of Ticino goes back to the 16th century between Switzerland and the Ducat of Milan, since 1574. In that period, the border changed several times, and still in 1815 and again in 1861, the two regions didn't manage to find an agreement[18]. The definitive border was established finally in 1874. We can observe that it was not before the settlement of this frontier, in 1874, that a National Forest Law was published. In fact it happened two years later, in 1876, and ended to be the most decisive case of forestation implementation in the highlands of the Alps (that will be explored further on in this text).

In the central Alps, the problem was due to the undetermined location of the border between Italy and Switzerland in the Ticino ducat, which seemed to have been moving like the tides between the two sovereignties, for centuries[19].

In Austria the forestation of the Tyrol was due to different factors. With the German unification (1881) and the Russian expansionist aspirations over Asia and Europe, the Austrian Empire lost the control over the Danube, ceasing the direct access to the timber market of Northern Sea.[20] This was fundamental to hold the tunnels and mines of the salt industry, explored in regime of monopoly by the Hapsburg Crown, in the territories of the Empire.

Allegedly due to environmental problems of torrential water and mud-flows, the crown decided to rule the forestation of Tyrol in 1884[21]. This appear quite odd since floods and destruction of soil and built patrimony had been taking place at least since 1852, in Bavaria and contiguous territories in Austria and Italian States, under the Hapsburg administration till 1866 (when Garibaldi restored Italian sovereignty over Venetian States, Trento and Alto Adige)[22].

II.4. Austria

In Austria, the delay on this process was clearly due to an alternative market of timber supply, which was more economic than the investment on forestation for the crown[23]. On the contrary, Switzerland seems to be the most unique case of forest implementation that took ahead the plantation of trees in the highlands between the 1500 and the 3000m and

18. Lowenthal, D., "Marsh at Cravairola: Boundary-Making in the Italo-Swiss Alps", in *Environment and History*, vol. 10, n°2, May 2004.
19. Idem, Ibidem.
20. Weiss, G., "Mountain Forest Policy in Austria...", op.cit. note 5; Taylor, A. J. P., *The Struggle for Mastery in Europe, 1848-1918*, Oxford, Oxford University Press, 1984.
21. Idem, Ibidem.
22. Idem, Ibidem.
23. Weiss, G., "Mountain Forest Policy in Austria…" op.cit., note 5.

even above, as a clear measure to mark the borders in the landscape. At the same time the cordon of trees and the increase development from stains of trees to fairly continuous forest in the several cantons of the Helvetica Confederation, was part of a political plan to confer uniformity and a common ground for national identity[24] in areas originally influenced by Italian, German and French culture and administrations.

Table 4: Forests laws and political events in Austria (Tyrol and Bavaria; Alto Adige Friuli and Venetian States were included in the Empire)

Year	Forestation law	Political events
1852	Alps forestation Austrian Law- never implemented	Floods
1857-1859		Torrential rains and floods (Bavaria and Italian Alps)
1866-1870		Loss of the Italian states
1868		Torrential Rain and floods in Bavarian and Swiss Alps
1881		German annexation: loss of the control over the Danube
1884	Tyrol forest law – Implemented	

Sources[25]

III. Breaking the Whiteness

In territories with no clear elements of geographical distinction, forestation became a tool to create difference in the landscape with the purpose to create a distinctive symbol of national identity in the whiteness.[26] In Switzerland, almost entirely carved in the mountain system, the territory inscribed in its borders was indistinctive from French, Italian, Bavarian and Austrian landscapes; the Helvetian rulers felt the need to create distinction in the cantons landscape.

24. Speich, D., op.cit. note 1
25. Bruggemeier, J.-F., op.cit. note 5; Mehlum H., Miguel E. & Torvik R., *Rainfall, Poverty and Crime in the 19th Century Germany*, Memorandum n.04/2004, University of Oslo, Department of economics, <http://www.oekonomi.uio.no/memo>; Pfister, Ch., *Das Klima der Schweiz von 1525-1860 und seine Bedeutung in der Geschichte von Bevölkerung und Landwirtschaft / Christian Pfister Band 1 Klimageschichte der Schweiz 1525-1860*, Bern, Paul Haupt, 1984; Weibel, E., *Histoire et Géopolitique des Balkans de 1800 à Nos Jours*, Elipses Éditions, Paris, 2002; Weiss, G., op.cit., note 5; Taylor, A. J. P., *The Struggle for Mastery in Europe...* , op.cit. note 20.
26. Speich, D., op.cit. note 1.

The forest law of 1876 was not only promulgated but was seriously implemented, even at high altitudes such 3000m.[27] The parallel alignment of the trees corridors, above the 1500 in Switzerland, can be still identified. They were mostly planted after 1876. Thus, Man restored forest in altitudes where it naturally existed previously but also created biodiversity over the altitude where *Quercus Pyrenaica*, or other species, would naturally spring up. A great deal of the Swiss landscape was therefore made up by human intervention.

In similar cases, like Switzerland, foresting the mountains was used as a tool to create a common national identity through and in the landscape. The border line of Switzerland had to be differentiated "artificially" from the continuous geographical mountains. Something had to be done to break the immense whiteness shared by Switzerland, France, Austrian Empire and Italy in the same mountain chain. Foresting the landscape was not only useful to prevent torrential regimes but to create a different landscape in order to exclude – visually and aesthetically – the Swiss territory from the others producing its specific and unique trace of differentiation that we nowadays recognise as the beautiful landscape of the country. Part of it was artificially created and designed in order to look as it does today.

But there were other reasons to forest areas in national territories apart from the attempt to prevent torrential regimes and create landscapes as symbols of national identity. At an internal level the excessive exploitation of heavy industry and its consequences on poisoning environment lead to decision making on foresting for public health reasons.

Table 5: Forest laws, political events and electoral regimes in Switzerland

Year	Forestation law	Events
1804-1820		Floods
1812	Regulation of lakes and Lint valley	
1852	Forest law – with no implementation	- Bring up together of the Helvetica Confederation - New attempt for the definition of the border between Switzerland in Italy in Ticino canton at Lugano Convention (in changing since 1574) – Non recognized by Swiss and Italians
1868		Biggest floods of the century in Switzerland (52 people died due to mud floods)
1874		- Achieved attempt of for the border between Switzerland and Italy
1876	Forestation National law over State lands and commons and Forest National Guards Institution	

Sources[28]

27. Idem, Ibidem.

IV. Cultural Heritage and Landscape Contradictions: The False Perspective of the Romantic period

In a simplified and brief scheme, the following paragraphs will present the contradictions between the Romantic idea on marketing forestation of landscape as a sign of elevated culture and the fact that part of this movement came from social conflicts due to health problems verified in industrial areas of steel and iron exploitation.[29]

Table 6: Forestation and pollution in Europe

Country	Forest	Poisoned rivers 19th century
German	Saxony Wuttenberg Baden Baden Liechtenstein Bavaria	Rhine
France	Pyrenees Alps	Garonne Rhone
Switzerland	Borders	Lint
Austria	Tyrol	Danube
Italy	Piedmont	Po

28. Idem, Ibidem; Pfister, Ch., "Strategian Zur Bewaltigung von Naturkatastrophen seit 1500" in *Am Tag Danach – Zur Bewaltigung von NaturKatastrophen in der Schweiz1500-2000*, Haupt ed., Bern, 2002, pp.209-255; Pfister, Ch., *Das Klima der Schweiz von 1525-1860 und seine Bedeutung in der Geschichte von Bevölkerung und Landwirtschaft / Christian Pfister Band 1 Klimageschichte der Schweiz 1525-1860*, Haupt ed., Bern,1984.

29. Dogliani, P., "Territorio e Identità Nazionale: Parchi Naturali e Parchi Storici Nelle Regioni d'Europa e del Nord America", in *Richerca e Memoria* Vol. I, Carocci Editori, 1998, pp. 7-37.

As Joseph Bruggemeir pointed out for the Germanic case, heavy industry co-lived in harmony with the forestation and deforestation of Germanic sates in the 19th century.[30] Peter Sieferle noticed in fact that, charcoal produced from Saxony, Wurttemberg and Bavaria forests, for instance would supply heavy high industry in Prussia. Iron and still production industry would stimulate forestation and timber investment.[31] But on the other hand, Marc Cioc proved that Rhine was intensely polluted in that same period.[32] Due to the water pollution by heavy metals, miners started to die from water poisoning. In reaction to this, as Patricia Dogliani pointed out, miners started strikes and developed riots against the lack of health conditions.[33] For this reason, the Governments started to consider forestation as well in industrial places in order to restore landscape. This wasn't exactly the message that poets like Slëgel passed in praise for nature, and neither was the intention of intellectuals who attributed the love for nature as a sign of cultural development. They just *forgot* to mention how industrial revolution led to social revolts and this obliged public power to attend health policies.

Something similar might have happened in other countries where we can find heavy industry like France. In its territory, the Rhone and the Garonne were pretty polluted.[34] In conclusion we may dare to suggest that on one side political borders had been modified due to the rush for natural resources exploitation but also that on another one health problems caused by mining industry forced public health policies to think about forestation.

V. Conclusions

Thus, as a general conclusion regarding the forestation processes in the Alps, and taking into account all the different events mentioned: the geopolitics of borders, the industrial revolution, and the question of national identity, we can assume that from 1851 to 1881, the process of redesigning European frontiers took a decisive role on postponing forestation intervention in the Alps, but also that forestation was due to some reasons not so publicized (public health, national identity...). The large areas submitted to sovereignty changes didn't help to project forestation in the regions that would have need a massive intervention of

30. Bruggemeier, J.-F., "A Nature Fit for Industry: The Environmental History of the Ruhr Basin, 1840-1990" in *Environmental History Review*, Vol. 18, Number 1, Spring 1994, pp.35-54.
31. Sieferle, R.P., *The Subterranean Forest. Energy Systems and the Industrial Revolution*, The White Horse Press, 2001.
32. Cioc, M., *The Rhine: An eco-Biography 1815-2000*, University of Washington Press, 2002.
33. Dogliani, P., "Territorio e Identità Nazionale: Parchi Naturali e Parchi Storici Nelle Regioni d'Europa e del Nord America", in *Memoria e Ricerca*, Vol. I, Carocci Editori, 1998, pp. 7-37.
34. Woronoff, D., Forges et Forêts, Paris, 1990 ; Woronoff, D., *Histoire de l'Industrie en France: du XVI Siècle à Nos Jours*, Paris, Seuil, 1994.

this kind earlier in time to avoid natural hazards and human losses. At the same time this was not the only cause to justify immediate campaigns to renew forest after their definitive settlement, as it has been shown in the case of Italy.
It doesn't explain either how the eruption of fast cutting timber during the period of increase industrialization of iron and cold, wood crafting and building activities played an enormous role in the destruction of forest and its linked ecosystems.

Role and Place of Mountainous Areas in the Development of Nature Conservation Legislation

Ludwig Krämer

The Development of Nature Protection Legislation in Europe

Nature conservation in Western Europe developed only slowly during the nineteenth and in large parts of the twentieth century. Until recently, nature was mainly perceived as a threat to humans against which it was necessary to ensure protection.[1] Since the beginning of the nineteenth century, scientific curiosity, romantic ideas, more time for leisure activities and the economic search for the extraction of minerals and other raw materials led to a progressively greater attention given to nature. In the center of concern for the protection of nature were animals and plants, less the protection of natural areas.

Mountain areas were traditionally perceived as barriers and borders, and shared this perception with rivers and coasts. When nations built up in the recent European history, they frequently made attempts to have natural borders, and mountains formed part of such natural frontiers. The development of modern transport more and more enabled seas to bridge the link between adjacent land masses, as seas enabled communication, trade, hostile attacks and access to far away resources (food, energy, precious metals etc). All these possibilities did not exist with mountain areas.

The evolution of law followed these patterns. Public international law developed to a large extent around the law of the sea, almost not at all around mountain law. The protection of nature was in the heads of some poets: the British poet William Wordsworth, discoverer of the "inner eye" of humans[2], mentioned in 1810 that the Lake District in the United Kingdom

1. See also the contribution of Cristina Joanaz De Melo in this volume.
2. In a poem, Wordsworth talks of the daffodils which he once saw:
   "(...) For oft, when on my couch I lie
   In native or in pensive mood,
   They spring upon my inner eye
   Which is the bliss of solitude;
   And then my heart with pleasure fills,
   And dances with the daffodils"

was a "sort of national property in which every man has a right and interest who has an eye to perceive and a heart to enjoy".[3]

However, it needed the fresh look of the Americans at nature in order to transform such thoughts into legal texts. In 1832, the US designated the Hot Springs Reservation in Arkansas, 1864 the Yosemite Valley and in 1872 the Yellowstone National Park. It took another forty years, before the first natural parks in Europe were legally protected, beginning in Sweden in 1909. Around the same time, in 1902, an international convention on birds that were "useful to agriculture" was signed which concentrated on birds and did not mention bird areas at all.[4]

Europe-related nature protection legislation became more numerous after the Second World War. Another Convention on birds was signed in 1950[5], and in 1971 the Ramsar Convention on international wetlands was adopted[6], with a relatively modest ambition: it asked the Contracting Parties to designate at least one wetland in order to ensure its protection. These international activities were welcomed in Europe, too; but it was only when the European nations started to cooperate in regional organisations that nature protection legislation was more systematically developed. The Council of Europe developed the Bern Convention on European fauna and flora species that were threatened, and included provisions on the habitats of such species which should also be protected[7]; this went hand in hand with the adoption of the UN Convention on migratory species[8] which also provided for the protection of habitats of such migratory species. In the same year 1979, the European Union followed, adopting a directive on the protection of wild birds[9] and in 1992 Directive 92/43 on fauna and flora species.[10] Both directives explicitly included the protection of the species' habitats in their field of application, and the 1992 Directive even went one step further: it also protected natural habitats which were typical for the natural environment and threatened by human activities, even though there were no endangered species living in these areas.

As can be seen from this sketchy overview, the protection of ecosystems only developed very slowly. Directive 92/43 aimed at the protection of areas of EU-wide interest. It sub-divided them into by now nine different biogeographical regions[11], but remained at the concept that specific habitats had to be identified, geographically delimited and specifically declared to be a habitat of European interest.

3. <http://www.peakdistrict.gov.uk/index/visiting/crow/crow-timeline.htm>
4. Paris Convention for the protection of birds useful to agriculture, of 19 March 1902.
5. Paris International Convention for the protection of birds, of 18 October 1950.
6. Ramsar Convention on wetlands of international importance especially as waterfowl habitat, of 2 February 1971.
7. Bern Convention on the conservation of European wildlife and natural habitats, of 19 September 1979
8. Bonn Convention on migratory species, of 23 June 1979.
9. Directive 79/409 on the conservation of wild birds OJ 1979, L 103 p.1; in 2009, this Directive was renumbered as Directive 2009/147, OJ 2010, L 20 p.7.
10. Directive 92/43 on the conservation of natural habitats and of wild fauna and flora, OJ 1992, L 206 p.7.
11. These regions are: Macaronesian, Atlantic, Alpine, Boreal, Continental, Mediterranean, Black Sea, Pannonian and Steppic Region.

The Convention on Biological Diversity and the European Landscape Convention

International developments of law had gone further in the meantime. In 1992, the Convention on Biological Diversity was adopted[12] which approached nature conservation with the new concept of "ecosystem". An ecosystem is "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit".[13]
The European Union ratified the Convention on Biological Diversity.[14] However, it was of the opinion that its internal EU law complied already fully with all the requirements of the Convention and that therefore no further legislative measures were necessary. While this reasoning might appear unjustified, it should not be overlooked that the Convention on Biological Diversity shares the fate with so many international environmental conventions in that it is not effectively implemented and enforced. This allows the Conference of the Parties of the Convention to adopt far-reaching and rather profound analyses, resolutions and decisions. However, the Contracting Parties which have to report regularly on the implementation of the Convention know that there is no enforcement mechanism. Their reports are regularly painting a rosy picture of the state of biodiversity protection issues; the reading of the implementation reports – including those of the EU– normally gives the impression that biodiversity is better and better preserved worldwide. The reason for this is mainly that the reports deal with legislative and financial measures that were taken, but do not report at all on results that were achieved or failures that were incurred. Implementation is not critically looked at.
Under these circumstances, it is not surprising that the EU does not consider adopting EU legislation on the protection of the biological diversity. Indeed, any such legislation would have to address the numerous conflicts which occur day by day between the interests of biodiversity protection and protectors on the one hand, the interests of farmers, town and country planners, economic developers etc., and on the other hand, conflicts which are not easy to solve on the densely European continent with intensive agricultural, industrial and trade activities, a high concentration of urban agglomerations and an extended transport infrastructure.
Similar reasons underlie the decision of the European Union to not ratify (yet) the Council of Europe Convention on Landscapes[15]: again the fear prevails that EU-wide legislative measures on landscapes would make the solving of the above-mentioned conflicts of

12. Rio Convention on Biological Diversity, of 5 June 1992.
13. Rio Convention, Article 2.
14. Decision 93/626, OJ 1993, L 309 p.1.
15. European Landscape Convention ,Florence, of 20 October 2000.

interests more complicated and difficult than at present. As most administrations at local, regional and national level side with economic interests – they promise jobs, increased tax income, improved infrastructure and more local, regional or national wealth –, a potential interference of European institutions which might wish to see the legal environmental protection provisions fully applied, would rather be perceived by them as a negative development.
Mountain areas were not yet mentioned explicitly in this scenario. Mountain areas in Europe were, in the past, mainly seen as barriers to communication, transport and trade. The search for natural borders quite logically led to national borders frequently being situated in mountain areas, as is evidenced by the three biggest mountain chains in Europe, the Alps, the Pyrenees and the Carpathians. EU legislation does not refer specifically to mountain areas and the ratification of the Alpine Convention by the EU[16] did not lead to the adoption of any legislative measure by the EU.
It might be interesting therefore, to examine why the Convention on Biological Diversity considers mountainous areas to have specific features with regard to other parts of the natural environment. The Conference of the Parties of that Convention adopted, in 2004, a Resolution on mountainous area[17] where it identified the following specific features of such regions:

1. Mountain areas have a particular importance for forests, inland waters, dry and sub-humid lands and agriculture;
2. Mountains have often been referred to as "natural water towers" because they contain the headwaters of rivers that are also vital for maintaining human life in densely populated areas downstream. Natural and semi-natural vegetation cover on mountain helps to stabilize headwaters, preventing flooding and maintaining steady year-round flows by facilitating the seepage of rainwater into underwater aquifers;
3. Soil retention and slope stability are connected with the extent of above-ground and below-ground vegetation, and both are essential to ecosystem resilience after disturbance;
4. Many mountain ecosystems are particularly fragile and vulnerable to the adverse effects of land-use change and climate change, such as the retreat of glaciers and increased areas of desertification;
5. Mountain areas have a particularly high concentration of biological diversity hotspots, including high ecosystem diversity, high species richness, high number of endemic

16. Decision 96/61, OJ 1996, L 61 p.43.
17. Resolution VII/27, adopted in 2004 in Kuala Lumpur.

and endangered species and high genetic diversity of crop, livestock and there wild relatives; There is a significant mountain biological diversity loss at global, regional and national levels;

6. Mountain areas show considerable cultural diversity; in particular, indigenous and local communities play a key role in the conservation and management of mountain biological diversity;
7. The upland-lowland interactions characterize mountain ecosystems, and there is a special relevance of upland ecosystems for the management of food, water and soil resources.

Taken together, these features would well justify the taking of specific measures with regard to mountain areas. Yet, if one looks at a map of Europe, there is a very limited amount of efforts to take practical steps to preserve, protect and improve the quality of mountain regions. National, environment-oriented legislation on mountains is scarce. Mountains are not perceived as needing specific protection with regard to their environment. The same observation applies to the European Union. It is true that the EU adhered to the Alpine Convention, as mentioned above. However, it did not adopt one single measure in implementing that Convention, but left this task exclusively to the Member States as well as to the Secretariat of the Alpine Convention itself.

If one looks at the different areas on which the Alpine Convention considered necessary a transnational cooperation, in particular in the form of Protocols, i.e. of binding legal instruments among Contracting Parties, the picture is much the same. The Convention had identified, in Article 2, twelve such areas, namely land planning, nature protection, agriculture, forests, energy, soil protection, tourism, transport, population and culture, air pollution, waste management and water management. National legislation in these areas only exceptionally addresses the specific problems of mountain areas. And the fact that in particular Austria tries, since a number of years, to address, nationally and internationally, transport problems that are linked to the Brenner motorway, does not contradict this affirmation. Indeed, Austria tries with these measures to mitigate problems (noise, air pollution) which it had created itself by constructing that motorway.

EU legislation on the different areas identified as relevant by the Alpine Convention shows no different picture. Mountain problems are only exceptionally addressed. Examples, where such issues are addressed, include aids for farmers in mountain areas[18], or derogations from

18. See for example, Regulation 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development, OJ 2005, L 277 p.1. Art.37 provides for payments to mountain farmers in order to "compensate for farmers" additional costs and income forgone related to the handicap for agricultural production in the area concerned".

the provisions of the Directive on landfills for isolated settlements.[19] In contrast to that, EU legislation on water and waste, air pollution and energy, forests and transport is silent on mountain areas and their possible specific needs.

Legislation on Mountain Areas – by the EU or by International Agreements?

This raises the more general question, whether legislation on mountain areas at EU or at international level is necessary and/or desirable. It is probably easy to find examples in any of the twelve sectors which had been identified by the Alpine Convention mentioned above, where specific legislative measures for mountain areas could contribute to improving the existing situation; and the need for protecting the natural environment in mountain areas appears to be clearly identified by the above-mentioned indications of Resolution VII/27 of the Convention on Biological Diversity.

However, the main and decisive argument for specific legislation on mountain areas lies in another area which does not appear in the list of the twelve sectors and the programmatic or political descriptions of protection needs. It is the governance aspect: in all European States, the protection of the (natural) environment has been laid in the hands of the administration. It is the administration that grants authorisations and licences, plans and realises infrastructure projects, monitors environmental pollution and impairment, and enforces the existing provisions. In doing this, the administration has very broad discretionary powers and the legal systems at national, EU and international level do normally not provide for mechanisms, instruments or tools to control the administration in the implementation – or non-implementation – of these tasks; in particular, private persons and environmental organisations have very limited possibilities to oblige administrations to act, to protect nature and to omit the execution of measures that impair the natural environment.

A legal instrument which addresses the specificities of mountainous areas and which contains binding commitments for administrations with regard to the monitoring of the mountain areas and addressing the specific problems in the different (twelve) areas mentioned above, can thus be helpful. By its very nature, such an instrument has to be adopted at a level which is larger than the State level – though in some States that are of "federal" structure, the instrument might contribute to clarify the relations between the different regional authorities.

Would it make sense to plead for European Union legislation to address the problems of

19. Directive 1999/31 on the landfill of waste, OJ 1999, L 182 p.1, Arts 2 and 3.

mountain areas in Europe? The EU legislation has the advantage that it provides a specific enforcement procedure[20], that the European Commission has the obligation to ensure that European Union law is effectively applied[21] and that the focus of the European public is more concentrated on European Union legislative instruments than on international agreements.
These arguments are, though, not sufficient to favour EU legislation on mountain areas. There are a considerable number of arguments against such an approach.
The first is the experience with the Alpine Convention: though that Convention is, by virtue of the EU's adherence to it, part of EU law[22], the Commission has not undertaken any steps to ensure its full and effective application within the EU Member States. This is due to the fact that the Commission does not ensure the application of the provisions of an international environmental convention by the EU Member States, contrary to the provisions of Article 17 TEU. The Commission never justified or explained this attitude. The jurisdiction of the Court of Justice which confirmed the assertion that an international environmental convention to which the EU has adhered, is part of EU law and shall be enforced by the Commission[23], did not lead to any change in the Commission's policy. And as the Court of Justice is also of the opinion that the Commission's discretion to take action against a Member State for not complying with EU law cannot be controlled by the Court[24], this discretion is without limits. That means in practice, that there is no guarantee at all that the Commission would effectively enforce any EU legislation on mountain areas.
The second argument stems from the content of any such mountain areas legislation. Indeed, it would not make sense to limit such legislation to transboundary mountain areas. Rather, also mountain areas that are clearly placed within a Member State would have to be covered, such as the Apennines in Italy, the Massif Central in France or the Harz in Germany. Under these circumstances, any mountain area legislation could only be very general in nature, in order not to be in contradiction with the subsidiarity principle of Article 5 TEU.[25]

20. See Article 258 ss Treaty on the Functioning of the European Union (TFEU). According to these provisions, where the Commission is of the opinion that an EU Member State does not comply with its legal obligations, it addresses a letter of formal notice to it. Should the Member State's answer not be satisfactory, the Commission addresses a reasoned opinion to that State. Should the reaction still not be satisfactory, the Commission may apply to the Court of Justice which decides in the matter. Where a Member State does not comply with the findings of the judgment, the Commission may repeat the procedure. In this second turn, the court may fix, as a sanction, the payment of a penalty or of a lump sum.
21. See Article 17 TEU: "The Commission.. shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union".
22. See Article 216(2) TFEU.
23. Court of Justice, case C-213/03, *Etang de Berre*, European Court Reports 2004, p.I-7357; C-239/03 Commission v. France, European Court Reports 2004, p.I-9325.
24. Court of Justice, case C-247/87 Star Fruit v.
25. Article 5 TEU: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

It would have to leave numerous aspects of environmental protection in mountain areas to the national legislation; even for borderline mountain areas such as the Alps, the Pyrenees or the Carpathians, EU legislation would inevitably take the form of framework legislation, as it is not really imaginable that different provisions could be established for mountain areas that are transboundary and those that are not.
A third argument stems from the fact that the mountain areas in Europe also affect a considerable number of non-EU States. This is obvious for the Balkan region and the Carpathians, but also Liechtenstein, Andorra and even Monaco are to be mentioned. EU legislation would not reach those States and would therefore be of – geographically and substantially – limited value.[26]
A last argument is derived from the very objective of any such legislation. One of its main objectives must be to stimulate the local population to cooperate in the preservation of the natural environment. This means, however, that the specificities of the local environment and the concern of the indigenous population must be addressed, if one wishes to avoid legislation that consists of generalities and common places. EU legislation is not really capable of stimulating this active participation of local communities in the elaboration and application of nature protection legislation, as it is elaborated and negotiated too far away – geographically and also intellectually - from the concerns of the indigenous population.
Overall thus, it appears that EU legislation on mountain areas is not a way forward and would not lead to any significant improvement of the present status quo.

A General Convention or Conventions on Mountain Ecosystems?

A European convention on mountain areas would not, it appears, fulfill a useful complementary function with regard to existing agreements. The international Convention on biological diversity was already mentioned, which also covers mountain areas and tries to fix general rules, principles and objectives in order to preserve and protect biological diversity, in mountain areas and elsewhere. The Council of Europe Convention on landscapes also covers mountain landscapes. Species of fauna and flora, including those of mountain areas, are protected by the Bern Convention.
In general terms, thus, everything on the need to protect biological diversity, fauna and flora

26. Directive 2000/6, establishing a framework for Community action in the field of water policy, OJ 2000, L 327 p.1, tried to overcome these difficulties by suggesting that in those areas where river basin management included non-EU countries, there would be no legal obligation to establish common management plans and other measures, but that Member States should "endeavour" to adopt common measures (Article 3(5)). This transfers the legislation in this regard into recommendations and is, therefore, of very limited value.

species, and landscapes, has already been stated. Another international convention would thus only, to a very large extent, duplicate the existing provisions. To this argument has to be added the general observation that it does not appear to make much sense of taking parts of the natural environment, such as wetlands[27], mountain areas, plains or forests, and subject their monitoring to specific legal provisions. Indeed, the different ecosystems are all part of the natural environment, they liaise, interact, and are exposed to common challenges (transport, air pollution, urbanisation etc.) Introducing specific legal rules for them would reintroduce legal and administrative barriers to the natural environment which contradicts the basic understanding that the (natural) environment does not know frontiers.

All this leads to the conclusion that if one wishes to ensure protection of mountain areas on the European continent, it is advisable to provide for agreements concerning a specific region. In this regard, the Alpine Convention can thus well serve as a "model". Agreements on the protection of the Pyrenees, the Carpathians, the Balkan Mountains etc could thus usefully complete the legal protection tools. All these mountain regions are shared, administratively, by several countries and offer thus perspectives for effective cooperation in view of optimising their protection.

The Alpine Convention – A Limited Model

The fact that the Alpine Convention was called a model for other European mountain areas does not mean that its content, the organisational structure within which it is embedded, and the policy orientations of its monitoring and implementation programmes constitute a model for other regions. In fact, its organisational structure is relatively poor and obviously influenced by the strong wish of the Contracting Parties to keep full control on any development under the Convention. The main decision-making body is the Permanent Committee (Article 8) which is composed of delegates of the Contracting Parties. The Convention did not even set up a permanent secretariat, but only provided for the – unanimous – decision to set up such a secretariat (Article 9); while this has been set up in the meantime, this provision shows the will of the governments to keep full control of the evolution of the Convention.

The most marking feature of the Convention, though, are two omissions which are vital for nature conservation in the Alps, i.e. the absence of any structured representation of civil society on the one hand, and the absence of any representation of the interests of nature on the other hand.

The Alpine Convention recognised "that the Alps constitute the living and economic

27. At international level, the Ramsar Convention (note 5, supra) deals exclusively with wetlands. However, this rather early international Convention was not followed in its approach and its success in conserving nature appears to be limited.

environment for the indigenous population" (Recital 2) and that the economic, cultural, recreational and living environment in the heart of Europe is shared by numerous peoples (Recital 1). However, no scientific or advisory committee was set up by the Convention to represent the different groups of persons, who could bring in their opinions on the increased threat to the Alpine region and its ecological functions. If one recognises the Alps as being a biogeographical area – an ecosystem – in itself, then it is not really understandable, why the people in this ecosystem cannot get any participative status within the Convention's administrative structure. It is true that the Alpine Convention recognised, until now, fourteen organisations and bodies as official observers. However, this observer status is not the same as an official advisory, participatory or scientific body within the Convention.

The second omission concerns the representation of nature's interests within the Convention's structure. It is a commonplace that nature has no voice and does not take part in elections. Asking the bear, the eagle or the marmot of what they consider appropriate for the protection of nature in the Alps is not possible. However, this does not mean that the interests of nature cannot be represented. Austrian Länder developed the idea of an ombudsman for the environment which has the right to participate in administrative and political discussions and has the task to interfere in the interest of nature protection. Nothing would prevent the Alpine Convention to appoint an ombudsman for the Alpine nature who would be entitled to raise its voice in favour of nature. As five of the seven recitals of the Convention emphasize the importance of the Alpine nature and the threats and pressures to which it is exposed, giving a voice to nature would be a reasonable and useful completion of the Convention's structure.

Against this suggestion cannot be objected that the fourteen organisations and bodies with observer status would and could assume this functions. First, there are a great number of these organisations which do not have the conservation of the natural environment as objective[28]. And also the other organisations or bodies which have more specific nature conservation objectives, have or might have many diverse interests, including financial interests, which might incite them of not being too vigorous a defender of nature interests.

In the same way, the interests of nature are not necessarily taken into consideration by the Contracting States of the Convention. Indeed, these States have or might have numerous other interests than nature conservation, such as tourist development, transport facilities, or the improvement of traffic infrastructure. A good evidence of this is the observation of the European Environment Agency on "pressure on mountain biodiversity"[29] which identified as

28. This applies, for example to the "European Association of Elected Representatives from Mountain Regions", "the Alps-Adriatic Working Community", the Arbeitsgemeinschaft Alpenländer", the "Club Arc Alpen", "Cotrao", "Euromontana", "Alpine Space Programme", and "UNO-UNEP".
29. European Environment Agency, *10 messages for 2010, Mountain ecosystems*. Copenhagen 2010, section 2.1.

the main pressure on the mountain biodiversity of the Alps the change of land use practices, infrastructure development, unsustainable tourism, overexploitation of natural resources, the fragmentation of habitats and climate change. With the exception of climate change, where progressively a problem analysis is taking place – not necessarily action for remediation! – there is very little analysis on these threats for the Alps, not to talk of joint and concerted actions to eliminate these threats. Neither the different reports on the state of the alpine environment contain any discussion of these problems, nor are there other contributions from Convention bodies which critically analyse the issues and suggest improvements. Nature without-a-voice is losing out in the present way of proceeding.

At the end, all these problems are linked to the fact that the protection of the environment is in the monopolistic hands of the (national) administrations and political instances. They know best how to proceed and they do not wish critical and controversial discussions on what could or should be done to stop unsustainable trends. All environmental legislation which had been adopted by the contracting States of the Convention and by the European Union did not, until now, reduce or eliminate the threats which the European Environment Agency identified. Can there be a better evidence of the futility of the nature conservation efforts with regard to the Alps?

From a legal point of view, one has to admit that numerous of the objectives and obligations laid down in the Convention or the different Protocols are simply too vague to be able to checked as to their compliance in practice. Examples of such vague legal obligations are:

- Measures for encouraging economic diversification in order to remove structural failings and the risk of a single-sector economies;[30]
- The inclusion in spatial and sustainable development plans and/or programmes of "limiting of holiday homes;[31]
- Measures for limiting traffic, which may also include limitations to motorised traffic;[32]
- Regular reports to the Standing Committee on measures taken under this Protocol. The reports shall also cover the effectiveness of the measures taken;[33]
- "The Contracting Parties shall adopt the measures necessary so that the preservation and development of the natural or near-natural habitats of wild animals and plant species and of other structural elements of the natural and rural landscape are pursued on the basis of landscape planning aligned with the territorial planning";[34]

30. Protocol on spatial planning and sustainable development, Art.9(1.b).
31. Protocol on spatial planning and sustainable development, Art.9(3.c).
32. Protocol on spatial planning and sustainable development, Art.9(5.d).
33. Protocol on spatial planning and sustainable development, Art.17(1).
34. Protocol on conservation of nature and the countryside, Art.8.

- "The Contracting Parties shall aim to reduce the environmental impact and impairments undermining nature and the countryside in the entire Alpine territory, while also taking account of the interests of the local population. They shall take steps to ensure that all the significant uses of the territory are with due care for nature and the countryside. They shall also adopt all the measures necessary for preserving and, to the extent necessary, restoring special structural, natural and near-natural elements of the landscapes, biotopes, ecosystems and traditional rural landscapes";[35]
- "The Contracting Parties shall assure that no wild animal or plant species are introduced into a region that was not previously present naturally for a verifiable historic period";[36]
- "The Contracting Parties undertake to combine sustainable development with environmentally-friendly tourism";[37]
- "The Contracting Parties shall ensure that in areas attracting high numbers of tourists, a balance is struck between intensive and extensive forms of tourism";[38]
- "The Contracting parties shall ensure that the development, maintenance and use of ski slopes blend into the natural surroundings as much as possible, taking account of natural balances and biotope sensitivity".[39]

This list could very easily be prolonged to reach two or three times its length. Its different elements demonstrate the specificity of environmental provisions: very often, they are so vague that they allow the taking of protective action, if a municipality, a region or a State has the political will and the necessary financial and human resources to make the provisions operational; however, where this political will is absent, the legally binding provision will not be of much help.

Of course, without the Alpine Convention the threats for the conservation of nature in the Alps would even be stronger, and the measures undertaken to reduce the threats would be much fewer in number. And this is not to play down or despise the considerable efforts which all stakeholders, Contracting Parties and the Permanent Secretariat of the Convention, observer organisations, environmental organisations and others deploy to protect preserve and improve the Alpine environment. However, it seems, as if these efforts only slow down the progressive, slow but continuing degradation of nature conservation of the Alps.

On principles to protect and conserve nature, there is thus no lack in the Alpine Convention

35. Protocol on conservation of nature and the countryside, Art.10.
36. Protocol on conservation of nature and the countryside, Art.17.
37. Tourism Protocol, Art.5.
38. Tourism Protocol, Art.9(3).
39. Tourism Protocol, Art.14.

and its Protocols. Other mountain regions in Europe could well be inspired by these provisions. However, any international agreement of mountain areas' protection and conservation, in Europe or elsewhere, must consider the fact that principles and long-term objectives – "the sustainable development of the Alps" – are good on paper, but need the daily political and administrative application. In this, the active participation of the local population plays a role of paramount importance. The environment cannot be protected without or against the will of the local population. And whenever decisions are to be taken which affect the natural environment, measures must be taken to ensure that the voice of the natural environment can be heard.

The cooperation of States that share mountain areas such as the Alps or the Pyrenees is good and welcome, and many administrations deploy great efforts to reconcile economic, traffic and environmental interests. It is an error, though, to believe that cooperation among administrations and policy-makers is enough to take nature's needs duly into account in this governance process. Often enough, nature needs to be protected against the zeal of public authorities, in realising infrastructure projects, develop tourism, promote traffic etc. Furthermore, where the mountain ecosystems are significantly deteriorating or are destroyed, it is almost impossible to reconstruct them. Nature's interests must therefore, in general, prevail over short-term economic interests, be they defended by local, regional or national administrations.

Concluding Remark

The conclusion of these lines is relatively simple: it is desirable to develop specific international conventions to protect transboundary mountain areas in Europe. The Alpine Convention may, to a large extent, be a useful model for such cooperation. However, a more institutionalised participation of the local population in the monitoring process, in new decisions, in the assessment of past measures is necessary. Also, the mountain ecosystem needs an ombudsman to have its interests represented in the discussions on finding an appropriate balance between economic and ecological interests, and in assisting in finding ways to stop the slow, but progressive deterioration of the European mountain ecosystems – which continues in the Alps and elsewhere.

II

National and International Legal and Policy Frames

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Water in the Mountains: Aspects of Legal Protection

Karl Weber

I. Preliminary Remarks

It is not necessary to stress the significance of water as a basis for life and economy. Water is indispensable, no matter whether as drinking water, as an economic asset for industry or for the generation of energy. Water also plays an important role within the protected natural resources. Water can, however, also be a massive threat: floods and avalanches – that is to say: frozen water – can endanger human settlements and lives. Water in the Alps shows some ecological characteristics which necessitate specific water protection but also specific measures to protect people from the hazards of water.

In view of the great significance of water it is hardly surprising that for generations it has been the subject of legal protective measures. Water protection can be found in all parts of law: in International Law, European Law, national law, regional and local legal provisions. Using the Austrian Law as an example I would like to show how these different layers of law work together. The Alps cover a large part of the Austrian national territory. Therefore the Austrian law on the protection of water (in the widest sense) is of particular importance for the alpine areas. Although water legislation – according to the allocation of competences – is incumbent upon the Bund and therefore refers to the whole Austrian territory, several regulations were adopted specifically for the alpine regions. This is especially true for flood and avalanche protection.

II. Threats to Water

We know alpine water as flowing waters (rivers, streams), standing waters (lakes) and groundwater. A permanent threat to water is the increasing environmental pollution, in the form of air pollution, soil pollution and pollution caused by industry and traffic. In addition to that, also climate change has negative effects, especially on the alpine glaciers. In the long term, this will have impacts on the water reserves in the Alps. Furthermore, the potential threat of water (flooding) will increase due to climate change.

For the time being the threat to water supply because of deteriorating water quality is not a pressing problem. At least for the next decades the supply of drinking water for the alpine population seems to be secured. The question arising is: how does international and national law react to these threats? I will first give a short overview of the national law and afterwards a survey on the national protective regulations. Finally I will explore the question of whether the Alpine Convention needs a specific Water Protocol.

III. Water Protection in International Law

International law hardly provides any regulations on water protection in the Alps or the Austrian Alps in particular. There are, in fact, several international agreements which concern water protection. However, Austria has only ratified some of them, and other agreements are only soft law. There are also several bilateral contracts concerning cross-border water pollution, but they only refer marginally to Alpine areas.

Article 2(2)(e) of the Alpine Convention obliges the Contracting parties to take measures concerning water balance. The aim of these measures is to preserve or reestablish healthy water systems, in particular by keeping water free of pollution, by applying natural hydraulic engineering techniques and by using water power which serves the interests of both the indigenous population and the environment alike. However, a particular protocol on the protection of water does not exist. This is unfortunate, especially when one bears in mind that Article 2 is only soft law. This means that if the obligations are not fulfilled there are no sanctions. Besides, this provision is not directly applicable.

IV. Rules in European Law

In the field of environmental protection and environmental planning, the European Union mainly enacts its legislation in the form of directives. Consequently, it is in the first place the Member States who have to implement these directives. In federal states the implementation very often tackles difficult questions due to the federal allocation of powers.

The probably most extensive and ambitious legislative project in the field of water protection policy and water policy is the European Water Framework Directive (WFD). Its overall aim is to improve the protection of inland surface waters, transitional waters, coastal waters and groundwater. The WFD contents do not have a focus that refers particularly to the Alps. The directive rather sets out committed objectives but at the same time leaves the Member States the freedom to react to the specific geographic requirements of their territories. Therefore the concrete measures taken can vary according to whether mountain areas or lowlands are concerned.

The most important objectives of the WFD are:

1. To prevent further deterioration and to protect and enhance the status of aquatic ecosystems and those ecosystems and wetlands directly depending on the aquatic ecosystems.

2. To secure a good status respectively to restore a good status of surface waters and groundwater.
3. To promote sustainable water use based on long-term protection measures of available water resources.
4. To provide sufficient supply of good quality surface waters and groundwater.
5. To progressively reduce and for the long term to avoid emissions of hazardous substances to water.
6. To contribute to mitigating the effects of floods and droughts.

The WFD gives the Member States a phased system consisting of procedures and measures to be implemented into national law. Here the standardization of the criteria for assessing the riverine conditions is of particular importance. This is supposed to ensure a pan-European system of measurement methods and data acquisition. For alpine waters this is particularly significant because it means that throughout the Alps uniform testing and measuring procedures must be established.

Central focus of the WFD is cast on the management plans and programmes of measures. Based on an analysis of the actual conditions each Member State is obliged to produce a programme of measures for each river basin district. Then there is also an action programme: the objectives of the WFD shall be realized within a phased timetable. In addition there are management plans that guarantee an ecological rational use of water as an economic asset. All these programmes and measures aim to protect or if necessary to improve the ecological status of Alpine waters – again taking the Alps as an example.

These ambitious goals of the WFD must, however, be seen in the context of far-reaching exceptions (so called "escape-clauses"). The Member States are free to designate water bodies as "artificial and heavily modified surface water bodies". In that way they can – at least temporarily – evade the strict regime of the WFD. On that specific issue, economic considerations play an important role: not only do they justify a delay in the implementation of the directive, they also relativise the level of the protection objectives. In relation to that, the WFD contains several vague terms and it will probably be up to the European Court of Justice to specify them.

An essential component of the WFD is the principle of cost coverage of commercial water use. The costs of water services, including environmental and resource costs are to be taken into account according to the polluter-pays principle. This creates incentives for the efficient use of water resources. At present, internationally acknowledged and practicable calculation and assessment methods are still missing. Furthermore, the directive allows to contravene this principle in favour of social aspects.

The focus of the water policy of the EU lies definitely on good water quality. To safeguard water quality the EU has adopted a number of directives that refer to surface waters as well as groundwater. For example, in recent years directives have been adopted on the protection of groundwater, the quality of freshwater for human use as well as for the protection of fish stocks. Other directives refer to the quality of bathing water or the protection of waters against pollution caused by nitrates from agricultural sources, to mention just the most important ones. These directives supplement and intensify the WFD and set high standards of protection. The Member States may tighten these standards according to the requirements of efficiency. Of course this is only true under the precondition that fundamental freedoms as guaranteed in the TEU are not violated.

V. The Austrian Legal Position in the Field of Water Protection

Austria is a federal state with an extremely complicated allocation of competences. Although according to Article 10 (1) (10) of the Austrian Constitution (B-VG) water law is allocated to the *Bund*, yet the *Länder* also have a number of competences referring to water protection. They have, for example, the power to legislate nature conservation as well as the treatment of sewage. The topic of sewage disposal in particular shows that the laws of *Bund* and *Länder* are closely interwoven.

The most important set of rules for the protection of alpine waters is definitely the Water Act (*Wasserrechtsgesetz*, WRG). It contains some of the most essential national regulations that have been adopted in order to implement the European directives. I will briefly mention some of them:

The objectives of the WFD are mainly implemented in form of planning acts. As the Water Act is executed in indirect federal administration (*mittelbare Bundesverwaltung*), the governor of the Land (*Landeshauptmann*) plays an important role. The ministries coordinate the planning and accomplish tasks of overall importance. Since 2003 Austria has gradually realised the planning that is laid down in the WFD. First of all the legal framework for the planning was defined in the amendment to the Water Act 2003.[1] The aim is to implement the national water plan – as laid down in European law – into Austrian law. The analysis of the actual conditions was communicated to the European Commission in spring 2005 in form of a report.Hence this report now serves as a basis for the elaboration of further planning phases (monitoring programmes, setting of environmental objectives, programmes of measures).

The analysis of the actual water conditions was substantiated in form of decrees (*Erlässe*,

1. BGBl I 2003/82.

legal norms without external legal effects). They are now regarded as so-called acknowledged expertise that has to be taken into account when assessing public interests or interpreting vague legal terms. This analysis is of particular importance for the proportionality test that is provided in different legal provisions. It has to be applied when public interests have to be positioned within the area of tension between water protection on the one hand and economic interests on the other.

The environmental objectives concerning surface waters and groundwater are defined in regulations (*Verordnungen*) of the Ministry of Environment. According to these, aquatic chemistry, hydrobiology and water structure shall be assessed jointly. Once again the focus of these regulations is on good water quality. The regulations that have been adopted so far do not only provide rough guidelines but legally binding objectives that are to be met until the end of 2015. If not it may lead to an infringement procedure.

The programmes of measures that are to be adopted referring to §§ 55 e, f, and g Water Act, should have been completed until 2009 and should be implemented into practice until the end of 2012. These programmes of measures do, however, not only concern water law: they must also include other topics that are of relevance for the environment, such as industrial law, waste disposal law, chemical law and others. The objectives concerning environmental conservation as well as agricultural aspects of water protection have to be implemented by the *Länder*. These measures, which are laid down in a mix of different legal instruments, only have an indirect legal effect. The process of defining the measures has not been fully completed yet.

The next stage of planning, which concerns water management, takes place according to river catchment areas. This includes especially the Austrian parts of the river basin districts Danube, Rhine and Elbe, miscellaneous planning areas as well as several water bodies, surface water bodies, groundwater bodies, water withdrawal areas and protected areas. In this connection once more the problem of the federal allocation of powers arises. It shows that the regulations of the Water Act are not as far reaching as the provisions in the WFD. It is up to the *Länder* to adopt additional acts of planning.

All these stages of planning are summed up in the so-called national water plan, which the Minister of Environment adopts as a regulation.

Following the WFD, the Water Act provides the possibility to designate water bodies as artificial and heavily modified water bodies and protected zones. In a way these two categories are the antipodes of the Austrian policy of water protection. While in protected areas, especially the European ones, there are high standards of water quality criteria, artificial modified water bodies are waters or stretches of water that are much more open for commercial use and are only protected by a weaker protection regime. This is not only of importance for the industry but also for the construction of power plants.

This wide range of instruments is supplemented by regional water planning. In addition, there

are several regulations that guarantee measures of monitoring. Also the procedural aspects of data collection and data processing are set in different and partly dispersed laws.

Besides the planning instruments, the Water Act also contains several other administrative instruments. Their common basis is the general duty to keep waters clean. This means that everyone must refrain from polluting waters and must ensure to keep them clean. For this purpose most projects that effect the aquatic environment are subject to a permit procedure. In that way not only public interests in water protection can be secured but also an efficient use of hydropower. In support of these aims, the Water Act also contains a number of prohibitions. They refer to the emissions of hazardous substances into water as well as into soil (groundwater) by agriculture.

To supplement and tighten up the Water Act, in 2009 the Act on environmental liability was adopted.[2] This law holds an obligation for operators of plants that put the environment at risk: they have to prevent pollution respectively repair damages to waters, provided that they have a certain degree of relevance. Although the terminology resembles, environmental liability does not have anything in common with liability in civil law. Environmental liability is strictly based on the polluter-pays principle. It serves as an instrument to prevent heavy pollution caused by industrial accidents respectively to ensure that damage is repaired.

Within water protection also the nature conservation legislation of the *Länder* plays a key role. These laws do not primarily refer to water, nevertheless effective nature conservation can hardly be realized without taking into account standing and flowing waters. All nature conservation laws contain regulations on the protection of banks, the protection of wild fauna and flora – these include also aquatic habitats – as well as the protection of glaciers. In the Tyrol, in Salzburg and Carinthia glaciers are largely protected from interventions. However, particularly in the Tyrol glacier protection is considerably diluted. As the existing glacier ski resorts constantly strive for expansion, a circle of permanently opening up new areas is continuing. In the future, climate change might make this obsolete, but in the next years and decades we can expect intensive debates between the operators of ski resorts and environmentalists.

VI. Assessment of Legal Water Protection in Austria

EU-Law and especially the WFD have highly improved Austrian water protection. It is true that – due to the allocation of competences – the implementation of the WFD is not completely satisfying. On the whole however, new planning instruments have been created,

2. BGBl I 2009/55.

which contain stricter specifications for the authorities than before. This applies when they have to assess possible interferences with waters in a permit procedure. In short, one could say that the former practice of individual permits has been integrated into a complex of planning instruments. This was done by planning acts with binding effects. In that way the individual conflicts between economy and environmental protection were integrated into a rational coordinate system of public interests. Besides, nature conservation law supports alpine water protection with its different acts of planning.[3]

The question of whether the Alpine Convention needs a specific water protocol has also been repeatedly discussed in Austria. Given that the Alpine Convention does not have a very distinctive regime of protection for the alpine waters, this idea suggests itself. One must however keep in mind that the existing environmental law does already have numerous instruments when it comes to serious interferences with the environment. Environmental Impact Assessment, Strategic Environmental Assessment, Natura 2000, the permit procedures as laid down in water law and nature conservation laws and the duty to weigh up competing interests are, for a start, adequate measures to protect water from severe and sustainable impacts. Of course we cannot deny that in practice there are recurrent problems with environmental assessment and the weighing of competing interests. Nevertheless it is doubtful whether these shortcomings in enforcement can be eliminated by further legislative proposals as these would bear the danger of an increasing bureaucratization.

VII. Protection against the Hazards of Water – Flood Protection and Avalanche Protection

The existing Austrian water law contains several regulations that do not prevent the emerging of floods but aim at minimizing the hazards to life, health and property. These provisions are laid down in the Water Act[4], in the Act on Torrent and Avalanche Control[5] and in the Forest Act.[6] At first glance it seems incredible that the Austrian Law does not contain a binding commitment of the State for disaster control. Nevertheless, also in Austria this is regarded as part of the State's responsibility. The European Court of Human Rights underpinned the States' obligation for preventive disaster control in the judgment Budayeva/Russia in March 2008.[7]

The tasks of preventive flood and avalanche protection are only rudimentarily set down

3. See Sebastian Schmid's contribution in this volume.
4. BGBl 1959/215.
5. RGBl 1884/117.
6. BGBl 1975/440.
7. ECHR 20.3.2008, 15.339/02 and others.

in law. Most legal acts have no binding force, that is to say they do not establish any rights or obligations. Their legal effects are restricted to the authorities only. As far as flood and avalanche protection is concerned the focus here lies on the Hazard Zone Plans (*Gefahrenzonenpläne*). Although they are legally not binding, they actually determine disaster control planning.

Austria is obliged to implement the Flood Directive by 2010. Currently this implementation is still in elaboration. It is, however, obvious that Austria has to reform the existing law on flood prevention substantially. The Flood Directive, like the WFD, requires an analysis of the actual conditions, a differentiated system of planning and the provision for measures. In the future the Hazard Zone Plans will – in accordance with the Flood Directive – probably have legally binding force. This means that flood protection will need to have a clear legal basis in the Water Act. In accordance with this legal basis the plans will then have to be enacted as regulations. The Flood Directive revolutionizes Austrian flood protection in so far as non-constructional measures are given precedence to constructional measures. Where it is possible, nature-related floodplains should be set up instead of protective structures. Thus, a certain "greening" of flood protection can be expected in the future.

Avalanche protection is only indirectly affected by the Flood Directive. In this field, the policy of protective structures will remain dominant.

The Swiss Approach to Mountain Protection and its Relation to European Law: Complementarities or Conflict?

Astrid Epiney/Jennifer Heuck[1]

I. Introduction

The present article addresses the mountain protection in Switzerland *in toto* and its relation to European Union law (EU law). We will first examine the relevant provisions of the Bilateral Agreement on overland transport (OTA) between Switzerland and the EU, which includes obligations already set out in EU law as well as autonomous obligations (II). Then, we discuss two instruments of Swiss Law, which aim at reducing transport of goods by road traffic: the performance-related toll for heavy goods vehicles (PRTHV) (leistungsabhängige Schwerverkehrsabgabe) (III) and the Alpine Crossing Exchange (ACE, "Alpentransitbörse") (IV).

There are no specific legal instruments for environmental protection of mountain areas in Switzerland: the general Swiss legislation equally applies to mountain areas. One may doubt whether such legislative management for the protection of mountain areas with regard to land planning is sufficient. However, the law on nature protection[2] and the regulations derived from this legislative act warrant the protection of specified areas, a concept similar to that of the European Directive on Habitats.[3] Swiss legislation on environmental matters is in general compatible with the prerogatives of EU law, except for certain aspects of public participation. The ratification of the protocols of the Alpine Convention should – from a legal point of view – not affect the existing Swiss law because of the large margin of appreciation that these protocols leave to contracting parties.

1. The authors wish to thank Benedikt Pirker (LL.M. (CoE Bruges), Research Assistant at the Institute of European Law University of Fribourg) for his precious help on the English version of the text.
2. Cf. Bundesgesetz über den Natur- und Heimatschutz, SR 451.
3. Dir. 2009/147 on the conservation of wild birds, OJ L 20 of 26.1.2010, 7. Dir. 92/43 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, 7, last modified by Dir. 2006/105, OJ L 363 of 20.12.2006, 368.

II. Europeanization of Swiss Law: The Bilateral Agreement on Overland Transport

International agreements may include obligations for Switzerland to ensure equivalent legislation with respect to a part of the *acquis*. From the Swiss point of view an international agreement is necessary in situations where the autonomous way[4] does not result in the desired objectives.

The OTA constituted one of the more difficult Bilateral I treaties.[5] While Switzerland aims at a reduction of the transport volume through the Alps,[6] the EU's main interest is the undisturbed transit through Switzerland including the free movement of goods and the free provision of services.[7]

The main aspects of the OTA are summarised as follows[8]:

- Part I of the treaty includes **general principles**. Apart from the principle of free choice of mode of transport,[9] the principle of non-discrimination stated in Art. 1 (3) OTA counts among the most important.[10]
- Part II of the Agreement (Art. 5 ff. OTA) refers to **weight limits and technical standards**. The stepwise increase of the weight limit from 28 t to 40 t in 2005, and the adoption of taxes and contingents (for a transition period) for 40 t vehicles are of particular importance. The Agreement defines a (maximum) level for taxes and the contingents for a transition period in Part IV. The level is mandatory; therefore it is

4. Amgwerd M., *Autonomer Nachvollzug von EU-Recht durch die Schweiz: Unter spezieller Berücksichtigung des Kartellrechts*, Europainstitut an der Universität Basel, 1998; Spinner, B., Maritz, D., *EG-Kompatibilität des schweizerischen Wirtschaftsrechts: Vom autonomen zum systematischen Nachvollzug*, in: Peter Forstmoser (ed.), *Der Einfluss des europäischen Rechts auf die Schweiz, Festschrift für Roger Zäch,* Schulthess, Zürich, 1999, 127 et seq.
5. The 'Bilateral I' agreements entered into force in 2002. They include seven agreements in public procurement, technical barriers to trade, research, road and rail transport, air transport, agriculture and free movement of persons. The seven agreements form a 'package' insofar as they are interconnected by a so-called 'guillotine clause': they can only collectively enter into force. The non-prolongation or cancellation of a single agreement would effect the abrogation of all other agreements. From an institutional point of view, however, each agreement is an autonomous agreement, relating to different matters including its own institutional provisions. No framework agreement exists.
6. Siegwart K., Gruber R., Beusch, M., "Stand und Perspektiven der Umsetzung des Alpenschutz-Artikels (Art. 36^{sexies} BV) unter besonderer Berücksichtigung der Raum- und Umweltplanung", *Aktuelle Juristische Praxis (AJP)* 1998, 1033 (1034-1035); Epiney A., *Die Beziehungen der Schweiz zur Europäischen Union, dargestellt am Beispiel des Alpentransits,* Zentrum für Europäisches Wirtschaftsrecht, Vorträge und Berichte, Bonn, 1996, 12 et seq.
7. Individual interests of the MS were playing a decisive role: France and Austria wanted to reshift the traffic, that was diverted to France and Austria because of the 28 t limit introduced by Switzerland; Germany and Italy were interested in finding a solution providing a minimum of costs.
8. Epiney A., Gruber R., "Das Landverkehrsabkommen Schweiz – EU. Überblick und erste Bewertung", URP/DEP 1999, 597 et seq.; Sollberger, K., *Konvergenzen und Divergenzen im Landverkehrsrecht der EG und der Schweiz. Unter besonderer Berücksichtigung des bilateralen Landverkehrsabkommens*, Universitätsverlag Freiburg Schweiz, 2003, 177 et seq.
9. Cf. further in the text and IV.4.a).
10. According to Art. 1 OTA the OTA ensures free access to each other's transport market for the carriage of passengers and goods by road and rail and an efficient management of the traffic. Within the scope of the agreement, direct and indirect discrimination on grounds of nationality are prohibited.

neither possible to digress to the top (as far as taxes are concerned) nor to the bottom (as far as contingents are concerned).

- **Free access to railway and transit rights and the standards for railway** companies are regulated in Part III of the Agreement (Art. 23 ff. OTA).
- Part IV of the Agreement (Art. 30 ff. OTA) deals with the **Coordinated Transport Policy**:
  - The (maximum) level of taxes for transit through Switzerland has been determined for the reference travelling distance Basel-Chiasso[11] and is binding for Switzerland (Art. 40 OTA). In turn, the EU develops a system for charges on its territory, reflecting the costs arising from the use of infrastructure and the "user-pays" principle (Art. 41 OTA). The imprecise wording of the provision, however, may lead to the conclusion that it does not provide a defined and enforceable obligation on the EU.
  - Switzerland is obliged to build the NEAT[12]; vice versa the EU obliges itself to ensure the North –and South– access to the NEAT.
    The number and the costs of empty drives (that do not pay a PRTHV) are scrutinized.
  - The contracting parties oblige themselves to supporting measures such as the custom clearance.
  - Safeguard precautions shall aim at a more effective handling in crisis situations.
- Part V contains the **final provisions** (Art. 49 ff. OTA) of the OTA.

It is noteworthy that the OTA mentions the "**Principle of free choice of mode of transport**" twice. Although the principle has been integrated into a legally binding agreement, its legal consequences seem to be rather limited:

- Art. 1 (2) OTA defines the principle in **relation to the general principles and objectives of the Agreement** as follows: "The provisions of the Agreement and their application are based on the principles of reciprocity and free choice of mode of transport." Art. 1 (2) OTA emphasizes that the OTA-provisions and their application should be governed by that principle. The principle as such is not legally binding. Therefore, at its best the principle has an advisory character.
- According to Art. 32 OTA the measures to reach the objectives for the **coordinated transport** policy[13] of the contracting parties, mentioned in Art. 30 OTA should comply

11. And therefore indirectly the PRTHV-rate. See below III.
12. The NEAT is a new alpine transversal, including also the new rail tunnels Gotthard and Lötschberg.
13. Art. 31 (1) OTA: "To this end, the Contracting Parties shall take measures designed to ensure healthy competition between and within the various modes of transport and to facilitate the use of more environmentally sound means of transporting passengers and goods."

in particular[14] with the "principle of free choice of mode of transport". Due to the merely advisory character of the principle[15] and its potential to create a conflict with Art. 11 TFEU its legal consequences seem to be limited with respect to the principle of proportionality – which must be respected anyway – and to its inability to prohibit a certain mode of transport in its totality.[16]

III. The Performance Related Toll on Heavy Goods Vehicles and its Compatibility with EU law

Since January 1st 2001 Switzerland charges a performance-related toll on heavy goods vehicles (PRTHV).[17] The toll combines a fiscal and a steering tax, to cover the costs of road use and other external costs[18] caused by heavy weight traffic. It is supposed to contribute to the improvement of rail-traffic at the expense of road traffic. With a few exceptions transport vehicles having a total weight of more than 3,5 t are charged on the Swiss road network. The charges depend on the maximum weight of the vehicle and the driven kilometres. The toll may also be calculated according to the emission and the fuel consumption rate of the vehicle.[19]

The introduction of the PRTHV should be viewed with reference to Art. 84 of the Swiss Federal Constitution (FC) and with reference to the fiscal management of the OTA[20]:

- Art. 84 (3) FC prohibits the increase of road transit capacities in the Alps. According to national law[21] four road sections in Switzerland are classified as "transit roads?"[22]. The law also enumerates the measures for the increase of traffic capacity. The reconstruction of a road shall be permitted, if it is of primary interest of preserving and improving traffic security. Therefore, the obligation of Art. 11 of the Transport Protocol of the Alpine Convention to ban the construction of new large-capacity roads for transalpine traffic is adequately taken into account.

14. Concerning the legal reach of Art. 32 OTA see Epiney A., Sollberger K.,, *Zum Gestaltungsspielraum der Vertragsparteien: die rechtliche Tragweite des Art. 32 des Abkommens über den Güter- und Personenverkehr auf Schiene und Straße*, in: Felder D. and Kaddous Ch. (eds.), *Accords bilatéraux Suisse – UE (Commentaires) / Bilaterale Abkommen Schweiz – EU (Erste Analysen)*, Helbing & Lichtenhahn, Bâle/Genève/Munich, 2001, 521 et seq.
15. Epiney A., "Der 'Grundsatz der freien Wahl des Verkehrsträgers' in der EU: rechtliches Prinzip oder politische Maxime?", ZUR 2000, 239 et seq. (239-240).
16. Epiney, *ZUR* 2000 (note 15, supra) 244-245; Epiney/Sollberger (note 14, supra), 530 et seq.
17. Cf. Bundesgesetz vom 19.12.1997 über eine leistungsabhängige Schwerverkehrsabgabe, SR 641.81.
18. As to the question whether "traffic jam costs" are part of external costs see Heuck J., "Zur Internalisierung von Staukosten", *AJP* 2010, 521 ff.
19. Cf. to the PRTHV e.g. Danielli G., Maibach M., *Schweizerische Verkehrspolitik*, Rüegger Verlag, Zürich, 2007, 58 et seq.; Griffel A., in: Georg Müller (ed.), *Schweizerisches Bundesverwaltungsrecht, vol. IV, Verkehrsrecht, Helbing Lichtenhahn* Verlag, Basel, 2003, A, para. 46-47; Sollberger, *Konvergenzen und Divergenzen* (note 8), 59 et seq.
20. Cf. II.
21. Cf. Bundesgesetz über den Strassentransitverkehr im Alpengebiet vom 17.6.1994, SR 725.14.
22. San Bernardino, Gotthard, Simplon and Grosser Sankt Bernhard.

- Art. 84 (2) FC provides that freight border-to-border road traffic shall be relocated to the rail within 10 years. The provision contributes to the reduction of environmental damage caused by road traffic. At first glance, the legal consequences of the regulation were unclear. The EU argued that the article breaches the transit agreement of 1992 (and now the OTA). The legal implication to use the rail was considered to be in contradiction with the principle of non-discrimination and the principle of free choice of mode of transport. The obligation predominantly concerns the freight transport crossing the Alps and therefore foreign protractors. As a consequence, this might result in an indirect discrimination on the grounds of nationality. However, the provision does not mention an absolute ban on driving.[23] On the contrary, it does not retain a conditional behavioural norm, but should be understood in an ultimate way. The obligation clearly points to a result-oriented obligation within a certain timeframe. The choice of appropriate means to achieve the objective is left to the discretion of the legislator. Art. 84 (2) FC should therefore be interpreted as an intention to relocate the freight traffic from the road to the rail, at least to the extent of border-to-border transport. The year 1994 with 650'000 freight journeys through Switzerland per year has been chosen as baseline reference.
- The PRTHV shall attain the objective by means of steering the carriers' behaviour into a certain direction. However, the goal of a maximum of 650'000 alpine crossing journeys per year still seems to be a distant prospect.[24]
- The fiscal management of the OTA provides for a "compensation" for the permitted maximal vehicle weight from 28 t to 40 t. Switzerland is allowed to charge a distance-dependent toll. The OTA defines the maximum toll Switzerland cannot increase the toll unilaterally.

A toll such as the PRTHV is in accordance with the polluter-pays principle. It can be considered compatible with the requirements of EU law that are legally binding for Switzerland: the PRTHV is charged on all vehicles on Swiss roads. It does not exclusively penalise in fact foreign vehicles and companies. Therefore it can be considered compatible with the principle of non-discrimination on grounds of nationality.

It may be questioned, whether the PRTHV complies with EU secondary legislation, and Dir. 1999/62 on the charging of heavy goods vehicles for the use of certain infrastructures[25] in

23. Epiney A., Gruber R., *Verkehrspolitik und Umweltschutz in der Europäischen Union*, Universitätsverlag Freiburg Schweiz, 1997, 187 et seq.
24. With further references see Weber R. H., "Alpentransitbörse im europarechtlichen Fadenkreuz", *AJP* 2008, 1213 et seq. (1213-1214).
25. Dir. 1999/62 on the charging of heavy goods vehicles for the use of certain infrastructure, OJ 1999 L 187, 42 last modified by Dir. 2006/103, OJ 2006 L 363, 344.

particular. Dir. 1999/62[26] intends to reduce or eliminate distortions of competition between transport hauliers of different MS that have different levy systems.[27] The directive regulates the conditions under which MS can charge tolls and user taxes in road traffic (the scope of the directive is, however, limited to freight transport vehicles of 3,5 t[28]). Art. 2 lit. b, lit. c Dir. 1999/62 defines a "toll" as a specified amount of fee payable for a vehicle travelling a given distance. The calculation of fees considers the distance travelled and the type of vehicle used. In contrast, a "user charge" specifies the payment that confers the right for a vehicle to use an infrastructure for a given period. Therefore, a "user-charge" is time-related.

After revision of Dir. 1999/62 the PRTHV should beyond any doubt[29] be in conformity with the "space-based" toll: according to Art. 7 (1) Dir.1999/62 the directive is limited to tolls and user charges on the trans-European network (TEN) or on parts of that network. MS may, however, introduce other tolls and user charges on other roads, provided that they respect the principles of the Treaty, and the principle of non-discrimination in particular. It is worth mentioning, that according to Art. 7 (9) Dir. 1999/62 tolls are based on the "principle of the recovery of infrastructure costs". This implies that the weighted average toll is related to the construction costs and operating costs, maintaining and developing the infrastructure network concerned. Manifestly (other) external costs shall not be included in the calculation. Art. 7 (10) Dir. 1999/62 indicates exceptions from this principle. As a result, MS can include other external costs in the calculation of the toll in the TEN. Art. 7 (11) Dir. 1999/62 also offers the possibility to add a mark-up on infrastructure in mountain regions.

IV. The Alpine Crossing Exchange[30]

The objective of the "Alpine Crossing Exchange" (ACE) is to limit the number of freight alpine transits by introducing a trading scheme of certificates for transalpine freight traffic on the road. In 2008, the Swiss parliament adopted a federal law on the relocation of the transalpine traffic of heavy goods vehicles from the road to the rail[31]. By 2019, transalpine transports of heavy goods vehicles (HGV) on the road shall be gradually reduced to 650'000

26. In 2006 the Directive was subject to important modifications especially in relation to the admissibility of tolls and user charges for the use of certain infrastructure. Cf. Dir. 2006/38, OJ 2006 L 157, 8. Concerning these changes see Obwexer W., "Die „neue" Wegekosten-Richtlinie", ecolex 2005, 663-664.
27. Cf. Recital 1 of Dir. 1999/62.
28. Art. 1 in conjunction with Art. 2 lit. d Dir. 1999/62.
29. Concerning the situation before the revision cf. Epiney A., *Straßenbenutzungsgebühren und europäisches Gemeinschaftsrecht*, Liber Amicorum Gerd Winter, Groningen/Amsterdam, 2003, 87 et seq.
30. This section is in most parts based on Epiney/ Heuck, "Zur Verlagerung des alpenquerenden Straßengüterverkehrs auf die Schiene: die „Alpentransitbörse" auf dem Prüfstand des europäischen Gemeinschaftsrechts", *ZUR* 2009, 178 et seq.
31. Bundesgesetz über die Verlagerung des alpenquerenden Güterschwerverkehrs von der Straße auf die Schiene [GVVG]. Cf. the 'message' of the Federal Council in BBl. 2007, 4377, 4509.

journeys per year.[32] The objective shall be accomplished with the introduction of the ACE. The ACE, however, will require legislation that may be subject to a referendum. The Federal Council is requested to discuss this matter with the EU and the neighbouring countries.[33] Negotiations may be required, since the ACE can only be successfully implemented after conciliation with the other alpine States and the EU.

In the following we discuss the question to what extent the ACE – as currently planned by Switzerland – is compatible with legal disciplines of the EU law.

IV.1. The Mechanism of the Alpine Crossing Exchange

The ACE[34] shall limit the number of alpine transits of HGV by introducing a quantitative ceiling and a principle of "cap and trade". HGV with a weight above 3,5 t shall be in possession of an alpine transit-right (ATR) on road-passes for which an ATR is compulsory.[35] A certain number of alpine transit entities (ATE) shall allow the acquisition of an ATR, for which the exchange rate[36] needs to be fixed in advance. The ATR shall be granted for a specific vehicle to cross the road-pass in one direction within a certain time, unless unpredictable incidents of the system such as accidents and natural catastrophes occur.

The allocation of the ATEs can be free of charge or can be obtained for a fixed charge or in the framework of an auction on a regular basis. Currently, preference is given to the auction based system.[37] After the first purchase the ATE may be freely exchanged on the market, as long as it is allocated to a vehicle as ATR. However, the possibility may be given to change the ATR into ATE at any time.

The local and short distance traffic – defined by distance[38]– is subject to specific rules. If one would apply the same market costs for the alpine transits, the costs for short distant trips would be significantly above those of long-distance trips. For the implementation it has been suggested to reduce the number of ATEs for an ATR, whereby a different exchange rate may be applied.

32. Cf. Neue Zürcher Zeitung, 4/12/2008.
33. Cf. NZZ, 4/12/2008.
34. The system of the ACE has been delineated from a description of an expertise enquired from various Federal Offices. The expertise analysed the technical and practical feasibility of the ACE, Cf. Bundesamt für Raumentwicklung (ed.), *Alpentransitbörse. Untersuchung der Praxistauglichkeit*, 2007, Neuenschwander R., Springer U., (Project-team Ecoplan), Rapp M., Loewenguth S., Felix A. (Project-team RAPP Trans AG) and Moll K., <http://www.are.admin.ch >.
35. In Switzerland they shall be according to Art. 2 STVG (Bundesgesetz über den Straßentransitverkehr im Alpengebiet/ Federal Law on the road transit traffic in the alpine region, SR 725.14): San Bernardino, Gotthard, Simplon, Großer St. Bernhard.
36. The exchange rate may be calculated considering various conditions. The number of ATEs for an ATR can, for instance, differ from one vehicle type to another (e.g. emission categories).
37. See Weber, *AJP* 2008 (note 24, supra), 1213.
38. The maximum distance of the local traffic is 40 km on both sides of the road-pass. For the short-distance traffic the maximum distance is 150 km, see Bundesamt für Raumentwicklung, Alpentransitbörse (note 34, supra), 91.

IV.2. Primary EU Law

The ACE could be in conflict with Art. 34 TFEU and Art. 18 TFEU.[39]

a) Art. 34 TFEU

Quantitative restrictions on imports and all measures having equivalent effect are prohibited[40], unless they have been legally justified (Art. 34 TFEU).[41] Quantitative restrictions are all measures, which amount to a total or partial restraint of imports, exports or goods in transit.[42] Measures having an equivalent effect to quantitative restrictions are those (governmental) measures "which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade"[43] (Dassonville-Formula). As such, measures that have a negative impact on the trade of goods between MS fall under the scope of Art. 34 TFEU. This implies a free circulation of all goods that are legally produced and sold in one MS.[44] According to the Keck-jurisprudence[45] Art. 34 TFEU is not applicable if the national provision is restricting or prohibiting certain "selling arrangements", as long as those provisions apply to all relevant traders operating within the national territory and as long as they affect, in law and in fact[46], the marketing of domestic products and those of MS in the same manner.

The ACE seems to have an effect equivalent to a quantitative restriction. It may render the movement of products more expensive and more difficult, thereby fulfilling the conditions of the *Dassonville*-formula.[47] It may, however, be questioned whether the conditions of the *Keck*-jurisprudence are fulfilled. If they are, the ACE must be qualified as a measure on selling-arrangements, so that Art. 34 TFEU would not apply.[48] It may be argued that the ACE is not product-related, because it is meant to regulate the transport of goods and the

39. As to the missing relevance of the application of Art. 110 TFEU see Epiney/Heuck, "Zur Verlagerung des alpenquerenden Straßengüterverkehrs auf die Schiene: die 'Alpentransitbörse' auf dem Prüfstand des europäischen Gemeinschaftsrechts", *ZUR* 2009, 178, 180.
40. Cf. with further references, Astrid Epiney, in: Bieber R., Epiney A., Haag M., *Die Europäische Union. Europarecht und Politik*, Nomos, Baden-Baden, 8. Aufl., 2009, § 11, no. 34 et seq.
41. Cf. further below in the text.
42. Cf. ECJ, 2/73 (Geddo), ECR 1973, I-865, para. 7; see also ECJ, 124/85 (Commission/Greece), ECR 1986, I-3935, para. 3 et seq.
43. ECJ, 8/74 (Dassonville), ECR 1974, I-837, para 5.
44. See in this context ECJ 120/78 (Rewe-Zentral AG), ECR 1979, I-649, para. 8 (Cassis de Dijon).
45. ECJ, comb. C-267/91 and C-268/91 (Keck), ECR 1993, I-6097.
46. The details of a factual limitation of Art. 34 TFEU are disputed (with reference to case-law Astrid Epiney, in: Bieber R., Epiney A., Haag M., *Die Europäische Union. Europarecht und Politik*, Nomos, Baden-Baden, 8. Aufl., 2009, § 11,, para. 40 et seq.).
47. Same conclusion Weber, *AJP* 2008 (note 24, supra), 1213 (1216).
48. On the *Keck*-jurisprudence in relation to transport policy measures Astrid Epiney/Reto Gruber, *Verkehrsrecht in der EU. Zu den Gestaltungsspielräumen der EU-Mitgliedstaaten im Bereich des Landverkehrs*, Nomos, Baden-Baden, 2001, 80 et seq.

costs of freight road transport in specific regions in particular, rather than product mobility and therefore the traffic of goods. As such, the ACE could be considered as comparable with traffic regulations (speed limits, single traffic lane a.o.) that cannot be assessed under the scope of Art. 34 TFEU.[49]

More convincing arguments suggest the application of Art. 34 TFEU: the aim of the ACE is to limit quantitatively a mode of transport (road-traffic) on certain roads. From a technical point of view, the roads concerned are of utmost importance and can hardly be bypassed. A limitation of the traffic of goods will endorse this objective, since the transport cannot be executed if the haulier is not in possession of an ATR. Therefore the ACE is not only setting out the traffic-rules but is traffic-regulating. It has a direct effect on the attitude of trade partners to deliver their goods using a certain system of transportation. Thus, Art. 34 TFEU is applicable.[50]

This raises the question about the justification of the ACE. According to the case law of the ECJ quantitative restrictions and measures having equivalent effect – as far as indiscriminative measures are concerned[51] – are justified to ensure the protection of the environment.[52] The ACE pursues the objective to reduce HGV on alpine transit routes and to contribute to relocate (partly) the transalpine freight traffic from the road to the rail, which is more protective of the environment. However, the measure also needs to be proportionate.[53] The proportionality of the measure should be assessed in relation to the level of protection as defined by the MS unless the EU defines the level of protection.[54] There can hardly be any doubt that a quantitative limitation of the transalpine freight traffic on the road contributes to a reduction of adverse impacts on the environment. As such, the ACE may be considered

49. Epiney A., Gruber R., *Verkehrsrecht in der EU. Zu den Gestaltungsspielräumen der EU-Mitgliedstaaten im Bereich des Landverkehrs*, Nomos, Baden-Baden, 2001, 80, 82. Considering the Keck-Formula in the area of transport cf. Weber K., *Der Transitverkehr in der Judikatur des EuGH: Spannungsfeld zwischen Warenverkehrsfreiheit und Umweltschutz*, in: Günter H. Roth/Peter Hilpold (eds.), *Der EuGH und die Souveränität der Mitgliedstaaten. Eine kritische Analyse richterlicher Rechtsschöpfung auf ausgewählten Rechtsgebieten*, Stämpfli, Bern, 2008, 395 (420 et seq.).
50. With the same point of view see Weber, AJP 2008 (note 24, supra), 1213 (1216). Also ECJ, C-112/00 (Schmidberger), ECR 2003, I-5659; ECJ, C-320/03 (Commission, Germany a.o./Austria), ECR 2005, I-9871; see also the illustration and analysis of the ECJ case law on the matter of transit traffic and user charges of Karl Weber, *Der Transitverkehr in der Judikatur des EuGH: Spannungsfeld zwischen Warenverkehrsfreiheit und Umweltschutz*, in: Günter H. Roth/Peter Hilpold (eds.), *Der EuGH und die Souveränität der Mitgliedstaaten. Eine kritische Analyse richterlicher Rechtsschöpfung auf ausgewählten Rechtsgebieten, Stämpfli*, Bern, 2008, 395 et seq.
51. Whether measures with direct discriminating effect can be justified with reasons of public interest cf. Epiney, in: *Die Europäische Union*, § 11, para. 58-59.
52. ECJ, 302/86 (Commission/Denmark), ECR 1988, I-4607; see also ECJ, C-2/90 (Commission/Belgium), ECR 1992, I-4431; ECJ, C-379/98 (Preussen Elektra), ECR 2001, I-2099; ECJ, C-18/93 (Corsica Ferries), ECR 1994, I-1783, para. 36.
53. In regards to the transport sector Epiney/Gruber, *Verkehrsrecht* (note 49, supra), 89 et seq.; Weber, in: *EuGH und Souveränität* (note 50), 395 (416-417). From the ECJ case law see ECJ, C-463/01 (Commission/Germany), ECR 2004, I-11705; ECJ, C-309/02 (Radlberger Getränkegesellschaft), ECR 2004, I-11763; ECJ, C-320/03 (Commission, Germany a.o./Austria), ECR 2005, I-9871, para. 70.
54. ECJ, C-394/97 (Heinonen), ECR 1999, I-3599; ECJ, C-388/95 (Belgium/Spain), ECR 2000, I-3123.

a measure that is suitable to protect the environment.[55]

The ACE's objective is to quantitatively limit the transalpine freight transport on the road to benefit environmental protection. Less restrictive measures are not apparent. The ACE limits rather than prohibits freight transport. Every haulier who paid the toll can transport his goods on the roads of the ACE-network.[56] However, it is worth mentioning, that according to the ECJ, hauliers who cannot or do not wish to purchase an ATR, need to be offered realistic alternatives of transporting their goods.[57] An alternative offer could be sufficient, attractive and competitive rail capacities – especially in regards to the costs; in other words, the introduction of an ACE in all alpine countries calls for coordinated rail offers. In Switzerland they already exist.[58]

It may be concluded that the introduction of an ACE falls under the scope of Art. 34 TFEU. Yet the measure is justified on the grounds of environmental protection.[59]

b) Art. 18 TFEU

Art. 18 TFEU prohibits direct or indirect[60] discrimination on the grounds of nationality. The article may be relevant for local and short distance traffic without prejudice to other provisions of the treaty. Indirect discrimination could exist in case of preferential treatment of transport near the alpine transit road passes. Domestic hauliers, who are established near the ridge of the Alps could benefit from the criteria.[61]

Indirect discrimination may be justified on grounds of objective reasons. However, the justification cannot be argued from the point of view of environmental protection, because a treatment other than the introduction of an ACE does not pursue an environmental objective. The specific treatment aims at reducing detrimental impacts for smaller economic and peripheral regions that are caused by a disproportionate increase of costs for the local and short distance traffic. It is questionable, whether such a concern should be taken as an "economic reason" according to ECJ jurisprudence. According to the ECJ, such economic reasons aim at steering the economy or pursue concerns on politico-economical grounds (especially those

55. ECJ, C-320/03 (Commission, Germany a.o./Austria), ECR 2005, I-9871, para 73 et seq. where the ECJ states that the sectoral prohibition on the movement of lorries is adopted in order to ensure the quality of ambient air in the zone concerned and is therefore justified on environmental protection grounds.
56. Weber, *AJP* 2008 (note 24, supra), 1213 (1217), states that the necessity is related to the problem of "fiscality" (transalpine freight transport on the road getting more expensive) rather than to the problem of contigency.
57. ECJ, C-320/03 (Commission, Germany a.o./Austria), ECR 2005, I-9871, in relation to a sectoral prohibition on the movement of lorries.
58. Weber, *AJP* 2008 (note 24, supra), 1213 (1217).
59. On the privilege of the local and short distance traffic see below IV.2.b).
60. On the different notions Epiney, in: Die *Europäische Union* (note 49, supra), § 10, para.
61. Cf. also ECJ, C-205/98 (Commission/Austria), ECR 2000, I-7367, para. 72 et seq., referring to Dir. 99/62 the ECJ affirms an indirect discrimination because of a different toll for short distance and long distance journeys at the Brennerautobahn.

of a protectionist nature).[62] Protectionist measures for economic branches in the regions do not qualify as a reason of justification. However, the objective of the preferential treatment of the local and short distance traffic is not intended to strengthen the competitiveness of enterprises in the region concerned. The objective is rather of a nature of regional policy: peripheral regions on both sides of the alpine main ridge are economically closely connected. They need to maintain a vital link in order to safeguard the economic development of the region. It must be scrutinized whether the measure at issue pursuits the aim of local and regional economic policy rather than the aim of strengthening the competitiveness of certain economic branches. This is also evident from the distinguishing feature, which is the travelled distance rather than the place of residence or the business location of a haulier company. The ECJ affirmed in several cases, that measures which at first sight seem to pursue an economic aim, can be justified by other non-economic reasons, such as to ensure a financial balance of the social security systems[63] or to safeguard the supply of goods at short distance of isolated areas of MS.[64] The question addresses the privilege of the local and short distance traffics aiming at the economic survival of peripheral regions. The pursuit of a regional economic policy can constitute a reason for justification.[65] As to the proportionality of the measure the appropriateness seems undisputed: the price-reduction for the local and short distance traffic improves and sustains the regional economic development and the provisioning of the local population. As regards necessity, less restrictive measures do not appear to exist.[66] Therefore, the privileged treatment of the local and short distance traffic complies with Art. 18 TFEU. In quantitative terms the local traffic will hardly have a significant impact.[67]

IV.3. Secondary EU Law: Directive 1999/62

The incompatibility of the ACE with secondary EU law – and Dir. 1999/62[68] in particular – would not prevent its introduction, because secondary EU law can be modified. However, this question is of interest in view of the possible need for such an amendment of secondary law.

62. ECJ, C-324/93 (Evans), ECR 1995, I-563, para. 36; ECJ, C-398/95 (Syndesmos ton Elladi Touristikon), ECR 1997, I-3091, para. 23.
63. ECJ, C-158/96 (Kohll), ECR 1998, I-1931, para. 41.
64. ECJ, C-254/98 (TK Heimdienst), ECR 2000, I-151, para.
65. This is also evident from Art. 96 (2) TFEU that obliges the Commission to pursue an appropriate regional economic policy while taking account of the needs of underdeveloped areas when approving financial support.
66. Coming to the same result, yet with different dogmatic arguments, Weber, *AJP* 2008 (note 24, supra), 1213 (1222). See also ECJ, C-157/02 (Rieser Internationale Transporte), ECR 2004, I-1477, para. 37, where the ECJ confirms in regards to Dir. 1999/62 that specific regulations apply for border regions. In ECJ, C-205/98 (Commission/Austria), ECR 2000, I-7367, the ECJ denied a justification of different tolls for the long and short distance traffic by interpreting the directive (in the version of the decisions' date) as having an exhaustive harmonizing effect; on the directive see IV.3.
67. Weber, *AJP* 2008 (note 24, supra), 1213 (1222).
68. Dir. 1999/62 on the charging of heavy goods vehicles for the use of certain infrastructures, OJ 1999 L 187, 42, last modified by Dir. 2006/103, OJ 2006 L 363, 344. Cf. to this directive already III.

The introduction of the ACE may be qualified as a toll.[69] It precludes that the level of the toll is calculated from the travelled distance using a certain vehicle type. The toll is introduced in parts of the TEN (Art. 2 lit. b, Art. 7 (1) Dir. 1999/62). It is also assumed that the alpine road-passes in the MS are in principle part of the TEN. Art. 7 (2-12) Dir. 1999/62 provides details on the legal requirements of a toll and its calculation. In contrast, the maximum amount for the ACE-toll is not fixed in advance but the costs are established by market forces. MS have no influence on the costs once the maximum number of transits across the road-passes has been defined and the ATEs have been allocated or sold. The principle favours the argument that the ACE may not be considered as introducing a toll in the sense of Dir. 1999/62. This is why Dir. 1999/62, which regulates only the toll and user charges (Art. 1 Dir. 1999/62), does not apply for the ACE.

It is questionable whether Dir. 1999/62 harmonises the rules on "infrastructure costs". In the affirmative answer only systems specified in the directive are permitted under defined prerequisites, whereas systems of different structure – such as the ACE – would constitute a breach from the beginning. Important arguments can be raised against such a broad interpretation of the directive: it does not appear reasonable to interpret a directive as being exhaustive. This would prohibit the introduction of other systems, including those that do not fall within its scope, if the directive only sets out rules for a certain type of tax with the only aim to minimize the distortion of competition. Any other interpretation would lead to the unjustified conclusion that a EU-directive would extensively or even entirely abrogate the discretion of a MS to pursue a policy – which according to the principles of EU law is part of the MS' competence.

IV.4. Overland Transport Agreement

The following provisions of the OTA could be primarily important to the ACE:

a) Legal consequences of the principle of "free choice of mode of transport"

The agreement relies upon the principle of free choice of mode of transport (Art. 1 (2) OTA). Transport policy measures must comply with this principle (Art. 32 indent 2 OTA). The legal consequences of the principle are not described. Furthermore, such a principle is unknown to EU law.[70] Even when admitting a legal effect, the principle could only be understood as

69. The qualification as a user charge does not seem to be adapted. The system would give only one right to travel the road-pass and in one direction only. This may be valid for a certain period of time, but it is not time-dependent as in the sense of Art. 2 lit. c Dir. 1999/62; it does not allow an unspecified number of road-pass transits within a given timeframe.
70. The term is used in certain statements of the Commission, cf. Epiney A., "Der „Grundsatz der freien Wahl des Verkehrsträgers" in der EU: rechtliches Prinzip oder politische Maxime?", ZUR 2000, 239 et seq. Cf. as to the use of the principle in the OTA already II.

a right to choose between the use of different, existing traffic infrastructures. The choice could be restricted under the premise that the principle of proportionality is duly respected.[71] Evidently, the principle has no individual legal relevance that goes beyond the principle of proportionality.[72] Therefore, the principle is not in conflict with the introduction of the ACE.[73]

b) The prohibition of unilateral quantitative restrictions

The aim of the prohibition of unilateral quantitative restrictions (Art. 32 indent 3 OTA) seems to be the durable opening of the transport market.[74] In connection with the scope of the Agreement (Art. 2 OTA) Switzerland and the EU are obliged to renounce from measures that could quantitatively limit the access to the transport market. As in Art. 34 TFEU[75], measures that would normally fall within the scope of the provision may, however, be justified on grounds of general public interest.[76] Therefore an incompatibility of the ACE with Art. 32 indent 3 OTA cannot be asserted.

c) Principle of non-discrimination

Art. 1 (3) OTA prohibits any discrimination on the grounds of the nationality. Art. 32 OTA refers to this principle in the context of traffic related measures, explicitly enumerating the prohibited discrimination criteria. The legal consequences of the principle stated in the OTA are the same as in EU law[77], since Art. 18 TFEU also prohibits the discrimination on the grounds of nationality.

d) Principle of proportionality in the imposition of charges relating to transport costs

With the introduction of the ACE, charges will be imposed to the transalpine freight traffic on the road, provided that the principle of proportionality (Art. 32 OTA) is respected. For the application of the principle three aspects should be distinguished:[78]

- Intramodal aspect: in accordance with the polluter-pays principle the costs imposed to different vehicle types of the same mode of transport must be proportional to the actual costs caused by a given vehicle type. There seems to be *a priori* no indication why the costs imposed on an ATR should not be in accordance with the polluter-pays principle and why one does not make a differentiation on the grounds of objective criteria. A market mechanism seems to be an appropriate and efficient instrument for charging costs, because the ATEs necessary to purchase an ATR may vary according to the type of vehicle.
- Intermodal aspect: all traffic carriers should be charged the costs they cause. There seems to be no indication why the ACE should lead to a violation of the principle of proportionality.[79]
- There seems to be no evidence that the introduction of an ACE breaches the principle of proportionality between the costs that were caused and the imposed charges, since Art. 37 OTA seems to allow the consideration of all external costs.[80]

e) Fiscal regulations of the OTA and the prohibition of quota limitation

The OTA provides a maximum charge for the "reference distance" between Basel and Chiasso (300 km). The OTA does not only define a maximum tax rate but also the composition of the tax: on the one hand the charges are classified in categories of emission standards and the travelling distance; on the other hand they may partly be made up by toll fees for the use of specialised alpine infrastructure (Art. 40 (5) OTA). This part can constitute up to 15 % of the maximum amount of the charges. The maximum charge for an alpine transit as defined by the OTA is compulsory.[81] Switzerland is not allowed to charge higher fees for the transalpine traffic than established by the OTA.[82] The assessment is not affected by the procedure.[83] In an auction, the State sells the ATE for the best bid, which would be associated with a tax for the alpine transit road. In case of an allocation free of charge the first customer will not be charged. However, all other partners on the market have to pay the market price for an ATE to the first customer. This is why we can still talk about a charge imposed by the State – even though the first customer has been privileged.[84] It cannot be argued that the State does not impose charges because the first allocation is issued without tax. For example the trade with CO2-certificates is equally not qualified as a "tax".[85] The system of the ACE leads to a

71. Also Weber, *AJP* 2008 (note 24, supra), 1213 (1215).
72. Cf. Epiney/Sollberger, in: *Bilaterale Abkommen* (note 14, supra), 521 (530 et seq.); also Weber, *AJP* 2008 (note 24), 1213 (1215); Sollberger, *Konvergenzen und Divergenzen* (note 8, supra), 55-56.
73. Also Weber, *AJP* 2008 (note 24, supra), 1213 (1215).
74. Cf. Epiney/Sollberger, in: Bilaterale Abkommen (note 14, supra), 521 (534); Weber, *AJP* 2008 (note 24, supra), 1213 (1220-1221).
75. Cf. Sollberger, *Konvergenzen und Divergenzen* (note 8, supra), 338-339; Weber, *AJP* 2008 (note 24, supra), 1213 (1214).
76. Cf. Epiney/Sollberger, in: *Bilaterale Abkommen* (note 14, supra), 521 (535 et seq.); Weber, *AJP* 2008 (note 24, supra), 1213 (1221).
77. Cf. Epiney/Sollberger, in: *Bilaterale Abkommen* (note 14, supra), 521 (528).
78. Cf. in general Epiney/Sollberger, in: *Bilaterale Abkommen* (note 14, supra), 521 (538 et seq.).
79. Also Weber, *AJP* 2008 (note 24, supra), 1213 (1221), who mentions that the OTA envisages the subsidisation of the rail and that the contracting parties therefore wish to privilege the rail.
80. Cf. Epiney/Sollberger, in: *Bilaterale Abkommen* (note 14), 521 (539-540).
81. On protection clauses that are not relevant as regards the ACE see Epiney/Gruber, *URP/DEP* 1999 (note 8), 597 (612 et seq.).
82. Sollberger K., Epiney A., *Verkehrspolitische Gestaltungsspielräume der Schweiz auf der Grundlage des Landverkehrsabkommens*, Stämpfli, Bern, 2001, 62-63.
83. A free allocation would however lead to a certain amount of practical and economic problems (the demand would be much higher than the offer); see also Bundesamt für Raumentwicklung, *Alpentransitbörse* (note 34, supra), 96-97.
84. Coming to the same result Weber, AJP 2008 (note 24, supra), 1213 (1217 et seq.). Other point of view Bundesamt für Raumentwicklung, *Alpentransitbörse* (note 34, supra), 223-224.
85. Representing this point of view Bundesamt für Raumentwicklung, Alpentransitbörse (note 34, supra), 223.

situation where costs will be charged for the transalpine traffic. The amount of costs can and most certainly will not correspond to the upper level as defined by Art. 40 (4) OTA. This would undermine the objective and contents of that article: a system that exceeds the maximum limits of road toll is in contradiction with the OTA.

Since the ACE is derived from the market principle, the costs of an ATE may fluctuate according to the demand. The introduction of maximum costs for an ATE will put the whole system in question. It may be assumed that the costs of an ATE will more often be above rather than below the maximum level defined by Art. 40 (4) OTA. Moreover, according to the OTA, a difference from the maximum road toll for the reference distance for reasons of the protection of the environment cannot be justified. Such an interpretation would be contrary to the evolutionary history of the OTA and the definition of a maximum fee would no longer make sense. The introduction of an ACE must therefore be considered contrary to a road tax regime as provided for by the OTA.

Art. 8 (6) OTA on the transitional arrangement on the weight of vehicles provides that all vehicles having the technical standards as defined in the second paragraph of Article 7 (3) OTA shall be exempt from any quota or authorization agreements with effect from January 1st, 2005. The provision, together with additional paragraphs of Art. 8 OTA that define the maximum number of alpine transits, the general context of the Agreement and the principle of prohibition of quota restrictions in particular, can only be interpreted as stating that a quota for alpine transits is prohibited. Since it is the intention of the ACE to introduce a quota it would equally constitute a breach of the OTA.

V. Conclusion

A major problem of European Transport Law seems to be the inability of the EU and its MS to agree on effective instruments that are able to reduce road (freight) traffic. One reason for this is that many MS have not created or do not apply instruments with a sufficiently promising impact such as road taxation. This causes special problems in the alpine region because of its specific geographical und ecological features.

Instruments to improve the protection of the Alps seem, however, achievable. The question arises whether the Alpine Convention may provide a platform for the development and the promotion of these instruments and for the assessment of their legal implications in order to ensure an effective protection of the Alps from continuously increasing traffic. Instruments that deal with individual traffic and not only transport of goods may also be considered.

GMOs in the Alps: To Impose, To Dismiss or To Mould?

Gerd Winter

I. Introduction

GMOs do certainly not count among the most serious threats for the unique ecology and traditional economy of the Alps. More important appear to be human settlements, roads, tourist infrastructure, industrialisation of agriculture and forestry, etc. The cultivation of maize – the only crop (besides the potato Amflora) of which a GM seed (MON 810) is authorised in the EU – is not widespread in the Alps. The corn borer – target pest of MON 810 – is not frequent in that region. Therefore there is not much incentive for farmers to use GM maize. Moreover, reflecting widespread reticence of the public vis à vis gene technology, governments of Alpine States have slowed down the commercialisation of GMOs within their jurisdiction. The prohibition of agricultural GMO-use in the federal Land Oberösterreich, the prohibition of April 2010 of cultivating the GM potato Amflora by the Austrian Minister of Health, and the Swiss moratorium for GMO introduction into the environment, recently extended until 2013, were significant events in that respect. On the societal level, many regional initiatives have declared GMO-free regions, and they have created networks supporting each other and building up pressure on the EU institutions.

If GM technology is therefore neither emerging as a socio-economic trend nor well received by politics the situation can however change in future. Over the medium and long term, pressure by multinational seed enterprises may finally melt down resistance, de facto contamination of non-GM produce with GMOs may create facts, and EU climate protection policies fostering energy from biomass may persuade farmers to cultivate new GM crops.

Gene technology understandably meets public rejection and protest because – apart from the chemicalisation of agriculture and the growing demand for biomass – it works as a third moving factor towards the ever increasing industrialisation and intensification of agriculture. However, it should be reflected if this is necessarily so. A soft and adapted kind of gene technology is imaginable which could even help to make agriculture and forestry more ecologically benign. The fact that Monsanto and other global players impose their products on producers and consumers employing legal and illegal methods at their will[1] is

1. See Robin, M.-M., *Le monde selon Monsanto*, Editions La Découverte, Paris, 2008.

scandalous and a tragedy for attempts of wise use. It has driven producers and consumers into a fundamental clash of defenders and opponents of gene technology as a whole.

This paper is aimed at exploring the legal framework as to its potential of allowing wise use of gene technology in the Alpine region. This region is a seminal starting point because of its tradition to look at agriculture and forestry as embedded in ecological cycles. This more complex view on nature uses was also laid out in the Alpine Framework Convention and its Protocols.

The paper proceeds as follows: first the legal framework controlling the environmental risks of GMO release will be sketched out, including both genuine gene technology legislation and nature protection law. It will be shown that risk control measures have not succeeded in appeasing the said clash of opinions. As a remedy, the EU proposed co-existence of GM and non-GM production and produce. Switzerland introduced a moratorium instead. Arguably, however, co-existence does not work over the long run because natural processes cannot be separated into mutually exclusive areas. As a third step, the paper will suggest a more fundamental approach relying on a concept of agriculture and forestry that is embedded in ecological cycles rejecting GMO lines as presently developing but keeping itself open for more suitable gene technology.

II. The Regime of Risk Control

As a first step, we will consider whether the EU legislation sufficiently controls risks from GMO introduction into the Alpine environment. The Swiss law will be left aside but I can assure that it is not less scrupulous than EU law in this respect. Licensing of experimental release at an identified location must be distinguished from licensing the placing on the market of a GMO which includes the right of release everywhere in the EU.

Article 4 of Directive 2001/18/EC lays down the standard of control:

> «Member States shall, in accordance with the precautionary principle, ensure that all appropriate measures are taken to avoid adverse effects on human health and the environment . . . »

The standard ("avoid adverse effects") is comparatively strict. In particular, the precautionary principle is mentioned. This means that the authorisation can be denied even if there is scientific uncertainty about adverse effects.[2] Still, according to ECJ jurisprudence, 'merely

2. See ECJ 5 May 1998, Case C-180/96, United Kingdom v. Commission, [1998] ECR I-2265 (BSE), para. 99; and CFI 11 September 2002, Case T-13/99, Pfizer Animal Health SA v. Council of the European Union [2002] ECR II 3305 (Pfizer), para. 139.

hypothetical considerations of a risk' would not suffice.[3]
The standard of control is further specified by the requirement that an environmental risk assessment (e.r.a.) must be conducted, which is by the said Directive defined as:[4]

> «The evaluation of risks to human health and the environment, whether direct or indirect, immediate or delayed … »

According to Article 13(2a) of Directive 2001/18/EC, the necessary information provided with an application:

> «shall take into account the diversity of sites of use of the GMO as or in a product. »

This geographic aspect is further specified by a Commission Guidance paper on the design of e.r.a.:[5]

> «For each adverse effect identified, the consequences for other organisms, populations, species or ecosystems exposed to the GMO have to be evaluated. This requires detailed knowledge of the environment into which the GMO is to be released (site, region) and the method of release. Moreover, there may be a broad range of environmental characteristics (site-specific or regional-specific) to be taken into account. To support a case-by-case assessment, it may be useful to classify regional data by habitat area, reflecting aspects of the receiving environment relevant to GMOs (for example, botanical data on the occurrence of wild relatives of GMO plants in different agricultural or natural habitats of Europe). »

Is this profile of substantive criteria adequate to cover effects on nature, and in particular effects on Alpine ecosystems? The answer must distinguish between experimental releases and market placement of GMOs.
For experimental releases, the affected species and ecosystems are identifiable because in these cases the location of the release is fixed. It can be argued that the e.r.a. methodology is ambitious enough to also grasp the specific conditions of the affected Alpine ecosystems.
In contrast, an authorization for *market placement* can result in the introduction into the environment of GMOs across Member States. If one applies the above-quoted wordings

3. See Pfizer, note 1, supra, para. 143. The court requires that 'the risk […] appears nevertheless to be adequately backed up by the scientific data available at the time' (para. 144).
4. Arts. 4 (2) and 2 (8) Directive 2001/18/EC.
5. Attached to Annex II of Directive 2001/18.

to procedures for the authorization of market placement, they give the impression that all European species and ecosystems possibly affected by the introduction of GMOs are included in the e.r.a. This is, however, neither the case de facto nor possible at all. Responsible assessors must realistically concentrate on certain types of ecosystems. In consequence, the authorisation must be confined to specified areas of application. If this is not done, if the authorisation is provided without restriction, species and habitats not scrutinised in the authorization procedure need to be handled by subsequent procedures of risk assessment and decisions studying the geographic conditions of release.
Law available in that respect is nature protection law. In contrast to genetic engineering law which looks from a single source (GMOs) to a variety of effects (among others: nature), nature protection law looks from a single environmental endpoint (i.e. nature and landscape) to various possible sources (among others: GMOs). Concentrating on EU law the relevant legal act is the Habitat Directive 92/43/EEC. It prohibits adverse effects by projects on Natura 2000 sites and requires that a Natura 2000 impact assessment must be elaborated if a project is likely to have significant effects on the site.[6] Given the broad understanding by the ECJ of the term[7] the cultivation of GM seeds can be regarded as a project. The likelihood of significant effect requires a preliminary screening. In doing this, the authority has, according to the ECJ, to apply the precautionary principle. The ECJ sets high standards in that respect. It should 'not be excluded' that the project may have significant effects on the site. If 'doubts' exist, an impact assessment must be carried out.[8] Whether the release will, according to the impact assessment, cause adverse effects depends on the kind of GMO, the environment of release and the protection goals for the site. When applying these yardsticks the authorities should also have in mind that Art. 18 of the Protocol on the Conservation of Nature and Countryside quite strictly postulates that a 'release will not lead to any risk for man and the environment'.
Overall, it appears that this standard of scrutiny is ambitious. In procedural terms the Natura 2000 impact assessment should be integrated into the licensing procedure for experimental releases. In contrast, for the cultivation of GM seeds authorised for placing on the market an additional procedure is required whenever the GMO shall be released in an (Alpine or other) environment which was not checked at the stage of market admission.
Without going into details it should be added that EU Member States (as well as, of course, Switzerland) are free to introduce additional procedures also if nature protection areas not belonging to the Nature 2000 network are affected. Art. 18 of the Protocol on the

6. Art. 6 (3) Directive 92/43/EEC.
7. See ECJ 7 September 2004, Case C-127/02, Landelijke Vereniging v Staatssecretaris van Landbouw, Natuurbeheer en Visserij, [2004] ECR I-7448, paras 26 and 27 where mechanical mussel fishing was regarded as a project, and as being likely to have significant effect on the site.
8. ECJ 10 January 2006, Case C-98/03, Commission v. Germany, [2006] ECR I-75, para 44.

Conservation of Nature and Countryside can be read to support this, because its scope of application is not confined to Natura 2000 sites.

III. The Regime of Co-Existence

In spite of the precautionary approach EU law has propelled in relation to releases of GMOs, the clash of opinions has not been bridged. It appears that the legally instituted risk discourse has not triggered legitimacy, not the least because the EU Commission, pressed by concerns about the international competitiveness of EU technology, has gradually taken side with the proponents of gene technology. Playing on the inability of Member States' governments to form majorities in the competent regulatory committee, it has proliferated more and more authorisations for GM food and feed, and has ventured into licensing GM seeds beginning with the renewal of the authorisation of maize MON 810 and the issuance of potato Amflora. Critiques have upheld allegations that the authorisation procedures do not sufficiently clarify risks. For instance, Greenpeace immediately challenged the Amflora authorisation by presenting a scientific and a legal expert opinion which found lacunae in the e.r.a. and errors in applying the precautionary principle.[9]

In this situation of persisting controversy about risks the EU Commission proposed and the EU legislator adopted co-existence of different production methods and produce[10] as an additional possibility to build legitimacy. Switzerland, by contrast, introduced a moratorium. The concept of co-existence does not strive for the perfect determination of risks but accepts that there are differences in opinion, and therefore suggests that the individual preferences of producers and consumers shall rule. Thus, the EU Commission stated in a Recommendation:[11]

> «Coexistence refers to the ability of farmers to make a practical choice between conventional, organic and GM-crop production, in compliance with the legal obligations for labelling and/or purity standards. »

9. <http://www.greenpeace.de/fileadmin/gpd/user_upload/themen/gentechnik/Wissenschaftliches_Gutachten_Amflora_03_2010_gesamt.pdf> and <http://www.greenpeace.de/fileadmin/gpd/user_upload/themen/gentechnik/Rechtsgutachten_Amflora_03_2010_gesamt.pdf>
10. Art. 26(a) Directive 2001/18/EC. For a comprehensive account of the development of the EC coexistence approach see Grossman M. R., "Coexistence of Genetically Modified, Conventional, and Organic Crops in the European Union: The Community Framework" in Bodiguel L., Cardwell M. (eds.) *The Regulation of Genetically Modified Organisms: Comparative Approaches,* Oxford: OUP 2010, 123-162. For moves on MS level to implement the concept see Bodiguel L., Cardwell M., Garcia A. C., Vitti D., "Coexistence of Genetically Modified, Conventional and Organic Crops in the European Union: National Implementation", in: Bodiguel and Cardwell, op. cit., 163-197.
11. Commission Recommendation of 23 July 2003 on guidelines for the development of national strategies and best practices to ensure the coexistence of genetically modified crops with conventional and organic farming, C(2003)2624, recital 3.

Farmers may decide by themselves whether to cultivate GM, conventional or biological crops. Traders and consumers may decide by themselves whether to trade and consume GM or non-GM food. Thus, the will of market actors, not a risk based determination shall have the last word.

Attached as declaration to the Protocol on Mountain Farming the EU suggested the concept of co-existence also for the interpretation of this protocol. It appears that the statement is somewhat ambivalent: It can be understood to comfort those who are afraid that the Alps will fully be conquered by gene technology, assuring that non-GM agriculture will co-exist; but it can also be understood to warn those who wish to shy gene technology away from the region, alleging that GM agriculture must be given a chance. Speaking in legal terms, the declaration has however no binding effect on the contracting parties. It only reserves the right of the EU to pursue its co-existence policy which is to allow but not to compel member states to adopt co-existence regulation.

In the normal case the individual choice of market actors need not be much fostered by law. Producers just decide how and what to produce and the competition will work out whether they remain in business or are driven out. Law must only provide for the legal infrastructure of competition including guarantees of physical and intellectual property and of contract law. Coexistence however needs to be legally hedged through provisions on the physical separation of production, including also sanctions (compensation rights) if this does not work. Otherwise a non-GM farmer cultivating his land close by a GM farmer could not produce non-GM crop. Therefore, for purely economic reasons, not for reasons of risk avoidance, the law must create a regulatory framework. For market adherents this is a violation of market principles, because it appears as if regulation is used for protectionist reasons. In fact, I believe, it is not. The law only ensures the physical possibility of different production modes, it does not guarantee that the GM or non-GM product will finally succeed on the market.[12] This hedging of production quality does not fundamentally differ from regulation of product quality such as regulatory standards for the performance of pesticides.

Nonetheless, while referring to the choice of producers and consumers appears as a free market solution to the basic conflict, in practical effect the concept is neither economically efficient nor ecologically sustainable. Where agricultural plots are small and ownership diverse, as is the case in the Alps, minimum distance requirements seriously reduce the possibility of GM agriculture, if a farmer wishes to cultivate GM plants in a non-GMO area. More importantly, it is an ecological impossibility that GM plants can be contained if released

12. See for the discussion Lee M., "Multi-level Governance of Genetically Modified Organisms in the European Union: Ambiguity and Hierarchy", in: Bodiguel and Cardwell, op. cit., 101-122, at 120.

to the environment. Nature cannot be enclosed in fences. Pollen flight and other ways of spreading will over the long term contaminate all relatives of the GM plant or change the ecosystems in other ways. Separation of GM and non-GM food and feed will not be feasible in the production, sales and use chain. The vision of separating two economies is hardly practicable in fact. For some time fictions may be introduced positing that contaminated products are GM free (such as the 0,9 % threshold for food and feed) and setting aside the fact that animal produce was generated on GM feed. In addition, compensation may be offered for products unintentionally contaminated at a level above the thresholds. But fictions and compensation payments are no enduring solution to the systemic character of the problem, i.e. the fact that gene technology cannot be contained but influences the economical and ecological system in general. The strategy of compromise is therefore likely to fail and prove uncapable to creating trust in consumers.

IV. Exploring Embedded Uses

If neither risk discourse nor organised co-existence help to build societal legitimacy what other possibilities are available? I believe we should broaden the view on gene technology to obtain a more comprehensive vision. As outlined earlier, agriculture and forestry experience a secular trend towards industrialisation. High yield varieties, mechanical high tech and chemical fertilizers and pesticides have brought about the first revolution. Gene technology is about to become the second. While until recently the resulting agricultural overproduction has somewhat kept production under limitation, demand is now exploding with policies supporting and even requiring biomass use as energy resource. This deeply embarrassing situation asks for a more fundamental reflection about the productive utilisation of the land resources. Such inquiry should start with extensive production close to natural cycles and gradually move towards more intensive modes. Its ideological background would be a strong version of understanding sustainable development, i.e. one which acknowledges that nature is the fundament of society and economy, not an asset swiftly tradeable for economic and welfare gains.[13]

The Alpine Convention and Protocols are a suitable model for this approach because they seriously strive for understanding economic and social life as part but not master of natural resources. Thus, in the Convention's very first recital the contracting parties declare themselves

13. Cf. Winter, G., "A Fundament and Two Pillars: The Concept of Sustainable Development 20 Years after the Brundtland Report", in: Bugge H.-Chr. & Voigt Chr. (eds.) *Sustainable Development in International and National Law*, Europa Law Publishing, Groningen, 2008, 25-47.

> «aware that the Alps are one of the largest continuous unspoilt natural areas in Europe, which, with their outstanding unique and diverse natural habitat, culture and history, constitute an economic, cultural, recreational and living environment in the heart of Europe, shared by numerous peoples and countries»

Taking the relevant protocols to the Alpine Convention as a guide we will proceed from nature protection to mountain farming and forestry. Keeping GMOs as a focus the question will be whether areas can be declared where the introduction of GMOs – at least of the prevalent brand – is excluded.

IV.1. GMOs and the Conservation of Nature and Landscapes

A fascinating example for dealing with GMOs in nature protection law is to be found in Art. 8 of the Swiss Gene Technology Act which states:

> « In habitats and landscapes that are especially vulnerable or worthy of protection the direct working (Umgang) with GMOs is only admissible if it serves to avoid or mitigate dangers or adverse effects for humans, animals and the environment, or to preserve or make sustainable use of biological diversity. »

The relevant habitats and landscapes are defined as comprising nature protection areas, rivers including 3 m of riversides, groundwater and groundwater protection areas, forests, areas exempted from hunting, and protected landscapes. In nature protection areas, non-hunting areas and areas of protected landscapes the restriction of GMO use is meant notwithstanding special provisions laid down in the protection regulations.

This example is highly interesting because gene technology is not excluded from the outset but made instrumental to serve ecological goals. This implies that, for example, herbicide resistant GM plants must be kept out of protected sites because even if the environmental risk is found to be small the GMO further industrialises agriculture by combining gene and chemical technology. Thus, the benefit side of GMOs would enter into the assessment of admissibility of GMOs transcending the focus on risks. Gene technology would be turned from a means of further instrumentalisation of nature into a means serving ecological production. As long as the technology still adheres to quantitative and uni-dimensional augmentation of yield it can be prohibited from the outset, even without assessing risks.

If this approach is provided by Swiss law, is it also to be found in EU law? The answer unfortunately is no. The relevant Habitat Directive still follows the logic of risk discourse. If no significant adverse effect is to be expected the release of GMOs does not contradict the protection requirements of the directive. However, this does not mean that the Member

States could not introduce measures aiming at other objectives than avoiding risks for protected sites. They can do this arguing that the directive does not address questions of advantages of gene technology. Or they could rely on the competence to go further based on Art. 193 TFEU. On that basis they could take the Swiss route allowing gene technology that serves nature protection goals.
Alternatively, they could exclude any deliberate release of GMOs based on a conception of originality (Eigenart) of nature that should be preserved in certain areas. German nature protection law can be understood to allow such declaration of GMO-free nature protection sites.[14] Also the Protocol on the Conservation of Nature and Landscapes can be read to ask for a complete keeping out of GMOs from certain areas:

> « The Contracting Parties […] shall set aside areas of respect and tranquillity that ensure giving priority to the wild animal and plant species over other interests. They shall ensure that, in these areas, there is the peace necessary for the ecological processes typical of the species to take place undisturbed, and shall reduce or prohibit any form of use incompatible with the ecological processes of these areas. »

In conclusion it appears that the Alpine States are free under EU law and even encouraged by the Protocol on Nature and Landscape Conservation to establish protected areas where GMOs are either in principle excluded or only admitted if serving the specific protection goal.

IV.2. Agriculture and Forestry

Taking a similar perspective we will now address the law on agriculture and forestry. I will concentrate on the Protocols on Mountain Farming and on Forestry inquiring what concept of primary production they propagate and how this looks at gene technology.
In its Art. 9, the first Protocol proposes, under the heading 'Nature-friendly farming methods - typical produce':

> «The Contracting Parties undertake to adopt all necessary measures with a view to applying common criteria to promote employment and wider use, in mountain areas, of nature-friendly extensive farming methods characteristic of the area and to protect and promote typical farm produce, with distinctive, unique, nature-friendly production methods limited to the locality. »

14. See Arts. 23 – 25 Federal Nature Conservation Law. Cf. Winter G., "Nature Protection and the Introduction of GMOs into the Environment", in *Review of European Community and International Environmental Law*, 17/2 (2008) 205-216.

This is a clear option in favour of extensive farming which would exclude GMOs that foster industrialised monocultures. Interestingly, the provision envisages a particular brand of Alpine produce which may succeed on markets for its nature-friendly production. As long as gene technology stands for 'hard' objectives such as developing insecticide toxins, this nature-friendly brand of Alpine produce would certainly benefit from declaring itself GMO-free.
In a similar line, the Protocol on Mountain Forests develops an ecological concept of forest use. Distinguishing between forests with protective and economic functions and focussing on the first, it requires Contracting Parties 'to undertake to give priority to that protective function.' This means that the forests must be conserved and managed to further protect the forest locations, inhabited areas, farm lands etc. In addition, all forests are regarded to have 'important functions of a social and ecological nature', and that the Contracting Parties shall 'adopt measures that ensure their effectiveness for water resources, climate balance, cleaning the air and noise protection, their biological diversity, the enjoyment of nature and the recreational functions.
Once more, it appears that this concept of forestry encourages to either exclude any GMOs from forests or let only those be admitted that serve the protective and ecological functions.

V. Instruments of Management

I will focus on planning instruments because they appear as the most appropriate tool of ecologically managing nature, farming and forestry. Two kinds of planning are provided: integrated spatial planning and landscape planning.
The Protocol on Spatial Planning and Sustainable Development requires, in Art. 3, spatial planning to pay particular attention to:

a) safeguarding and restoring the ecological balance and the biodiversity of the Alpine region,
b) safeguarding and managing the diversity of the natural and rural sites and landscapes, and also the urban locations of value,
c) …
d) the protection of ecosystems, the species and rare landscape elements.

In relation to rural areas, according to Art. 9 of the Protocol, spatial plans shall include:

a) reserving lands for agriculture, forestry and pasture farming,
b) defining measures for the maintenance and development of mountain agriculture and forestry,

c) conservation and reclaiming of territories of major ecological and cultural value.

While integrated planning already breaths the air of sustainable uses of nature this is once more reinforced by Landscape planning which is provided as a tool by the Protocol on the Conservation of Nature and Landscapes. According to Art.7 in the landscape plans the following elements are to be presented:

a) the current situation of nature and the countryside and its evaluation,
b) the condition of nature and the countryside being aimed for, as well as the measures necessary for its achievement, specifically:
- the general measures for protection, management and development,
- the measures for protecting, managing and developing certain parts of nature and the countryside, and
- the measures for protecting and managing the wild animals and plants.

In conclusion, integrated spatial and sectoral landscape planning appear as appropriate tools of determining uses of land, including the introduction, prohibition or selective admission of GMOs.

VI. Compatibility with Internal Market Principle

The powers or even duties of the Alpine EU member States in relation to GMOs I have suggested have still to be checked as to their compatibility with EU primary law. One could argue that the Alpine Convention being an international treaty binding also upon the EU (once the EU will have ratified it) as a party would set aside any EU secondary law opposing the Convention. This would be a stark hypothesis which is hard to defend given the rather inconclusive language of the Convention and thus its built-in reticence to claim superiority.
However, I will show that the Convention as interpreted here does not contradict EU law. Of course, the decisions of the European Courts in the Oberösterreich case come to mind here.[15] In that case the Court of First Instance, upheld by the ECJ, held that the prohibition by the Land Öberösterreich of GMO release contradicted Art. 95 EC (now Art. 114 TFEU). They denied that specific local conditions were given to justify any stricter measure than was provided by the EC legislation on controlling GMO releases.
It appears to me that Austria acted unwisely when notifying the Land regulation as a

14. CFI judgement of 5 October 2005, Cases T-366/03 and T-235/04; ECJ Case C-439/05

measure under Art. 95 paragraph 5 (now Art. 114 para 5). By doing so the Courts could not react other than by applying the very restrictive criteria the same provision establishes for the going further by Member States. I submit Austria might have taken a step back and argue that the authorisation regime of EU law for the placing on the market of GMOs does not exhaust the regulation of uses. To give an example of other regimes, the authorisation of marketing pesticides does not exclude national powers to declare water protection sanctuaries excluding the use of pesticides. The authorisation of a car type does not prevent traffic regulation which may even go so scandalously far as to hinder a Porsche which was licensed for a speed up to 250 km/h to ever drive more than 120 km/h.
Hence, arguably, the authorisation of the placing on the market of GMOs does not imply that the GMO can be used everywhere. There is a margin for Member States to regulate uses. This is I believe true in no less than four dimensions: Firstly, in terms of risk discourse: As said before, authorisations should be restricted to only allow GMO release in those types of habitats which have been checked as to their vulnerability by the particular GMO. Secondly, still in terms of risk control: Member States may establish special protection for certain areas. They are encouraged and even forced to do this by the Bird and Habitat Directives. Thirdly, in terms of co-existence: Member States can declare distance standards and – I submit – also use spatial planning powers to somewhat enclose the introduction of GMOs. Fourthly, in terms of concepts of sustainable use of natural resources: Member States can set aside areas where no GMOs shall be released or only GMOs of a kind which serves the ecological functions of the area.
Of course, such measures are not allowed to make the release of GMOs totally impossible in a Member State or a political subunit. There must be substantive reason of risk, co-existence or conception of nature use. In that respect it was unfortunate of the Land Oberösterreich to refer the prohibition of GMO release to the entire Land rather than to properly defined areas. This is not to mean however, that these areas could not cover areas larger than political units, like major natural ranges, mountain forests and farming land, as envisaged by the relevant Protocols of the Alpine Convention.

Land Use and its Changes

Borut Šantej

"Every land-use decision has environmental consequences; most environmental protection measures have land-use consequences. We should thus not expect to find a bright line between environmental law and land-use law. In fact, it is not even clear that they are two separate fields."[1]

I. The importance of Land Use Decisions

Nowadays, most Slovenian municipalities are in the process of preparing and adopting new spatial and urban plans. The main point of debate in this process and also the main area of contention is the change of land use. In general, municipalities claim that at present they do not have enough space designated for development and that they have to allocate more land for "building zones" (that is, zones which can be legally built upon). Such new building zones would of course come at the expense of land which is currently dedicated to other land uses, mainly agricultural land and forests. To change the existing land uses in their spatial plans, municipalities have to get the approval of national institutions which are in charge of protecting natural resources[2] - and these approvals are not readily given. Here, we won't dwell on the abstruse system of criteria and procedures by which changes in land use are approved or denied, but the general impression the public may get is that there are two competing factions here in a tug of war contest: on one side the municipalities, the somewhat irresponsible development-pushers; on the other side the national institutions, frozen in their dogmatic conservationism.

Land use decisions are perhaps the most important part of spatial planning. They are always contentious, but even more so in alpine or other mountainous settings, where conflicting interests are more difficult to reconcile due to spatial constraints, development pressure and the fragility of environment. The European Union has long recognised the environmental impacts of land use and, in consequence, of spatial planning: in the last couple of decades, a constant stream of documents has been trickling from Brussels stressing the importance

1. Plater A., Abrams R.H., W. Goldfarb, *Environmental law and policy*, West Publishing Co., St. Paul 1992, p. 946.
2. Most important among them are the Ministry of Agriculture, Forestry and Food and the Ministry of Environment and Spatial Planning.

of balanced and sustainable planning.[3] Most of these documents warn about the dangers of urban sprawl and other negative effects of uncontrolled change of land use. The negative effects of urban sprawl are wide ranging: with the conversion of arable land or forests into artificial surface these natural resources are irreversibly lost, food and wood production is impaired, water permeability is decreased, more energy is consumed and more pollution caused, natural areas become fragmented and biodiversity disappears. The Alps and other mountain ranges are particularly influenced by the urban sprawl due to spatial constraints, sensitive ecosystems, and higher susceptibility to natural disasters.

II. Monitoring Land Use Trends

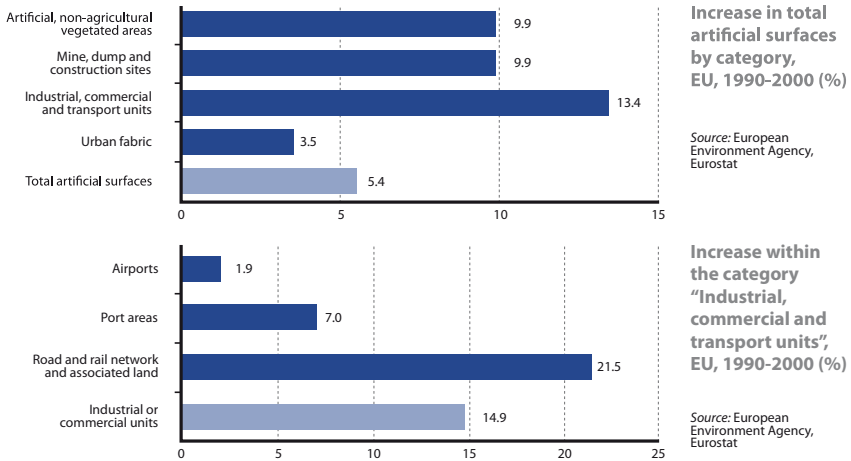
It is therefore not surprising that the new Eurostat monitoring report of the EU sustainable development strategy[4] has chosen the change of land cover as the sole indicator which shows the sustainability of land use trends in EU. In the report, land use has been placed in the chapter about "conservation and management of natural resources", which is one of the 10 "themes" monitored by the report. The results in this theme are mixed: it contains areas where trends are clearly sustainable, such as water quality and growth of protected areas (thanks to Natura 2000 network), and also abject failures, such as conservation of fish stock.[5] With regard to land use, the report states that "Built-up land is continuously encroaching on farmland and semi-natural land. The category 'industrial, commercial and transport units' (comprising industrial sites, airports, ports and roads) experienced the highest rate of growth." The results are shown in *Figure 1 below*.

How are we to interpret these results? The Eurostat report concludes that the changes in land cover are "moderately unfavourable" in relation to the objectives set in Sustainable development strategy.[6] In general, we must agree with that: the increase of artificial surfaces is clearly not a positive trend; it is also in the long run clearly unsustainable and will not just

3. See for example the Commission documents *European Spatial Development Perspective ESDP* (1999) and *Guiding Principles for Sustainable Spatial Development of the European Continent* (2000). A special report dedicated to urban sprawl has also been produced recently by the European Environmental Agency: *Urban Sprawl in Europe – the Ignored Challenge* (2006). It is worth mentioning that almost uniquely among the areas of environmental protection, spatial planning in general and land use in particular have not been directly regulated with any binding EU instrument (directives or regulations) – if we do not count indirect measures such as strategic impact assessment (which influence the planning process), or Habitat Directive. So the Alpine Convention, along with its protocol "Spatial Planning and Sustainable development", is one of the few binding documents about spatial planning that has been until now signed by the EU.
4. Sustainable development in the European Union (2009 monitoring report of the EU sustainable development strategy (Eurostat, Luxembourg, 2009). Available online at: <http://epp.eurostat.ec.europa.eu/cache/ity_offpub/ks-78-09-865/en/ks-78-09-865-en.pdf>. The report monitors the implementation of The EU sustainable development strategy, which was last renewed by the Council in 2006 and is available online at <http://register.consilium.europa.eu/pdf/en/06/st10/st10917.en06.pdf>, accessed on 13.4.2010.
5. Id. at 165-66.
6. Id. at 165.

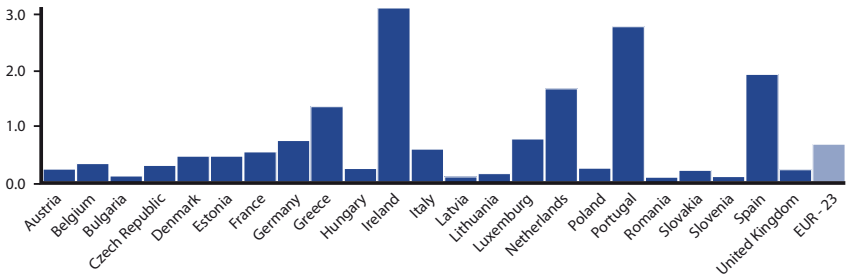
have to slow down (which in many EU Member States already is the case[7]) but also to stop or even reverse. The data about the change in land cover in individual Member states show that the trends are very different from one country to another (*see Figure 2 below*, which shows annual land take in EU Member States in percentage of artificial land).

Figure 1: 10-year increase in artificial surfaces in EU[8]



NB: EU aggregate based on the following 23 Member States: BE, BG, CZ, DK, DE, EE, IE, EL, ES, FR, IT, LV, LT, LU, HU, NL, AT, PL, PT, RO, SI, SK, UK.

Figure 2: Annual increase in artificial surfaces[9]



7. Compare Peter Bibby, "Land Use Change in Britain", in *Land Use Policy* 265 (2009) pp. 3-13: the conversion of agricultural land for urban uses in Great Britain amounted to 15.000 ha in 1975, and only 5000 ha/year at present (p. 12).
8. Figure copied from Eurostat report, supra note 1, at 165.
9. Expressed in mean urban land take 1990-2000 as a percentage of 1990 artificial land. Data were taken from EEA website at <http://www.eea.europa.eu/data-and-maps/figures/mean-annual-urban-land-take- 1990-2000-as-a-percentage-of-1990-artificial-land>, accessed 15.4.2010.

III. Slovenian Land Use Patterns

As seen in Figure 2, the annual land take figure for Slovenia is very low, among the lowest in Europe. This is somewhat surprising giving the amount and intensity of debates about the land use changes that accompany the ongoing preparation of new municipal spatial plans. The actual amount of built-up areas in Slovenia is also relatively low: 3.9 % percent of total surface area has been built-upon (agricultural land amounts to 27.8 % and woodland to 66 %).[10] Judging by the numbers alone, the land use situation in Slovenia – at least regarding the conversion into artificial land – is quite exemplary.

In fact, this is far from the truth. Anyone who has ever driven through the Slovenian countryside could not help but observe that although the relief is in general quite hilly[11] and thus not very practical for human habitation, this did not stop people from peppering the major parts of the landscape with their mostly over-dimensioned individual family houses and vacation cottages. This type of low-density scattered development of single family houses in suburban and rural areas can only partially be described as "urban sprawl"[12]. It does occur on urban fringe, but not as a rule – it is as common in rural areas away from major towns.[13] In literature, it is usually described as "dispersed construction". In English, "rural sprawl" would perhaps be a better word to denote the dispersed settlement of individual houses in Slovenian rural areas.

Such urban and rural sprawl is clearly damaging from the environmental point of view; in fact it may be the most environmentally wasteful form of habitation with the highest energy and land consumption per person, high public utility costs and an above average pollution. There are many reasons why rural sprawl developed in Slovenia from the 1960s onward. Some of these reasons are predictable and widely known, such as a lack of affordable housing in urban areas and lax inspection control over construction. Other are more specific to the Slovenian situation, for example the extremely cheap loans with negative interest rates available to land-owners during the 1970s and part of the 1980s, which resulted in the construction of many an over-dimensioned family house and vacation cottage out in the country.

10. *Statistični letopis 2009* (Statistični urad Republike Slovenije, 2010), available at <http://www.stat.si/letopis/2009/01_09/01-03-09.htm>, accessed at 14.4.2010.
11. 60% of Slovenian surface has an inclination of 15% or more. Statistični letopis *supra* note 8, at <http://www.stat.si/letopis/2009/01_09/01-04-09.htm>, accessed on 15.4.2010.
12. The European Environment Agency (EEA) has described urban sprawl as the physical pattern of low-density expansion of large urban areas. See Urban *Sprawl in Europe, supra* note 3, at 6.
13. Although the agricultural population in Slovenia is very low (less than 5% in 2001), the majority of people live in rural areas. See an excellent study of urban sprawl in Ljubljana region in Nataša Pichler-Milanović, *The causes of urban sprawl - Ljubljana case study*, (Annual report) (Urbanistični inštitut RS, 2002). The author shows that two phases of urban sprawl can be distinguished in Ljubljana: «Until 1990s urban sprawl was characterised only (or mostly) by ''low density, strip, scattered or leapfrog" (planned or unplanned) residential development, predominantly of single family detached houses, but also of small business and services. Due to macro-economic and structural reforms in 1990s, (…) another type of ''urban sprawl" has occurred that can be described as "(poorly) planned, large-scale new residential, industrial and commercial development in areas previously not used for that purposes" (…) at the edge of the inner-city area of Ljubljana, in suburban areas (settlements) in city agglomeration, and small towns and rural settlements in Ljubljana urban region.» (p. 3).

Such a dispersed development pattern may not have caused big changes in land cover, as Figure 2 testifies (although it may in fact even be under the radar of the EU land cover observation instruments[14]). But it is nevertheless highly visible – aesthetically, socially and environmentally, and therefore rightly perceived as a problem.

So what can be done to curb such wasteful development, especially now that the first spatial planning reform in 25 years is taking place in Slovenia and new municipal plans are being prepared and adopted? Of course, planning itself cannot provide the cure for urban and rural sprawl. What spatial plans can do is to provide enough building zones to which new development may be steered, and lay out clear criteria for such development. Ideally, sufficient well-planned building zones for different uses will cause the pressure for uncontrolled dispersed development to subside. Of course, this condition is in itself not enough to diminish urban and rural sprawl; the sprawl was not caused by planning alone, and cannot be redressed by that instrument alone. Other preconditions must also be fulfilled, among them the following:

- Effective property tax on real estate must be prescribed. Until now, Slovenia has not had a property tax levied on the value of land as well as on the value of the buildings erected on it. Such tax, especially if it includes a penalty tax on vacant lots, will help the activation of vacant or underused inner-city plots. The tax reform to institute such tax is in preparation in Slovenia.
- Urban renewal instruments should be put in place: Slovenian legislation lacks instruments which would enable municipalities to engage in complex urban renewal projects and thus activate derelict and underused zones.
- More use should be made of compulsory replotting. This instrument has been recently provided for by spatial planning legislation, but has yet to be sufficiently exploited. It would enable the adjustment of land plots in accordance with the plan and thus enable development to take place.
- Real costs of public utilities should be paid by the developers and owners. This seems an obvious thing to do, but it was not the norm in Slovenia: in the past, and in many cases even today, the impact fees which the owners had to pay were inversely proportionate to actual costs spent on their construction. Impact fees were thus proportionally much higher in urban areas than in rural areas, although the cost of public utilities is much lower in the former. Recent changes in legislation require municipalities to prescribe their impact fees in proportion to the actual cost of construction of public utilities.

14. The Corine land cover project uses a scale of 1/100.000. Given the scale, individual units must represent a quite significant area of land. In fact, the smallest Corine mapping unit is 25 hectares. See <http://www.eea.europa.eu/publications/COR0-landcover>, accessed at 14.4.2010. I would suggest that the majority of Slovenian land use changes occur on a smaller scale and are thus not registered by Corine.

- Inspection control over the construction of buildings should be more effective.
- Cadastral land division in building zones and outside them has to be controlled; no subdivisions of land contrary to spatial planning provisions should take place. This instrument has not yet been adopted in Slovenian legislation.

The current spatial planning and building legislation[15] is actually much better than the old pre-transition legislation. Nevertheless, a lot still has to be done to enable municipalities and the State to combat urban and rural sprawl effectively. So who is right then in the contest between municipalities and the ministries in charge of natural resources that we mentioned at the beginning? Both, of course: the municipalities rightly feel – and can prove that with numbers – that they need more land for development, if they want to provide enough building zones for different uses and thus accommodate the development which, until now, caused urban and rural sprawl. Without more available building zones in the existing settlements or in their close vicinity the rural sprawl cannot be contained. On the other side, new building zones are just one precondition to limit the rural sprawl. The national agencies responsible for the protection of natural resources are rightly wary of municipal hunger for land: the past and current trends do not show an effective planning of land use, and there are no guarantees that urban and rural sprawl will not continue to grow despite new building zones being planned and put to public use.

IV. Conclusion

We've seen that land use is an important aspect of sustainable development, and that a change in land cover is an important indicator of land use sustainability, which is easily measured and quite easily compared between individual countries. However, the results that the land cover indicator shows are not unequivocal. As the Slovenian example testifies, sometimes a comparatively small change in land cover caused by dispersed settlement can lead to considerable detrimental consequences for the environment – consequences which actually exceed those brought about when a quantifiably greater change in land cover takes place in a more organised and properly supervised manner. Contrary to expectation, a relatively small change in land cover may actually signify bad news, and vice versa: a greater change in land cover may sometimes signify a step for the better insofar as the health of environment and the sustainability of development is concerned. What matters therefore are not numbers alone but the quality of land use planning and its implementation.

15. The Spatial Planning Act (Zakon o prostorskem načrtovanju – ZPNačrt, 2007) prescribes the system of spatial and urban plans and the planning procedure, while the Spatial Management Act (Zakon o urejanju prostora, 2002) prescribes some instruments for the implementation of plans (expropriation, pre-emption rights, compulsory reploting), whereas the Construction Act (Zakon o graditvi objektov ZGO-1) regulates the building permits.

Tourism for Mountain Sustainable Development: A Comparative Law Perspective

Elisa Morgera

Environmental and social concerns related to mountain tourism as a direct and indirect driver of change in mountain biological and cultural diversity can be counterbalanced by the consideration of opportunities offered by sustainable mountain tourism as an activity contributing to the sustainable use of biodiversity.[1] Sustainable mountain tourism can contribute to provide investment for the conservation of biodiversity and mountain culture, and support an integrated and participatory approach to mountain development that serves the well-being of future generations and maintains healthy mountain ecosystems for the long-term future.[2]

Sustainable mountain tourism can also contribute to meeting current livelihoods needs of mountain communities, who are the guardians of mountain biodiversity, and at the same time among the poorest and most vulnerable communities in the world. Mountain communities often suffer from marginalization and discrimination. They are disadvantaged in terms of communication and infrastructure, and are significantly affected by environmental degradation and the negative impacts of climate change. They also generally bear the brunt of the negative impacts of mountain tourism in terms of waste generation, security risks, inflation, increased traffic and demands on resources.[3]

Against this background, law has a significant role to play in striking a fair balance between regulation and promotion of mountain tourism that ensures long-term environmental sustainability and presents realistic and accessible opportunities for income-generation and employment for local communities.

In this contribution, I will address the question of whether mountain law is equipped to ensure environmental protection in the specific context of mountain regions from a comparative perspective, singling out legal approaches and tools that seem particularly promising to this end. The analysis will start by identifying relevant guidance provided by the Convention on Biological Diversity (CBD).[4] I will then turn to the international obligations emerging from the specialized regimes of the Alpine Convention[5] and the Carpathians Convention,[6] and to the instruments used in national mountain-specific legislation. I will conclude by identifying two major challenges for national legislators in the area of sustainable tourism development: ensuring the full and effective participation of mountain communities in decision-making on tourism development and the fair and equitable sharing of the benefits arising from sustainable mountain tourism activities.

1. CBD, Note by the Executive Secretary: In-depth Review of the Implementation of the Programme of Work on Mountain Biological Diversity, UN Doc. UNEP/CBD/SBSTTA/14/2, 2010, paras. 2(c) and 11.
2. Brewer Lama W. and Sattar N., "Mountain Tourism and the Conservation of Biological and Cultural Diversity", in Price M., Jansky L. and Iatsenia A. (eds.), *Key Issues for Mountain Areas* (United Nations University, Tokyo, 2004) 111-148, at 123.
3. Ibid., at 113, 111, 116 and 120; and Castelein C., et al., *Mountain and the Law: Emerging Trends*, FAO Legislative Study No. 75rev.1 (FAO, Rome, 2006), at 1 .

CBD Guidance on Sustainable Mountain Tourism

National legislators may find significant international guidance on sustainable mountain tourism. Agenda 21, for instance, clearly links the promotion of sustainable mountain tourism to the objective of protecting the livelihoods of local communities,[7] and to the integrated management of mountain areas.[8] The Convention on Biological Diversity, in addition, provides a wealth of guidance on how to achieve these two objectives in a mutually reinforcing way through the conservation and sustainable use of mountain biodiversity.

The most pertinent starting point in the multitude of decisions and guidelines adopted by the Parties to the CBD[9] is the CBD work programme on mountain biodiversity, which contains three key guidelines for ensuring sustainable mountain tourism development. First, local capacity for sustainable tourism management should be strengthened to ensure that benefits derived from tourism activities are shared by indigenous and local communities, while preserving natural and cultural heritage values.[10] Second, sustainable land-use practices, techniques and technologies of indigenous and local communities and community-based management systems should be promoted for the conservation and sustainable use of wild flora and fauna (including pastoralism, hunting and fishing) and agro-biodiversity in mountain ecosystems; and activities of indigenous and local communities involved in

4. Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, in force 6 March 1995).
5. Convention concerning the Protection of the Alps (Salzburg, 7 November 1991, in force 6 March 1995 – hereinafter, Alpine Convention).
6. Framework Convention on the Protection and Sustainable Development of the Carpathians (Kiev, 22 May 2003, in force 4 January 2006 – hereinafter, Carpathian Convention).
7. In Report of the United Nations Conference on Environment and Development, UN. Doc. A/CONF.151/26, 1992, Annex II, para. 13(15)(b).
8. Ibid., para. 13(6)(e).
9. On the question of the legal significance of COP decisions, see Brunnée J., 'COPing with Consent: Law-making under Multilateral Environmental Agreements' 15:1 *Leiden Journal of International Law* (2002) 1.
10. CBD decision VII/27, 2004, Annex, para. 1.3.7.

the use of traditional mountain-related knowledge, in particular concerning sustainable management of biodiversity, soil, water resources and slope, should be supported.[11] Third, the implementation of environmental and social impact assessments should be encouraged at sectoral, programme and project levels, taking into account the specificities of indigenous and local communities depending upon mountain ecosystems, by observing the CBD Akwé: Kon voluntary guidelines on cultural, environmental and social impact assessment.[12]

It should be noted from the outset that this is a demanding set of guidelines, underpinned by the following key concepts: capacity-building, benefit-sharing, promotion of traditional practices, support and recognition of community-based management systems, and environmental and socio-cultural impact assessments. These are concepts that are used throughout the thematic and cross-cutting areas of work of the CBD, in order to realize the ecosystem-based approach.[13] Among these legal tools, I argue that benefit-sharing in the context of biodiversity conservation and sustainable use is the most promising to support sustainable mountain tourism. In this context, benefit-sharing as a legal relationship between the State and its communities should be distinguished from benefit-sharing as an inter-State obligation identified in the third CBD objective (Article 1) and as usually linked to access to genetic resources. The dimension of benefit-sharing that is more relevant to sustainable mountain tourism emerges, however, from CBD Article 8(j) as a recognition of the contribution of indigenous and local communities' traditional knowledge, innovation and practices to the conservation of biodiversity[14] and - based on a combined reading with CBD Article 10(c)[15] - to the sustainable use of biodiversity components, in consideration of the fact that traditional knowledge derives from the customary use of biodiversity components and contributes to ensuring their conservation.[16] Thus, in the context of conservation and

11. Ibid., paras. 1.3.2-1.3.4.
12. Ibid., para 2.1.9. The Akwé: Kon Guidelines for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, provide guidance to CBD Parties on the incorporation of cultural, environmental and social considerations of indigenous and local communities into new or existing impact assessment procedures. The guidelines are contained in CBD Decision VII/16F, 2004.
13. The ecosystem-based approach integrates management of land, water and living resources, and it promotes conservation and sustainable use in an equitable way; at the same time it entails a social process: different interested communities must be involved through the development of efficient and effective structures and processes for decision-making and management. See generally, Principles of the Ecosystem approach, CBD Decision V/6, 2000, Annex B.
14. Schroeder D., 'Justice and Benefit Sharing', in R Wynberg *et al. (eds) Indigenous Peoples, Consent and Benefit-Sharing: Lessons from the San Hoodia Case* (Springer, 2009), 11, at 11 in which benefit-sharing is considered a reward for the custodians of biodiversity.
15. CBD Article 10(c) reads as follows: 'Each Contracting Party shall, as far as possible and as appropriate: [...] Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.'
16. See Glowka L. *et al., A Guide to the Convention on Biological Diversity*, IUCN Environmental Policy and Law Paper No. 30 (IUCN, Gland, 1994), at 60.

sustainable use – the first and second objectives of the Convention - benefits are expected to flow directly to communities and immediately contribute to their livelihoods as a matter internal to one State.[17] This approach is particularly relevant in the context of sustainable mountain tourism because of the hardship experienced by mountain communities and their critical role in ensuring sustainable mountain development.

The mountain biodiversity work programme is thus based on the multiple, mutually reinforcing functions of State-to-community benefit-sharing, namely: a reward for the use of traditional knowledge for the conservation and sustainable use of biodiversity; a broader incentive to ensure the full and effective participation of indigenous and local communities in decision-making and adaptive management of biodiversity, and compensation for the costs and negative impacts of biodiversity conservation or sustainable management activities on indigenous and local communities. As such, the concept of State-to-community benefit-sharing becomes an essential substantive tool that complements procedural guarantees to ensure community involvement in decision-making as a truly bottom-up approach to the sustainable management of living resources.[18]

Against this background, it should be stressed that other instruments adopted by the CBD Parties are relevant for the implementation of the programme of work on mountain biodiversity, in that they provide specific guidance on the procedural steps to be taken to realize sustainable tourism development with the participation of mountain communities through benefit-sharing.[19]

The CBD Guidelines on Biodiversity and Tourism Development, for instance, specifically call for legislative measures on stakeholder participation, approval and control of tourism development, environmental impact assessment (including assessment of cumulative impacts and effects on biodiversity), and decision-making processes based on environmental and cultural sustainability guidelines for new and existing tourism development.[20] The Guidelines stress the need for the involvement and consultation with relevant stakeholders, and especially indigenous and local communities that are or may be affected by tourism development, in reviewing legislation and control measures, assessing their adequacy and effectiveness, and proposing development of new legislation and measures. This is particularly needed when addressing access, and/or ownership by communities in relation to tourism development, or operations on lands and waters traditionally occupied or used by them and

17. Morgera E. and Tsioumani E., "The Evolution of Benefit-sharing: Linking Biodiversity and Communities' Livelihoods", in 19:2 *Review of European Community and International Environmental Law*, pp.150-173.
18. Ibid.
19. Ibid.
20. CBD Decision VII/14, 2004, Annex, para 32.

other legally established rights.[21] In addition, concerned local communities should be involved in environmental and socio-economic impact assessment, and their traditional knowledge should be acknowledged and considered in particular when authorizing tourism projects that affect their sacred sites or lands and waters traditionally occupied or used by them.[22] The Guidelines list a series of possible benefits arising from tourism and the conservation of biodiversity to be shared with local communities, such as job creation, participation in tourism enterprises and projects, education, and direct investment opportunities.[23] They also call for providing alternative and supplementary ways for communities to receive revenue from biodiversity.[24]

The CBD Addis Ababa Principles and Guidelines on the Sustainable Use of Biodiversity[25] are also relevant for present purposes, particularly because they link the inclusion of traditional knowledge in biodiversity management planning with benefit-sharing, which should be applied also when planning mountain tourism development. Principle 4(a) states that adaptive management should be practiced based on science and local and traditional knowledge, according to a rationale underlining that 'in many societies traditional and local knowledge has led to much use of biological diversity being sustainable over long time-periods without detriment to the environment or the resource', thus considering the incorporation of such knowledge into modern use systems critical to avoiding inappropriate use and enhancing the sustainable use of biodiversity components. Accordingly, adaptive management plans are to incorporate 'systems to generate sustainable revenue, where the benefits go to indigenous and local communities and local stakeholders to support successful implementation.[26] The operational guidelines to Principle 4 recommend adopting policies and regulations that ensure that indigenous and local communities and local stakeholders who are engaged in the sustainable use of a resource receive an equitable share of any benefits derived from that use. It also recommends promoting economic incentives that will guarantee additional benefits to those involved in the management of any biodiversity components, such as support for co-management, job opportunities for local peoples, or equal distribution of returns amongst locals and outside investors. Notably, the guidelines use benefit-sharing as a means to ensure local stakeholder participation also in projects led by foreign investors.

21. Ibid., paras. 31 and 33.
22. Ibid., para. 39.
23. Ibid., para. 23.
24. Ibid., para. 43.
25. Addis Ababa Principles and Guidelines for the Sustainable use of Biodiversity, adopted by CBD Decision VII/12, 2004, Annex II.
26. Ibid., operational guidelines to Principle 4.

The CBD Guidelines on the incorporation of biodiversity-related issues into EIAs are equally relevant for present purposes, as they call for an assessment of: inter-related socio-economic, cultural and human-health impacts; changes to access to and rights over biological resources; social change processes as a result of a proposed project; sensitive species that may be important for local livelihoods and cultures; activities leading to the displacement of people; and impacts on societal benefits and values related to land-use functions.[27]
Finally, the Akwé: Kon Guidelines are particularly relevant for sustainable mountain tourism, as explicitly recognised by the CBD work programme on mountain biodiversity. The Akwé: Kon Guidelines recommend that the cultural, environmental and social impact assessment reflects 'a balance between economic, social, cultural and environmental concerns, with a view to maximizing opportunities for the conservation and sustainable use of biological diversity, the access and equitable sharing of benefits and the recognition of traditional knowledge, innovations and practices in accordance with Article 8(j) of the Convention; and seeking to minimize risks to biological diversity.[28] Specifically, they provide that '[p]roposed developments on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities should ensure that tangible benefits accrue to such communities, such as payment for environmental services, job creation within safe and hazard-free working environments, viable revenue from the levying of appropriate fees, access to markets, and diversification of income-generating (economic) opportunities for small and medium-sized businesses.'[29] The Guidelines thus suggest that impact assessments can be used as tools that contribute to the equitable sharing of benefits, by identifying and weighting expected cultural, social and environmental costs and impacts of proposed developments, as well as communities' opportunities and traditional contributions to conservation and sustainable use.

What emerges from this overview of relevant CBD guidelines is the expectation that States fully involve communities in the governance of biodiversity conservation and sustainable use, encouraging and rewarding them for their participation in decision-making through the legal recognition and promotion of community management systems, provision of capacity-building services, and making available employment or other income-generation opportunities. Ultimately, States are expected to give precedence to community-based mechanisms for conservation and sustainable use or, when the latter is not possible, to share economic revenues derived from the conservation and sustainable use of biodiversity (such

27. CBD Decision VI/7, 2002, Annex.
28. Akwé: Kon Voluntary Guidelines, n. 12 above, para. 56.
29. Ibid., para. 46.

as park entrance fees, licences fees for wildlife watching or sustainable hunting, etc.) that are accrued by the State or outside investors. This is in recognition of the fact that community participation in decision-making is not per se a reward for communities, but may rather entail costs and risks for communities. So procedural guarantees should be coupled with substantive legal provisions requiring authorities to recognize and support communities' sustainable practices, to provide guidance to improve the environmental sustainability of community practices, and proactively identify opportunities for better/alternative livelihoods in these endeavours, with a view to facilitating understanding of, and compliance with, the law. Benefit-sharing may also act as compensation through payments for ecosystem services, diversification of income-generating opportunities, and other mitigation measures, when the interests of biodiversity protection are in an irreconcilable conflict with the legitimate interests of communities, and the former need to prevail. To this end, indispensable procedural steps include undertaking cultural, social and environmental impact assessments with the full engagement of relevant communities and integrating traditional knowledge and community concerns in management plans.[30]

It is worth noting that many of these legal tools find recognition and support also in other instruments adopted outside the framework of the Convention on Biodiversity. The 2002 Declaration on Eco-tourism, for instance, emphasizes the inclusion of local and indigenous communities in the planning, development and operation of eco-tourism. The latter is understood as tourism that contributes actively to the conservation of natural and cultural heritage and to human well-being, and takes into account social, economic and environmental benefits and costs to the environment and local communities, their natural resources and traditional knowledge and practices).[31] The Declaration supports the use of participatory planning to allow local communities, in a transparent way, to define and regulate at the local level the use of their areas, including the right to opt out of tourism development,[32] and of a wide consultation process in the development of national, regional and local ecotourism policies and development strategies with those who are likely to become involved in, affect, or be affected by ecotourism activities.[33] Governments are also invited to consider the possible reallocation of tenure and management of public lands, from extractive or intensive productive sectors to tourism combined with conservation, wherever this is likely to improve

30. Morgera and Tsioumani, n. 17 above.
31. Québec Declaration on Eco-tourism, 22 May 2002, preamble. It was adopted by the representatives of 132 countries participating in the World Ecotourism Summit (Québec City, Canada, 19-22 May 2002), under the auspices of the UN Environment Programme and the World Tourism Organization.
32. Ibid.
33. Ibid., para. 1.

the net social, economic and environmental benefit for the community concerned.[34] The Declaration further provides specific guidance on public participation related to eco-tourism that may be relevant in mountain regions, namely: using in the framework of regulatory and monitoring mechanisms objective sustainability indicators jointly agreed with all stakeholders and environmental impact assessment studies as feedback mechanism; and making the results of monitoring available to the general public.[35]

The next question is whether existing mountain-specific international treaties also reflect similar approaches to sustainable mountain development and sustainable mountain tourism more specifically.

Tourism and the Mountain Conventions

The Alpine Convention stresses the need to restrict tourism activities harmful to the environment, and harmonize tourism activities with ecological and social requirements, in particular by setting aside quiet areas.[36] On this basis, the 1998 Protocol on Tourism to the Alpine Convention[37] provides pragmatic and specific guidance (and in the cases in which mandatory language is used, obligations) on tourism development in mountain areas. It should be noted that its relevance is not necessarily limited to its parties, as it can be considered as a model for other mountain regions.[38] Specifically, the Protocol aims to contribute to sustainable development "by encouraging environmentally-friendly tourism" taking into account the interests of both local communities and tourists.[39] Among its provisions, the following provide useful, detailed guidelines for national legislators:

- Environmental integration: Parties undertake to take a holistic approach to policy and legislation on tourism, regional planning, transport, agriculture, forestry, nature protection, water and energy, with a view to reducing any negative or contradictory effects;[40]
- Institutional coordination and decentralization which focuses on regional and local authorities: parties are required to define the best level of coordination and cooperation between the institutions and regional authorities directly concerned to encourage solidarity of responsibility in applying tourism policies, and regional and local authorities

34. Ibid., para. 2.
35. Ibid., para. 4.
36. Alpine Convention, art. 2(2)(i).
37. Protocol for the implementation of the Alpine Convention of 1991 in the field of tourism (Bled, 16 October 1998, in force 18 December 2002 – hereinafter, Alpine Tourism Protocol).
38. Castelein et al., n. 3 above, at 9.
39. Alpine Tourism Protocol, art. 1.
40. Ibid., art. 3.

are mandated to participate in preparing and implementing such policies;[41]
- Tourism management: parties are required to support the preparation and implementation of "guidelines, programmes and sectoral plans",[42] through, *inter alia*, assessments of socio-economic and environmental impacts;[43]
- Specifically linking incentives for tourism development to compliance with ecological requirements and support to environmentally-friendly tourism and the promotion of cultural and natural heritage;[44]
- Encouraging the control of tourist flows[45] and commitment to the establishment of "quiet areas" where no tourism facilities can be developed;[46]
- Providing specific environmental sustainability requirements for ski lifts, tourist traffic and transport, ski slopes, artificial snow machines, sporting activities and landing by air.[47]

These provisions seem to be in line with the CBD guidelines related to adaptive management plans and environmental and social impact assessments discussed in the previous section. Existing references to the need to take into account the interests of communities and to ensure decentralization may be considered a step in the right direction in facilitating participation of mountain communities in decision-making at the local level. Explicit provisions encouraging public participation, and specifically the involvement of local communities in decision-making and planning and benefit-sharing, are however not included in the text of the Convention. The lack of such detailed provisions thus contributes to explain the perception of the Alpine Convention as a top-down instrument.[48] This approach seems to be reflected throughout the Protocols adopted under the Alpine Convention, with the exception of a provision calling for the direct involvement of farmers in decision-making in the Protocol on Mountain Agriculture.[49] The lack of State support for a strong participatory stance in the implementation of the Alpine Convention and its Protocols may also be reflected in the lack of a protocol on population and culture,[50] and the general language of the Declaration on Population

41. Ibid., art. 4.
42. Ibid., art. 5(1).
43. Ibid, arts. 5(2)(a)-(b) and 9.
44. Ibid., art. 6(4).
45. Ibid., art. 8.
46. Ibid., art. 10.
47. Ibid., arts. 12-15.
48. M. Onida, 'A common approach to mountain specific challenges: The Alpine Convention,' presentation at the international conference "Environmental Protection and Mountains: Is Environmental Law Adapted to the Challenges Faced by Mountain Areas?" (27-28 April 2010, Innsbruck, Austria).
49. Protocol for the implementation of the Alpine Convention in the field of mountain agriculture (Chambery, 20 December 1994, in force 18 December 2002), art. 4.
50. Which was foreseen at art. 2(2)(a) of the Alpine Convention.

and Culture, which was adopted instead of a protocol. The Declaration merely refers to the recognition of the important role of civil society and the promotion of transparency in the relationship between the public administration and the population and public participation in public affairs.[51] This does not support a more proactive substantive legal approach to effectively engaging mountain communities in sustainable mountain tourism.

In turn, the Carpathians Convention, which is a more recent instrument successive to the conclusion of the CBD, explicitly links in its operative text the promotion of sustainable tourism with the need to provide benefits to the local people, based on the exceptional nature, landscapes and cultural heritage of the Carpathians.[52] Its Protocol on the Conservation and Sustainable Use of Biodiversity and Landscape Diversity, however, seems to have weakened these references. It points to 'stakeholder' involvement in management planning,[53] rather than calling attention to mountain communities more specifically. It also makes reference to the use of traditional knowledge,[54] without mention of benefit-sharing.

There seems, therefore, to be a mismatch between the general guidance of Agenda 21 and the precise guidance provided by the CBD on sustainable mountain tourism on the one hand and the general approach and more detailed provisions that can be found in the regional mountain conventions that have been concluded so far, on the other. This can certainly be explained by the fact that both conventions were concluded before the adoption of the CBD programme of work on mountain biodiversity: this is not the case, though, for the Alpine Declaration on Population and Culture and the Carpathians Protocol. It remains to be assessed whether national law has been more significantly influenced by the CBD work programme on mountain biodiversity and other relevant guidelines.

A Brief Assessment of Existing National Solutions

A review of national legislation on sustainable mountain development[55] carried out by the Food and Agriculture Organization of the United Nations (FAO) reveals that almost all national laws specifically devoted to mountains contain explicit provisions on tourism.[56] These

51. Declaration on Population and Culture (2006), chapter I., para. 4.
52. Carpathians Convention, art. 9(1).
53. Protocol on Conservation and Sustainable Use of Biological and Landscape Diversity to the Framework Convention on the Protection and Sustainable Development of the Carpathians (Bucharest, 19 June 2008, not yet in force), art. 17.
54. Ibid., art. 23.
55. The term has been defined as "a regionally-specific process of sustainable development that concerns both mountain regions and populations living downstream or otherwise dependent on these regions'. See Price M., 'Introduction: Sustainable mountain development from Rio to Bishkek and Beyond', in Price, Jansky and Iatsenia, n. 2 above, 1-17, at 5-6, which stresses compensation for sustainable management of mountain ecosystems by downstream populations and creation of new livelihood opportunities.
56. Castelein *et al*, n. 3 above, at 31.

provisions have generally either the aim of regulating tourism development in mountains or that of providing financial and other support for promoting tourism development.

Restrictions on tourism development to ensure environmental sustainability can be found, for instance, in the French Act on Mountain Development and Protection, which calls upon local authorities to monitor the implementation of tourism development operations and to conclude contracts with tourism promoters to ensure supervision of tourism facilities and the management of ski lifts.[57] In addition, mountain tourism developments are regulated by specific planning rules, to ensure respect of the quality of the sites and the natural balance.[58]

More commonly, however, national laws provide incentives for tourism development in mountain regions. In Georgia, preferential loans are made available for the promotion of mountain tourism to develop recreational and sports amenities and to protect and restore rural, historical and natural monuments.[59] In Bulgaria, institutional support through central and local authorities that are specifically tasked to foster the development of tourism in mountain regions, is coupled with the provision of subsidies to put in place programmes for increasing land available for thermal tourism and agri-tourism, fostering commercial and handicraft activities connected with mountain tourism, and providing basic training and refresher courses for mountain tourism personnel.[60] In Romania, performance-based incentives have been put in place: hotel certification rewards owners with the allocation of land from local authorities and priority in obtaining building permits.[61] In addition, the development of agri-tourism is favoured by exempting agri-tourism farms from the payment of land taxes and turnover taxes for the first five years.[62]

What clearly emerges, therefore, is national legislators' emphasis on the economic and sometimes environmental dimensions of mountain tourism, with little, if any, attention to mountain communities and related socio-cultural dimensions that are paramount for the conservation and sustainable use of mountain biodiversity as well as for the flourishing of mountain tourism itself. An analysis of these tourism-specific provisions, however, may not suffice to understand whether a fair balance between regulation and promotion of mountain tourism has been achieved, or whether incentives are effectively linked to compliance with

57. Act 85-30, 9 January 1985, article 42 (see Castelein et al, n. 3 above, at 69).
58. Act 2005-157on the development of rural lands, 23 February 2005, art. 190 (see Castelein et al, n. 3 above, at 70).
59. Act of 8 June 1999 on the socio-economic and cultural development of mountain regions, art. 3 (see Castelein *et al*, n. 3 above, at 78).
60. Law on the development of mountain regions in the Republic of Bulgaria, 1993, arts. 5 and 6(1)(2) (see Castelein *et al*, n. 3 above, at 56).
61. Mountains Act of 14 July 2004, art. 18 (see Castelein et al, n. 3 above, at 100).
62. Ibid., art. 19.

environmental requirements.

Provisions on mountain-specific institutions, for instance, may provide significant procedural guarantees for mountain communities' involvement in the support and control of tourism development in mountain areas: national and local mountain boards may facilitate a balanced discussion of economic, environmental and social impacts related to tourism development in a specific mountain area due to the inter-sectoral representation and the varied expertise of the board members. In addition, multi-stakeholder boards may allow for the regular inclusion of mountain communities representatives, as well as environmental and cultural heritage NGOs in decision-making related to mountain tourism.[63] Other provisions on regular public participation in decision-making, environmental impact assessments and planning may act as preconditions for ensuring the environmental and social sustainability of mountain tourism.

Similarly, provisions on the protection, dissemination and transmission of the culture of mountain communities may be very much related to the development of sustainable mountain tourism. For instance, the French Act on Mountain Development and Protection subjects land occupancy decisions to the respect of typical landscapes and areas of cultural and natural heritage, which were subsequently qualified by the introduction of exceptions to the restrictions on building constructions in order to bolster tourism.[64] This may, however, be a rather top-down approach if communities are not involved in the decision-making process.

Provisions on raising living standards of mountain communities, by granting them priority rights in local employment and training opportunities or in the allocation of harvesting rights over natural resources[65] may implement a benefit-sharing approach to sustainable mountain development. The law of North Ossetia-Alania, for instance, grants privileges to mountain communities, including priority rights in natural resource use including for tourism, mountaineering and excursion purposes.[66] Different legal provisions can also support benefit-sharing from sustainable tourism development. A tourism or bed tax would allow funds collected to be used for community development needs. Alternatively, rotation of visitors among service providers could be required or encouraged, and/or selecting training of non-lodge-owning community members as guides could be favored. In addition, a broader and more diversified economic base in mountain regions could be stimulated through technical

63. For this and other examples of specialized mountain institutions created by national law, see Castelein et al, n. 3 above, at 20-23.
64. Ibid., at 26.
65. Ibid., at 24-25.
66. Law No. 30-z of 1998 on mountain territories of the Republic of North Ossetia-Alania (the Russian Federation), art. 11, read in conjunction with art. 14 (see also Castelein *et al*, n. 3 above, at 25-26). Similar legal provisions can be found in arts. 12 and 15, Kyrgyzstan's Law No. 151 on mountain territories of 2002.

and start-up financial assistance, specifically targeting local communities.[67] Further options include requiring by law the sharing of economic revenue from touristic activities to the benefit of communities: in Kyrgyzstan, for instance, a community-based tourism fund has been created with 5% of tourism operators' charges to support the development of community-based tourism. A more empowering option is to provide particular support or priority to community-based tourist activities: in Pakistan, community-based trophy hunting schemes have been used to increase the touristic attraction of remote areas, based on planning, management and benefit-sharing involving local communities. Other interesting examples include the conclusion of conservation contracts for the provision of training and marketing assistance in ecotourism to communities in exchange for communities' commitment to carry out panda patrols in China, or facilitating interactions between foreign ecotourism operators and local community-based tourism operators in Kyrgyzstan.[68]

While not all these initiatives may be backed-up by the law, it should be stressed that a legal basis is more suitable to create a long-term stake in sustainable mountain tourism for mountain communities, by providing legal certainty in the face of changing governments or changing government priorities. Such legal basis may be provided in mountain-specific legislation, or in general laws on environmental protection and mountain-specific laws: legal provisions on the protection of mountain forests, soil and waters[69] may, for instance, provide incentives for particularly environmentally beneficial tourism activities (such as those leading to the rehabilitation of degraded sites) carried out by local communities, or create opportunities for these communities to monitor tourism impacts on the environment.

Challenges for National Laws on Sustainable Mountain Tourism

Overall, it seems that two elements should be embodied in national legislation to ensure sustainable mountain tourism that contributes to environmental protection and human well-being, particularly that of vulnerable and disadvantaged mountain communities: procedural guarantees for community involvement in decision-making and substantive provisions on benefit-sharing.

Procedural guarantees for adaptive and participatory sustainable mountain development can already be found in mountain-specific legislation, as well as in general environmental laws applicable to mountain tourism. In the specific case of the EU Member States that

67. Brewer Lama and Sattar, n. 2 above, at 120.
68. Ibid., at 132-137.
69. Ibid., at 27-29.

are parties to the Alpine Convention, for instance, EU legislation on public participation in environmental decision-making would serve this purpose, including participation in licensing and environmental impact assessment.[70] In other regions, multi-stakeholder institutions, participatory management planning, and socio-cultural and environmental impact assessments that take in particular account the possibility of cumulative impacts on biodiversity are all essential ingredients to allow a holistic application of the various rules relevant for sustainable mountain development.

Even when legal provisions exist, however, they may not be developed sufficiently. The FAO review, for instance, points to a lack of national legal provisions on ensuring compatibility of tourism development and the protection of mountain cultures, or on gender equity issues.[71] Another example is provided by EU legislation on environmental impact assessment, which does not seem well equipped to fully consider biodiversity considerations and provides little support for an assessment of socio-cultural issues that are related to the conservation and sustainable use of biodiversity.[72] In that respect, the CBD Guidelines for biodiversity-inclusive assessments and the Akwé: Kon Guidelines for the conduct of cultural, environmental and social impact assessment may provide useful additional inputs to national legislators that can be adapted to the specific context of mountain tourism.

The most significant challenge for national legislation on sustainable mountain development is, however, ensuring substantively the fair and equitable sharing of benefits arising from sustainable mountain tourism with mountain communities. That is, to ensure that benefits from mountain tourism reach poorer households who lack capital to invest in, and skills relevant to, tourism-based enterprises,[73] consistently and in adequate proportions, as well as ensuring that tourism impacts on mountain biodiversity and culture be monitored, minimized and managed with a portion of tourism revenue reinvested in restoration; and that mountain communities should be active and responsible participants in undertaking tourism development.[74] Legal provisions supporting community-based tourism may be particularly significant in this respect: national legislation already incorporates some interesting tools to this end. More challenging is ensuring benefit-sharing in situations in which outside and foreign investors are mainly involved in mountain tourism: a legal basis is necessary to ensure that benefits arising from investor-driven tourism development reach also local communities.

70. Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.
71. Castelein *et al*, n. 3 above, at 25-26.
72. European Commission, Report on the application and effectiveness of the EIA Directive (Directive 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC), COM(2009) 378, 23 July 2009, at 9.
73. Brewer Lama and Sattar, n. 2 above, at 120.
74. Ibid., at 112.

In addition, benefit-sharing should specifically reward mountain communities for the use of traditional knowledge used for tourism purposes, as well as compensate communities for the negative impacts of tourism activities at the local level.[75]

Overall, substantive provisions on benefit-sharing and procedural guarantees for mountain communities' involvement in decision-making at all levels related to mountain tourism should foster a true partnership between authorities, investors and local stakeholders as an essential approach for reconciling human and environmental protection needs, as called for by the ecosystem approach.[76] The need for such an approach will become increasingly felt as climate change[77] impacts disproportionately on mountains and mountain communities: benefit-sharing may be needed, on the one hand, to reward the use of mountain communities' traditional knowledge that contributes to adaptation efforts. On the other hand, technology for low-carbon tourism may only be in the hands of outside investors with the risk of marginalizing community-based tourism efforts, unless benefit-sharing is used to ensure communities' involvement in investor-driven tourism development or compensation for such exclusion.

In conclusion, as Agenda 21 pointed out almost twenty years ago, communities' livelihoods and integrated environmental management need to go hand in hand in ensuring that tourism truly contributes to sustainable mountain development. National legislation still faces critical challenges in reaching that objective, particularly in systematically providing substantive and proactive legal tools for benefit-sharing, although international guidance is abundant in this respect.

75. See generally Morgera and Tsioumani, n. 17 above.
76. Krämer L., 'Role and Place of Mountainous Areas in the Development of Nature Conservation Legislation', presentation at the international conference "Environmental Protection and Mountains: Is Environmental Law Adapted to the Challenges Faced by Mountain Areas?" (27-28 April 2010, Innsbruck, Austria).
77. Quillacq P., 'The Action Plan on Climate Change in the Alps: Legal Stumbling Blocks to a Joint Implementation by the Parties', presentation at the international conference "Environmental Protection and Mountains: Is Environmental Law Adapted to the Challenges Faced by Mountain Areas?" (27-28 April 2010, Innsbruck, Austria).

III

The Range Approach: Surveying the Experiences and Identifying the Potential for New Mountain Treaties

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A Common Approach to Mountain Specific Challenges: The Alpine Convention

Marco Onida[1]

I. Introduction

Eight States and the EU decided in 1991, after some years of negotiation, to create a specific legal framework for protecting the Alps, whose territory they share, and the interest of the alpine population. The building process of this legal framework did not finish with the signature of the Alpine Convention but continued intensively until the year 2000, with the adoption of eight thematic protocols[2]. Although since then no new protocols have been signed or negotiated, the legislative activity of the Alpine Convention has not stopped, but has rather concentrated on non-binding measures such as ministerial declarations and action plans as well as on implementation instruments.

The Alpine Convention covers an area of approximately 200,000 km^2 hosting a population of about 14 million people. Almost two thirds of the area of the Alpine Convention is shared by Austria and Italy, followed by France, Switzerland and, to a smaller extent, Germany, Slovenia and the two principalities of Monaco and Liechtenstein. The Alps are not just a living and working area for their population but a unique territory at the heart of Europe, a reservoir of water, wood, biodiversity and other natural assets, which attracts some 120 million tourists per year and yet which is heavily exploited as a transport corridor and by energy infrastructures.

This book furthers discussion on whether environmental law is "adapted to the challenges faced by mountain areas" and focuses specifically on the Alps. The mere fact that the Alpine Convention exists should lead one to conclude that, in this region, national and European

1. Secretary General of the Alpine Convention. The opinions contained in this article are expressed on a personal basis and attributable only to the author.
2. For the genesis of the Alpine Convention: Galle, E., Das *Übereinkommen zum Schutz der Alpen (Alpenkonvention) und seine Protokolle*, 2002, Erich Schmidt Verlag, Berlin; Treves, T., Pineschi, L., Fodella, A., (eds.) *International Law and Protection of Mountain Areas*, 2002, Giuffré editore, Milano; Treves, T., Pineschi, L., Fodella, A. (eds.) *Sustainable Development of Mountain Areas*, 2004, Giuffré editore, Milano.
   A reference list of books and articles on the Alpine Convention between 1989 and 2010, by the Austrian Alpine Club, is available at < http://www.alpconv.org/archive/public01_en>

law was deemed as not "adapted" - or certainly not completely adapted - to the challenges of mountain areas. As a consequence, the need for a specific international legal instrument has been clearly identified. The question addressed in this article is therefore whether the Alpine Convention and its protocols are adapted to the challenges faced by the Alps. This article will attempt to answer this question, though it is not a question that can be answered in a simple manner. It has to do with the effectiveness of the Alpine Convention. Although many important elements of sustainable development policy are embedded in the Alpine Convention, when looking at current environmental, social and economic developments, it is evident there is still a long way to go in order to say that the situation is fully satisfactory. This is, however, not necessarily related to the content of the Alpine Convention and its protocols, but rather to the way they are applied and taken (or not taken) into consideration.

In addition, it must be underlined that although the Alpine Convention was born as an instrument for environmental protection, it quickly developed into other areas which clearly extend beyond environmental protection *stictu sensu* and encompass other aspects of sustainable development such as the support of crucial economic sectors (e.g. mountain farming, forestry and tourism), access to social services, cultural identity and tradition.

Paragraphs 1 and 2 of chapter II describe the current state of affairs in relation to the protocols and their ratification. Paragraphs 3 and 4 of chapter II focus on the scope of application of the Convention and its protocols as well as on their content, both from the perspective of the enforceability of the legal provisions and of their categorisation into different types of measures. Chapter III attempts to draw some conclusions.

II. A Critical Assessment of the Alpine Convention and its Protocols

II.1. Missing One or More Protocols?

Article 2 of the Alpine Convention establishes the scope of application of the Convention *ratione materiae*. Twelve topics are mentioned. On four of them (population and culture, water, air and waste), however, no specific protocol has yet been adopted. Population and culture has made the subject of a non-binding declaration adopted by the Ministers in 2006[3], when it was clear that one or more States would not be ready to subscribe to a protocol (which had been negotiated for some time). The scope of this declaration is very wide and touches on most of the relevant socio-economic issues of the Alps, from cultural diversity,

3. <http://www.alpconv.org/NR/rdonlyres/E0A45E2E-5540-4C6B-8708-C7E173DC983D/0/PopCult_en.pdf>

to participation, access, community life, regional development and employment, and the relationships between cities and rural areas. The States decided that, in spite of its non-binding character, the declaration was to be subject to the compliance procedure (further discussed below), inter alia in order to assess at a later stage whether a protocol is necessary. This process is currently still under way, but there is no indication that the Contracting Parties would agree to sign a binding protocol. However, in the framework of the implementation of the declaration, a Working Group on "demography and employment" was set up in 2009 with the objective of studying demographic change in the Alpine regions and identifying the factors which help counter undesired developments (e.g. the abandonment of rural areas).

As regards the management of water resources, the Contracting Parties decided not to adopt a specific protocol but to rely on the already existing legal instruments, such as, at EU level, directive 2000/60/EC[4] (the "Water Framework directive - WFD"). The Alpine Conference (the Ministerial Conference of the Alpine States) decided in particular to follow closely the drafting and implementation of river basins management plans in the Alps, by means of a specific Working Group. Whether, however, the WFD is fully adapted to the Alpine specificities is doubtful: for example, no provisions of this directive deal with the management of quantitative water resources (greatly affected by glaciers melting), nor with the use of water for artificial snow-making. A first result of the activity of the Working Group on water was the drafting of common guidelines for the construction of small-size hydropower stations. Hydropower greatly affects the ecological balance of many water courses and, although no new large plants are planned in the Alps, many new small ones are emerging and risk endangering the few remaining natural water courses.

As regards air and waste, there is currently not even a discussion as to whether a protocol would be necessary, the Parties having implicitly already replied in the negative. These are, however, areas in which detailed national and EU legislation exists and fully applies to mountain regions. The absence of protocols in relation to these two topics is generally, therefore, not felt as an element of weakness of the Alpine Convention. However, air pollution and road traffic noise are a significant problem in the Alps, since the physical conformation and the concentration of high-volume traffic routes makes local levels of air pollution very significant in some regions. As an example, Tyrol has taken measures to restrict the transit of heavy goods vehicles in order to decrease air pollution. These restrictions are systematically being challenged by the EU Commission as well as by other States (Italy, the Netherlands) on ground they would be incompatible with primary EU law on the free circulation of goods. A case was adjudicated by the European Court of Justice in 2005[5] a further case is currently

4. Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, pp. 1-73.

pending before the Court[6]. This is an area where a fairer balance is certainly needed between free circulation requirements and the specificities of the Alps in respect of the environmental and health impact of road-transport.

It is difficult to draw conclusions on whether there is a need for supplementary protocols, especially if one considers the less than satisfactory state of implementation of the existing ones (see below). However further measures (not necessarily protocols, but also measures at national level) are clearly necessary to address the issue of the continuous depopulation of many mountain areas and the increasing concentration of the population in towns and major valleys; these shifts lead to a decrease in the supply of basic services at higher altitudes, which in turn leads to a vicious circle of further depopulation. Remedial measures could, for example, take the form of tax incentives for undertakings (especially those related to the green economy) which invest in mountain areas; or to the attribution of certain competences (and the corresponding resources), which in some case are still centralised at State of regional level, directly to the local authorities located in mountain areas. As regards water management and air pollution, there is clearly a need for specific consideration of mountain specificities in applying the existing EU principles and directives.

II.2. The Current State of Ratification of the Convention and of its Protocols

The 1991 framework Convention has been ratified by all the Contracting Parties and has been in force since 1995. The protocols are in force in Austria, France, Slovenia, Germany and Liechtenstein, which ratified them all. As the EU has ratified four of the eight thematic protocols[7], these apply, to the extent that they touch on matters of EU competence, to the Italian territory of the Alpine Convention. Monaco ratified four protocols. To the surprise of many, in September 2010 the Swiss Parliament rejected by large majority a Government proposal to ratify three protocols. This means, as its Government stated, that Switzerland will not ratify any of the Alpine Convention protocols, although it will continue to cooperate within the Alpine Convention organs. As regards Italy, a Government bill proposing the ratification of all protocols was endorsed by the Italian Senate in May 2009 but the other branch of the Parliament (Camera dei Deputati) has still to give its final vote, the competent parliamentary committees having (February 2010) expressed themselves in favour of all

5. C-320/03, Judgment of 15.11.2005, ECR 2005, p. I-9871. See in particular the Conclusions of Advocate General Geelhoed, pp. 57-61. On this point see also: Onida, M., "Plaidoyer pour une politique communautaire des montagnes: l'exemple à prendre de la Convention alpine", in Revue du Droit de l'Union européenne, 4/2008, pp.760-762.
6. C-164/09.
7. The EU has ratified the Protocols on mountain farming, soil protection, tourism and energy. A Commission proposal (COM (2008) 895 of 23.12.2008) for the ratification of the Protocol on transport awaits approval by the Council.

protocols except the one on transport. This is indeed the most controversial protocol and the one on which the Alpine Conference found agreement most difficult. The French ratification of the protocol on transport has been accompanied by an interpretative declaration, which some consider to be a real reservation to Article 11[8], dealing with the prohibition on building new transalpine highways. However, since no other Contracting Party has made use of the instruments provided for by the 1969 Vienna Convention on the Law of Treaties to challenge the French declaration/reservation within the time-limit of 12 months, the French declaration/reservation is to be considered as having been accepted by the those Parties which ratified the transport protocol. The EU and Italy (as mentioned, Switzerland decided not to ratify it) might still raise an objection against the French declaration, but it is very unlikely that they will do so.

The fact that the protocols have been ratified is a necessary condition for their full implementation, but not a sufficient condition. Currently, as a matter of fact, Austria is the only State where the Alpine Convention protocols have become fully part of national and regional administrative law and where they seem to systematically play a role in daily decisions on spatial planning and on the authorisation of infrastructural projects. In all other States where the protocols are in force, they do not seem yet to have become an active ingredient in the daily work of the local administrations, although some States are actively promoting the legal implementation of the Convention[9]. This does not necessarily mean that in the other States the protocols are not complied with, as in many cases existing national, regional and local bills reflect the content of the Alpine Convention protocols. A lack of direct reference to the protocols does not always imply that their content is not being implemented. But there is no systematic monitoring and information on this. The reports of the Compliance Committee of the Alpine Convention (see below) are very general and not sufficiently detailed to draw conclusions as to whether the protocols really play a role in individual administrative or judicial decisions. In some cases it may even be that certain individual decisions perfectly reflect one or more provision of the Alpine Convention protocols, without the body which takes the decision being aware of this. In 2010 the Autonomous Province of Trento launched an initiative inviting the regions of the Alps to join an informal network of regions[10] whose objective is, inter alia, to "map" their legislation and decisions in order to assess the legal state of implementation of the Alpine Convention in their respective territories.

8. Geslin, A., "Convention Alpine et Droit international public", in Yolka (ed.), L*a Convention Alpine, un nouveau droit pour la montagne* ? CIPRA France, 2008, Grenoble.
9. In Germany the Federal and Bavarian Ministries of the Environmental jointly published in 2008 guidelines for the legal implementation of the Convention and its protocols: Die Alpenkonvention-Leitfaden für Ihre Anwendung, available on < http://www.bestellen.bayern.de >
10. <http://www.alpconv.org/theconvention/conv07_b_en.htm>

II.3. The Territorial Scope of Application of the Alpine Convention

The scope of application *ratione loci* is one of the most important factors distinguishing the Alpine Convention from other instruments of international environmental law. Indeed, there are very few cases of international treaties whose scope of application is defined on the basis of a specific territory not corresponding to the borders of the Contracting parties. The 1959 Antarctic Treaty, and its 1991 Protocol on environmental protection, apply "to the area South of 60° South Latitude, including all ice shelves". In the case of the Alps, due to the complex geographical/geomorphologic character of the area, it was not possible to refer to a specific latitude and longitude *tout court*. The provisions of the Alpine Convention apply to the parts of the territory identified by each Contracting Parties. On this basis, a list of administrative units was set up and annexed to the Convention. These administrative units vary according to the States they belong to: In Austria they are either whole regions ("Länder"as for Tirol, Carinthia, Vorarlberg) or municipalities within the other regions, in France whole "Departments" ("Départements") or "Arrondissements" within the "Departments", in Italy entire regions (Valle d'Aosta, Trentino Alto Adige-Südtirol), whole provinces, or selected municipalities within given provinces, in Slovenia municipalities or even part of the territory of municipalities and, in Germany, districts (Landkreise) or independent cities (Kreisfreie Städte). Only in the cases of Monaco and Liechtenstein does the entire territory of the State falls within the scope of application of the Alpine Convention. This determination is by definition political, since a commonly agreed definition of "mountainous area" does not exist. A few municipalities falling under the scope of the Alpine Convention have relatively little to do with mountains. To this it must be added that there is a gradual but constant process of urbanisation of valley bottoms and of depopulation of the agglomerations at higher altitudes. Between 1981 and 2001 the number of municipalities forming part of "metropolitan areas" has practically doubled (from 1086 to 2118)[11]. Furthermore, even the "true mountainous territories" are all but homogeneous. This is one of the reasons why the Alpine Convention protocols set out several general principles but leave competent authorities much discretion to adapt these principles to the specific local conditions.

This "territorial application" of the Alpine Convention has important consequences, both in terms of advantages and disadvantages. The advantages are mainly related to the greater possibility of identification of the competent authorities with the applicable rules, which should facilitate their implementation. The main disadvantage is that competence for applying the provisions is not always (or is seldom) attributed to the administrative unit

11. Source: CIPRA, "Noi Alpi!", 2007, p. 259.

which is targeted by the provision. As a consequence, competent authorities (be it national or regional level) have to make extra efforts, compared to when they apply rules which apply to the entirety of their territory, in order to ensure the application of the provision and fulfill the corresponding monitoring duties. This is indeed one of the key problems of the Alpine Convention when one looks at the legal aspect of implementation: how to reconcile the territorial scope of application with the distribution of legal competences between national, regional and local authorities? The issue is further complicated in States where the relationships between the national and the regional authorities are complex and political considerations (or "colours") play an important role. In these States the Alpine Convention clearly suffers from the fact that it is often regarded by regional or local authorities as a "top-down" or imposed instrument.

The fact that the Alpine Convention targets only a portion of the national territory may also create difficulties with the acceptance of specific provisions at national level. This is the case of the transport protocol in Italy, insofar as it aims at restricting the construction of new transalpine highways, and which is therefore strongly opposed by some Italian economic operators, which see a risk that the export (by road) of goods from the whole of Italy to the north of Europe might become more difficult or more expensive. Not surprisingly, the opposition to the protocol comes mainly from the road-transport associations.

However, regional and local authorities have not been forgotten in the protocols. On the contrary, they play – at least in theory – a very important role: each and every protocol contains a reference to the need to involve the interested territorial authorities in (1) the preparation (2) the implementation and of the national measures aimed at giving effect to the provisions contained in the protocols as well as (3) in the assessment phase of the effectiveness of the protocols, with a view of possible amendments to the protocols. Indeed, the participation of territorial authorities to the assessment phase of the protocols is one of the few "hard-law" provisions which can be found in every protocol. This last statement leads us to the next topics.

II.4. Observations on the Nature and Content of the Protocols to the Alpine Convention

So far we have touched on the generalities of the Alpine Convention protocols, such as their scope and state of implementation. It is now useful to focus on their content. The eight thematic protocols adopted between 1994 and 2000 are very diverse in their contents, as they deal with very different topics, but nonetheless very similar in their structure as well as some important common features. Hereafter, a brief summary of the common features of the protocols is presented, followed by an attempt to systematise the provisions of the protocols according to categories. The aim is, through this methodology, to better understand the

structure of the protocols and draw some further conclusions on their effectiveness or the challenges to their implementation.

II.4.1. Common features to the Alpine Convention protocols

- **Participation of regional and local authorities**. All protocols contain an identical provision requesting the Parties to define, within their institutional framework, the best level of coordination and cooperation between the institution and regional authorities directly concerned so as to encourage solidarity[12] of responsibility, in particular to exploit and develop synergies when applying the various policies defined by the protocols, and implementing measures under them.

- **Integration principle**. All protocols require taking account of the objectives of the respective protocols in other policies. The "other relevant policies" are specifically listed, except in the cases of the mountain farming and transport protocols, which contain a general reference to "other policies". The transport protocol furthermore requires the Parties to anticipate and evaluate the effects of other policies on transport[13].

- **Research and observation**. All protocols establish cooperation and joint action in the field of research. The results of research have to be integrated in a joint observation and information system[14] and made accessible to the public.

- **Education/training and information**. The Parties are requested not only to promote education and further training, but also to "provide information to the public about the objectives, measures and implementation of the protocols".

- With the exception of the ones on energy and transport, all protocols contain a specific article on "**international cooperation**". Once again, it is specifically referred to local and regional authorities. The protocols on soil and spatial planning explicitly require the removal of obstacles to international cooperation between territorial authorities. The spatial planning, soil and tourism protocols require, in addition, that "when local and regional authorities are unable to implement measures because they are a matter of national or international competence, they must be given the opportunity to effectively

12. The English (unofficial) translation of the soil conservation protocol uses the terms "shared responsibility" (art. 4(1)). This difference does not exist in the official Alpine Convention languages.
13. Art. 4(2).
14. The Soil Conservation Protocol goes even further and requires the establishment of harmonized databases (art. 20).

represent the interests of the population".

Whether these "standard" provisions are indeed systematically applied by all the States where the protocols apply, is at least doubtful. In particular, it is not evident that the integration principle is followed: in many cases the competent administrations tend to deal with "their" (e.g. water, tourism, agriculture, energy) competences without necessarily coordinating their activities with "neighbouring" administrations. In the end it is up to the political level to ensure such coordination.

- **Additional measures**. Interestingly, all protocols except the one on transport include a specific article stating that "the Contracting Parties may take additional measures[15] to those stated in this protocol". The added value of this clause is not very clear, since it seems to imply the existence of a kind of "full harmonisation background", which in international environmental law is rarely (if at all) the case. On the contrary it is quite evident that the measures prescribed by the protocols are minimum measures. A "gold plating" clause explicitly allowing Parties to take additional or stricter measures seems therefore not to be necessary. Moreover, some of the protocols touch on matters of EU competences (e.g. agriculture, product policy), where the EU has adopted full-harmonisation measures. One could therefore ask the question, how can in such cases the right to take additional measures (for example on mountain agriculture) than those set out in the protocol, be reconciled with the existence of EU full harmonisation measures[16]. Although international law ratified by the EU (and therefore the Alpine Convention) ranks higher than EU secondary law, a measure adopted on the basis of the "right to take additional measures" contained in the Alpine Convention protocols would remain a national measure and would therefore have to be compatible with EU secondary law. Whatever the reason for this clause is, it is also a fact that a minimum level of harmonisation is desirable in order to avoid competition distortions at the expenses of environmental protection. For example, it is not infrequent that Austrian economic operators in the skiing sector complain that the stricter application of Alpine Convention protocols in Austria as compared to other States where protocols have not been ratified or are applied less strictly, leads to competitive disadvantages.

15. The English (unofficial) translation of the protocol on energy uses the terms "further action", this difference does not exist in the official Alpine Convention languages.
16. As a matter of fact, at the time of ratification of the protocol on mountain farming the EC has made the following declaration regarding Articles 8 and 9 "The European Community recognises the principle of coexistence as the ability of farmers to choose between conventional, organic and genetically modified crop production, in compliance with the legal obligations for GMO labelling and/or purity standards. The relevant articles of the protocol on mountain farming should be interpreted in this light"; and the following declaration regarding Articles 7, 9 to 11, 13, 14 and 16: «The European Community considers that public support measures in favour of certain enterprises must be in conformity with its rules on competition as established on the basis of Articles 36 and 87 to 89 EC, and not distort or threaten to distort competition and affect trade between contracting parties» (OJ L 271/2006, p. 70).

II.4.2. An attempt to characterise the provisions contained in the Alpine Convention Protocols

Apart from the aforementioned common features, the protocols of the Alpine Convention contain very diverse provisions, in line with the very broad scope of the Convention.
Aware of the risks of over-simplification that this kind of exercise implies, this section presents an attempt to categorise the provisions of the protocols according to some outstanding distinctive features. A first categorisation (a) touches on the "bindingness" of the provisions (hard-law versus soft-law), whereas section (b) groups the provisions of the protocols on the basis of an (forcefully arbitrary) selection of categories.

a) "soft" versus "hard" law

Each protocol contains one or more articles laying down the objectives to be achieved in the respective fields. The means to pursue these objectives consist of both "soft-law commitments" and "hard-law provisions", where by the former it is meant provisions which are binding but are expressed in vague or "soft" terms such as to make their implementation fully and solely dependent on the good will of the Contracting Party and, furthermore, to make the assessment of their implementation all but easy.
It is no surprise that the Alpine Convention protocols, as instruments of international public law, strongly rely on soft-law. However, a good number of hard-law provisions are also to be found in the protocols of the Alpine Convention.
The soft-law provisions reflect the typical uneasiness that States have with international commitments (a problem which also exists in relation to EU law, but to a smaller extent since over the years the EU has transformed itself in a supranational governance level where most decisions are taken by qualified majority vote, whereas this is not the case in international law). A clear example are the provisions on the environmental "compatibility of projects" (Article 10 of the spatial planning and sustainable development protocol[17] and Article 9 of the tourism protocol[18]). If one compares these formulations with the

17. "*The Contracting Parties shall create the conditions necessary for examining the direct and indirect impacts of both public and private projects that could significantly and lastingly undermine nature, the landscape, the architectural heritage and the territory. This examination is to take account of the living conditions of the local population, particularly of its interests in relation to economic, social and cultural development. The result of this examination will be taken into account when deciding on authorising or implementing projects.*"
18. "*It is appropriate to establish prior assessment for projects likely to have a marked impact on the environment, within the existing institutional framework, which will be taken into account when decisions are made.*"

provisions of the EU directive on EIA[19] (Environmental Impact Assessment), one cannot but see a clear difference[20]: whereas the EU EIA Directive requires that all necessary measures are taken to ensure that an environmental impact assessment is carried out, the Alpine Convention spatial planning protocol only requires the States to "create the conditions necessary for examining". Furthermore, although no provision in the EIA directive would prevent the granting of a development consent even if it was proven that the project would have a very considerable impact on the environment, it does provides for some minimum requirements in terms of procedure and access of the public to the relevant documents. No such requirements, besides a very general obligation to "take into account the results of the examination", are to be found in the Alpine Convention protocols on spatial planning and the one on tourism.

Similar considerations apply to the assessment of the implications of projects on nature. Article 9 of the protocol on conservation of nature and the countryside[21] contains prescriptions (stricter than those contained in the spatial planning protocol) aimed at ensuring that projects do not permanently or significantly undermine nature and the countryside. However, Article 6(3-4) of directive 92/43/EC the "Habitat directive"[22] is clearly more precise in setting out in greater detail, also by referring to priority habitats and species, when the needs of nature are

19. Directive 85/337/EEC as amended. Consolidated text available on <http://ec.europa.eu/environment/eia/eia-legalcontext.htm>
20. Article 2 of dir. 85/337/EEC as amended reads: «*Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects.*» *Pursuant to Article 8 of the same directive «the results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.* »
21. *«1. The Contracting Parties shall create the prerequisites to ensure that, in the cases of measures and projects, whether private or public, that could significantly and lastingly undermine nature and the countryside, the direct and indirect effects on the natural balance and the landscape structure are assessed. The result of the assessment is to be considered when authorising and/or constructing such projects, particularly assuring that any avoidable impairments do not occur.*
2. In accordance with national law, unavoidable impairments must be offset by measures for conservation of nature and the countryside, while the impairments that cannot be compensated may only be allowed on condition that, having evaluated all the interests, the needs for nature and countryside conservation are not dominant. However, even in these cases, measures must still be taken to conserve nature and the countryside. »
22. OJ L 206/92, p. 7. Art. 6 (3-4) reads as follows: «*3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public. 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.»*

dominant and the project cannot be authorised.

In reality, one has to be aware that the EIA and the Habitat directives apply anyway in most of the Alpine States, therefore this difference is of small practical effect. However these examples are important in showing the difference of approach between EU secondary and international law.

A second aspect seems to play a role in explaining the different degree of "bindingness" between EU secondary law and the Alpine Convention. The use of "soft" terminology is not solely due to the unwillingness of the States to commit themselves to the stringent provisions of international public law. Another reason for the use of this language in the Alpine Convention protocols is intrinsic in the very wide scope of application and objective of these protocols, which in many cases contain measures which clearly go beyond strict environmental protection. Again, the direct reference to one or more examples helps clarifying this statement.

Article 18(2) of the tourism protocol refers to the staggering of holidays and establishes that *it is appropriate to support cooperation between States on staggering holidays and experimenting with extending holiday seasons*. At least in relation to the extension of holiday seasons, this is an area where conceiving hard-law provisions is very difficult, if not impossible. Another good example is Article 15 of the mountain farming protocol, requiring States to *reinforce and improve the quality of the services indispensible in order to overcome the unfavorable conditions faced by farm and forestry workers in mountain areas in order to link improvement of their living and working conditions to economic and social development in other fields and in other parts of the Alpine region*. Along the same line, Article 10 of the transport protocol requires States to adopt policy measures aimed at facilitating the modal shift, from road to rail, in the transport of goods, including an increased use of shipping. Of course one can devise prescriptive measures, such as road transport prohibitions, or apply tax incentives so to encourage rail or shipping, but this requires a mix of policy measures (legal, fiscal, economic), clearly going beyond pure "hard law" provisions.

Other enlightening examples occur in provisions of the protocol on tourism, such as that on the control of tourist flows, intended to *evenly disperse and accommodate tourists* (Article 8) or the one on *natural limitations to development* (Article 9), aimed at *ensuring that tourism development is adapted to the specific environment and available resources of the area or region concerned*. More than all other protocols, the one on tourism is of a "strategic" character. It touches on the environmental dimension of tourism as well as on the economic (competitiveness, Article 7) and social dimensions (development of weak regions, Article 17; services for disabled people, Article 23). Furthermore it anticipates measures in a field where legislation hardly exist (a legal basis on tourism was introduced for the first time in

the EU Treaty by the Lisbon Treaty[23], although this legal basis excludes the possibility to adopt harmonisation measures). The implementation of these measures requires not only concerted action at all levels of political decision-making and public administration, but also the direct involvement of the relevant (mostly private) economic sector. Several other examples of provisions which have the clear character of "economic-policy measures" can be identified in the Alpine Convention protocols. Some provisions even directly refer to the "general economic policy" of the Contracting Parties (e.g. Article 3, protocol on mountain farming, dealing inter alia with the fight against the abandonment of mountain regions or Article 15 dealing with the improvement of living and working conditions; Article 7 of the forest protocol dealing with forests as a source of employment; Article 9(3) of the spatial planning protocol dealing with the limitation of holiday homes). Indeed, these provisions often constitute the "strategic core" of the protocols, whose implementation necessarily requires: A. coordination between different levels, both internationally and nationally; B. that the responsible authorities are given or acquire sufficient political weight and competences. The successful implementation of these provisions is in fact very dependent on the possibility of orientating the market through very general measures of economic policy. Whether this happens, is often a matter of (competing) political priorities. Given that, within the current political priorities, the representation of the Alps both at national and at European/ international level is rather weak, it is quite frequent that these commitments remain a dead letter. It is thus important that the Alpine territories and competent authorities join forces in order to increase the overall "weight" of these priorities at all levels (regional, national and international). In this context, the newborn network of Regions of the Alpine Convention can play an important role.

In conclusion, the presence of "soft-law" provisions is not necessarily a weakness. It can also be a strength as it signals the presence of "strategic" measures. But there must be also a sufficient political will to make use of this "strategic" potential.

Analysis of the contents of the protocols leads to another conclusion. The protocols are very much interlinked with each other. Their successful application requires an integrated and concerted action by the various competent authorities as well as by the different departments within the same national or regional authority. This is even truer in cross cutting areas, requiring the thorough implementation of several protocols, such as climate change. But, as mentioned above, national and regional administrations are often structured in a way that responsibility for dealing with the various individual protocols is scattered across different departments, making coordination – and the exploiting of the "strategic" potential of the Convention - not always easy and effective.

23. *Art. 195.*

b) Categories of provisions

Another categorisation relates to the content-type of the provisions. The following broad categories can be identified:

Plans and programmes: with the exception of the protocols on mountain farming and on transport, all protocols require either the adoption or the modification of sectorial plans and programmes. Again, the respective provisions are very different. Some require drawing up specific plans and programmes (e.g. protocols on land planning and on nature and the countryside); while others call for the Alpine requirements to be taken into account in existing plans (e.g. protocol on energy, Article 2(a)). Since, however, there is no systematic requirement to publish these plans and programmes nor to report about their content, it is difficult to have a clear picture about the way these provisions are applied in practice.

Financial measures: since economic activities in the Alps are often carried out in conditions which, due to climatic conditions, distance from conurbations or other factors, make the costs of production and of supplying services higher compared to other areas (large cities or plain areas), it is no surprise that several provisions of the Alpine Convention protocols refer to financial incentives or support. In some case the respective provisions refer to the granting of incentives or compensation (e.g. Article 12(1) of the protocol on forestry and Article 7(2) of the mountain farming protocol). But in other cases they refer to general measures of economic policy, as, for example, in Article 14 of the transport protocol (referring to the application of the "polluter-pays" principle in relation to the use of transport infrastructure) or Article 11(a) of the protocol on land planning, requesting the States to "ascribe market prices to the users of resources that include in their economic value the cost of making these resources available".

Procedural measures: this category encompasses the provisions dealing with procedures related to environmental decisions, such as environmental impact assessments, participation of the public in the decision-making process, access to information and to administrative or judicial remedies. As mentioned above, the protocols on spatial planning (Article 10) and on nature conservation and the countryside (Article 9) both contain an article requiring an assessment of the effects of measures and projects that could "significantly and lastingly" affect nature, the countryside, the architectural heritage and the territory. The result of the assessment is to be taken into account in the authorisation procedure. The spatial planning protocol also requires that the authority of "neighbouring Contracting Parties" are given the time to express their views in case of transboundary repercussions of a project. The protocol on energy also contains a specific article dedicated to environmental impact analysis (Article

12) requesting an initial evaluation of the environmental impact "in accordance with national legislation and international convention and agreements", in relation to any planned power plant referred to in the protocol (hydropower, fossil fuel, nuclear as well as energy transport and distribution; all these projects would in any case fall under the scope of dir. 85/337/EEC as amended on EIA). It is worth highlighting that Article 2(2) of this protocol requires that in case of construction of new large power plants and of significant increase in the capacity of existing plants, the assessment shall include "the territorial and socioeconomic effects". This is a remarkable difference to directive 85/337/EEC as amended, which refers only to the environmental impact of projects: indeed, this is a point on which the Alpine Convention goes beyond EU legislation.

Reporting obligations and monitoring: all protocols of the Alpine Convention provide for the obligation on the Parties to regularly report to the Permanent Committee (the executive body made up of Contracting Parties' representatives) on the measures taken under the protocols. The report shall also cover the effectiveness of the measures taken. The Permanent Committee shall verify that the Parties fulfill their obligations under the protocols, draw up a report to the attention of the Alpine Conference which may issue recommendations in case it is found that obligations have not been met. In addition, the protocol on transport requires the Parties to "record and periodically update in a reference document the state, development, and use of or improvement on large-capacity transport infrastructure and transport systems and the reduction in environmental damage" (Article 15). A further article in all protocols requires the Contracting Parties to regularly examine and evaluate the provisions of the protocols and propose amendments should this be necessary.

The above is aimed at showing the very wide scope and diversity of the provisions contained in the Alpine Convention protocols. This diversity represents an asset, but also a clear implementation challenge, requiring adequate political will and administrative resources.
Before ending this section, the issue of reporting and monitoring of compliance deserves further elaboration. First of all it is useful to recall that the reporting provisions of the eight protocols have been "absorbed" by decision VII/4 of the Alpine Conference, adopted in 2002, which established a compliance procedure and set up a specific Compliance Committee in charge of this procedure. Instead of individual reports, the Parties are asked to participate in an overall compliance procedure.
The compliance Committee can propose, on the basis of the results of a periodical compliance report, that the Alpine Conference addresses recommendations to one or more Contracting Parties. Recommendations may, inter alia, include the invitation to draw up an implementation strategy accompanied by a specific calendar. The Recommendations are in principle to

be adopted by consensus but it is provided that, in case no consensus can be reached, a majority of 3/4 of the Parties is sufficient. This implies that, in theory, recommendations can be adopted by the Alpine Conference when the concerned Party disagrees. However, there is no sanction provided in case of failure to comply with the recommendations. Moreover, the Compliance Committee is composed of up to two representatives of each Contracting Party, it is not a fully independent organ and it is very unlikely that it will decide against the will of one Contracting Party. As a matter of fact, the first compliance report[24], adopted in March 2009 by the Xth Alpine Conference, contains only very general recommendations addressed to all Contracting Parties. This report does not say much about the way the individual provisions of the protocols are implemented.
The compliance procedure provides the Observers to the Alpine Conference (including relevant NGOs) with the possibility to request a compliance check in relation to an alleged case of non-compliance with a provision of the Alpine Convention or its protocols[25]. However, it is up to the Compliance Committee to decide whether to follow up such a request and it is very unlikely (and as a matter of fact it has never been the case) that the Compliance Committee would decide in favour of any such procedure.
A protocol on the resolution of disputes adopted in 2000, and which is independent of the Compliance Procedure, provides for a procedure in case of disagreement between Contracting Parties on the interpretation or the application of the Convention or one of the protocols. It can therefore, theoretically, also affect the implementation of a provision. If a consultative phase brings no result for the solution of the dispute, a specific procedure provides for the setting up of an arbitration panel, whose decisions are then binding. However, there is no means of enforcing the decision of the panel if the concerned Contracting Party refuses to do so. In any case, it is very unlikely that such a procedure will be used, as among Contracting Parties the principle of the non-interference with each other's national business seems to prevail. As a matter of fact, no use of this protocol has even been invoked so far.
All this reinforces the conclusion that the correct implementation of the Alpine Convention protocols depends very much on the attitude and procedures set up at national level. Both the compliance procedure and the protocol on the resolution of disputes are built on the principle of cooperation, they cannot be considered jurisdictional remedies in the classic sense. The only possibility of using the Alpine Convention in a judicial procedure depends on the availability of procedures at national level or, for EU Countries, on the possibility of invoking a violation of a provision of the Alpine Convention protocols which is also part of EU law, after ratification by the EU. This remedy, whose access to individuals is in any case

24. <http://www.alpconv.org/theconvention/conv06_CC_en.htm>
25. Chapter II.2.2(3) of decision VII/4 of the Alpine Conference.

precluded, is reserved to the Commission and to the Member States on the basis of Articles 258-260 EU Treaty. A precedent exists, where the Court of Justice found a Member State incompliant with EU law by virtue of the violation of a protocol of international law which had been ratified by the EU[26].
Finally, there are aspects of the Alpine Convention which the current compliance procedure cannot identify and assess. The Alpine Convention is not only about legal provisions, but also about structures which are set up either by official decisions (working groups) or voluntarily (networks[27]), either formally or informally. These structures often play fundamental roles in implementing the provisions of the Convention and in spreading information about the Convention's contents, without this being immediately reflected in the compliance reports.

III. Conclusions: Challenges and Outlook

1) The Alpine Convention, as a legal and policy instrument, has several merits:
   a. It focuses attention on the challenges of one specific area with specific territorial characteristics.
   b. It helps defend the political interests of the mountains against the "more powerful" plain areas and cities.
   c. As a first-comer, it is a model for other areas of the world (both positive and negative).

2) However, there is still an enormous and unused potential for improving the implementation of the Alpine Convention.

3) The Alpine Convention has simultaneously a specific scope of application *ratione loci*, covering part of the territory of nations and their regional and local authorities, and a very broad scope of application *ratione materiae*, which extends beyond the realm of traditional international environmental law. The Alpine Convention is not a purely environmental Treaty but a set of instruments necessitating, and dependent on, measures of general economic policy: it deals equally with nature protection and with the promotion of economic sectors which are crucial for the mountain economy. Its implementation is a challenge insofar as it requires political will, integration and long term strategies. Traditional "legal" criteria (e.g. number of cases brought to Courts) may not prove adequate to fully assess the effectiveness of the Alpine Convention.

26. ECJ, Judgment of 7.10.2004, Commission v. France, C-239/03, "Etang de Berre".
27. For example networks of municipalities <www.alpenallianz.org>, of cities <www.cittaalpina.org>, or tourist destinations <www.bergsteigerdoerfer.at> and protected areas <www.alparc.org>

4) The broad scope and often general formulation of the provisions of the protocols represents at the same time a great potential for promoting sustainable development and a drawback for enforcing specific provisions. The "soft-law" language of many provisions is in some cases a consequence of the wide scope of the Convention as an instrument of economic policy.

5) In some specific fields (e.g. water management, climate change) further protocols or legal provisions would be useful. However, prior to negotiating and adopting further thematic provisions, it is necessary to improve the implementation of the existing ones.

6) For a successful implementation of the Alpine Convention and its protocols the meeting of certain conditions is indispensable:
   a. Territorial authorities must identify themselves with the principles and objectives of the Alpine Convention and acquire the responsibility for its implementation; several regions in the Alps, unfortunately, still look at the Alpine Convention as an imposition by the States, rather than an opportunity.
   b. National authorities must support territorial authorities in implementing all measures requiring coordination at international and national level.
   c. Responsibility for implementing the protocols must be shared by or integrated in all relevant departments of the various administrations, beyond those in charge of environmental protection strictu sensu;

7) It is doubtful whether the current rules on reporting and monitoring, including the compliance procedure, are sufficient in contribute fully exploiting the potential of the Alpine Convention.

8) The merits of the Alpine Convention are not be found only in the provisions of the protocols, but also in the "structures" which are set up as a consequence of the Alpine Convention either voluntarily (networks) or by way of decisions of the Alpine Conference (working groups). Indeed, beyond the individual legal provisions, the potential of the Alpine Convention rests with the possibilities it creates to join forces, exchange experiences and set up networks. The current compliance procedure, focused as it is on formal aspects (whether the legal provisions are implemented), cannot fully reflect these positive attributes.

The Carpathian Convention: Specificity of the Methods to Respond to Mountain Challenges

Pier Carlo Sandei

Europe is characterized by a number of mountain chains, each representing a different natural, social and economic reality.

The Carpathians are Europe's largest mountain range, shared by seven Central and Eastern European countries: the Czech Republic, Hungary, Poland, Romania, Serbia, Slovak Republic and Ukraine. The diversity of the natural heritage is one of the biggest assets of the Carpathian region. The Carpathian area is a living environment for millions of people, yet it is subject to a variety of threats and adverse impacts from land abandonment, habitat conversion and fragmentation, deforestation, climate change, large scale migration on the one hand, and from industrialization, pollution and over-exploitation of natural resources on the other.

The Carpathian Convention, signed in 2003 in Kyiv, enshrines a common vision, integrates developmental and environmental goals, provides objectives for action and constitutes the strategic framework for cooperation to address these challenges in a transnational context. It is calling for the development of coordinated spatial planning policies aiming at the protection and sustainable development of the Carpathians. The Carpathian Convention is, at present, the only multi-level governance mechanism covering the whole Carpathian area, allowing for cross-sector integration and broad stakeholder participation.

I. Basic Facts about the Carpathians

The Carpathians represent a region with a remarkable natural and cultural heritage. They are the largest mountain chains in Europe, with a unique ecosystem and an exceptionally high biological diversity. A considerable number of endangered species (brown bear, wolf, lynx etc.) with almost 4,000 partly endangered plant species live in the Carpathians. They account for 30 per cent of the European flora. Culturally, the Carpathians are steeped in age-old traditions and are home to numerous different nationalities and ethnic groups.

Economically, the Carpathian Region is one of the least developed in Europe and therefore

the need to combine development and conservation – or actually development through conservation - was an essential driving factor in the development of the cooperation process among the countries.

II. Introduction to the Carpathian Convention

The Carpathian Convention is often called as the younger sister of the Alpine Convention but in reality is very much different from the only other international agreement for the sustainable development of a shared mountain region.

In 2001, UNEP/ROE was requested by the Government of Ukraine, to service a regional cooperation process aiming at the protection and sustainable development of the Carpathians, a major transboundary mountain range shared by the seven countries of the region (Czech Republic, Hungary, Poland, Romania, Serbia and Montenegro, Slovak Republic and Ukraine) (UNEP, 2004). **This is already a first difference with the Alpine Convention since in that framework the negotiation was always led by the countries themselves without external supporters facilitating the process.**

As a consequence UNEP-ROE promoted an Alpine-Carpathian partnership and organized several meetings of the Carpathian countries[1]. Finally at the Fifth Ministerial Conference "Environment for Europe" in Kyiv, Ukraine, in May 2003, the Carpathian countries adopted and signed the Framework Convention on the Protection and Sustainable Development of the Carpathians.

In this we can see another differentiation factor with the Alpine Convention given that the CC has been negotiated in just 2 years and ratified by all countries in less than 2 additional years. Moreover, the countries have already negotiated and signed a protocol on the Conservation of the biological and Landscape diversity (in application of art. 4) which has been signed by all countries and ratified by 4 countries in less that 2 years from the signature demonstrating the high commitment to the implementation of this international agreement.

Definitely the Carpathian Countries took advantage of being second comers in the field of MEAs for sustainable mountain development, but is also absolutely true that the willingness to cooperate was very high and this accelerated the negotiation process.

UNEP-ROE has been requested to act as the interim secretariat of the Carpathian Convention.

1. The Alpine-Carpathian partnership has been initiated and launched in the UN International Year of the Mountains 2002 by the Ministero dell'Ambiente e del Territorio (Ministry of the Environment and Territory) of Italy. In cooperation with the European Academy (EURAC) in Bolzano further meetings at expert level were supported. The process was sustained by Austria, Liechtenstein, the Netherlands and the WWF International.

And in this we see another difference since the Secretariat of the Carpathian Convention is established by the Convention itself while the Alpine one has been established by COP7 almost 12 years later the signature of the convention. Moreover the Alpine Convention has decided for an independent secretariat, while the Carpathians decided to entrust this role to UNEP which is administering several MEAs (CBD, Basel, CITES and Stockholm Conventions just to name a few) ensuring a high level of coordination and synergy.

The Convention on the protection and sustainable development of the Carpathians is a framework type convention pursuing a comprehensive policy and cooperating for the protection and sustainable development of the Carpathians. Designed to be an innovative instrument to ensure protection and foster sustainable development of this outstanding region and living environment, the Carpathian Convention is willing to improve the quality of life, to strengthen local economies and communities. It aims as well at providing conservation and restoration of unique, rare and typical natural complexes situated in the heart of Europe and objects of recreational and other importance, preventing it from negative anthropogenic influences on mountain ecosystems through the promotion of joint policies for sustainable development among the seven countries

Although it supposes to be further elaborated with thematic protocols, **the convention is already very binding** and for every topic an article prescribes general principles which have to be respected by the countries. While the Alpine Convention summarizes in its art. 2 the topics it aims to cover, **the Carpathian Convention articulates its mandate in 7 articles (from 4 to 11) with very specific prescriptions**. An example can be found in art. 7.4 on sustainable forestry where the convention commits Countries to "apply sustainable mountain forest management practices in the Carpathians, taking into account the multiple functions of forests, the high ecological importance of the Carpathians mountain ecosystems as well as the less favourable conditions in mountain forests" (art. 7.4).

Another example can be given by art. 4 on Conservation and Sustainable use of Biological and Landscape diversity which states that Parties shall pursue "policies aiming at the prevention of introduction of alien invasive species and release of genetically modified organisms threatening ecosystems, habitats or species, their control or eradication". Moreover art 4 establishes a **Carpathian Network of Protected Areas as an official body of the Convention** while the Alpine, only recognizes Alparc as useful instrument for the implementation of the protocol on Nature Conservation.

Another aspect to be underlined is the use of English as the only official language in the Carpathian Convention. The countries have since the beginning decided to use only English as the language of the Convention and this on one side for economic reasons (translation and interpretation costs would increase the costs tremendously) and for communication purposes since it makes easier to share information with other regions considering that in any case the translation of important documents would be ensured by each country or by observers. Moreover this greatly facilitates the exchange of information and coordination with global MEAs.

The observers play an essential role in the Carpathian Convention especially in promoting its implementation. The Convention foresees very general rules for the observer status which is open to "any national, intergovernmental or non-governmental organization the activities of which are related to the convention". In this respect the Carpathian Convention really represents an open and participatory process which for sure helped in building momentum for its negotiation and ratification and later for its implementation.

Since COP1, the Carpathian Convention is calling for the accession to the treaty also by the EU. Unfortunately this request has not been responded so far and this is quite surprising considering the value of such a platform for neighboring policy with Ukraine and the Balkans. The Convention has so far received great support from EU funds (especially INTERREG) nevertheless an institutional involvement of the EU is welcome by the countries.

At the moment of negotiating the Convention, the countries express the need to avoid as much as possible time consuming processes of reporting especially on the conventions implementation. In this sense neither the Convention nor the protocol on Biological and Landscape diversity foresee a system of compliance reporting to the other member States.

This might imply some more difficulties in identifying possible violations or lack of implementation of the convention, nevertheless is should allow to the countries to focus on the active achievement of the Convention goals than on filling in reports and questionnaires.

III. The Scope of Application

The Convention applies to "the Carpathian region (hereinafter referred to as "Carpathians"), to be defined by the Conference of the Parties (art. 1). In consequence this "purpose-fully-vague spatial definition"[2] led to complex considerations, pointing to problematic aspects of defining such a region.

The process of a spatial definition of the area covered by the Convention is characterized by the difficulty to find a compromise between the definition of a biophysical ideal on one side and on the other one political as well as socioeconomic considerations.

The delineation is of great relevance as it defines the application area of the Carpathian Convention and therefore the geographic area for relative measures. On the other side there

2. Fall J. and Egerer H., "Constructing the Carpathians: the Carpathian Convention and the Search for a Spatial Ideal", in *Revue de Géographie Alpine/Journal of Alpine Research* 92/2.

might exist financial matters (depending on future financial rules of the Convention) which depend on the delineation of the application area. For example in the Alpine Convention, financial contributions for the State Parties are calculated using a formula combining the geographical surface of the defined mountain region, the human population and national gross domestic product (GDP). Furthermore, the need for the scope of application to be in conformity with regional development policies and laws at the national level has to be expressed.

Due to different interpretations of the meaning "Carpathian Region" as referred in art. 1 of the Framework Convention, Romania signed on 22th May 2003 the Carpathian Convention with the following reservation: "The Government of Romania considers the term "Carpathian region" in article 1, paragraph 1 of the Framework Convention for the Protection and Sustainable Development of the Carpathians as designating the Carpathian mountain area, which is defined, on the territory of Romania, in accordance with physico-geographical and biological criteria, as well as with socio-economic criteria related to a reduced land use potential and to the relationship of the local population with the specific physical environmental features, and also in conformity with the criteria of the European Community regarding the delimitation of alpine bio-geographical regions, based on the Council Directive 92/43/EEC [Habitats Directive] on the conservation of natural habitats and of wild fauna and flora". Whereas the Hungarian position systematically called for a "scientific" definition of the area[3].

Considering that the scope of application is a very important factor in the successful achievement of the goals of the convention, its definition by consensus seems appropriate and actually necessary. On the other side, from a strictly juridical point of view, the scope assumes relevance only when a dispute would arise on a possible violation of the convention in a part of the territory of a member State. Considering the very limited number of such type of events we can argue that although important is not an essential element from a legal point of view for the implementation of the convention. And in fact 6-7 years later the signature of the Convention, there is still no agreement on the scope of application of the Carpathian Convention but this seems not to represent a factor limiting its further development (in terms of protocols) and or its implementation.

IV. Conclusions

From the above, it easily recognizable that the Carpathian Convention represents a positive example of international cooperation and in particular on the sustainable development of mountainous regions.

If there is no doubt that the Carpathian Convention has highly benefited from the existence of the Alpine Convention and by the cooperation with the latter, is absolutely true that it has developed an independent way of working and delivering results.

One could even say that the governance mechanisms set up by the CC could today serve the AC, where the spirit of cooperation between the parties is not always up to the expectations.

In any case what is undisputable is the relevance of Conventions such as the Alpine and the Carpathian ones for promoting and further facilitating the implementation of global MEAs and of EU legislation.

3. Fall & Egerer, op.cit.

Alps and Balkans: Potentials for Cooperation and Common Approach

Tanja Bogataj

I. Mountain Regions and International Mountain Partnership – The Wider Context for Cooperation and Common Approach

Mountain regions are similar regarding the landscape, their rich natural resources and biodiversity, the fact that they are water reservoirs, climate regulators and that they play economic, social and cultural functions; yet they may differ considerably regarding the political organization, economy, natural conditions, history and culture. Mountain regions, due to these listed elements, plus to the role they play as transport corridors, their touristical attractiveness, are even more threatened by development challenges, climate change, globalization and demographical changes, among others. Mountain areas also suffer from some weaknesses, namely poor access, lack of infrastructure, population decline, ageing population, natural handicap, limitated possibilities for employment etc. Key elements of sustainable mountain development processes are nested in international treaties, projects, funds, networks and cooperation.

The Alpine Convention[1] is member of the UNEP/FAO Mountain Partnership. Besides Carpathians, Caucasus and Central Asia, a priority area of cooperation is also the Balkans (Dinaric Arc region)[2]. The enlargement of the European Union (EU) in the direction of Western Balkans[3] is also one of the priority tasks of the EU (Council's conclusions, 2003).

Slovenia, which holds the current presidency of the Alpine convention (March 2009 to March 2011), titled its presidency's programme "*Alp as the development potential of Europe*". Among the three priority themes of the programme, Slovenia underlined the strengthening of the regional cooperation and mountain partnerships. The emphasis is put on the links and synergies between the Alps and the Dinaric Arc in a way of transferring the knowledge, experiences and good practice of the Alpine Convention. In this regard the Alpine Convention is considered a good example of policy and legal framework for achieving sustainable development and cooperation among contracting parties and relevant institutions, and as such it also stimulates improving of the environmental protection in the mountain area.

This approach includes an integrated approach for achieving sustainable and balanced development, and territorial cohesion through the transnational territorial cooperation;, and it represents a framework for joint actions in dealing with common challenges and problems of the respective area. This is important from many aspects, mainly regarding the quality of the exchange of knowledge and experiences with the aim of mutual understanding and learning, avoiding repeating the mistakes, overcoming obstacles of sectoral approaches and enforcing integrated approach to managing the respective mountainous area. The territorial cooperation and territorial cohesion highlights the importance of using endogenous resources as development capital, as well as the importance of integrated approach in assuring efficient transfer of public services, sustainable development, and efficient management and protection of natural and cultural values in respective area.

II. State of Affairs of the Environmental Law and Cooperation, with Emphasis on the Dinaric Arc Region

II.1. Policy and Legal Framework and Development

Different state of affairs in the field of environmental protection could be noted by the countries that are contracting parties of the Alpine Convention and countries of Dinaric Arc. The Alpine Convention was signed with the aim to better ensure the sustainable development of the Alpine space. Almost all contracting parties of the Alpine Convention are also members of the EU. They have incorporated high level standards of environmental protection already in their legislation and they are striving to achieve these standards by implementing it and with mutual cooperation in this field. Besides the frame convention, they have almost all ratified the Protocol on Conservation of Nature and the Landscape Protection. And they are also contracting parties of other international conventions and treaties in the field of environment protection.

Even more diverse legislation could be noticed between the Western Balkan countries, where the process of coordination with the EU standards has started, but is in some cases is far from being

1. Contracting parties are: Austria, France, Germany, Italy, Liechtenstein, Monaco, Slovenia, Switzerland and the EU. All information available on <http://www.alpconv.org>
2. The Dinaric Arc is a region of south-eastern Europe encompassing the region which includes portions of Italy, Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Kosovo under UNSCR 1244/99 and Albania.
3. The definition of the term "Western Balkan countries" is more political than geographical (defined by The Thessaloniki Agenda, European Council, June 2003) and consists of Croatia, Serbia, Bosnia and Herzegovina, Montenegro, Albania, Kosovo under UNSCR 1244/99, and the Former Yugoslavia Republic of Macedonia.

finished. What also differs among countries regards their status in the process, whether they are candidate countries (Croatia, Former Yugoslav Republic of Macedonia-FYROM) or not[4].
In the Thessaloniki Agenda for the Western Balkans "Moving towards European integration", the EU encourages the Western Balkan countries to introduce environmental policies and strategies geared towards compliance with the EU environmental law, and emphasizes that the environmental protection is an important element of sustainable development, and in particular, environmental issues should be addressed across the energy sector, especially in the scope of the Kyoto protocol.[5] From the different documents regarding the state of the environmental protection or legislation in the countries in the Dinaric Arc region[6] we can deduce that these countries are progressing on the transposition and harmonization of their legal and institutional frameworks with the EU environmental *acquis* and Directives, at different paces and dynamics.
On the basis of the national progress reports to the European Commission[7] we can deduce the state of the affairs and development of legislation in the field of environment in the countries of the Western Balkan:

1) From the progress report for 2009, it derives that Croatia[8] made good progress on the environment, especially in the field of air quality, industrial pollution control, risk management and climate change. However these progresses, considerable efforts are still needed in order to reach alignment with the *acquis* in the water sector and nature protection, as well as in strategic environmental assessment and access to justice in environmental matters, which need to be improved. The Strategy and Action plan for Biological and Landscape diversity were adopted, and the Nature Protection Act has been amended to ensure further alignment with the acquis. The list of Natura 2000 sites is not concluded yet.

2) Good progress has been noted in FYROM[9] on the implementation of the legislation on

4 EC Progress reports and reports on pre-accession partnership of the EU 2009; <http://ec.europa.eu/enlargement/rapport_2009_en.pdf>
5. Thessaloniki European Council, 19-20 June 2003, Presidency conclusions; <http://www.greekembassy.org/embassy/Content/en/Article.aspx?office=1&folder=167&article=11744>, p. 17. <http://www.see-educoop.net/education_in/pdf/comm-from-com-1--oth-enl-t02.pdf>
6. United Nations Environment Programme-Dinaric Arc and Balkans Environment Outlook; <http://unep-dabeo.org >
7. European Commission, Progress reports and reports on pre-accession partnership of the EU 2009; <http://ec.europa.eu/enlargement/key_documents/reports/2009/en.htm>
8. European Commission, Progress report, Croatia, 2009, <http://ec.europa.eu/enlargement/pdf/key_documents/2009/hr_rapport_2009_en.pdf> p. 62-63.
9. European Commission, Progress report, Macedonia, 2009, <http://ec.europa.eu/enlargement/pdf/key_documents/2009/mk_rapport_2009_en.pdf>, p. 68-69

environmental assessment and public participation. The national strategy and plan on protection and rescue were adopted. Progress was also made in the area of climate change, in particular on implementation of the clean development mechanism under the Kyoto protocol. Little progress has been noted in the filed of natural protection, in particular regarding the implementation of the management plans of the protected areas and adopted amendments of the Law on Hunting, however the national strategy and plan for nature protection have not yet been adopted and administrative capacity is still considered to be insufficient. The Commission considers the preparation in this area to be advancing moderately.

3) There was limited progress noted made in Albania in 2009 on environment[10] , in particular in the field of water and waste management, however the new draft Law on Environmental Protection, which incorporates a number of important Directives (IPPC, LCP, Seveso II, public participation, WFD) has not yet been adopted, and the new draft Law on Environmental Impact Assessment also waits adoption. There was some progress also in the field of natural protection. The total coverage of protected areas increased on 12,58 % of the territory and the government approved a decree on the criteria for the establishment environment of the biodiversity inventory and monitoring network. The Commission considers the preparation in this field to be advancing moderately.

4) For Bosnia and Herzegovina[11] some progress has been noted in this area. It has ratified some agreements, such as the Convention on Biodiversity and the Cartagena protocol on Biosafety, the Bern Convention on Conservation of European Wild Species and Habitats, but efforts are now important to ensure proper implementation. No progress has been made as regards the transposition of the Directive on Strategic Environment Assessment, and besides the National strategy and plan for protection of the biological and landscape diversity, no significant further progress has been made in the field of natural protection. The European Commission identifies that the transposition and implementation of the acquis in the field of horizontal legislation needs considerable improvement.

5) In Montenegro[12], the government adopted National Environment Policy, which includes national priorities in this field; also the alignment of environment legislation with the

10. European Commission, Progress report, Albania, 2009, <http://ec.europa.eu/enlargement/pdf/key_documents/2009/al_rapport_2009_en.pdf> p. 38.
11. European Commission,, Progress report, BiH,2009, >http://ec.europa.eu/enlargement/pdf/key_documents/2009/ba_rapport_2009_en.pdf> p. 48.
12. European Commission, Progress report, Montenegro, 2009, <http://ec.europa.eu/enlargement/pdf/key_documents/2009/mn_rapport_2009_en.pdf>, p. 48.

acquis has moderately advanced, however further efforts are required on implementation and enforcement of the legislation. In the field of natural protection the Nature Protection Law established the legal framework for the Natura 2000, however related by-laws have not yet been adopted. Several international agreements have been ratified (the Bern Convention, the Bonn Convention, the European landscape Convention etc.), also a Law on Mountain trails and amendments to the Law on natural parks were adopted, but the inspection measures and sanctions have not yet been adopted. The Commission considers the level of alignment has improved, however the implementation and enforcement remains challenges, and in so the preparation in this area is in early stage.

6) For Serbia[13], good progress can be noted in the area of the environment, particularly because of the implementation of the large package of laws and ratification of the several international conventions. The Law on Environment Impact Assessment and the Law on the Natural Protection were amended. In the field of natural protection an important step was made with the adaptation of the Law on Natural protection along with several by-laws, and a network was established to notify the areas of special conservation interest, however the national strategy for biodiversity conservation and action plan need to be finalized. The additional efforts need to be invested in capacity building and implementation of the water legislation.

7) For Kosovo under UNSCR 1244/99 the Commission reported[14] some progress in the field of environment. The Law on Environment Impact Assessment and the Law on Strategic Impact Assessment were adopted in March 2009, but they need to be revised in order to align with Community standards. There has been no progress with the adoption of the European standards in the area of natural protection, transposition of the Birds and Habitat Directives has been held back by delays of the Law on Natural Protection.

From different documents regarding the state of the environmental protection in the countries in the Dinaric Arc region we can assess that these countries consider the need for environmental protection, preservation of biodiversity and managing the economic development in sustainable way as a major objective, however due to historical, political, cultural and other factors, there are still some obstacles, internal and external, which need

13. European Commission, , Progress report, Serbia, 2009, <http://ec.europa.eu/enlargement/pdf/key_documents/2009/sr_rapport_2009_en.pdf>, p. 44-45.
14. European Commission, Progress report, Kosovo under UNSCR 1244/99, 2009, <http://ec.europa.eu/enlargement/pdf/key_documents/2009/ks_rapport_2009_en.pdf> p. 38-39.

to be overcome in this area to improve the present situation. For instance the conflict associated with the break up of the former Yugoslavia caused heavy damage to natural resources, there are areas with high level of unemployment and poverty and high pressure by the economic sector to advance the activities not necessarily in sustainable way (tourism etc.). The United Nations Environment Programme (UNEP) has launched the process called Dinaric Arc and Balkans Environmental Outlook (DABEO)[15] which will provide an integrated picture of environment state and trends in the mountainous region including all or parts of Albania, Bosnia-Herzegovina, Bulgaria, Croatia, FYROM, Greece, Montenegro, Serbia and Slovenia. This will represent a valuable contribution for future cooperation, activities and measures in this area.

II.2. Critical Issues in Environmental Protection

Main critical issues and risks regarding the environmental protection in the mountain areas are related to balancing environmental protection and preservation with high development needs and pressures of the economic activities, especially tourism and transport. This is related also to awareness and behavior of the residents, tourists and other visitors in these areas. From the document, assessing the state of the affairs of environmental protection in the countries within the Dinaric Arc region, and strategic and legal documents of these countries[16] we can identify some main risks and possible controversial aspects.

These main obstacles are:

a) insufficient government commitment to adapt and implement required protected areas regulations as well as to provide the necessary budget allocation;
b) pre-selected protected areas don't materialize due to delays in legislative process or other obstacles;
c) influential stakeholders resist the establishment of protected areas and adoption of key reforms in management of sites[17] ;
d) inadequate capacity to implement activities;
e) lack of financial resources;
f) lack of awareness regarding biodiversity conservation; and
g) lack of collaboration between various institutions.

Furthermore, governmental commitment to preserve respective ecosystem weakens against

15. United Nations Environment Programme-Dinaric Arc and Balkans Environment Outlook , <http://unep-dabeo.org/>
16. United Nations Environment Programme-Dinaric Arc and Balkans Environment Outlook, <http://dabeo.unep.org/>
17. World Bank document on Bosnia and Herzegovina, 2008, http://unep-dabeo.org/

pressures for non-compatible economic development; tourism growth or growth is rapid but does not follow sustainable path; weak institutional implementation capacity and high interdependency of institutions for joint activities[18]. Post-war fast track of economic development, also due to the opening EU accession discussions, affects biodiversity. Another serious problem is the high rate of unemployment in these areas where tourism is the only employment opportunity for many residents. Obstacles to the biodiversity conservation are limited capacity for biodiversity management, lack of coordination, lack of environmental awareness regarding the karst ecosystems and high tolerances of illegal behavior[19].

As main problems and threats of the Western Balkan countries in achieving sustainable development, Čalić[20] (2010) identifies the poor legislation, and the gap between the officially in all planning documents claimed objective that the rich biodiversity should be preserved, and the reality of this preservation in practice. However, comparing the progress reports of the European Commission from 2007 and 2009, we can derive that significant progress in transposing and implementing the European standards and acquis in the field of environment in the analyzed countries has been made, but considerable additional efforts are still needed for the efficient implementation and enforcement of the legislation. The noted progress also proves the importance of the environmental law and institutional framework for proper natural protection.

III. Proposals for Cooperation and Activities

III.1. Initiatives for Cooperation in the Area

There are some successful initiatives for cooperation, which significantly contributed to improved environmental protection in this area, such as the Joint Statement of the Dinaric Arc's countries for joint cooperation in implementing the obligations from the Biodiversity Convention (CBD) - Dinaric Arc (2008), the Joint Statement of high officials of the contracting parties of the Sava River Basin (2007), the existing sectoral bilateral or multilateral agreements among countries of the EU, countries of the Alpine Convention and countries in the area of Dinaric Arc, The Dinaric Arc Ecoregion Project (DAE), and the Dinaric Arc Initiative.

The Dinaric Arc Ecoregion Project (DAE) is a part of the WWF's Protected Areas for a Living Planet Programme (PA4LP), which is helping Slovenia, Croatia, Bosnia and Herzegovina, Montenegro and Albania to fulfil their obligations under the CBD Programme of Work on Protected Areas.[21]

18. National Strategy for Sustainable Development of Montenegro; Ministry of tourism and environment protection, 2007; <http://unep-dabeo.org/>
19. World Bank document on Croatia Karst ecosystem Conservation project, 2002, <http://unep-dabeo.org/>
20. Čalić, J., Western Balkans in a wider context, Geographical Institute Jovan Cvijić, Serbia, 19.4.2010; presentation at the International Conference "Territorial Potentials for the Co-operation with Western Balkans; <http://www.cilj3.mop.gov.si>

III.2. Future Cooperation and Activities

To improve environmental protection in the Dinaric Arc region, the ongoing initiatives and projects should be continued, as well as the harmonization of the legal and institutional frameworks of the countries in this region with the EU environmental *acquis*, and the directives should be pro-actively implemented and upgraded. However, to ensure opportunities, a future to mountain areas, it is essential to achieve sustainable development and efficient implementation of the environmental legislation, without forgetting the implementation of other instruments, such as a common framework for joint projects, the development of financial instruments, networks, platforms, inclusion of residents, use of endogenous resources as development potentials, etc..

The overarching challenge to maintain biodiversity from the Alps to the Dinaric Arc region lies in properly balancing economic development with the conservation of globally significant natural resources. Intergovernmental cooperation on the basis and in the frame of the Alpine convention ensures the sustainable development for the whole Alpine space, and as such, it enables its protection, but under a development perspective. This frame could also be established for the Dinaric Arc region to stimulate the mobilization of potentials for cooperation. Although there might be different background, it is important to identify common themes and interests and build a consensus about it.

The Alpine Convention is a framework which lays down general objectives to pursue a policy of conservation and intensified cooperation, in particular in 12 thematic areas: population and culture, land use, air quality, soil protection, water, nature protection and landscape tending, mountain farming, mountain forests, tourism, transport, energy and waste. The Alpine Convention is a commitment to legal, scientific, economic and technical cooperation and a common policy of research and observation. It stresses the interests of the resident population, and it aims in providing them the conditions for a quality of living and working in this area.

Common themes or issues of common interest between the Alps and the Dinaric Arc region, and among the Dinaric Arc region countries as well, could be: sustainable development, climate change adaptation and mitigation, environmental protection, natural conservation, cooperation within the network of protected areas, water management, spatial planning,

21. Dinaric Arc Ecoregion project (DAE), <http://www.cbddinaricarc.com/content/view/14/30/>

transport, forests, energy efficiency, natural hazards protection, indicators and monitoring, research etc.. The Alpine Convention has a technical and content know-how to be transferred in this regard. Experiences and knowledge of each included country could significantly contribute to constitute a framework as a basis for cooperation, common projects and mutual understanding. The frame for this cooperation could represent the so called "resolution for sustainable development of Dinaric Arc and neighbor regions", for which some countries and international environmental organizations already expressed strong support and interest.

This cooperation and activities could contribute to stimulate and improve the environment protection and provide sustainable use and management of endogenous natural, cultural and human resources by implementing the principle of comprehensive area approach in multilateral cooperation and partnership in the respective area. Within the (pre-) accession process each Western Balkan country is progressing in this field. But with the proposed legal and policy framework the Dinaric Arc area as a region could also progress and improve nature conservation, environmental protection and achieve more successfully sustainable development. The cooperation with the contracting parties of the Alpine convention could have for this area a kind of "pull effect" and could also contribute in dealing with common development challenges such as climate change, energy supply and efficiency, accessibility and connectivity, culture and improved implementation at the regional and local level and inclusion of the residents. These activities would form a parallel process to the EU (pre-) accession process and bilateral or multilateral projects. Both processes can have positive effect on each other. They can contribute to overcome obstacles in different historical, political and legal framework and trying to find common points and challenges to work jointly towards the common future, as it was and it is the process within the Alpine convention's contracting parties.

IV. Conclusion

The article is discussing the context, advantages and potential of the range approach for fostering the regional cooperation between Alps and Dinaric Arc in order to improve the management of these two European mountain ranges and as a consequence improve the environmental protection and achieving the sustainable development in these areas. The article is arguing the importance of setting the broader legal and policy frame for the Dinaric Arc and neighbour regions as transfer of experiences and good practice of regional and international cooperation form the Alpine Convention and frame for the implementation of the Environmental law and improved environmental protection in the mountains.

In the article we discuss the role of the European and domestic law when dealing with the environment in mountain areas and other instruments necessary for achieving better environmental protection of these areas. Also critical issues in environmental protection in mountain areas are discussed, and on this basis the proposed potentials for improvements in this area in the future.

The aim of the article was to identify the possible common ground and the need for future common approach and cooperation between the Alps and Dinaric Arc region. The emphasis is on giving the general insight on possible future cooperation in a way of mutual learning and improving the natural protection and sustainable development in mountain regions, which is also the aim of the current presidency of the Alpine Convention.

The Pyrenees: Missing a Convention?

Agustín García-Ureta with Iñaki Lasagabaster and Iñigo Lazcano[1]

The purpose of this paper is to consider certain matters regarding the Pyrenees and whether an international law instrument covering this mountain range should be adopted. As argued below, an international instrument, e.g., a convention, could certainly provide a legislative and organisational framework the Pyrenees currently lack but do require for their coherent protection and development. Likewise, it would also reinforce the position of this mountain region and highlight the problems and challenges it currently faces.

I. General Matters: Geographical data, Species, Glaciers and Infrastructures

The Pyrenees is a mountain chain of approximately 55,000 km^2 spreading over France, Spain and the Principality of Andorra. Extending for approximately 450 kms , from the Bay of Biscay to the Mediterranean Sea, the Pyrenees divide France and Spain, the Principality of Andorra constituting a small territory of 484 km^2 between these two States. The mountains reach more than 3,000 metres in its central section. From a climatic viewpoint, the Pyrenees are basically divided into three bioclimatic sectors. The Western sector is affected by mild and humid Atlantic air streams, the central continental sector by colder and drier weather, and the Eastern section by the Mediterranean influence, bringing warm summer periods. In the Southern Pyrenean lower ranges (so-called pre-Pyrenees) the predominant climate is also Mediterranean. The Pyrenees contain a rich variety of landscapes, species, mountain torrents, and glaciers. The Pyrenees are home to a variety of outstanding fauna. About 64 species of mammals inhabit the Pyrenees, including endemic subspecies. As regards vegetation, the Pyrenees contain different altitudinal forests. At lower altitude the predominant species are

1. Professors of Law, University of the Basque Country (Bilbao). Research project MICINN Pirineos: DER2009-14775-C03-01. This paper is based on a previous version prepared and presented by Agustín García-Ureta to the Conference held in Innsbruck on 27-28 April 2010. The authors wish to thank Marco Onida and Ludwig Krämer for their kind invitation to participate in this conference; Patricia Quillacq (Alpine Convention Secretariat) for data concerning Andorra; and Marta Múgica and Carlota Martínez (Europarc-Spain) for useful information on nature protection sites in the Pyrenees. Errors and omissions are only attributed to the authors.

of Mediterranean origin. Medium heights are characterized by the presence of mixed forests, e.g., pine forests and Mediterranean black pine. High mountain forests are mainly composed of mixed beech with mountain pine. Like the Alps, there are a number of glaciers in the Pyrenees covering an area of 450 hectares. All peaks containing glaciers are above 3,000 metres.[2]

Transport in the Pyrenees has always been problematic. The principal roads and railroads between France and Spain run basically in the valleys at the Western and Eastern ends of the Pyrenees, respectively, near sea level. This may be explained by the difficulties to overcome the central sections of the mountain chain. Between the two ends of the belt there are, however, some passes such as the Col de la Perche, between the valley of the Têt and the valley of the Segre, the Port d'Envalira, the highest mountain pass in the Pyrenees and also one of the highest points of the whole European road network (2,047 metres), and the Col de Somport or Port de Canfranc.[3] Andorra has a road infrastructure of approximately 279 km. It lacks railways and airports save some heliports. There are two international railway lines between Spain and France (Irún-Hendaye on the Western side, and Port Bou-Cerbere on the Eastern side). Approximately 100 million tonnes pass through the Pyrenees by road every year. The two main railway lines transport approximately 6,5 million tonnes per year. In recent times Spain and France have expressed their interest in the construction of a new railway line crossing the central part of the Pyrenees with a 40 kilometres long tunnel. The connection has been funded with 5 million Euros by the European Union for the development of studies between 2007 and 2013.

Among the different infrastructures carried out in the Spanish portion of the Pyrenees those regarding water projects could be regarded as the most damaging in terms of environmental aggression, human impact and loss of valued agricultural lands. The majority of those projects were carried out in the 50s, 60s and 70s of the last century flooding vast extensions of the territory and requiring the search for new settlements for the local populations, an objective contradicting other policies aiming at maintaining the inhabitants in their original villages whilst supporting their traditional activities. Nowadays, this trend has been somewhat reversed despite the decision to increase the capacity of Yesa reservoir in the Autonomous Community of Navarre, a project affecting the Way of St. James, or the construction of Itoiz reservoir, also in this province, which led to a contentious discussion before the Spanish courts and also before the European Court of Human Rights.[4]

2. Gonzalez Trueba, J.J., *et al.*, "Little Ice Age glaciation and current glaciers in the Iberian Peninsula", (2008) *The Holocene*, 551.
3. Another tunnel to mention is Bielsa-Aragnouet (3,070 mts.).
4. *Gorraiz Lizarraga v. Spain*, judgment of the ECtHR of 27 April 2004.

Ski resorts logically cause controversy. Enlargement of ski resorts and connection between existing installations, such as the project to link three ski resorts in the Autonomous Community of Aragón, is one of the most important trends in the Pyrenees. Apart from the environmental impact of these works, some voices argue that this type of tourism leads to an intolerable and sudden rise in the number of tourists also encompassing a boost of constructions and services only used during a small part of the year.[5] It has also been claimed that what is sought after "in almost every case" is an increase in visitor numbers with little thought given to sustainable development perspectives.[6] Besides, this tendency does not necessarily support the local populations since there is a constant abandonment of villages. Notwithstanding the aforementioned, other voices argue that ski resorts support different activities throughout the year and not only during the ski season.[7] Last but not least, it should be noted that a majority of ski resorts in the Pyrenees use artificial snow machines with high energy and water consumption (approximately 13,000 kw/h per hectare; 1 ha., requiring 4,000 m3 of water).[8]

II. The Authorities

There are three French Regions alongside the Pyrenees: Aquitane (41,308 km2) with four departments (Dordogne, Gironde, Landes, Lot et Garonne, and Pyrénées Atlantiques), Midi-Pyréneés (45,348 km2) with 8 departments (Ariége, Aveyron, Gers, Haute-Garonne, Haute Pyrénées, Lot, Tarn, Tarn-et-Garonne), and Langedoc-Roussillon (27,376 km2) with 5 departments (Hérault, Pyrénées-Orientales, Aude, Lozère, Gard).[9] There are four Spanish Autonomous Communities affected by the Pyrenees: Basque Country (7,234 km2) Navarre (10,421 km2), Aragón (47,719 km2), and Cataluña (32,000 km2).[10] Spain and France are Member States of the European Union whilst Andorra maintains a peculiar status. This means, inter alia, that none of the basic regulations regarding the environment or other related EU policies apply in

5. Plataforma en Defensa de las Montañas, "Informe sobre el esquí alpino y el urbanismo en las zonas de montaña a de Aragón": <www.plataformamontanas.es/index.php?option=com_docman&task=cat_view&gid=39&Itemid=66> at p 66-69.
6. Clarimont, S., and Vlés, V., "Pyrenean tourism confronted with sustainable development: partial and hesitant integration", (2009) *Journal of Alpine Research* < http://rga.revues.org/index978.html>
7. Gobierno de Aragón, "Estudio sobre el sector de la nieve en Aragón (October 2009): <http://www.aragonparticipa.aragon.es/images/stories/procesos_participacion/mesa_montana/09022010/estudio1.pdf> <http://www.aragonparticipa.aragon.es/images/stories/procesos_participacion/mesa_montana/09022010/estudio2.pdf >
8. UICN France, "1985–2005: 20 ans de loi Montagne. Bilan et propositions", at p. 11: <http://www.uicn.fr/IMG/pdf/UICN_France_-_Bilan_loi_montagne.pdf>
9. These figures refer to the total surface of the Departments, the one affected by the mountain range being more difficult to determine with accuracy.
10. Same as the previous note, *supra*.

the Principality. In addition, Andorra is Party to a limited number of international environmental conventions, namely the Convention on the Conservation of European Wildlife and Natural Habitats (Bern 1979); the UN Convention for the protection of the Ozone layer (Vienna, 1985), the UN Convention on Wetlands (Ramsar, 1971), and the UN Convention on the control of transboundary movements of hazardous waste and their disposal (Basel 1989).[11]

II.1. Spain

Unlike France, Spain does not have a law specifically and comprehensively devoted to the mountains despite the enactment of Law 25/1982, on mountain agriculture, and Law 45/2007, on the sustainable development of rural areas. Rather, there are different pieces of legislation dealing with matters that affect the mountains, the activities carried out in them and consequently in the Pyrenees. In addition, the decentralised structure of Spain means that different authorities may intervene in matters related to the mountains. Even though the Spanish Parliament is in charge of the adoption of so-called "basic" rules, that is, norms that must be complied with throughout Spain, most of the powers are shared with the Autonomous Communities. Therefore, the latter are entitled to adopt their own policies whilst respecting State rules, and also further protection measures.[12]

(a) Arguably, the most important powers are those regarding town and country planning,[13] bearing in mind the exponential development of projects that has taken place in the last fifteen years in Spain, with disastrous effects, albeit with arguably less impact in some parts of the Pyrenees. Nevertheless, as indicated above, diverse controversial projects affecting this mountain range, i.e., those concerning ski installations and the following urban projects, have emerged in the last decades with opposition from the local population and NGOS alike. It is mainly for the Autonomous Communities to set out the rules concerning town and country planning, the State guaranteeing basic equal conditions on this matter.[14] However, the State is not entirely deprived from powers regarding the adoption of policies affecting the Autonomous Communities while developing its powers in areas such as communications, transport, energy and the protection of the public hydraulic and maritime domains. It should be observed in this respect that the State is empowered to authorise different large infrastructure projects that in principle prevail over the powers of the Autonomous Communities, e.g., prisons, transport of energy, army installations.

11. The Government of Andorra has also approved the signature of the European Landscape Convention, Florence 2000, on October 6, 2010, and of the UN Convention on Climate Change, on November 18, 2010.
12. Article 149(1)(23) of the Spanish Constitution; Article 193 TFEU.
13. Article 148(1)(iii) of the Spanish Constitution.
14. Constitutional Court Judgment 61/1997.

(b) The environment is another sector affected by State rules even though it is shared with the Autonomous Communities. However, the Spanish Parliament has never attempted to adopt a general mountains Law like its French counterpart. The basic piece of legislation in this particular respect is Law 42/2007, on the natural patrimony and on biodiversity. However, it does not single out the Pyrenees as a particular territory deserving special protection nor provides special rules focusing on mountain chains, albeit it contains the category of so-called "natural monuments". This includes spaces or elements of nature consisting of formations of remarkable beauty, rareness or singularity.[15] The Law defines "mountain areas" as continuous and ample territories of high altitude in comparison with other surrounding territories, the physical characteristics of which produce an ecological gradient conditioning the organisation of ecosystems and affecting living creatures and human societies.[16] These areas are designed to achieve the ecological connectivity of the territory. For the attainment of that purpose the Law gives priority, among other things, to mountain areas. In addition, it requires public authorities to promote the drafting of guidelines on the conservation of mountain areas bearing in mind, as a minimum, landscape, water and environmental values.[17] However, the Law neither provides further directions on these matters nor criteria for minimal harmonisation of those questions. So far there has no been any attempt, for instance, to protect mountain summits, the purpose of such figure being the safeguard of the integrity of the mountain summit from human activities, e.g., windmills, telecommunication installations, and artificial degradation in general.

(c) As said before, protected areas are abundant in the Pyrenees region. Some of them are of EU origin, (SPAs and SCAs) and others depend on national and/or regional categories. Most of the categories are to be classified by the Autonomous Communities. The State may only designate national parks with the previous agreement of the corresponding Autonomous Community. The management of those areas depends on the Autonomous Communities. Two of them, Aragón and Cataluña, are in charge of two important National Parks, Ordesa and Monte Perdido (of approximately 15,700 ha.) and sharing common characteristics with the French Pyrenees National Park (*Parc National des Pyrénées*, 45,700 ha.); and Aiguës Tortes with 14,119 ha. The other Autonomous Communities, Basque Country and Navarre do not have any national parks but they also manage rich and varied nature protected areas.

15. Article 33.
16. Article 3(1).
17. Article 20.

(d) Water law is another field where there is a convergence of competences. However, unlike the environment, the State enjoys further powers since, according to the Spanish Constitution, all waters flowing alongside two o more Autonomous Communities [i), inter-Community river basins)] are to be managed by the State. If those waters only flow within the territory of an Autonomous Community then it is for the latter to manage those resources [ii), intra-Community river basins], including the carrying out of water infrastructure projects, e.g., dams, whilst complying with the river basin provisions of water legislation. In the case of the Spanish section of the Pyrenees, the majority of the waters belong to the former category [i), *supra*], in particular the Ebro river basin which is the most important and affects the Basque Country (Southern part), Navarra, Aragón and Cataluña, thus depriving these Autonomous Communities from exercising key functions in this matter. Unlike Aragón and Navarra, Cataluña is in charge of an intra-Community river basin encompassing the rivers that flow from the Pyrenees to the Mediterranean Sea, and covering 9,500 km^2 approximately. The Basque Country also enjoys an intra-Community river basin in the case of waters flowing to the Cantabrian Sea.

(e) The Pyrenees include an important variety of forests, either at low, medium and high altitude. In addition, it should be noted that approximately 11% of forests are included in protected areas in Spain. Forestry law follows the usual division of powers between the State and the Autonomous Communities, that is to say, the former adopts basic rules (Law 43/2003) and the latter are allowed to approve further additional measures. Law 43/2003 is entitled "Montes" Law (literally "mountains law"). However, it should be noted that the term "montes" is not related to the common notion of mountains, e.g., natural elevations of the earth surface rising more or less abruptly from the surrounding level,[18] but to any surface covered with vegetation, either trees or bushes, and carrying out environmental, landscape, productive, amenity or protective functions.[19] Law 43/2003 does not contain specific provisions for forests located in mountain areas. However, some of its provisions certainly address matters concerning those forests. This is the case of forests regarded as (i) "public domain" and so-called (ii) "protective forests". This second category includes forests that may avoid or reduce avalanches or landslides, or those situated alongside streams or rivers. The Autonomous Communities are entitled to adopt other categories, provided they contribute to the protection of biological diversity, fauna and flora, or are located in areas included into Natura 2000 areas or into any other protected areas.

18. Oxford English Dictionary.
19. Art. 5.

(f) The Autonomous Communities whose territories form part of the Pyrenees have not adopted specific and comprehensive rules for the region albeit they have approved diverse plans with different legal impact. The laws creating these Communities and setting out their powers (so-called *Estatutos*) do include the mountains and also the environment among their competences. This is the case of Aragón with Organic Law 5/2007, which refers to the mountains among its exclusive powers. Likewise, Organic Law 6/2006 of Cataluña indicates, within the rules concerning the environment, that public authorities must adopt rules to guarantee a special treatment for mountain areas. Organic Law 13/1982, of the Autonomous Community of Navarra also includes mountain areas within its exclusive competences albeit with due respect to State rules on this matter. However, the Autonomous Community of the Basque Country does not expressly mention the mountains among its powers. Adopting cross-sectoral laws for the Pyrenees appears to be a thorny task, at least in Spain. Perhaps one of the clearest examples of the difficulties to adopt comprehensive laws on mountain areas may be found in the attempt in the Autonomous Community of Aragón to approve a bill in 2002. It covered various aspects such as water management, transfrontier co-operation, basically with the French authorities and also within the framework of the Pyrenees Community of Works, the role of local authorities, rural development projects, management of natural resources and also the regulation of sport activities. Even though the bill was based on a *prima facie* comprehensive approach to the different types of activities affecting the Pyrenees, the attempt failed due to strong opposition from certain quarters which led to its withdrawal in September 2002. Cataluña adopted Law 2/1983 for high altitude mountain areas. The Law acknowledges that even though these areas occupy one fifth of the territory of the Autonomous Community they merely represent 2% of the whole population. The law is mainly devoted to improve their economic resources, in particular, agriculture, craftworks, tourism, create new infrastructures, halt migration from those areas, and protect the environment.

II.2. France: The case of the Mountains Law of 1985

Unlike Spain, France remains a centralised State notwithstanding the adoption of some decentralisation measures, particularly in 1983 and 2004, the scope of which is beyond this contribution. However, the key Law to examine is basically the Development and Protection of Mountains (Law 85-30),[20] which replaced a 1977 National Directive on Mountain

20. This Law has been subject to several amendments. See Carraud, M., and Davignon, J-F., "La montagne: entre aménagement et protection", (2007) AJDA 1278; Charles, H., "La loi montagne en région PACA: 20 ans et après? Rapport introductif", (2005) RFDA 499; Morand-Deviller, J., "Rapport de Synthèse", (2005) RFDA 533; Danna, P.P., "Vingt ans après, que faire de la Loi montagne", (2006) *Droit de l'aménagement, de l'urbanisme et de l'habitat*, p.29.

Development and Protection. The Law could be regarded as a compendium of prima facie well designed principles and instruments for the attainment of the objectives it sets out. However, it should be noted that some of its provisions have progressively been included into other Codes, such as the Rural, Forests and Town Planning Codes. The Law was accompanied by Law 2005-157, of 23 February 2005, regarding the development of rural territories. This Law took into account the decentralisation process and the need to co-ordinate the activities of public authorities affected by mountain ranges. Law 2006-11, of 5 January, foresees the grouping of all laws and regulations concerning the mountains in a future mountains code.[21]

(a) The Law 85-30 acknowledges that mountains are territories where equitable and sustainable development constitutes an object of common concern for the whole nation.[22] It aims to enable those territories to achieve standards of living comparable to those existing in other regions. Moreover, the Law assumes that it is necessary to adapt the national provisions to the specificity of the mountains, and the general provisions governing mountain development to the particular situation of each range or each part of a range.[23] As in the case of the Alpine Convention, the integration principle is central to the Law. Therefore, mountains' needs must be integrated in economic and social development plans adopted at national and regional levels. The Law provides that mountain zones comprise municipalities or parts of municipalities with limited land-use possibilities and a substantial increase in the cost of works due to very difficult climatic conditions caused by altitude, and very short agriculture periods; or, at a lower altitude, the fact that most of the territory comprises abrupt slopes that make mechanised farming unworkable, or for which specific and expensive machinery has to be used; or a combination of those two factors. The Law also takes into account the existence of mountain ranges, such as the Pyrenees.[24] This requires the development of inter-regional policies for the management of the range. Institutional arrangements are also an important part of the Law. As considered below, this matter should be one of the central questions under a future international law instrument for the Pyrenees alongside the Alpine Convention. Unlike Spain, the Law creates specific institutions dealing with mountains both at central level and for each range. First, the National Mountains Council (*Conseil National de la Montagne*). This institution has an advisory role regarding policies affecting mountains.

21. Marchand, C., *Droit du litoral et de la montgane* (Litec, 2009), p. 315.
22. Article 1.
23. Article 8.
24. The following mountain ranges are considered: Jura, Vosges, Alps (formerly Northern Alps; and Southern Alps), Corsica, Central Range and Pyrenees.

The president is the French Prime Minister. It has representatives from Parliament, trade unions, associations of local authorities and other associations. The State must inform this Council on any investment programmes carried out in the different mountain ranges. Secondly, a Council for each of the mountain ranges (*Comités de massif*). They comprise representatives from the regions, departments and municipalities, apart from other associations, e.g., those concerned with ski installations. These councils suggest measures for the sustainable development of the mountains and give their opinions concerning the carrying out of new tourist resorts. The 2005 Law reinforced their role since they are currently in charge of the preparation of strategic spatial plans for the mountain ranges. The regions affected wholly or partially by a mountain range may also constitute a trans-border organization (*Entente interrégionale de massif*).

(b) Agriculture is one of key matters of the Law. However, this is not the only provision dealing with this subject since both the Rural and the Town Planning Codes contain rules to promote this type of agriculture. Of particular interest is the creation of a mountain label to be granted if the production, livestock, fattening, slaughtering, manufacturing, processing and packaging of foodstuffs (save wines), non-food and non-processed agricultural products, as well as raw materials used for animal feed or for the manufacture of food and products, are located in or come from a mountain zone.[25] Also related to the economy, the Law declares that commercial facilities and handicraft services in mountain zones are in the general interest bearing in mind their contribution to local development. This guiding principle must be incorporated in all public activities concerning the economic and social development of mountain zones. The *prima facie* importance of this matter is reflected in the requirement addressed to the central government to submit an annual report to the National Mountain Board and to the range committees on the measures it has adopted for the benefit of traders and craftspeople in mountain areas.

(c) Local authorities are mainly responsible for monitoring the implementation of tourism development operations. Housing developments are also subject to rules that must be fully implemented in mountain areas, particularly bearing in mind that disasters are likely to occur due to the topographical characteristics of mountain ranges. Therefore, it is prohibited to construct on mountain slopes. In addition, all constructions in new tourism complexes must be, in principle, in continuity with existing villages and settlements;[26]

25. This matter was introduced by Decree 2000-1231.
26. Article 145-3 of the Town Planning Code. However, the Code also foresees exceptions to this rule.

a rule that reminds public authorities of the shortage of space in mountain areas, as it happens in the Alps.

(d) Article 1 of the Law enshrines the principle that the protection of ecological and biological balances, conservation of sites and landscapes, rehabilitation of existing buildings and promotion of cultural heritage must be one of the pillars of national mountain policy. However, it could be argued whether the Law pursues to square a circle. In fact, in order to find the concrete measures it is necessary to search them in diverse laws, such as the Environment or Forests Codes. Similarly to Spanish Law, land clearing in mountain forests may be turned down for conservation purposes, such as the preservation of soil or slopes. Likewise, forests the conservation of which is necessary to maintain the land in mountain areas may be declared as "protected forests".

(e) The Law of 1985 has been subject to criticism in the last years. Broadly speaking, the main censures concern the gap between its main objectives and its implementation. It is argued that whilst town and country planning instruments have evolved this has not happened in the case of those mechanisms provided for in the Law. Therefore, plans establishing specific rules for mountain ranges have not been developed. Likewise, institutional deadlocks do not seem to be solved.[27] It is for this reason that it has requested an assessment on the application of the Law in the last 25 years.

II.3. Andorra

Andorra enjoys a distinctive political and institutional frame since according to its long history and under the 1993 Constitution, two co-princes, namely the President of France and the Bishop of Urgell, are the Head of State,[28] albeit the head of government retains executive power. The authorization of international treaties with France and Spain, as well as all those dealing with internal security, defense, Andorran territory, diplomatic representation, and judicial or penal cooperation correspond to the co-princes. Andorra is internally divided into seven parishes. The organisation of Andorra consists of a General Council (*Consell General*) that exercises legislative power, approves the State budgets, and determines and controls the Government's political actions, and seven parishes (*Parròquies*). The Municipalities (*Comuns*) are in charge of the representation and management of the interests of the parishes. They

27. This was expressly acknowledged by the French Prime Minister before the National Mountain Council on November 3, 2009: "*je crois qu'on peut dire que depuis 1985 le Conseil national de la montagne s'est réuni avec une régularité dont on peut dire qu'elle a été variable*" (emphasis added); <http://www.anem.org/fr/chiffres/documents/11_03_Conseil_National_de_la_Montagne.pdf>
28. Article 43 of the Constitution (approved by referendum on March, 14 1993).

approve and administer their own budgets, establish and implement public policies and manage all public assets in their territories. Even though Andorra has adopted certain pieces of legislation dealing, *inter alia*, with town and country planning, waste, water and the protection of aquatic habitats, it has not yet signed some key international environmental conventions, such as the Bonn Convention on migratory species (1979), the Convention on environmental impact assessment in a transboundary context (Espoo, 1991), and CITES (1973).

II.4. Cross-border Organisations

The Pyrenees are not devoid of cross-border organisations, including those encompassing the three States, Spain, France and Andorra. However, their real role for the proper management of common problems is not very clear.

(a) Working Community for the Pyrenees. The history of the Working Community of the Pyrenees (*Comunidad de Trabajo de los Pirineos or Communauté de Travail des Pyrénées*, CTP) dates back to the 1980s with the adoption of an Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities within the context of the Council of Europe. This was followed by a Conference of the Pyrenees Regions in 1982 and the signature of a Protocol constituting the CTP in 1993. In 2005 the members of the CTP signed the Inter-Administration Cross-border Co-operation Agreement for the creation of the CTP consortium. This was an important step since the CTP lacked legal personality. The new legal status meant that the CTP was entitled to receive aid from the European Union and carry out the management of shared projects. In fact, the CTP consortium has been designated Managing Authority of the Spain-France-Andorra Cross-border Cooperation Operational Programme for the period 2007-2013. Nevertheless, it should be noted that the CTP and the consortium coexist together maintaining their respective forms of regulation. In fact, it was the Treaty of Bayonne of 1995, signed by France and Spain, the instrument that foresaw the possibility of constituting an organisation, with juridical status, for cooperation between regional bodies. The main purpose of the CTP is to contribute to the development of the Pyrenees by encouraging the exchanges among the different territories, finding common solutions for the problems affecting them, and adopting transnational activities. The CTP embraces a rotating Presidency (2 years) in charge of representing the organization and defining the tasks to adopt during that period. The Presidency is supported by a general secretariat. There is also an assembly with representatives from the members of the CTP that approves the tasks proposed by the Presidency. It meets once per year. The tasks so adopted are basically carried out by a Co-ordination Committee. The latter has the support of different committees created within the context of the CTP. Each of those committees is also divided into different working groups dealing with diverse matters. However, their real impact for the development of common instruments applicable for the different participants in the CTP is difficult to assess.

(b) Atlantic Arc Commission. The Atlantic Arc Commission was created in 1989. It covers 27 Regions from Andalusia (Spain) to Scotland (United Kingdom). This means that it is not wholly devoted to the Pyrenees in spite of including Spanish and French Pyrenean regions.

(c) Co-operation between National Parks. The authorities of Ordesa and Monte Perdido National Park (Spanish side) and the Pyrenees National Park (French side) adopted a Co-operation Chart in 1997.[29] However, it acknowledges that it is for each management authority to set out of the main principles and guidelines for the park. Therefore, strictly speaking there is not a single authority dealing with the administration of a sole natural reality. Nevertheless, both authorities invite each other to their meetings and also to their scientific committees. Likewise, the authorities managing the parks have two annual meetings regarding: (a) the training of the personnel; and (b) the balance of achievements and co-operation during the preceding year. The Chart expressly indicates that both parks have to assess their international value from a transboundary perspective and also considering the relationship with other institutions, namely UNESCO. The exact results derived from co-operation activities carried out by the two national parks are difficult to assess bearing in mind the lack of regular reports on the Spanish side, and not very much detailed information submitted by the French authorities, albeit they appear to be better organised than their Spanish counterparts.[30]

(d) Co-operation between the Aquitaine Region and the Autonomous Communities of the Basque Country and Navarre. In 1989, those three regions signed a Protocol for transfrontier co-operation and they also constituted a fund to finance projects of common interest, including those concerning the environment. A further Protocol was signed by the Aquitaine Region and the Autonomous Community of Navarre in 2000 since the latter had previously decided to withdraw from the previous Protocol. One of the objectives of the Fund is to harmonise policies of common interest while extending that objective to other forums. The different funds are managed by a permanent commission in charge of

29. <http://www.parc-pyrenees.com/diffusion-des-donnees/cat_view/77-documentation-generale.html>
30. These are available on the Internet up to the year 2006 (inclusive; last access December 2010), see the previous note.

the promotion of the diverse activities carried out within the context of this organisation: (i) research, high education and techonology transfer; (ii) economic development and the environment; and (iii) training, social policies and culture. This organisation is also linked with the CTP and the Atlantic Arch Commission. However, as in the case of the CTP there is scant information regarding the impact of this institution.

III. The Case for an International Law Instrument for the Pyrenees

The following question is whether an international law instrument (or instruments) would embrace real benefits for the proper management of the Pyrenees in terms of the coherence of the rules to be applied and also of the necessary coordination to achieve among the different public authorities affected by the geographical extent of the mountain range. Needless to say, these matters are also affected by different rules of both EU and national origin. A reflexion on the rules that could be adopted for the protection of the Pyrenees may be premature. This is due, up to certain extent, to the lack of definition of the aims to pursue in this mountain range. A future rule (or rules) may have different contents depending on various aspects, such as actors involved, matters to be tackled and organisation necessary to make it work. The first matter to address is the type of rule that could be adopted depending on its binding effect (either *hard or soft law*). In this second case, the legal problems to be tackled may be less important since the feasibility of an agreement may be easier. However, both hard and soft law approaches could also be combined. This may be achieved if different objectives are distinguished within the same rule allowing for direct intervention on certain occasions and for co-operation between the different actors involved in the Pyrenees. In the light of the foregoing, different instruments may be examined:

(a) International Treaty between the European Union and the Member States. This option would require examination of the relationship with EU law, the recognition of any role for the European Court of Justice, the different reach of that Treaty for the Member States and Andorra, and the organisation for its implementation.

(b) International Treaty between the three States concerned. This may be a feasible option. However, in this particular case it should be necessary to consider the effects on EU law and the position of Andorra.

(c) A single Treaty or various Treaties. Another important matter to analyse is whether it should be necessary to conclude several treaties or agreements with a limited territorial scope. Different problems take place in the Eastern, Central and Western sections of the mountain range. It may also make sense to suggest different organisations depending on the diverse territorial reach of the agreements in spite of likely problems to co-ordinate common activities.

Notwithstanding the aforesaid, some aspects should be examined in detail.

III.1. The Need for Common Rules and for a Common Institutional Framework

(a) The extent of EU rules is not as far reaching as the ones set out in the Alpine Convention at least in terms of the matters that are to be addressed in common. This issue is important and would certainly represent an improvement in comparison with the disperse set of rules addressed by States. The adoption of a Convention (or conventions) would certainly provide a common international law instrument for the whole region enshrining a coherent set of principles and/or rules. This fact should not be neglected. It is true that international law usually consists of rules lacking binding effect, the CBD being perhaps the clearest example by citing several times the expression "as far as possible and as appropriate".[31] Nevertheless, a Convention supplies common themes that are undoubtedly of the interest of the States involved in the protection of the Pyrenees. This is also important in the case of Andorra since it is far from having signed the same environmental conventions as its neighbours. A legal instrument would also single out the Pyrenees as a reality worth of protection and of coherent development bearing in mind that so far different public authorities execute diverse policies without considering their implications on other territories save perhaps in the context of environmental impact assessment procedures or under matters regarding water law. Therefore, enacting a universal instrument for the whole region would channel those diverse policies within harmonised principles, procedures and controls.

(b) As international environmental law reflects, conventions mainly serve as the first step for the subsequent adoption of further protocols that specify binding obligations whilst giving the States Parties time to adjust their rules or institutions to a common framework.[32] Arguably, a future Pyrenees convention would help them to clarify the whole range of subjects that so far are being neglected or only partially covered by either EU or national rules but not by institutions specifically dealing with them. Furthermore, Spain could

31. Articles 5, 6, 7, 8, 9, 10 and 11.
32. E.g., UNECE transboundary air pollution Convention (1979).

benefit from the principles and instruments already adopted by their French counterparts particularly within the framework of the Mountains Law and further developments enshrined in other codes.

(c) As indicated above, an institutional framework for the whole region is also required for the proper achievement of policies in the Pyrenees. The existing institutions do not have the necessary manpower and political willingness to adopt common principles and rules. Again, a Conference of the Parties (COP) may be a proper mechanism to channel and highlight the problems the whole region faces, *inter alia*, a coherent transport policy not limited to the development of infrastructures, the fight against deforestation and the combat of climate change trends, a coherent use of ski infrastructures and of the territory, the protection of water resources, and real participation of local communities in the drafting of policies and of economic activities. Nowadays it cannot be convincingly argued, for instance, that the CTP provides a proper forum for such purposes. Rather, there is a piecemeal approach to the matters affecting the whole mountain range. This institutional framework is also necessary to impose on the Parties the obligation to submit regular reports on the application of their policies. International law does not normally provide enforcing mechanisms, the Alpine Convention being an example in this particular regard.[33]

III.2. Common Themes

(a) The case of spatial planning rules. Even though the TFEU refers to this matter, any rules must be subject to the unanimous vote of the Member States.[34] This surely hinders a coherent balance of policies having an impact on the territory. Interestingly, EU trans-European network policy directly affects States' spatial planning rules by setting out priorities that also have a repercussion on the environment, i.e., Natura 2000 sites, as the opinions of the European Commission under Article 6(4) of Directive 92/43 reveal. The Alpine Convention does not provide binding rules on this respect. However, the Spatial Planning and Sustainable Development Protocol contains certain references that should be applied in the case of the Pyrenees. One of its fundamental commitments refers to the creation of general conditions to encourage harmonisation of policies for territorial planning,

33. See Onida, M., "International instrument for sustainable development of a transnational mountainous area: the Alpine Convention and is implementation challenges", (2010) Ingurugiroa eta Zuzenbidea, pp.1-13: <www.eitelkartea.com/default.cfm?atala=2&azpiatala=6&m1=2> ; Pineschi, L., "The compliance mechanism of the 1991 Convention on the Protection of the Alps and its Protocols", in Treves, et al., (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, TMC Asser, 2009, pp. 205-219.
34. Article 192(2)(b), first and thirds indents (respectively) TFEU.

development and protection, by means of international cooperation.[35] Admittedly, the wording employed in the Protocol does not impose a binding obligation. However, it acknowledges that the only proper way of tackling common problems regarding the use of the territory should require harmonisation of rules and, at least, co-ordinating territorial planning policies, in particular in border areas.[36] The concerns of the entire region is one of the key matters the same Protocol addresses when referring to the preparation of spatial plans defined for the entire Alpine region.[37] A similar principle should also be applied in a future Pyrenees Convention. In fact, Spain and France concluded an Agreement regarding co-operation in matters concerning spatial planning (31 January 1985). However, co-operation is only circumscribed to the exchange of information, documents, experts and people during training periods.[38]

(b) Cross-border network of protected areas. The Wild Birds and the Habitats Directives create two different networks of SPAs and Natura 2000 sites (SACs). Likewise, within the UNESCO and the Council of Europe other networks have been established, i.e., the biosphere reserves and the Emerald network, respectively. However, the mere existence of EU provisions does not by itself guarantee that they are to be *jointly* considered. Therefore, the creation of common criteria, apart from those of EU origin, could support a coherent management of the protected areas. It should be observed that each protected area supports the entire network. Therefore, States cannot ignore this basic fact, repeatedly enshrined in the case-law of the European Court of Justice.

(c) Species protection. The protection of species also requires actions overcoming national and/or regional approaches. As in the case of landscape planning, EU law does not necessarily impose common institutional frameworks to tackle these matters. A coherent policy cannot be conceived without management plans affecting the whole mountain range. This is more expedient in the case of species, i.e., bears, the distribution area of which may be very large and likely to be fragmented due to the construction of linear infrastructures. In addition, it cannot be ignored that the conservation of these species faces opposition from local authorities. Nevertheless, conservation measures must be applied regardless of the status of area where the relevant species may be located. Needless to say, this may represent a nightmare for the public authorities on certain

35. Article 2(e)
36. Article 4(2)
37. The same approach is adopted in the case of the Alps Energy Protocol, Article 2(2).
38. Article 3.

occasions but it is the plain consequence of legal compromises previously adopted.

(d) Landscape planning. Landscape concerns have received greater attention after the adoption of the Florence Convention of 2000.[39] However, the Convention mainly relies on the actions to be adopted by the States Parties. Landscape concerns are not properly addressed by the EU save perhaps under environmental assessment rules. In fact, the EU is not party to the Florence Convention.

(e) Transport. Arguably, transport policy is much more than merely facilitating access through the mountain range as reflected in current policies and long-term decisions adopted on both sides of the Pyrenees. However, it is doubtful whether there are clear objectives underlying those decisions and whether environmental concerns have been properly addressed. In this respect, the principle enshrined in the Alps Transport Protocol, according to which "transferring an increased amount of transport, especially freight transport to the railways",[40] should be central to a future international law instrument for the Pyrenees. This principle is also reflected in Article 11 of the said Protocol which imposes a clear cut provision whereby the Contracting Parties "shall refrain from constructing any new, large-capacity roads for transalpine transport", save under certain strict requirements. Transport policy should also address the creation of buffer areas not subject to infrastructures for the shake of preserving untouched portions of the territory.

(f) Energy. As indicated above, energy matters also affect the Pyrenees. For the time being and despite climate change concerns, it is doubtful whether a future international law instrument could include more than guiding principles. In fact, the Alps Energy Protocol indicates that the Parties shall encourage the use of renewable sources, "even in combination with existing conventional supplies".[41] Besides, the limitation of emissions derived from plants alongside the mountain range may certainly be beneficial for the environment but one should not ignore that pollution knows no frontiers and limitations are to be tackled elsewhere, e.g., cities surrounding the mountain range. Therefore, the efforts should mainly be focused on (i) energy saving, (ii) rational use (including the fight against other sources of pollution, e.g., light) and (iii) the use of local sources rather than the construction of new ones.

39. García Ureta, A., *Derecho Europeo de la Biodiversidad* (Iustel, 2010), 670-678; Lasagabaster, I., and Lazcano, I., "Protección del paisaje, ordenación del territorio y espacios naturales protegidos", (2004) Revista Vasca de *Administración Publica* 125.
40. Article 1(1)(a).
41. Article 6(3).

(g) Last but not least, economic activities and tourism. As in the Alps Convention, the underlying principle should be the (real) compatibility between recreational activities and the protection of the environment. This is particularly important in the case of winter activities that attract an increasing number of people. For instance, Andorra alone receives 9 million tourists every year, the services sector representing roughly 80% of its GDP. Mountain farming has been addressed by the Pyrenean States. However, it is doubtful whether support of mountain products has so far been properly addressed. This could be regarded as one of the aspects a future instrument for the Pyrenees should unquestionably deal with, in spite of other developments at European level, i.e., the European Charter of Mountain Quality Food Products and the Recommendation 1575(2002) of the Council of Europe on the introduction of a quality label for food products derived from hill farming.

IV. Concluding Remarks

This paper has attempted to highlight some of the concerns surrounding a single (but diverse) reality, namely the Pyrenees. Even though there are rules applicable to this mountain range they are mainly general and do not take into account the specific problems the whole range faces. Besides, the existence of several authorities adopting uncoordinated policies hampers their coherent implementation. Arguably, an international law instrument may not by itself resolve problems that have remained unsolved for decades and that are likely to get worse in future years, e.g., fragmentation of habitats, continuous occupation of the territory, implementation of incoherent town and country planning, and water policies. However, it would certainly help to focus the attention of public authorities on a single reality, i.e., the whole mountain range. This would also serve to avoid the current piecemeal approach adopted by the three States (notably Spain) whilst providing an institutional framework for the adoption of common solutions. The participation of the EU in a future agreement, as it happens in the case of the Alps Convention, would also strengthen the reach of its provisions and the position of the Pyrenees in decision-making procedures affecting them.

IV

Implementation of Environmental Legislation & Policy: Case Studies from the Alps

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Implementing the Alpine Convention: The Austrian Experience

Ewald Galle

I. Introduction

The Alpine Convention represents a classic tool for sustainable development which clearly proves that environment and development are mutually dependent and, with its integrationist, all-encompassing, and cross-border approach, has taken a special status among regional environmental agreements.

In this context, it must still be shown that the Alpine Convention and its protocols present protection objectives, but they do not aim at creating obstacles or prohibiting the development of the Alpine space in absolute terms.

II. The Process of Ratification of the Alpine Convention

During the Austrian parliamentary procedure the decision was taken – in contrast to the framework Convention – that all protocols have direct application in the national legislation as from the moment of their coming into force, so that the adoption of new laws is not necessary. The lack of such a legal reserve of execution means that the protocols of the Alpine Convention have direct applicability at national level. As a consequence, they need to be taken into account by the legislator and in their execution, as long as they are suited to be directly implemented ("self executing") what also depends on its sufficient precision, as provided by art. 18 B-VG.

In the meantime, the rough classification of the protocol provisions is recognised in Austria.

1. Provisions which are *immediately applicable* are those that can be applied by executive bodies and authorities without any further transformation or change.

2. Clauses whose aim is to bring about legal adjustments to laws and regulations or to become new provisions.

3. Provisions with a *declarative character* but which should still be taken into account by authorities as argumentative, explanatory and motivating instruments.

The majority of provisions has declarative character, but shall still be resorted to for interpretation purposes, to set political goals and as a benchmark when weighing any possible interest.

III. National Implementation – Structure and Measures

With the coming into force of the protocols of the Alpine Convention in December 2002, implementation has entered a new stage in Austria too. This is not least because of Austria's early awareness of the potential of the Alpine Convention. There are various decisions taken by authorities and courts that make reference to the Alpine Convention and the protocols ratified by Austria. For instance the Environmental Senate based its refusal to authorise the ski area on Art 14 par. 1 of the Protocol regarding soil conservation,[1] an international provision that, in its opinion, was directly applicable. This provision endorses the prohibition on constructing new ski tracks in sensitive environments.

At *institutional level*, in Austria there is an enviable situation. For 20 years there has been a specific institution for the creation of policies and the definition of agreements, under the name of Austrian National Committee. This domestic coordination platform comprises representatives from the various Länder, the Ministries concerned, national NGOs and the trade unions and business community. This institution, which is similar to a consultation committee, makes it possible to lead not only international negotiations on the basis of a large national consensus, but also to launch a whole series of actions at national level.

One essential cornerstone of the efforts to accompany the national implementation is the *manual* for the application of the Alpine Convention, finalised in spring 2007, which represents and, in particular, has the objective of providing a unitary and final Austrian legal definition. This work of reference published by our Ministry includes framework conditions, guidelines and practical proposals for the application into law of the Alpine Convention and its protocols.

The last highlight was the organisation of a *service centre of law*, established at the branch office of CIPRA-Austria. This centre has the difficult task to find answers on the interpretation of the Alpine Convention and especially its protocols. Everyone can use this opportunity and get a general, non-binding and free legal advice, without having the intent to substitute

1. BGBl. (Federal Law Gazette) III 235/2002.

expert opinions or to give concrete project evaluations.
Under a special homepage (www5.umweltbundesamt.at/alpenkonvention) you can find the newest tool – not only for the service centre of law, for everyone - a *data base* with a number of various decisions taken by authorities and courts that make reference to the Alpine Convention and the protocols and continuative literature.

IV. Conclusion - Consequences

With the coming into force of all protocols of the Alpine Convention, new opportunities and possibilities have emerged, but also new questions and challenges. In Austria we are still at the beginning of our journey and it will take some time before the well established traditions in the application of the law are reconsidered and also legal sources that have been created externally, as is the case of the Alpine Convention and its protocols, are allowed into national decision-making processes.
It took years to identify, recognize and slowly, step by step, also make use of the potential of the Alpine Convention and specifically of its implementation protocols. And it will take more years to bring to light the wide range of possibilities and to use them for the relevant objectives, ideally in the whole Alpine space. In this way the Alpine Convention can act not only as a tool for a specific environmental policy, but as a long-lasting political programme, that offers a credible perspective to the Alpine area as a living, economic and cultural space with all its diversity and its problems, as well as to the men who live in the Alpine space.

Mountains of Problems: Alpine traffic and International Law

Werner Schroeder

I. Introduction

The Alps offer a unique multicultural and natural scene but – we have to admit it – they are also an obstacle for road traffic. Nonetheless, a substantial part of European transport of goods is conducted through the Alps.[1] This puts the population, the environment and resources under significant pressure. This pressure inevitably leads to the demand to regulate transport in the Alpine region, above all the transport of goods insofar as it is operated by heavy goods vehicles.

The willingness to limit Alpine transit through measures such as bans on driving or toll systems is particularly great in Tyrol, as this province is penetrated by major transport corridors for transalpine traffic. Yet, it must meanwhile be stated – a sobering experience for some indeed – that in this field there is no consensus among the Contracting Parties to the Alpine Convention, let alone on the EU level. For instance, Germany is a party to the Alpine Convention, an EU Member State and itself a country affected by transit – but it is not an Alpine country. The traffic-related interests of Germany like most EU States primarily consist in unobstructed Alpine transit. On the whole, an attitude different from the Tyrolean one generally obtains in these countries with regard to traffic (see, for example, the German slogan: "free driving for free citizens").

These varying interests have resulted in "mountains of problems" concerning Alpine transport and international law. Alas, I cannot level these mountains, but I can only deal with a small portion thereof.

I.1. Alps

The title of my contribution relates to problems within the Alps by which I refer to the scope of application of the Alpine Convention in Art. 1 para. 1 in connection with the annex.[2]

1. Cf. the overview in Köll, Entwicklung des alpenquerenden Straßengüterverkehrs – Versuch einer Differenzierung, in: MONITRAF-Projektteam (Ed.), Verkehr durch die Alpen: Entwicklungen, Auswirkungen, Perspektiven, 2007, 39.
2. See Institut für Föderalismus (ed.), 33. Bericht über den Föderalismus in Österreich (2008), 2009, 322 et seq.; Schroeder, Die Alpenkonvention – Inhalt und Konsequenzen für das nationale Umweltrecht, Natur und Recht (NuR) 2006, 133; Galle, E., Das Übereinkommen zum Schutz der Alpen (Alpenkonvention) und seine Protokolle, 2002, 29 et seq.; Bätzing, Der Alpenraum im Sinne der Abgrenzung der Alpenkonvention, in: CIPRA (ed.), Die Alpenkonvention, 1993, 73.

I.2. Traffic

My paper deals with the topic of Alpine traffic. More specifically, I shall address transport in the form of transport of goods which, insofar as it is operated by heavy goods vehicles, has created specific problems in the Alpine region.

The transport of goods is the basis of the supply of the European population and, consequently, it is in the EU States' interest to secure a functioning transportation market and to take appropriate action in this regard. For these reasons, the transportation market was traditionally regulated. This has changed, however, notably under the influence of EU law, i.e. Art. 90 et seq. of the Treaty on the Functioning of the European Union (TFEU). Since many years a liberalisation of the transportation sector may be observed.[3] This has also had effects on Alpine traffic, namely – and this must be clearly pointed out – in the form of an increase in traffic.

In the course of this liberalisation, sometimes reference is made to the principle of "free choice of means of transportation" or of "neutrality of transport modes". This principle which is mostly relied upon on the EU level shall prevent the directionist steering of the division of labour among the different means of transportation. I sincerely doubt, however, whether this is really a legal principle which can have binding effects. Prof. Epiney has already dealt with this question in her writings and has, to my mind, come to the correct conclusion, i.e., that we are confronted here with a political maxim rather than a legal principle.[4]

I.3. International Law

International law has the function of regulating the above-described varying interests, that is,

- on the one hand, to provide for the necessary mobility (i.e., to eliminate, in the course of liberalisation, restrictions within the transportation sector), and
- on the other hand, to take account of the needs of sustainable traffic development as well as of the prevention of harmful effects on the environment,

by virtue of legal rules. There is no place in Europe where this field of tension becomes more obvious than in the Alpine region. The cleavage between economy and ecology also becomes manifest in the provisions of the Alpine Convention. The latter constitutes the most

3. See Stadler, in: Schwarze (ed.), EU-Kommentar, 2009, Art. 70 EGV para. 7 et seq.; Wallnöfer, Europarecht, in: Bauer (ed.), Handbuch Verkehrsrecht, 2009, 41 et seq.; Epiney, Verkehrsrecht, in: Dauses (ed.), Handbuch des EU-Wirtschaftsrechts, 2003, para. 226 et seq.
4. Wasserer, Warenverkehrsfreiheit versus sektorales Fahrverbot: Europäische Verkehrspolitik und nationale Handlungsspielräume, Journal für Rechtspolitik (JRP) 2009, 115 (118 et seq.); Epiney, Der "Grundsatz der freien Wahl des Verkehrsträgers" in der EU: rechtliches Prinzip oder politische Maxime?, Zeitschrift für Umweltrecht (ZUR) 2000, 239.

important legal framework regime that has the state of the Alpine region as its object.[5]
However, also EU law provisions, inasmuch they have an impact on Alpine traffic, pertain to the realm of pertinent international law provisions in the wide sense. This results in a certain overlap of norms, since the Alps and thus the scope of application of the Alpine Convention lie mainly in the territory of EU Member States.
Finally, there are also provisions of the national law of the Alpine countries which address specific alpine interests taking into consideration economic and ecological interests. This gives rise to the question whether these national law provisions are compatible with international law.
Here, I shall therefore first present a number of international legal sources and their legal relevance as to questions of Alpine transport. Thereafter, I shall briefly address some exemplary legal problems of Alpine transport such as bans on driving, toll systems and transport planning.

II. International Legal Sources

II.1. Alpine Convention

Apart from bilateral treaties such as the Overland Transportation Treaty between Switzerland and the EC[6], the Alpine Convention is the most important international treaty dealing with the regulation of Alpine transport of goods. Marco Onida has already made quite some remarks as to the framework character of the Convention, as well as to its Protocols which are treaties under international law.[7] I would like to reemphasise in regard to the topic "transport" that especially the Protocols are binding treaties under international law.[8] They partly contain self-executing provisions. These represent provisions to be immediately applied by national authorities and courts if they, as to their content, purpose and wording, are sufficiently determined and do not require further executive provisions. There are indeed numerous provisions in the Protocols that are sufficiently concrete to be applied directly by the national

5. Onida M., "Plaidoyer pour une politique communautaire des montagnes: l'exemple à prendre de la Convention alpine" in Revue du Droit de l'Union Européenne. 4/2008, 739 (760 et seq.); with regard to other international treaties see Bußjäger/Larch, Gemeinschaftsrecht, internationales Umweltrecht und Verkehrsprojekte, Recht der Umwelt (RdU) 2006, 104 (105 et seq.); Caldwell, The black diamond of harmonization: the Alpine Convention as a model for balancing competing objectives in the European Union, Boston University International Law Journal 2003, 137; Galle (note 2).
6. Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road, OJ 2002 L 114/91.
7. For a view on the "framework"-technique see Galle (note 2), 228 et seq.; Beyerlin, Umweltvölkerrecht, 2000, para. 85 et seq.
8. Cf. Bußjäger/Larch, RdU 2006, 109 et seq.; Schroeder, NuR 2006, 134 and 136.

authorities.[9] The Protocols, insofar as they are not directly applicable, still have (as the Alpine Convention itself) a function as a yardstick for the interpretation of national law.
I am dealing here with those aspects of the Alpine Convention that are relevant to transport.
Not surprisingly, these may be found above all in the Transport Protocol which entered into force in 2002.[10] The Protocol places sustainable traffic development in the Alpine region and the need for it to be compatible to man and nature in its very centre. It is not a secret that the Transport Protocol constitutes one of the most controversial elements of the Alpine Convention. For Austria, this Protocol was important enough to refuse to sign it earlier than that there was consensus also on the other Protocols of the Alpine Convention.[11] The European Community signed the Transport Protocol in 2006, but has so far not ratified it. Also Italy – like Switzerland and Monaco – has reservations vis-à-vis the Transport Protocol, as it assumes that restrictions on transalpine transport primarily disadvantage its own economy.[12]
Like the other Protocols, the Transport Protocol contains norms of different nature, partly determinate norms, partly provisions with the character of a principle, and partly norms of rather programmatic nature:

- First, the Transport Protocol contains a series of basic principles such as the "polluter-pays" principle in Art. 14. This principle which is crucial for the management of transport in the Alpine region requires that each traffic participant has to bear the so-called external costs (namely costs of environmental pollution and noise) inasmuch they are caused by him.[13] In order to induce traffic participants to behave in a more sustainable way, appropriate charging systems for the different transport modes shall be introduced. In that manner, namely by establishing toll systems, a situation of fair competition between the transport systems road and railway shall be created.
- In addition, there exist very specific legal obligations, for example, in Art. 11. There, the Contracting Parties stipulate to refrain from constructing any new large-capacity roads

9. For the direct applicability in Austrian law see Schmid, Das Natur- und Bodenschutzrecht der Alpenkonvention, in: CIPRA (ed.), Die Alpenkonvention und ihre rechtliche Umsetzung in Österreich – Stand 2009, 33 (34 et seq.); in German law see Schroeder, NuR 2006, 137 et seq.
10. Cf. Ehlotzky/Kramer, Die Novelle der Wegekosten-RL und das Verkehrsprotokoll der Alpenkonvention, Zeitschrift für Verkehrsrecht (ZVR) 2009, 193; Kramer/Ehlotzky, Verkehrsrelevante Aspekte der Alpenkonvention, Die Alpenkonvention 2009, 7; Hartl, Das Protokoll zur Durchführung der Alpenkonvention im Bereich Verkehr (Verkehrsprotokoll) und seine Auswirkungen auf das Gemeinschaftsrecht, Recht der Umwelt (RdU) 2007, 4.
11. See Galle (note 2), 122 et seq.
12. Ehlotzky/Kramer, ZVR 2009, 194; Hartl, RdU 2007, 5.
13. Ehlotzky/Kramer, ZVR 2009, 195; Hartl, RdU 2007, 4 and 6; Galle (note 2), referring to Art. 14: 138 et seq. and supplementary volume 62 et seq.; referring to the "polluter-pays" principle: 39 et seq.

for transalpine transport and subject other large-capacity road projects for intra-Alpine transport to strict preconditions.
- Finally, there are some generally phrased norms containing general objectives such as Art. 9 concerning the encouragement of public transport systems by the Contracting Parties.

All in all, the Transport Protocol does not only aim at reducing traffic-induced pressure on the Alpine region but it is further geared, as a general transport policy strategy, towards an overall reduction of transport in the Alpine region (Art. 7).
However, there are also transport-related provisions in the other Protocols of the Convention: Spatial planning decisions are, without doubt, of great importance for traffic development. Consequently, the Spatial Planning Protocol only permits measures for improving regional and super-regional connections that "use the resources and the territory sparingly and compatibly with the environment". Like the Transport Protocol, the Spatial Planning Protocol calls for the promotion of public transport, and transport compatible with the environment, and, as the case may be, measures for limiting traffic.[14]
Transport-related norms may also be found in the Tourism Protocol and the Conservation of Nature Protocol. These provide for a limitation of motorised traffic for the sake of the sustainable development of the Alpine region. However, they are mainly phrased so as to grant a certain margin of discretion and they are not of a categorical nature.[15]

II.2. EU Law

As far as EU law is concerned, it is well known that there exists a special title on transport in Arts. 90 to 100 TFEU. After initial reluctance, this basis for EU legislation in transport matters is now extensively relied upon. In addition, the EU may self-evidently conclude international agreements, what it has also done, for instance, by virtue of the conclusion of the Overland Transport Agreement with Switzerland.[16]
In regard to managing transport in mountainous regions, the EU does not have special legal provisions on its own. Nonetheless, EU law has a significant impact on Alpine traffic and the possibilities of regulating it. I shall come back to this later.
Already here, one should recall the fundamental freedoms. They constitute a barrier for all transport-related provisions of the Member States restricting free movement of goods

14. Cf. Kramer/Ehlotzky, Die Alpenkonvention 2009, 8.
15. Cf. Kramer/Ehlotzky, Die Alpenkonvention 2009, 8.
16. See Sollberger/Epiney, Verkehrspolitische Gestaltungsspielräume der Schweiz auf der Grundlage des Landverkehrsabkommens, 2001, 17 et seq.

guaranteed in Art. 34 et. seq. TFEU in the Alpine region.[17]
Finally, also the Alpine Convention and its Protocols may have binding effect as EU internal law, to the extent that the EU has ratified them. There exists a problem, however, since the EC, the legal predecessor of the EU, has only ratified the Framework Convention so far, but not the transport-relevant Protocols, let alone the Transport Protocol itself. The drama of ratification is now already being going on for more than ten years.
The reasons for this deadlock lie in the legal effects which the ratified Protocols would entail in the EU legal order. From their entry into force on, agreements concluded by the Union are to be considered a source of law of the EU legal order, and they are thus binding upon the EU institutions (cf. Art. 216 para 2 TFEU).[18] Hence, the traffic-related norms of the Union itself (as far as they concern the European mountain regions) would have to step back, if they are not compatible with the prescriptions of the Protocols.[19]
This holds true, for instance, for the "Directive on the charging for heavy goods vehicles for the use of certain infrastructures" 2006/38/EC – the "Eurovignette Directive"[20], which I will address later a bit more in detail. I have the impression that the Union seeks to avoid external obligations in this regard – even though it officially takes the position that there is no contradiction between its Alpine transport policy and the Transport Protocol.

III. Selected Problem Fields

This takes me to the selected problem fields that are located at the juncture of Alpine transport and international law.

III.1. Administrative Measures of the Alpine Countries

a) Some Alpine countries such as Austria operate on basis of the assumption that motorised transport of goods in and across the Alps is a phenomenon harmful to the environment. They have therefore taken administrative measures in order (1) to divert transport by heavy good vehicles to other modes of transport or (2) to change the routes of transportation through the Alps.

17. Weber, Der Transitverkehr in der Judikatur des EuGH: Spannungsfeld zwischen Warenverkehrsfreiheit und Umweltschutz, in: Roth/Hilpold (eds.), Der EuGH und die Souveränität der Mitgliedstaaten, 2008, 395 (411 et seq.); Obwexer, Die Regelung des Transitverkehrs, in: Hummer/Obwexer (eds.), 10 Jahre EU-Mitgliedschaft Österreichs: Bilanz und Ausblick, 2006, 299 (346 et seq.); regarding the fundamental freedoms in general see Schroeder, in: Streinz (ed.), EUV/EGV, Commentary, 2003, Art. 28 EGV.
18. ECJ, Case 181/73, Haegeman, ECR 1974, 449 para.
19. Ehlotzky/Kramer, ZVR 2009, 194; Odendahl, Die Bindung der Europäischen Gemeinschaft an die Alpenkonvention, in: Jahrbuch des Umwelt- und Technikrechts 2007, 2007, 59 (71 et seq.).
20. OJ 2006 L 157/8.

In the case of Tyrol, the following measures have been taken[21], amongst others:

- speed limits and bans on overtaking for heavy good vehicles on motorways,
- bans on night- and weekend-driving for heavy good vehicles and
- sectoral bans on driving for heavy good vehicles which concern the transportation of certain goods (waste, grain, wood, stones, excavated material, transportation of motor vehicles and construction steel).

These restrictions were mostly adopted on the occasion of the transgression of immission limits of national immission protection laws – which, on their part, are interestingly based on the air quality directive of the EU.[22]

In certain Alpine regions – such as is the case in Tyrol on the A 12 motorway – additional measures exist, such as an extensive control of social law provisions for the freight forwarding staff enforcing EU-prescribed conducting and rest periods.

b) If one examines these specific measures adopted in the Alpine region in regard to their effect on traffic and transport, one can observe that speed limits and bans on overtaking promote road safety, but have only hardly an impact on the traffic volume. The consistent enforcement of prescribed conducting and rest periods for freight forwarders at alpine control points results in a substantial increase in price of road transportation and is most likely to influence the volume of heavy goods vehicle traffic.

c) One of the most controversial measures are national bans on driving, above all the sectoral bans on driving for certain goods on the A 12 Inntal Motorway which were adopted by the Tyrolean Provincial Government. These bans have been, and still are, subject to proceedings before the ECJ.[23]

The Commission has mounted the not-unfounded criticism against Austria that the ban constitutes a national measure which is not compatible with the prohibition of measures of equivalent effect as quantitative restrictions, as laid down in Art. 34 TFEU.[24] Without doubt, these measures restrict transport and thus the trade of goods within the Union. I do not want

21. Cf. Obwexer (note 17), 346 et seq..
22. Directive 2008/50/EC of the European Parliament and of the Council on ambient air quality and cleaner air for Europe, OJ 2008 L 152/1.
23. ECJ, Case C-320/03, Commission/Austria, ECR 2005, 9871; thereto see Weber (note 17), 405 et seq. and 422 et seq.; Krämer, "Air Quality, free lorry transit through Austria and the protection of the environment - traffic ban on the Brenner Motorway," in *Journal for European Environmental & Planning Law* 2006, p. 156; Obwexer, Das sektorale Fahrverbot in Tirol auf dem Prüfstand des Gemeinschaftsrechts: Paradigmenwechsel in der Verkehrspolitik der EG?, Zeitschrift für Verkehrsrecht (ZVR) 2006, 212; ECJ, Case C-28/09, Commission/Austria, pending; thereto Wasserer, JRP 2009, 124 et seq.
24. Weber (note 17), 411 et seq.

to enter into detail here, but I would like to mention that I consider the debate whether these measures constitute product-related measures or mere "selling arrangements"[25] somewhat nit-picking. Furthermore, I would not devote particularly great attention to the question whether the local originating and terminating traffic in Tyrol is excluded from the ban. To my mind, the existence of such special arrangements is unavoidable in the Alpine region, since the latter is not only a transit area for internationally operating freight forwarders.

In my opinion, the challenge clearly poses itself on the level of justification. Such bans on driving eventually aim at enforcing the goal of environmental protection.[26] Even though proceedings before the ECJ are still ongoing and even though the Commission was kind enough not to request interim measures against Austria: I entertain some doubt with regard to measures of national transport policy for the protection of the Alpine environment that are not strictly oriented towards the harmful effects to the environment of the respective modes of transport, but to the type of goods being transported. I do not deem this to be an appropriate measure. This does not mean that special bans on driving always violate EU law – the ECJ has well indicated general sympathy for measures restricting traffic in the Alpine region. Yet, these measures must be actually appropriate and necessary for environmental protection.

III.2. Toll Systems

A subject in its own right or at least a topic for a symposium on its own is the charging of heaving good vehicles in the Alpine region based on the driving performance.

The Transport Protocol contains relatively clear requirements in this regard. It aims at shifting, by means of tolls, as much of the external costs as possible to the freight forwarders. External costs are understood as the costs, which are normally not borne by the users of roads, but by the public, notably the costs of environmental pollution and noise and the costs of damage to people and property caused by transport. The internalisation, by virtue of tolling systems, of such costs which play an important role in Alpine transport lead to a significant increase in price of heavy good vehicles transports. Such measures can prompt the shifting of such transports to modes of transportation that are less harmful to the environment, i.e., the railway.

In the EU, the imposition of tolls to road transport is governed by the Eurovignette Directive 2006/38/EC. Its approach differs from the legal regime of the Transport Protocol inasmuch it does not yet provide for a comprehensive shift of external costs, but only envisages a

25. See ECJ, Joined Cases C-267/91 and C-268/91, Keck and Mithouard, ECR 1993, 6097 para 15 et seq.; see Schroeder (note 18), Art. 28 EGV para. 41 et seq.
26. Weber (note 17), 413 et seq.; Obwexer (note 17), 346 et seq.; see ECJ, Case C-320/03, Commission/Austria, ECR 2005, 9871 para. 70 et seq.

"gradual" internalisation of such costs. To this effect, the Directive must be amended.[27]
The possibility of imposing, under strict preconditions, additional tolls in mountainous regions in order to finance alternative modes of transportation, which already exists under the current version of the Directive, gives less comfort in this regard. The additional charges are limited as to their extent, and the revenues gained thereof must be invested into projects of priority character and of European interest, which are located on the same transport axis (such as the financing of the Brenner Base Tunnel by means of a 25 % extra charge on the Brenner toll).[28]
It is to be hoped that the Eurovignette Directive will be amended soon in the sense that

- it allows for a comprehensive internalisation of external costs of transports routes and also
- facilitates the imposition of additional tolls in Alpine regions.

It may well be doubted, however, whether this will actually happen in the near future. The amendment of the Directive has been subject to endless debate within Council and Parliament. Unfortunately, the realisation of cost transparency in the Alpine region is rejected by most EU States as an unacceptable special treatment of the Alpine region.

III.3. Transport Planning

With respect to transport planning I would only like to briefly refer to Art. 11 of the Transport Protocol. It states that the Contracting Parties refrain from constructing any new large-capacity roads for transalpine transport. In addition, other large-capacity road projects for intra-Alpine transport are subjected to strict preconditions.[29]
This provision goes back to an Austrian initiative. It strived for preventing the project of the so-called "Alemagna Motorway" between Bavaria and Venetia by means of the Alpine Convention.[30] By ratifying the Transport Protocol, Austria has bound itself to this provision – what is now partly considered to be a burden here. This becomes manifest regarding the S 36/37 road project, i.e., a four-lane expressway through Styria and Carinthia. This project is qualified by its opponents as a new large-capacity road for transalpine transport. From the point of view of the competent Austrian authorities, the project shall be realised.[31]
What I wish to illustrate with this reference, is that road planning in the Alpine region is considerably influenced by the Alpine Convention and that Art. 11 of the Transport Protocol

27. Ehlotzky/Kramer, ZVR 2009, 195 et seq.; Hartl, RdU 2007, 7.
28. Referring to the current amendmend Ehlotzky/Kramer, ZVR 2009, 197 et seq.
29. Galle (note 2), 137 et seq. and supplementary volume 60 et seq.
30. Galle (note 2), 121 et seq.
31. See Haller, Zerstörung von Alpenraum und Rechtsstaat?, in: Jabloner/Lucius/Schramm (eds.), Festschrift für H. René Laurer, 2009, 41 (51 et seq.).

is of much more than mere theoretical value – there are for sure other examples from other Contracting States (e.g. the planned Letzetunnel in Feldkirch at the Austrian/Liechtenstein-Border). The provision contains a lot of potential for controversy – for instance, taking the example of the S 36/37 road project, whether there is a new construction of a road project or a mere extension of an existing one or whether a road project is for transalpine or intra-Alpine transport. It is furthermore not clear how one should classify the construction of an inner-State motorway within the Alps which is connected to the international road network. Does it transform into a transalpine connection that way?
In my opinion, the Transport Protocol needs to be applied in an effective manner. A kind of "salami technique" which allows for construction on a piecemeal basis and then permits the extension of existing road sections through the Alps, to my mind, interferes with the spirit of Art. 11 of the Transport Protocol.

Conclusions

There are many more elements of international law dealing with the Alpine region than I could address today. It should have become clear that the traffic problems in the Alps can only be solved by the interaction of the Alpine Convention and the Transport Protocol, on the one hand, and EU law, on the other hand. The observation that tensions between international law and EU law are opposed to an effective solution of the problem is, however, not a genuinely Alpine problem, but is also valid for other areas.
Nonetheless, it is remarkable that the EU has itself participated in the efforts to create, through the Alpine Convention, specific international legal provisions for a living, traffic and economic space in the Alps – legal provisions with which it cannot identify itself well as of today. This is also the crucial obstacle for the solution of the problem of Alpine transport: as long as the EU does not embrace another position in this regard, the Alpine Convention will not be capable of having decisive influence on traffic in the Alpine region.
It will be of interest moreover how the ECJ will deal with transport restrictions in mountainous regions in the future. So far, it has rather been on the side of the internal market and less on that of the Alpine environment. In order for this attitude to change, it would be helpful if the transport-regulating measures on the part of the Alpine countries abandoned their more or less hidden protectionist and discriminatory character. Only then the ECJ may convincingly address the significance of the protection of the Alps within the Union.

Protected Alpine Areas: Goals and Limits of Legal Protection

Sebastian Schmid

I. Introduction

Subject of the following study of international and comparative law are protected alpine areas. Thus, I want to start with an attempt of defining the legal term 'protected area'. In a next step we will have a look at typical protection goals of mountain reserves. Finally, it has to be focused on the question, which legal limits – particularly with regards to the principle of proportionality – do exist for nature conservation by law.

II. The legal term 'protected area'

The term 'protected area' can be found translated in many legal systems of the alpine countries. Several protocols of the Alpine Convention[1] contain this expression, without defining it. The following discussion shall, on the one hand, determine the subject of this study. On the other hand, it is necessary since the applicability of an international agreement depends on its determination.
Article 2 of the Convention on Biological Diversity (CBD)[2] is a good starting point for a definition:

> « 'Protected area' means a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives. »

From this definition the fact emerges that the act to establish a protected area is a specific legal regulation. The area of application of nature conservation laws is the whole national or regional territory. In protected areas a particular legal regime is in force. Acts to establish protected areas are in relation to the remaining local purview *leges speciales*.
The CBD does not contain any remarks concerning the procedure to establish a protected area. Consequently this international agreement does not rule that the reserve has to be set up by an Act of state.

1. Art. 3 (1), 11, 12, Annex I and II Protocol Conservation of Nature and the Countryside (A: BGBl III 236/2002); art. 6 Soil Conservation Protocol (OJ L 337, 22.12.2005, p. 29); art. 8 Protocol Tourism (OJ L 337, 22.12.2005, p. 43); art. 2 (4) and 10 (3) Energy Protocol (OJ L 337, 22.12.2005, p. 36).
2. See amongst others Council decision 93/626/EEC (OJ L 309, 13.12.1993, p. 1); A: BGBl 1995/213; CH: AS 1995 1408 (SR 0.451.43); G: BGBl II 1993, 1741.

Following the definition, the aim of a protected area is the realization of determined protection goals. Although article 2 of the CBD does not explicitly say it, only goals concerning nature – such as preservation of species or preservation of the natural scenery – are meant to be realized, which becomes evident in a systematic context. On the other hand, areas aiming at other protection goals – for instance protection of monuments or protection of drinking water – are not included in this definition.

According to these elements, a protected area is:

- a geographical delimited area
- which is established to realize nature protection objectives and
- in which a particular legal regime is in force.[3]

Austrian[4] and German[5] nature conservation laws as well as the South Tyrolean landscape conservation Act[6] call protected areas "Schutzgebiete", while in the Swiss Federal Act on land use planning[7] they are named "Schutzzone" and in the French environmental code[8] "Parcs et Réserves naturelles".[9] As far as the meaning of these legal terms is concerned, it turns out that the above outlined definition in the CBD is the common denominator of the given national conservation laws. Some of those use "protected area" in addition if the protection regime is only in force for a single object, for instance a certain tree or a source of water, and actually not for an area. However, it is not possible to have a more detailed discussion of the implied meaning of the respective laws in the course of this study.
The power to issue legal acts of nature protection is normally delegated by a statutory act. The real act of protection is then a 'sub-legal', general or individual regulation or decision with effect as against others, not only within the administrative body. This act establishes the concrete protection goals after instituting preliminary proceedings. Next to this technique of

3. See also art. 1 lit. j and l Council directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7): "site means a geographically defined area whose extent is clearly delineated; [...] special area of conservation means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated".
4. E.g. §§ 3 (1) und 32 (1) "Steiermärkisches Naturschutzgesetz" (LGBl 1976/65); § 3 nr. 3 "Oberösterreichisches Naturschutzgesetz" (LGBl 2001/129).
5. § 48 (2) "Bayerisches Naturschutzgesetz" (GVBl 2006, 2).
6. Art. 18 (4) and (5) "Südtiroler Landschaftsschutzgesetz", provincial law of 25.7.1970, nr. 16 (Ord Beibl zum ABl, 11.8.1970, Nr. 33).
7. Art. 17 "Bundesgesetz vom 22. Juni 1979 über die Raumplanung" (AS 1979 1573); see *Rauscher/Marti/Griffel*, Umweltrecht (2004) p. 175.
8. "L'ordonnance n°2000-914 du 18 septembre 2000 relative à la partie législative du code de l'environnement" (JO 21.9.2000 n° 219).
9. Livre III, titre III "Code de l'environnement".

legislation protected areas are sometimes established directly by an Act of Parliament, as it is often the case, when a national park is established. There are 14 different types of protected areas only in Austria.[10] In this study it seems neither possible nor is it necessary to compare all of these categories as it is from a legal point of view of limited value anyway.

III. Typical protection goals in protected alpine areas

The fundamental subject of this conference is the question, whether environmental law is adapted to the challenges faced by mountain areas, in other words if mountain-specific law exists, as in the present case, if there is an alpine law of protected areas.

Conservation laws always try to reach their goals through a mixture of measures; examples are prohibitions or that a project is subject to approval by the relevant authorities. These instruments are usually applicable in the whole area of application of the law so that a certain abstractness is necessary. Consequently and understandably, one cannot find mountain-specific instruments of protection, for example types of conservation areas, which only refer to alpine areas.[11]

Nevertheless, there are legal requirements, which protect *ex lege* certain landscapes or landscape elements. They are quite often situated in the mountain region as the following examples show: According to § 24 of the Salzburg law on nature conservation[12] *the alpine wastelands including glaciers and their surroundings* enjoy increased protection directly by law. In this context 'alpine wasteland' is an area above the timber line, which is not used for agriculture or forestry. Due to the South Tyrolean landscape conservation Act the protection *of glaciers and glacier basins as well as the mountain region above 1600 metres above sea level* are under special protection.[13] These cases of *ex-lege*-protection can be excluded from the further discussion: There is no typical legal act, which establishes the specific protection regime consisting of the designation of a site, the protection goals and statutory requirements for intrusions in the environment.

Summarising the results, mountain areas are regulatory purpose of conservation laws. At the same time there is no specific 'alpine protection law', because the different categories of protection areas are usually also applicable to non-alpine regions.

10. Federal Ministry of Agriculture, Forestry, Environment and Water Management (ed.), Protected Areas in Austria (2003) <www.umweltbundesamt.at > last checked 22.4.2010).
11. The French "Loi n°85-30 du 9 janvier 1985 relative au développement et à la protection de la montagne" (JO 10.1.1985 p. 320) occupies an exceptional position: Due to this law mountain areas are for economic, social and environmental reasons subject to public interest. The French environmental code (Code de l'environnement) which contains conservation law is in turn as abstract as other conservation acts in alpine countries.
12. § 24 (1) lit. d "Salzburger Naturschutzgesetz" (LGBl 1999/73).
13. Art. 1/bis (1) lit. c and d "Südtiroler Landshaftsschutzgesetz"; see also art. 1a (2) nr. 4 "Bayerisches Naturschutzgesetz or art. 5 lit e "Liechtensteinisches Gesetz zum Schutz von Natur und Landschaft" (LGBl 1996/117).

Enabling acts in conservation laws are given concrete form by administrative acts – for instance, the authorisation to designate a protected area by regulation.[14] Although the administrative authorities are only allowed to act under the law and in the context of legal provisions in force, there is usually a scope of discretion. As a result, the authorities are able to respond to the circumstances of the individual case. For this reason, typical goals of protected alpine areas shall be described below. There are various reasons for the designation of an alpine area: in the nature reserve *Schlern-Rosengarten*,[15] for example, *viewpoints and other places, which are particularly interesting relating to alpinism*, are protected. Within a 100-metres-distance from the viewpoint, any building project is forbidden. The Tyrolean protected area 'Antelsberg'[16] intends to preserve the animal species 'the German scorpion' (*euscorpius germanus*). Despite this variety main groups of protection goals can be elaborated:

One main goal of protected alpine areas is the conservation of alpine flora and fauna. The following provision, which can be found in the regulation on the Bavarian national park *Berchtesgaden*,[17] is just one of many examples: *The national park is aiming to achieve the conservation of the natural and natural closed habitats and the conservation of the native animal population and vegetation rich in species*. The Vorarlberger nature conservation and landscape development Act even has a specific category 'area of protected plants'.[18] An example of the latter is the reserve 'Nenzinger Himmel', in which *it is forbidden to damage, pull up, dig out or pick parts of, cut or tear off any alpine plant species*.[19]

Another main goal is the conservation of geological, geomorphological and hydrological appearances. Usually, negative impact on those appearances of geological development is legally forbidden. According to the order[20] to establish the nature reserve 'Sextener Dolomiten' certain listed areas of high geological and hydrologic interest are protected; this is of particular concern for *glacier-polished rocks, terminal and lateral moraines, mountain lakes and sources of water*. Another example can be found in the regulation[21] ordering the nature reserve 'Tennengebirge' in Salzburg: in this case, the aim of protection is *to preserve the originality of a mighty limestone massif with its various karst landscapes, for instance the far and wide cave systems*. In France, there are even geological reserves, so called *réserve naturelle géologique*, for example the *Réserve Naturelle Géologique de Haute Provence*,[22]

14. The designation by contractual act shall be disregarded below.
15. Art. 10 landscape protection act nature reserve Schlern-Rosengarten (approved by decree of the governor 16.9.1974, nr. 68).
16. LGBl 2002/30.
17. GVBl 1987, 63.
18. "Pflanzenschutzgebiet" § 26 (5) "Voralberger Gesetz über Naturschutz un Landschaftsentwicklung" (LGBl 1997/22).
19. § 1 (1) ordinance by the Regional Government on alpine plants protection in 'Nenzinger Himmel', LGBl 1958/16.
20. Approved by decree of the governor 22.12.1981, nr. 103/V/81.
21. LGBl 1982/18.
22. Decree 84-983, 31.10 1984.

established in 1984, in which fossil collecting is forbidden.

Another recognizable aim of protected alpine areas is the preservation of the natural scenery. This is actually a superficial protection target, because it aims at the conservation of the beauty of landscape and not its biodiversity. For hundreds of years alpine spaces have been influenced by man,[23] for example, there are various effects of alpine farming on the landscape. The Swiss Federal Inventory of Landscape and Natural Monuments of National Importance [24] registers typical Swiss landscapes. In this context they are defined as *cultivated landscapes shaped close to nature, which are particularly characteristic of a region because of their surface forms, cultural-historical features and important habitats for fauna and flora*.

Next to those man-influenced landscapes, the protection of natural scenery relates also to the last original landscapes, for instance the alpine wastelands above the timberline. Those areas have never been of any economic interest for man and present therefore a wide naturalness. Due to the Oberpinzgauer landscape conservation area[25] – situated in the province of Salzburg – *the characteristic natural landscape is protected because it is in some areas hardly influenced by man*.

The protection goals fauna and flora, geology und natural scenery have in common that they designate the subject of protection. Furthermore, they forbid intrusion, which is understood as man-caused negative effects. On the other hand, certain protected areas follow a different approach: the primary purpose is the prevention of a certain development and not the protection of an object. A notable example in this respect is a specific protection category of the Tyrolean conservation Act, the so-called "Ruhegebiet",[26] a kind of 'stillness reserve'. Outside built-up areas stillness reserves can be established, if this region is characterized by *far-reaching silence because of the lack of noise-making factories, of cableways for passenger service and of roads for public use*. Not a specific object is supposed to be protected but the prevention of touristic development.

IV. Limits of legal protection

If a project needs permission under conservation law, because negative effects on the environment are to be expected, the first logical step is to find out about the effects of the project. For this reason experts' opinions have to be considered. Then, in a second step, the authority has to balance the conflicting interests. It is important that the act of designation names the specific protection goals of a protected area, because the authority has to compare the negative effects of planned projects with the importance of the established protection

23. *Guérin*, Die alpine Natur – ein Produkt der Geschichte, CIPRA Info, nr. 86, 2008, p.
24. "Bundesinventar der Landschaften und Naturdenkmäler von nationaler Bedeutung", AS 1977, 1962 (SR 451.11).
25. "Oberpinzgauer Nationalpark-Vorfeld-Landschaftsschutzverordnung" (LGBl 2003/81).
26. § 11 "Tiroler Naturschutzgesetz" (LGBl 2005/26).

goals to decide, whether the one or the other position has priority in the individual case.[27] This leads to the granting or refusal of permission under conservation law.[28]

Designating an area as 'protected' normally does not mean that intrusions are unconditionally prohibited. The designation of a protected area documents the importance of environmental interests. According to the protection regime, projects with negative effects can be permitted, if the other, non-environmental interests prevail. Thus, protected areas are not resistant to intrusions in most cases.

Yet, the legal systems that are subject to this study have – in isolated cases – categories of protected areas in which any intrusion is prohibited without exception.[29] Those regulations set environmental interests as absolute; no other public or private interest can outweigh the interests of nature, however important they might be. The category 'special reserve' ("Sonderschutzgebiet"), which can be found in the Tyrolean conservation Act,[30] might serve as an example: it relates to areas which have been preserved in their natural originality. Every intrusion on nature is simply forbidden there. The only exception concerns measures to guaranty the protection goals which consequently must not affect them adversely. Another similar example is article 11 protocol "conservation of nature and the countryside" of the Alpine Convention: "The Contracting Parties undertake to preserve, manage and, where necessary, to extend the existing protected areas, in keeping with their protective function, and also to define, where possible, new protected areas." The exact wording of this article raises the question whether there is an unconditional obligation to preserve protected alpine areas as prescribed in the relevant protection goals. In this case, every intrusion on a reserve within the purview of the Alpine Convention would be permitted unless the core zone of a national park or a small rather unimportant natural monument is concerned.

From a legal point of view, such unconditional prohibited intrusions are not specific for mountain conservation law; they can occur in different contexts. Nonetheless, the mountain region is under an exceptional pressure resulting of different interests. This might be a reason, why this *ultima ratio* of conservation law can be found in context of protected alpine areas. Setting interests of nature without reservation raises the question, whether such a regulation is compatible with the principle of proportionality.[31] Apart from statutory determinations by

27. CH: BGE 127 II 273; 123 II 263; German Federal Constitutional Court 16.9.1998, 1 BvL 21/94 = NuR 1999, 99.
28. Of course there are different ways to balance interests (see e.g. art. 6 [4] directive 92/43/EEC); the crucial point in this context is that there is a balance of interests at all.
29. In art. 78 (5) the Swiss Federal Constitution contains an unconditional prohibition of any intrusion on mires and mire landscapes. Due to its constitutional status this regulation can remain unnoticed (see BGE 117 Ib 243).
30. "Tiroler Naturschutzgesetz" (LGBl 2005/26).
31. In Austria an unconditional legal rule has to be critically analysed in some ways from a constitutional point of view, in particular with regard to the principle of equality and the duty of one legislator to consider the interests of another legislator in a federal state ("bundesstaatliches Berücksichtigungsgebot", see Austrian Constitutional Court VfSlg 15.552/1999 and gloss by Weber, ÖZW 1999, p. 117).

national law, the principle of proportionality is written down in the European Convention on Human Rights (ECHR).[32] According to the case law of the European Court of Justice, it is furthermore one of the general principles of Union law.[33]

All alpine states are members of the Council of Europe and have ratified the ECHR.[34] Legal restrictions on use of land are an interference with the right to the peaceful enjoyment of possessions, which is guaranteed in the Convention.[35] There is neither a formal expropriation of the property, nor a *de facto* deprivation, but the interference must be considered as a control of the use of property.[36] Basically, the right to the peaceful enjoyment of possessions is legally binding for the legislator and for official authorities. However, the interference is never caused by the legal enabling act itself. Even if the legal enabling act establishes an unconditional prohibition of intrusion, the interference is in fact caused by the act of designation or by the administrative act, which refuses, based on the designation, the grant of a specific project.

It is also possible that the legal enabling act only contains the opportunity for the designation act to prohibit intrusions without exception which depends on a balancing of interests in the particular case. Again, it is the act of designation or an administrative act which causes the intrusion.

Such interference is justified if it pursues a legitimate aim, if it is in accordance with the law and if it is proportional. In accordance with the principle of proportionality, the act of a public authority has to be appropriate and necessary to the achievement of that aim. The question is whether a fair balance is struck between the opposing interests.[37]

Protecting the environment is undoubtedly a legitimate aim "in accordance with the general interest" for the purposes of the second paragraph of article 1 Protocol 1-1.[38] Furthermore, designating protected areas must be regarded as a proper way of achieving that aim. The question is, however, whether an unconditional regulation can ever be the measure that is the least restrictive of a person's rights.

At first glance, the question has to be denied: A *prima facie*-decision, that one pursued aim always outweighs every other thinkable interest, is more restrictive than balancing interests

32. *Grabenwarter*, Europäische Menschenrechtskonvention (2009), p. 115 ff.
33. ECJ 14.12.2004, case C-210/03, *Swedish Match*, ECR (2004) I-11893 with further references.
34. Switzerland signed but did not ratify Protocol 1 of the European Convention on Human Rights. Nonetheless, restrictions on the right to the peaceful enjoyment of possessions are only justified in accordance with the principle of proportionality (instead of many others BGE 132 I 229; 119 Ia 362).
35. ECtHR 16.9.1996, *Matos e Silva, Lda. a.o.*, nr. 15777/89; Austrian Constitutional Court VfSlg 13.563/1993, 15.065/1997; Austrian Administrative Court 21.6.2007, 2005/07/0086; CH: BGE 127 II 184, BGE 105 Ia 330, BGE 117 Ib 243; German Federal Administrative Court 31.1.2001, 6 CN 2/00 = NVwZ 2001, 1035.
36. ECtHR 29.11.1991, *Pine Valles Developments Ltd.*, nr. 12742/87; German Federal Administrative Court 30.9.1996, 4 NB 31 and 32/96 with further references = NVwZ 1997, 887.
37. German Federal Administrative Court 2.3.1999, 1 BvL 7/91 (BVerwGE 100, 226); 5.2.2009, 7 CN 1.08 = NuR 2009, 346; CH: BGE 103 Ia 417.
38. *Grabenwarter*, Menschenrechtskonvention, p. 115 and 434.

in a particular case. In other words, balancing interests is always the less restrictive measure to realize environmental goals under conservation law.[39] Furthermore, it is possible that intrusions lose their negative effect with compensatory measures. In this case, not only a general prohibition is the proper way to achieve the aims pursued.

In contrast, it could be argued that a balancing of competing interests can take place, when the protected area is designated:[40] Preliminary proceedings prove that environmental interests of exceptional dimension are given in a certain area. As a consequence, it is unthinkable, that any other interest can ever outweigh the interests of nature. But again it can be replied, that it is simply not possible to judge beforehand the importance of any other non-environmental interest which does not exist at the moment of balancing between interests.

In my opinion, an unconditional prohibited intrusion is not automatically an infringement of the principle of proportionality: if the exceptional dimension of environmental interests have been undoubtedly determined and documented with regard to a certain area, it is objectively justified, if a protection act is absolute and unconditional. The principle of proportionality gives sufficient scope to designate protected areas in which any intrusion is prohibited without exception, as long as the specific protection goals are of a dimension, which justifies any interference with a right guaranteed in the Convention on Human Rights.[41]

Thus, an absolute prohibition of any intrusion is only lawful in a very specific context. At the same time a general rule with a very wide scope, such as article 11 protocol "conservation of nature and the countryside" of the Alpine Convention, which refers to every category of protected areas regardless of the dimension of environmental interests pursued, is a violation of the principle of proportionality. This regulation is too undifferentiated and general, so that it cannot be regarded as appropriate and necessary to the achievement of that aim. Therefore, article 11 must be interpreted in conformity with the Convention on Human Rights in particular with the principle of proportionality in the sense that it determines a fundamental decision for the conservation of nature.

Let me close with a personal assessment: It is not stricter laws that will preserve the alpine region from further harming development. It is the attitude towards nature of the decision makers and of us all.

39. See BGE 103, Ia 417; BGE 128 I 3; in contrast BGE 100 Ia 445; cf. ECJ 12.3.1987, case 178/84, *Commission/Germany*, ECR (1987) 1227.
40. The Federal Supreme Court of Switzerland (117 Ib 243) illustrates with regard to art. 24sexies (5) – now art. 78 (5) – Swiss Federal Constitution (BV): "Eine Interessenabwägung gegenüber dem verfassungsmässig vorgesehenen Veränderungsverbot kann im Einzelfall nicht in Frage kommen. Vielmehr sind Interessenabwägung und Verhältnismässigkeit diesbezüglich bereits in der abstrakten Rechtsnorm vorab entschieden worden." (see also BGE 123 II 248).
41. Within a different context see Austrian Constitutional Court VfSlg 11.853/1988 (furthermore VfSlg 18.096/2007 and judgment of 11.12.2008, G 43/07).

The Use of Motor Vehicles in the Alps

Liliana Dagostin

I. Introduction

The Protocol on the implementation of the Alpine Convention of 1991 in the field of tourism and leisure activities (Tourism Protocol) was signed by all eight Alpine States and the European Community and ratified by all Contracting Parties with the exception of Italy and Switzerland. In article 15, paragraph 2 of the aforementioned Protocol, the Alpine countries expressed their intention to reconcile motorsports with the safeguard of the Alps.

Before considering this more in detail, a short overview is provided of how individual Contracting Parties have hitherto addressed the issue: attention will be paid in particular to strikingly different ways of dealing with motorsports in open terrain.

Apart from the European Union, only the Principality of Monaco have not been considered. The reason for excluding the latter is that its territory is entirely urbanized, whereas the focus of our considerations is on the use of motor vehicles in open terrain. It should be pointed out though that the need to regulate motorsports in the Alpine region does not regard only areas of unspoiled nature. Also in built-up areas, which are already burdened by commuter traffic and tourism-related traffic, a restriction of motorsports appears to be reasonable.

There is no doubt that motorsports have many supporters. While environmental organizations have a critical position towards these sports activities, there are lobbies that are loudly calling for the right of motorsports to exist in the Alpine region. Even though it has not been possible to obtain reliable data on how many motorsports fans are living in the Alpine countries or spend their vacations there, their number might be substantial considering the attendance of participants and spectators at motorsports events. In Switzerland for instance, a country where quads and skidoos are considered motorcycles and the relevant registry is steadily growing, 2004 saw the registration of 5,800 quads and 1,250 skidoos (snowmobiles). Most environmentalists are extremely critical of the sense for practicing motorsports, as these go against every sound principle of environmental and climate protection.

II. The Alpine Convention's Approach

As in other highly charged and controversial debates, the Alpine Convention is seeking to take these contrasting demands into due consideration, find common ground and create the space needed for different forms of leisure.

In light of the foregoing, we need to reaffirm what has become commonplace: Article 15, paragraph 2 of the Tourism Protocol does not sanction the hoped-for comprehensive ban on motorsports throughout the entire region. It rather calls for a compromise solution that eventually limits motorsports to specific areas. In our opinion, one partial success should be the determination of the most suitable areas to be designated. It would also be conceivable that development in areas of great environmental value be excluded in compliance with other environmental provisions of the Alpine Convention and regulations of the Contracting Parties.

III. The Approach of the Contracting Parties

In the relevant territories there is already a host of national and regional regulations dealing with motorsports. The provisions comprise limitations regarding vehicle types, nature areas and activities. Whether the competence to negotiate is a national or regional one depends on the subject matter that requires regulation.

Motorsports events do not pose any particular problem. These require either a notice or authorization either regularly or on a case-by-case basis once a given number of competing vehicles is reached. The venue can be either permanent or specific for the occasion.

Almost all the Contracting Parties assume that the use of certain **types of vehicles** contrasts with the environment-friendly use of natural resources and the legitimate interest in outdoor leisure. The Contracting Parties have adopted regulations especially for motorcycles of all types and particularly quads and snowmobiles. This is done often regardless of the purpose of use or whether these are strictly used for sports. For instance, in Bavaria the use of motorised snow vehicles is forbidden and exceptions are envisaged only for the purpose of safety and order and for the protection of the general public or environments against noise.[1] There is a similar ban in France as well if snowmobiles are used for recreational activities.[2] Quads, sport and endure motorcycles can be used only in specific dedicated areas. Slovenia bans the driving, stopping and parking of motor vehicles and motorcycles in all of the country's natural areas and hence in any area located outside build-up areas and traffic zones.[3] All of Austria's federal regions - except Lower Austria - have enforced provisions so that the use of motor vehicles is limited not only for sports purposes. For instance, Carinthia and Salzburg have bans on the use of motor vehicles in the countryside outside of traffic zones.[4] While the

1. see article 12, par. 1, item 2 and paragraph 2 of Bavaria's Act on emissions control
2. see article L362-3 of the French environment code
3. see State decree on the traffic ban of motor vehicles in natural areas (Law Gazette RS, no. 16/1995, 28/95, 35/2001)
4. see article 14 of Carinthia's Nature Protection Act of 2002 and article 27(d), of Salzburg's nature protection Act of 1999, currently in force

ban in Carinthia is limited to motor vehicles, the one in Salzburg applies to both motor and non-motorised vehicles, such as bicycles. Even the use of snowmobiles is banned by Salzburg in a dedicated law on the use of snowmobiles off public transportation roads. Manufacturers can apply for an authorization to carry out trial runs on slopes. Styria, too, bans the use of off-road vehicles outside of approved motorsports facilities. Tyrol bans sports competitions with vehicles with combustion engines outside of areas dedicated to the regular organization of motorsports events.[5] The use of motor vehicles for other purposes outside of traffic zones and enclosed build-up areas is subject to authorization.[6] Other Austrian federal regions regulate or ban the use of specific types of vehicles and/or the access to specific protected natural areas.

In Italy there are currently no national regulations, but efforts are being made to adopt a national law. On the initiative of interest groups representing national motorsports associations, a draft bill has been submitted by which the use of specific types of vehicles is banned in specific areas and on parts of the road network.

IV. Which Areas can be Considered as Designated Ones?

Provided that there are no other provisions on use, it can be assumed that use is allowed in all those places where transit is not forbidden or anyhow requires an authorization or notice. This assumption does not mean though that all areas where there is no ban are to be considered as designated areas as understood by the Alpine Convention. This conclusion would mean, for instance, that in France 1.5 million km of public roads, trails and other traffic zones including private roads and routes could be used for motorsports in compliance with the provisions of article 15. paragraph 2.

Of all the areas hereto considered, public roads outside protected areas or other areas subject to protection (e.g., alpine uncultivated lands, watercourses and water bodies subject to bank protection) pose the smallest problems for nature protection considering the purpose they are used for. However, this does not mean that these areas are immune to disputes. For instance, long time before the Dolomites were designated as a World Natural Heritage site, it has been discussed whether motorsports on the pass road around the Sella group should be substantially curbed or completely banned.

The matter of whether the use of vehicles is allowed in protected areas - and, if so, which type and for what purpose - has been regulated by the protected area laws, decrees and ordinances we have examined. According to these, the use of motor vehicles in protected

5. see article 5, item a, of Tyrol's 2005 Nature Protection Act
6. see article 6, item j, of Tyrol's Nature Protection Act

areas is prohibited or at least substantially limited. As a rule, there are no limitations on uses relating to public safety and order, the protection of the general public (e.g., civil protection, controlling of torrents and avalanche protection), ordinary agricultural and forestry use, supply and servicing of mountain huts or refuges.

Nonetheless, in our opinion, a comprehensive consensus is desirable by which protected areas are excluded from any kind of motorsports events and activities. This commitment should also include forest roads and trails so that motorsports are banned on these roads or anyhow should not be authorized considering the prevailing public interest in nature protection.

The most pressing questions on the compliance of the standards, which the Contracting Parties have passed national laws on[7] have come to fore on the issue of how to regulate the use of motor vehicles in the open.

In our opinion, French regulations are worth mentioning here for their rigor and spirit in line with that of the Alpine Convention. In France, the use of motor vehicles in the open and of snowmobiles for recreational purposes is prohibited in general. The designation of areas as competition or practice grounds is subject to authorization. Therefore, any area is designated before its use and included as such in the relevant Département's map.

Italy is tackling the issue, which has not been legally regulated yet, in a rather ambitious way. In the aforementioned draft bill, transit over unpaved roads and in the open will be subject to both spatial and time limits. As for motorsports, appropriate areas will be designated and made subject to authorization. One positive aspect worth noting is that the management of visitor flows is expressly mentioned as a goal in the preamble.

As in the case of protected areas, even in the open there are different exceptions to the partially comprehensive ban on driving. No significant exceptions for motorsports are envisaged. A closer look shows that these exceptions generally regard the operation of vehicles for the prevailing public interest and mainly for public order and the safety of people. Similarly, the exceptions also include measures on agriculture and forestry, the supply and servicing of Alpine infrastructures such as mountain huts, refuges and ski facilities, etc. Transit is allowed instead in areas designated and authorized in advance.

On the other hand, almost all the Contracting Parties reserve the right to authorize motorsports events, competitions or other major events on a one-time basis. These can be held outside of areas already designated and preferably on roads but also in the open.

In the past the Contracting Parties to the Alpine Convention have already dealt with the issue of types of motorsports and agreed on the following.

7. article 15, paragraph 2 of the Tourism Protocol

Article 15 of the Protocol on the implementation of the Alpine Convention of 1991 in the field of tourism:

(1) The Contracting Parties undertake to define a policy for controlling outdoor sporting activities, especially in protected areas, in order to avoid causing damage to the environment. This control may mean prohibiting a particular activity, if necessary.

(2) The Contracting Parties undertake to limit as much as possible, and if necessary prohibit, sporting activities using motorised vehicles outside areas designated by competent bodies.

V. Soft Law

When it comes to the application of this article, there is one major problem that is clear straightaway. At least the Alpine environmental organizations were disappointed with the vague wording and called early on for comprehensive limitations on motorsports. For instance, in a joint statement issued in Bad Hofgastein way back in 1978, the Austrian and German Alpine Clubs called for a renunciation of motorsports. The Club Arc Alpin is the umbrella association of alpine clubs with a total of 1.8 million members and one of the 14 official observers of the Alpine Convention. In 2009 it underscored and reaffirmed this appeal at its general meeting. The alpine clubs too are committed to making their fair contribution and are preparing proposals for rules of conduct. On behalf of their members and other environmentalists they are developing an increasing number of measures on the management of visitor flows and alternatives to individual motor car traffic for recreational purposes, e.g., by organising collective tours using public means of transportation.

VI. Concept of Motorised Sports

The 'motorised sports' concept is much more comprehensive than that defined by most of the Contracting Parties. It regards all types of motorised sports regardless of the type of engine or the technical features characterizing the vehicle used. This means that no distinction is made between vehicles with combustion engines or alternative drive, between vehicles with 2, 3 or 4 wheel-drive, or crawler vehicles, motorcycles, etc.

Unfortunately, article 15, paragraph 2, is to be applied only to 'sporting activities'. We do not know how this limitation came about or why the Contracting Parties decided on such a modest objective. However, it can be stated beyond dispute that motorised traffic is harmful to the environment. The purpose plays a secondary role. While some uses are in the interest

of the general public and any harm to the environment can be justified, this is not the case of motorsports in the opinion of the Contracting Parties.

It is assumed that all activities that cannot be defined as sports do not meet the definition of article 15, paragraph 2, and hence are not covered by it. This means for instance that all motor vehicle events aimed at improving driving skills or practice, as well as other motorised recreational events are excluded. Similarly, it excludes events like the Transvalquad in Savoy. It is a five-day event during which thousands of quads drive through the region. This also applies to Hannibal, an event held on the Ötztal's Rettenbach glacier. It is a re-enactment of the crossing of the Alps by the Carthaginians using snow groomers and snowmobiles. This also goes for vintage car shows and similar events.

VII. Allocation and Number of Areas?

In practice, the request to allocate dedicated spaces to motorsports has proven to be scarcely defined. The silence of the Contracting Parties on the suitability of the areas that can be designated has been especially problematic. If neither a regional law nor a conservation goal is violated, the permanent designation of an area for motorsports is conceivable also in a protected area. Article 15, paragraph 2, does not contain any provision on a time limit or sequence either. For instance, a motorsports event can be authorized in an area that was never designated before. As already argued in an administrative procedure, a one-time authorization of a motor sports event either at one or more plots of land constitutes designation as understood by article 15, paragraph 2 of the Tourism Protocol. If the application for authorization of a single event is enough to assume that an area is specifically designated under article 15, paragraph 2 of the Protocol, then the goal to regulate motorsports cannot be achieved. It cannot be anyhow inferred from the wording of paragraph 2 that the Contracting Parties have an obligation to define their own administrative procedures, for instance spatial planning rules for designating suitable areas. This is the necessary conclusion, given the goal pursued by the Alpine Convention.

Similarly, article 15, paragraph 2 of the Protocol does not contain any recommendation on the number of areas in a given territory. There is no way to discourage a municipality that wishes to draw motorsports fans and visitor flows to its own municipal territory from designating areas or circuits locally, instead of planning a few areas at a regional level.

VIII. Facit

As a matter of fact, most Contracting Parties do seek to settle the conflict of interest between motorsports and environmental protection. France and Slovenia as well as the Austrian regions of Salzburg, Carinthia and Styria have definitely been the most forward-looking and

comprehensive in taking action not only with regard to the motor sports activities, but also to other motorised activities.

Nevertheless, a joint commitment is desirable by which the Contracting Parties expressly pledge themselves to foster sustainable socioeconomic development in the Alpine region and give priority to the promotion of environment-friendly sports. A clear commitment in this regard would make it difficult to recognize a public interest in motorised sports and motorsports events held outside spaces designated in advance for the purpose. Anyhow it is necessary to raise the awareness of this conflict of interest among local communities, tourists and tourism operators.

In light of these premises, the pressure on political decision-makers is going to step up so that they play an active part in implementing the minimum requirements set in article 15, paragraph 2, and facilitating and ensuring enforcement by authorities

The Use of Helicopters for Leisure Purposes in the Alps

Jennifer Heuck

I. Introduction

The Society "Swiss Eternity" makes an exclusive offer: dispersing your ashes from a helicopter over the Aletsch glacier (a UNESCO world heritage site), the Matterhorn, the Mont Blanc Massif or in a more modest way over a mountain pasture. The offer includes pictures of the ceremony and a DVD presenting the place of dispersion.[1]

It is doubtful, whether such an activity can be considered as reasonable and ethically justifiable. From a legal point of view the question arises whether the activity is in contradiction to the protocols of the Alpine Convention: the contracting parties are obliged to limit or, if necessary, to prohibit airdrops in places other than aerodromes.[2]

In times of climate change, the sustainable development of mountain areas constitutes a major challenge. Sustainable development should be understood as protecting an entire living space, taking into account ecological, economic and social aspects.[3] This global challenge must be solved by tackling individual problems.

The motorised activities in the Alps are rapidly expanding. Helicopters are not only used for rescue and aerial work, but also for leisure purposes such as panoramic flights and drop-off services at mountain restaurants or huts. In addition, heliskiing, helimountainbiking, helisnowshoeing and heligolfing are widely advertised and even "helidispersion of ashes" is on offer as can be seen in a short film by Swiss Eternity.[4]

While the use of helicopters for rescue and aerial work is not questioned, their use for leisure purposes is subject to harsh controversy. Environmental pressure groups argue that such a use of helicopters causes unnecessary noise nuisance and CO_2-emissions. Economic actors counter that a diversification of the offer will attract tourists and create economical gains for whole regions. Furthermore, according to the latter, such leisure flights also constitute a means to access the mountains and thus an expression of everyone's freedom.

Zeno, a Greek philosopher (335 BC-264 BC) once said: "The goal of life is living in agreement with nature". The purpose of the Alpine Convention is to set a legal frame to achieve and ensure this goal of life.[5]

In the following sections, the provisions of the protocols of the Alpine Convention relating to this subject, the national civil aviation laws and the environmental regulations referring to the use of helicopters for tourist activities shall be analysed. Lastly, the scope and degree of harmonisation of these laws through the European Union (EU) shall also be addressed.

1. An advertising film can be watched at <http://www.swisseternity.com/indexfr.html>, accessed March 17, 2010.
2. Cf. below 2.1.
3. Birnie P., Boyle A., Redgewell C., International Law & the Environment, Oxford, 2009, 116 et seq.
4. Cf note 1 supra.

II. The Alpine Convention

Article 16 Tourism Protocol obliges the contracting parties "*to limit as much as possible or, where appropriate, to prohibit airdrops for sports purposes in places other than aerodromes*".[6]

Article 12 (1) Transport Protocol relates more generally to transport: "*The Contracting Parties undertake to reduce as far as possible the environmental damage caused by air traffic, including aircraft noise, without transferring it to other regions. Taking account of the objectives of this Protocol, they shall make efforts to limit or, where appropriate, prohibit airdrops in places other than aerodromes.*"

Both provisions have no direct effect, since they do not provide precise and unconditional obligations.[7] They merely oblige the national legislator or administration to substantiate its content. The articles imply that whenever a national administration uses its discretionary power, it should do so in a restrictive way.

Article 16 Tourism Protocol is limited to airdrops. However, the word "*airdrop*" is not defined by the protocols of the Alpine Convention. In everyday language the term is taken to mean "*a delivery of an object or person out of an aircraft in flight*".[8] The first sentence of Article 12 (1) Transport Protocol takes into account nuisances caused in general by airdrops and the use of helicopters and airplanes for instance when used for tourist flights or even aerial work.

Article 16 Tourism Protocol refers to airdrops for sports activities. However, according to sentence 2 of Article 12 (1) Transport Protocol the limitation or prohibition is not restricted to sports activities. All sorts of airdrops – the airdrop of persons and objects for any kind of purpose and hence also the disposal of ashes – should be limited or prohibited. This

5. Preamble of the Alpine Convention.
6. Legal translations of the Protocols of the Alpine Convention are not referring to the English version available on the websites of the European Union and the Alpine Convention, which is incorrect at some points. The translations, which are those of the author, refer to the official versions in French, German, Italian and Slovenian.
7. Whether a provision of International Law has direct effect in the national law systems is left to the discretion of each contracting party (Doehring, K., *Völkerrecht*, Heidelberg, 2004, para. 702; ECJ Case 104/81, *Kupferberg*, ECR 1982, 3641, para. 18; *Vedder*, in: Grabitz, EWGV (1986), Art. 228 EWGV para. 48). Usually it is necessary that the provision is sufficiently precise and unconditional. As to the conditions in European Union Law cf. ECJ Case 104/81, Kupferberg, ECR 1982, 3662, para. 23.
8. The Concise Oxford Dictionary, Oxford, 11th Edition 2004 (revised 2006).

distinction between Art. 16 Tourism Protocol and Art. 12 (1) Transport Protocol is important as long as the contracting parties have not yet ratified both protocols. The EU has only adopted the Tourism Protocol[9] and therefore is bound to the less restrictive provisions of this protocol.

The limitation or prohibition of airdrops is restricted to "*other places than aerodromes*". The protocols of the Alpine Convention do not provide for a definition of the term "aerodrome" (in the aeronautical language often used synonymously with the term "*airfield*"). Chapter 1.1. Annex 14 of the Chicago Convention[10] defines an aerodrome as "*a defined area on land or water (including any buildings, installations and equipment) intended to be used either wholly or in part for the arrival, departure and surface movement of aircraft*". The same Annex 14 defines a heliport (in the aeronautical language often used synonymously with the term "*helipad*") as "*an aerodrome of a defined area on a structure intended to be used wholly or in part for the arrival, departure and surface movement of helicopters*". The French, Italian and German legal definitions of "*aerodrome*" ("*aerodrome*", "*aerodromo*" and "*Flugplatz*") correspond to the international definition. We retain from that definition that an aerodrome or heliport must be officially designated by the competent authorities.

III. National Legislation

The national civil aviation laws are the rules which regulate flights and air travel. They also cover the use of all kinds of aircrafts. In principle, these laws prohibit the landing of helicopters outside of aerodromes. In some countries special rules regulate flights and transport with aircrafts in mountain areas. These norms are often part of the national environmental law. The following section addresses selected aspects of these different national regimes.[11]

III.1. Switzerland

Switzerland is the only country where the specific rules on the use of helicopters in mountain areas are embedded in the civil aviation law rather than in domestic environmental law. According to Art. 8 (1) and (3) Luftfahrtgesetz (LFG[12] – Swiss Civil Aviation Law) aircrafts can land and take off on aerodromes and designated "*mountain landing places*" (MLP). These

9. 2006/516/EC: Council Decision of 27 June 2006 on the conclusion, on behalf of the European Community, of the Protocol on Soil Protection, the Protocol on Energy and the Protocol on Tourism to the Alpine Convention – Declarations, OJ L 201, 25.7.2006, p. 31–33.
10. Convention on International Civil Aviation signed on December 7, 1944 in Chicago, Illinois.
11. The use of helicopters in mountain areas in Germany, Liechtenstein and Slovenia seems to be inexistent or on a much smaller scale than in the neighbouring countries Switzerland, Italy, Austria and France. For the national legislation of these countries see Heuck J., *L'Utilisation des Hélicoptères à des fins de loisirs en montagne Grenoble*, 2009, 88 ff.
12. SR 748.0.

places are by definition "*specifically designated landing fields above 1'100 metres*" (Art. 2 lit. n Ordonnance sur l'infrastructure aéronautique [OSIA[13] – aeronautical infrastructure act]) used for instruction and sport purposes or for the transport of persons (Art. 54 (1) OSIA).[14] The law limits the number of MLPs to 48 (Art. 8 (4) LFG and Art. 54 (3) OSIA). To date 42 MLPs have been designated.[15] Landing outside these MLPs is only allowed under very restrictive conditions (Art. 55 ff. and Art. 50 ff. OSIA).[16]

The question may be asked, whether MLPs fall under the definition of "aerodrome": if not, whether Switzerland already[17] fulfils the obligation as to limit or prohibit airdrops out of aircrafts outside aerodromes.

- MLPs are "*specifically designated*" by the Swiss authorities. Their official designation may lead to the conclusion that they must be considered as aerodromes: as such, the obligations of Art. 16 Tourism Protocol and Art. 12 (1) Sentence 2 Transport Protocol would not apply. However, MLPs are by definition "*landingfields*". "*Landingfields*" are defined as "*places for outside landing*" (Art. 2 lit. q OSIA), "*outside landing*" is the "*landing or take off outside an aerodrome*" (Art. 2 lit. d OSIA). Since the landing takes place outside an aerodrome, the obligations of the Protocols of the Alpine Convention are applicable.

- It seems doubtful whether Switzerland would fulfil its obligation "*to limit or, where appropriate, prohibit airdrops in places other than aerodromes*" and "*to reduce as far as possible the environmental damage caused by air traffic, including aircraft noise*" prescribed by article 12 (1) Transport Protocol with its 42 MLPs above 1'100 metres. Furthermore, seven MLPs are located in the Jungfrau-Aletsch-Bietschhorn area[18], which is a UNESCO world heritage site. Other MLPs are located in areas that are part of the federal inventory of landscapes, sites and monuments of national importance.[19]
  During the past years, considerable criticism has been raised because of the nuisance which heliskiing creates in these protected areas. For this reason the Federal Council

13. SR 748.131.1
14. A new "landingfield-act" ("Aussenlandeverordnung/Ordonnance sur les atterrissages en campagne) is currently being worked out
15. Before designating a MLP the Federal Commission for the Protection of the Nature and Landscape, the Swiss Alpine Club and interested development societies are to be heard (Art. 54 (2) OSIA).
16. It seems that illegal airdrops for heliskiing are also observed outside the MLPs, Rohrer M., *Les atterrissages illégaux d'hélicoptères dans les Alpes Suisses*, November 1998.
17. Switzerland has not yet ratified the Protocols of the Alpine Convention. See also below in the text.
18. Ebnefluh, Jungfraujoch, Langgletscher, Petersgrat, Kanderfin, Blümlisalp, Rosenegg West.
19. SR 451. 11 Ordonnance concernant l'Inventaire Fédéral des Paysages, Sites et Monuments d'Importance Nationale/ Verordnung über das Bundesinventar der Landschaften und Naturdenkmäler von nationaler Bedeutung (BLN).

mandated a general revaluation of MLPs to find out to what extent the heliskiing activities could be continued, taking into account the need to protect nature.[20] The revaluation has proven to be a particularly difficult task even for stakeholders among themselves. As an example, the Swiss Alpine Club could not agree on an unanimous conclusion among its different sections.[21]

It seems questionable that the ongoing revaluation will result in an improvement of the actual situation. It is an alarming signal that in the region Wallis-South-East the closure of one MLP (Unterrothorn) coincides with the "legalisation" of a new MLP (Trift), which has previously been used illegally.[22] Moreover, only seasonal restrictions of flights are currently planned, but no maximum number of flights per day will be fixed.[23]

Since Switzerland has not yet ratified the protocols of the Alpine Convention it is not bound by the individual provisions of the convention. Nevertheless, Switzerland is obliged to refrain from acts which could undermine the object and purpose of the protocols as set out in Art. 18 Vienna Convention on the Law of Treaties[24].

III.2. Italy

According to Art. 699 and 700 Codice della navigazione (CDN – Italian Civil Aviation Law) aircrafts can land and take-off from airports and aerodromes. Take-off and landing on an *elisuperfici* (helisurface) is allowed under certain conditions (Art. 701 CDN). Some of these conditions are defined by the Decreto 1 febbraio 2006.[25] In addition, rules decreed by the regions and local authorities need to be taken into account (Art. 701 CDN).

Heliskiing is provided at a large scale in the Valle d'Aosta. The following remarks refer to specific regulations that are implemented in that region.

Art. 1 (1) and (2) regional law no. 15 mars 4, 1998[26] provides the general principle that "*for the purpose of the protection of the environment, also from an acoustic point of view, the landing and departure of motor-aircrafts is prohibited in parcs, protected nature sites and areas for the protection of the fauna (…). It is also prohibited to overfly these areas at an*

20. It is proposed to establish rules for specific flight routes, the restriction of the activity to certain periods of the day or the year and to establish so called "tranquillity zones".
21. "Zankapfel Heliskiing", Die Alpen 3/2010, p. 27 et seq.
22. http://naturschutz.ch/news/alpen/funf-gebirgslandeplatze-im-raum-zermatt/, last accessed March 7, 2010.
23. Bundesamt für Zivilluftfahrt, Objektblatt Gebirgsplätze Region Wallis Süd-Ost vom 4. Juni 2009.
24. Adopted in Vienna May 23, 1969; entered into force January 27, 1980. United Nations, Treaty Series, vol. 1155, p. 331.
25. Decreto 1 febbraio 2006, Norme di attuazione legge 2 aprile 1968, no. 518, concernente la liberalizzazione dell'uso delle aree di atterraggio (GU n. 106 del 9-5-2006).
26. Loi régionale no. 15 du 4 mars 1988 portant réglementation des activités de vol alpin visant à la sauvegarde du milieu, Bulletin officiel de la région autonome de la Vallée d'Aoste no. 7 du 25 mars 1988, last updated by the regional law no. 1 of January 20th, 2005 (Bulletin officiel de la région autonome de la Vallée d'Aoste no. 6 du 8 février 2005).

altitude below 500 m of the ground. Similar prohibitions are in force for all areas above an altitude of 1'500 m in the region".[27]

Annex A of the law (Art. 1 (2), Art. 2 (1) Law no. 15) mentions exceptions for seven areas: Courmayeur; Gressoney-La Trinité d'Ayas; La Thuile; Ollomont, Valgrisenche; Arvier et La Thuile; Valtournenche et Doues. Every area is subdivided into several parts. Taken together there are 47 spots where skiers can be dropped-off by helicopters from the period of December 20th to May 15th (Art. 3.6 Law no. 15) between 7 am and 4 pm (Art. 3.3 Law no. 15). The communities and the operating helicopter society[28] can agree by convention to prohibit heliskiing on other days during periods of high affluence of backcountry alpine skiing (Art. 3.2 e Law no. 15). The downhill slopes are defined in advance. If the descent passes through a protected site for the fauna or a site where the animal population is in mating season, the itinerary must be defined in cooperation with the competent forest guard of the territory (Art. 3.5 Law no. 15).

The situation is similar to that in Switzerland. The designated zones for airdrops are *elisuperfici* (helisurfaces). By definition they are not an aerodrome:[29] therefore the provisions of the protocols of the Alpine Convention apply. Again, permitting airdrops on more than 40 different spots seems inappropriate for the limitation of airdrops and the nuisance caused by the use of helicopters in mountain areas.

Italy – like Switzerland – did not yet ratify the protocols of the Alpine Convention. However, as a Member State of the European Union Italy is indirectly bound to the Tourism Protocol via Art. 216 (2) TFEU, because the Tourism Protocol has been ratified by the European Union.

III.3. Austria

According to § 9 (1) Luftfahrtgesetz (LFG – Austrian civil aviation law) aircrafts are allowed to land on airfields[30] only. An exception is however made in § 9 (2) LFG: The Landeshauptmann can issue a permission for helicopters to land outside an airfield, if there is no conflict with public interest. In case of a conflict the permission can still be issued if the public interest for landing prevails. The permission is limited in time and, if necessary, has to be subject to further requirements.[31] If the conditions for the permit are no longer fulfilled, or if the

27. *«Dans un souci de protection de l'environnement, y compris du point de vue acoustique, l'atterrissage et le décollage des aéronefs à moteur sont interdits dans les parcs, les espaces naturels protégés et les aires de protection de la faune (…). Il est également interdit de survoler les zones susdites à une altitude de moins de 500 m du sol. Des interdictions semblables sont en vigueur dans la partie restante de la Région pour toutes les zones situées à une altitude dépassant 1500 m. »*
28. For security reasons in principle only one helicopter society is allowed to operate per community (Art. 2.4 Law no. 15).
29. Art. 1 Nr. 2 Decreto 1 febbraio 2006.
30. According to § 58 LFG airfields are land- or waterfields, designated for a permanent landing and take-off of aircrafts.
31. In case of a landing and taking-off on land, when the person entitled to dispose over the land has agreed to the issuing of the permit (§ 9 (4) LFG).

additional requirements are not met, the permit must be revoked.
The wording of the provision suggests that in principle the permit must be issued. The burden of proof, whether the issue of a permit could be in conflict with public interests, lies upon the authority issuing the permit. According to the case law of the Austrian Administrative Court (Verwaltungsgerichtshof) "*in areas of recreation interests for the protection of the environment and tourist interests can be considered as important public interests*".[32]
The Austrian *Länder* apply their discretion very restrictively.[33] The Land Tirol, which initially had 24 landing spots (and was asked for additional 36 permissions) explicitly prohibited the use of helicopters for the transport of persons for tourist activities, unless the transport is taking place between aerodromes.[34] Today, only the Land Vorarlberg allows airdrops of skiers at two points, the "Mehlsack" and the "Schneetäli-Orgelscharte".[35]
In 2004, the authorisation for one of the two existing landing spots for heliskiing in Vorarlberg was withdrawn, because the ski-descend passed through a Natura 2000 site. One year later, in 2005, a new landing spot was approved close to the old site. The political party "*Die Grünen*" invoked that by allowing a new landing spot, Austria would not limit, but on the contrary extend the activity of airdrops, without considering environmental aspects.[36] This was in their view a breach of Art. 16 Tourism Protocol and Art. 12 (1) Transport Protocol.
The administrative authority, however, did not follow this contention. In its decision the nuisance caused by the landing spot is considered to be insignificant, since the activity is limited to one valley only. Additionally, the activity is allowed during certain hours only; it is also prohibited during weekends and official holidays. Therefore it should not be considered to be in conflict with public interests.[37]

Two remarks can be made concerning this particular case:

- The authorisation for one of the heliskiing spots was revoked with the aim to limit the nuisances that are caused by backcountry alpine skiers. It therefore would be unsuitable to justify the abolishment with reference to Art. 16 Tourism Protocol and Art. 12 (1) Transport Protocol, because the objective of the authorities was apparently not to reduce the nuisance caused by the helicopters but to reduce the nuisance caused by the skiers.

32. VwSlg 14249 A/1995.
33. This is the result of a study conducted by the Umweltdachverband and CIPRA Österreich.
34. § 5 Abs. 1 lit. b Tiroler Naturschutzgesetz 2005: "(…) die Verwendung von Hubschraubern zur Beförderung von Personen für touristische Zwecke, ausgenommen zwischen Flugplätzen".
35. The activity counts approximately 900 flights per season (Vorarlberger Nachrichten, Samstag/Sonntag, 11./12. November 2006).
36. Selbständiger Antrag der Landtagsabgeordneten Mag. Karin Fritz, Klubobmann, Johannes Rauch, Katharina Wiesflecker und Bern Bösch, die Grünen; 9. Beilage im Jahr 2006 zu den Sitzungsberichten des XXVIII. Vorarlberger Landtages.
37. http://vorarlberg.orf.at/stories/155765/, last accessed March 22, 2010.

- The existing heliskiing landing spots are outside aerodromes. The party "*Die Grünen*" therefore correctly invoked that the Land Vorarlberg is not restricting but actually extending the activity in clear contradiction to what is allowed by the protocols of the Alpine Convention. The fact that a landingfield existed nearby does not justify the new authorisation.

III.4. France[38]

Heliskiing is prohibited in France. However, other helicopter activities and tourist flights, and the drop-off at mountain restaurants seem to be much *en vogue*. Skiers also call for a helicopter to pick them up, once they have reached a bottom of a valley after an "hors-piste" ski descent.
According to French civil aviation law, helicopters can land on aerodromes, heliports and helisurfaces[39] (Art. R. 123-1, Art. R. 132-1, D. 132-6 Code de l'aviation civile (French Civil Aviation Code)). By definition, helisurfaces are no aerodromes.[40]
As a particularity, French law – in contrast to Swiss, Italian and Austrian law –, has a distinctive provision on "airdrops of passengers" embedded in the Code de l'Environnement (Environmental Code). Article L. 363-1 of the French Environmental Code provides: "*In mountain areas, the airdrop of passengers for leisure purposes by an aircraft is prohibited, unless at an aerodrome indicated on a list by the authorities.*"[41]
At first sight, the wording seems to be very similar to the wording of the protocols of the Alpine Convention. However, certain aspects and differences should be highlighted:

- The prohibition is limited to "mountain areas" and does not apply to the entire French territory. The French Law defines mountain areas in an administrative rather than geographical way. The law covers the scope of the Alpine convention.[42]

- The French law prohibits the airdrop of passengers only Art. 16 Tourism Protocol and Art.

38. For a detailed analysis of the French Legal System concerning the use of helicopters in mountain areas for leisure purposes see: Heuck (note 12) passim.
39. In principle, helisurfaces can be used without previous authorisation. Their use is subject to certain conditions: They need to be identified in advance by the pilot and the landing necessitates a previous permission by the owner of the land, where the landing will take place (Art. 12 Arrêté du 6 mai 1995 relatif aux aérodromes et autres emplacements, JO no. 108 du 7 mai 1995, page 7522).
40. Circulaire du 6 mai 1995 relative aux hélistation et hélisurfaces, JO du 7 mai 1995, page 7524. Heliports are by definition aerodromes (Art. 5 Arrêté du 6 mai 1995).
41. "Dans les zones de montagne, les déposes de passagers à des fins de loisirs par aéronefs sont interdites, sauf sur les aérodromes dont la liste est fixée par l'autorité administrative".
42. The administrative definition of the French "*zone de montagne*" has been the basis to define the scope of the Alpine Convention for the French territory.

12 (1) Sentence 2 Transport Protocol also applies to airdrops of material. Therefore, the French law does not meet all requirements of the Alpine Convention.

- Also, Art. L. 363-1 of the Environmental Code prohibits the airdrops only, if they are provided "*for leisure purposes*".
  In comparison with Art. 16 Tourism Protocol the article of the Environmental Code implies a restriction and an extension: a restriction because airdrops for all leisure purposes are prohibited, even those which are not for sport activities; an extension for professional sports activities, because these are exempted from the prohibition.
  The scope of Art. 12 (1) 2 Transport Protocol is larger, because the prohibition is not limited to airdrops for leisure purposes.

- Aircrafts are exceptionally allowed to airdrop passengers in mountain areas, if the airdrop is done on an officially designated aerodrome.[43] In contrast to Switzerland and Italy dropping-off passengers from a helicopter – but not the landing of the helicopter – outside an aerodrome is always contrary to French law.

IV. Harmonisation by the European Union

Specific rules on the use of aircrafts for leisure purposes in mountain regions do not (yet) exist in EU law. The disparities between the national legal systems and the different levels of protection raise the question whether the EU can make a contribution to reduce the nuisance caused by helicopters in mountain areas by means of harmonisation. As preliminary issue, it has to be clarified whether the use of helicopters in the mountains is an issue of "tourism" (Art. 195 TFEU)[44], "transport" (Art. 90 TFEU)[45] or "environmental protection" (Art. 191 TFEU)[46].

The clarification is important, since the competence for the areas of "transport" and "environment" is shared between the European Union and the Member States (Art. 4 TFEU). In areas of shared competence, the Member States can exercise their competence to the extent that the Union has not exercised its competence (Art. 2 (2) TFEU). The area of

43. No specific list has been established. To anticipate a total paralysis of the air traffic in mountain areas the Direction de l'Aviation Civile Sud Est refers to the list of aerodromes and helistations of the Service de l'Information Aéronautique for the French territory. Tourists can be dropped-off on an aerodrome or a helistation, as long as these infrastructures are not reserved for special purposes such as rescue for instance.
44. As an offer by the tourist sector.
45. As part of the civil aviation laws.
46. In order to reduce the nuisance caused by the helicopters for the environment.

"tourism", however, remains as an exclusive competence with the Member States. The Union can only carry out actions to support, coordinate or supplement the actions of the Member States (Art. 6 TFEU).[47]

The choice of the legal basis for a measure may not depend simply on an institution's conviction: it must be based on objective factors that are amenable to judicial review.[48] *These factors include in particular the aim and content of the measure.*[49] It therefore is necessary to analyse the aim and objective of the provisions of the Tourism Protocol and the Transport Protocol in detail. Arguably, the regulations on the use of helicopters for leisure purposes in the Alps are a matter of environmental protection (Art. 191 TFEU). Although the existence of a Tourism Protocol might suggest that the contracting parties intended to safeguard the economic development of peripheral alpine regions, Art. 1 of the Protocol leaves no doubt that it can only be achieved by protecting the unique environment of the Alps: "*The objective of this Protocol is to contribute to the sustainable development in the Alpine Region (…) by encouraging environmentally-friendly tourism through specific measures and recommendations which take the interests of both the local population and tourists into account*". Art. 9 Tourism Protocol further says: "*The Contracting Parties shall ensure that the tourism development is adapted to the specific environment and available resources of the area or region concerned*".

It can be concluded that the contracting parties support the development of the tourism-branch by protecting the environment and establishing an eco-friendly tourism – an idea which is contradicted by the transport of tourists with helicopters.

As to the air-traffic, Art. 12 (1) Transport Protocol is even clearer: "*The Contracting Parties undertake to reduce as far as possible the environmental damage caused by air traffic, including aircraft noise, without transferring it to other regions*".

The obligations of Art. 16 Tourism Protocol and Art. 12 Transport Protocol aim at preserving, protecting and improving the quality of the environment. Arguably, the EU can therefore exercise its competence only on the legal basis of Art. 191 TFEU.

As an additional step, when adopting a directive or a regulation, the European Union must respect the principle of subsidiarity (Art 5 TUE). The Union should act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central, regional or local level. Considering the scale of the proposed action, it can

47. According to Article 195 (1) TFEU the Union shall complement the action of the Member States in the tourism sector, in particular by promoting the competitiveness of the Union undertakings in that sector. To that end, the Union's action shall be aimed at: (a) encouraging the creation of a favourable environment for the development of undertakings in this sector; promoting cooperation between the Member States, particularly by the exchange of good practice.
48. ECJ Case 45/86 *Commission v Council*, ECR 1987, 1493, para. 11.
49. ECJ Case 300/89, *Titandioxid*, ECR 1991, I-2867, para. 10.

be reasonably be assumed that the objectives may be better achieved at Union level.
National laws should be harmonised to ensure a uniform application of the rules established by the protocols of the Alpine Convention. In the instant case, the Member States, contracting parties of the Alpine Convention and (partly) its protocols have adopted different rules on landing and take-off of helicopters and the airdrop of passengers. As has been shown in the previous discussion, these national rules remain in most cases below the level of protection foreseen by the protocols of the Alpine Convention. Therefore a need to act arises for the EU as a contracting party bound to the obligations of the protocols.
The Tourism Protocols and the Transport Protocol establish a certain level of protection in their provisions. The EU can take even more restrictive action to protect the environment. Thereby the Member States margin of manoeuvre they enjoyed under the provisions of the protocols would be limited. [50] Still, on the legal basis of Art. 192 TFEU Member States can maintain or introduce even more stringent protective measures than the ones provided for by European law, as long as they are compatible with the Treaty and are notified to the Commission (Art. 193 TFEU).
So far, the European Union has only ratified the Tourism Protocol. The ratification of the Transport Protocol has come to a hold.[51] Therefore, the possibility for the EU to harmonise rules of its Member States only exists in relation to the less restrictive Art. 16 Tourism Protocol.

V. Conclusion

The existence of a legal instrument on national level does not necessarily mean that the use of helicopters in mountain areas meets environmental requirements set by the Alpine Convention. It seems that countries have different perceptions about the term "*to limit as much as possible*", and this mainly due to differences of economic pressures. In Switzerland and Italy the laws are too permissive and clearly not adapted to the challenges in mountain areas. The French national law goes in certain points beyond the obligations established by the protocols of the Alpine Convention. Even if the requirements of the Alpine Convention are met from a legal point of view, it is necessary that these requirements are effectively implemented. The breach of a legal rule ought to be pursued.
The EU can play an important role for the harmonisation of the national laws of its Member States, which are also contracting parties of the Alpine Convention. There is a pressing

50. *Tomuschat*, in: GTE, Band 5 (1998), Art. 210 para. 42; ECJ Case 146/89, *Kommission/Vereinigtes Königreich*, ECR 1991, I-3533, para. 25; ECJ Case 221/89, *Factortame*, ECR 1991, I-3956, para. 14.
51. Especially due to the fact, that Italy is not willing to ratify the Transport Protocol.

need to find a solution to restrict the activity of helicopters for leisure purposes in the Alps. However, a solution which would not be carried by all the Alpine countries seems more than unsatisfactory. Cooperation between the contracting parties of the Alpine Convention is therefore essential, which applies both to Member States and non-Member States of the EU. The Alpine Convention is the predestined platform to re-establish by legal means the tranquillity in the mountains, which both men and animals are searching for.

The Action Plan on Climate Change in the Alps: *Mirroring Reality or Encouraging a Common Alpine Vision?*

Patricia Quillacq

I. Introduction

National delegates of the Contracting Parties of the Alpine Convention easily recall the difficulties of the negotiations to draft the Action Plan on climate change in the Alps[1], which took place from 2006-2009.[2] Such difficulties are understandable, since climate change is interlinked in both cause and effect to almost each type of human activity and the exercise of adopting a common strategic document for eight industrial countries must not be underestimated: literature recognises that despite the increasing understanding of the impacts and causes of climate change, the capacity to draft and implement policy responses that engender effective action has remained insufficient.[3] To a certain extent, the exercise of drafting an Action Plan on one of the most difficult notions the international community has ever agreed to act upon is an achievement in itself.

The Action Plan on climate change in the Alps is part of the *sui generis* regime of the Alpine Convention and from an orthodox international law point of view, falls into the large and heterogeneous category of "soft law". Soft law documents enjoy more or less successful destinies, depending on political will, societal momentum, and economical resources. Although the Action Plan on climate change in the Alps (the Action Plan afterwards) is still in its infancy,

1. Convention on the Protection of the Alps (Alpine Convention) of 7 November, (Salzburg), 1991 – afterwards the Alpine Convention. See Marco Onida's contribution in this volume; the complete text of the Action Plan on climate change in the Alps can be downloaded at <http://www.alpconv.org/climate/index_en.htm>
2. The IXth Alpine Conference adopted the Declaration on climate change, 8th November 2006 (Alpbach, Austria), downloadable in the official languages of the Alpine Convention at <http://www.alpconv.org/climate/index_en.htm>
3. Burch, S., Robinson, J., "A framework for explaining the links between capacity and action in response to global climate change", in *Climate Policy* vol. 7, (2007)304–316.

a first assessment and some questions can be made about its value in terms of policy response to the threat of global warming and about its present and future implementation.
The following contribution intends to present the origins, philosophy, structure and content of the Action Plan, report on the current stage of implementation, explore the possibilities of implementation for the coming years, and reflect on the value of the Action Plan as a policy response to climate change.

II. From Pre-UNFCC to Burning Post-Kyoto Times: The Alpine Convention Regime and the Concept of Climate Change

II.1. The Alpine Convention Regime and Climate Change before 2006

The absence of reference to climate change in the text of the Alpine Convention may be partly explained by the fact that in the drafting years before its adoption in 1991, a part of the scientific community was still cautious over the causes and effects of the threat of global warming. Yet, this argument does not bring light to why climate change is not mentioned in most of the Alpine Convention implementation protocols, particularly those drafted and adopted after the adoption of the Kyoto Protocol to the UN Framework Convention on Climate Change in 1997- at the exception of the Energy Protocol.[4] Some author could defend the idea that, by addressing the major socio-environmental problems of the Alps, the Alpine Convention and its protocols are providing the best possible answer to climate change, framed in terms of comprehensive sustainability. In fact, the modest place of the concept of climate change in the Alpine Convention regime until 2009 tends to support the opinion that the two concepts of sustainable development and climate change have been treated in different international arena, with different scientific frames (science-driven v/ social science approach) and in a rather independent and isolated way one from the other.[5] The Alpine Convention is no exception to this peculiar interplay between these two central notions of the 21st Century environmental policy. A starting point to our reflexion is to see how climate progressively appears in the Alpine Convention regime.

a) Climate in the Alps: A specific regional heritage constraining human development

In 1994 was adopted the implementation Protocol of the Alpine Convention relating to

4. For example, the Transport Protocol (Lucerne) of 2/10/2000 does not mention the question of climate change when it is well established that transports are responsible for a large share of GHG emissions.
5. Montini M., "Sustainable Development and the Climate Change Regime", in *Sustainable Development and international Law: the way forward.* EUI WP Law 2008/28, at 41-43.

Spatial Planning.[6] The Preamble states that the Parties to the Convention are:

> « Aware that the Alps make up an area of Europe-wide importance which constitutes a *specific and diversified heritage in its* geo-morphological formation, *climate*, waters, plant and animal life, landscape and culture, and that the upper mountains, the Alpine valleys and the pre-Alpine areas form an environmental whole, *whose conservation should be of interest not just to the Alpine States*».[7]

Two years later, when adopting the implementation protocols on Mountain Farming and Mountain Forest, the Parties mentioned two other important features of the regional climate: firstly, that it is a constraint for human activities.[8] Secondly that the regional climate equilibrium is depending on certain natural components of the alpine environment, in particular forests.[9]

In conclusion to this brief review, the binding instruments of the Alpine Convention really don't establish much link with climate change, to the point the Tourism Protocol or the Soil Conservation Protocol do not even mention once climate change. Only the Energy Protocol proves that the Alpine nations were starting to include climate change in their environmental and sustainable development policies in the second half of the 1990s.

b) The Energy Protocol: First interplay between climate change and the Alpine Convention regime

A first step toward the integration of climate change in the general sustainable development frame of the Alpine Convention is taken with the Protocol concerning the sector of Energy[10]. There is still some reluctance to affirm unequivocally the anthropogenic roots of global warming[11], and the main rationale to take "*into account*"[12] the need to reduce greenhouse

6. Spatial Planning and Sustainable Development Protocol, 20/12/1994 (Chambéry)
7. Preamble, para. 2., Spatial Planning and Sustainable Development Protocol
8. «the fact that the geomorphology and *climate of mountain regions* create more difficult living and production conditions for farming activity.» Preamble, Mountain Farming Protocol, 27/02/1996 (Brdo)
9. Forest Protocol, Preamble «*Considering that forests absorb carbon dioxide from the atmosphere and, for very long periods, trap the carbon in the woody material in a way that favourably influences the climate*; Aware that mountain forests are indispensable for the *regional balance of the climate*...»
10. Energy Protocol, 16/10/1998 (Bled)
11. "taking account of the fact, that, faced with risks to environmental protection, in particular due to possible climate change caused by humans"
12. Energy Protocol, Preamble para. 3

gases is firstly the obligation to "*comply with the Commitments under the UNFCCC*", and secondly the recognition of the existence of a sufficient risk able to increase the natural hazards in the Alps.[13] In consequence, article 1 of the Energy Protocol declares that by creating a framework and adopting measures for energy saving, production, transport, distribution and use within the Alpine region limits, "*the Contracting Parties will make and important contribution to protecting local communities and the environment and to safeguarding resources and the climate environmental protection.*"[14] The commitments under the Energy Protocol are divided between basic commitments (article 2) and specific commitments (articles 5-13), in the respect of the principle of subsidiarity (article 4). The range of measures to use to comply with the general objective is quite comprehensive. Among others, the most important ideas are:

- influencing the final demand of energy[15]
- harmonising the energy-saving plans throughout the Alpine region[16] and developing specific saving energy measures for the entire area[17]
- promoting and supporting municipal energy and climate projects,[18]
- limiting the impact of the use of fossil fuels, through best available technology [19]
- promoting renewable energy resources[20]
- improving energy efficiency of existing buildings[21] and encouraging low-energy new buildings[22]
- systematic observation and research in the energy field "*in particular concerning the impact on the environment and climate*" [23]
- supporting training and assistance, including in « *the protection of the environment, nature and climate* ».[24]

II.2. The Alpbach Declaration (2006)

The foundational act relating to climate change in the frame of the Alpine Convention is the

13. Ibid., Preamble
14. Ibid., article 1
15. Ibid., article 2.1. c
16. Ibid., article 2.a. & 2.g
17. Ibid., article 5
18. Ibid., article 6.3.g
19. Ibid., article 8
20. Ibid., article 6
21. Ibid., article 5
22. Ibid., article 5.3.f. &5.3.h
23. Ibid., article 15.1
24. Energy Protocol., article 16.2.

Alpbach Ministerial Conference in March 2006.[25] The Alpbach Declaration lays the future content and structure of the Action Plan, distinguishing between adaptation and mitigation strategies and by bringing in the topics and fields of action that have ended up forming the core architecture of the Action Plan.

a) The endorsement of the 2°C maximum scenario – now officially contained in the Copenhagen agreement,[26] and consequently the commitment towards mitigation, actions, notably through some of the actions already inscribed in the Energy Protocol (energy efficiency, renewable energy sources) but also new ones such as the " eco-sensitive planning of transport, housing and landscapes to develop sustainable road transport, the promotion of low carbon farming methods, and a sustainable management of forests as multifunctional assets ". By including these points and expressing the concern for the economic sectors most likely to suffer from climatic changed conditions in the Alpbach Declaration, the Parties are extending the nexus of the sustainable development and climate change in the Alpine Convention, bringing in immediately Forest management, Planning, Transport and Farming sectors into the climate change agenda, or vice-versa.

b) A strong urge for adaptation to the impacts of climate change, « *through the development of concrete strategies for the integration of adaptation measures in sectoral policies, a proper organisational, legal and financial framework, through the implementation of new measures or the expansion of the existing ones, through awareness-rising and goal-oriented research.* » The Alpbach Declaration gives a high importance to natural hazards risk management (to be equally found in the Action Plan) with the recommendation to plan adequately the use of soil, the need to develop early warning systems, integrated and if necessary transboundary natural hazards management, compensation systems for the major hazards and a strong culture of natural hazards through the populations that must be informed and shall participate. The Declaration also insists on the need to develop adaptation strategies concerning the hydrological cycle and the conflicting use of water.

Interestingly, the Alpbach Declaration had foreseen the realisation of "*surveys in order to evaluate the possible impacts of adaptation measures programmed in the Alps systems and on its resident populations.*" This point was not translated in the Action Plan, yet raises a

25. < http://www.alpconv.org/NR/rdonlyres/D03D99E3-15AE-4A43-B265-818E8E8EE54C/0/AC_IX_07_declarationclimatechange_fr_fin.pdf >
26. Decision 2/CP.15, Copenhagen Accord, point 1. <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf#page=4 >

valid question in a time where the question of the sustainability of the adaptation measures is highlighted, and where the degree of social acceptance of adaptation measures is also debated. Realizing such surveys could be of great interest to value the quality and legitimacy of climate change policies in the Alps and give a more participative nature to the whole action of the Alpine Convention in this field.

II.3. The Action Plan on Climate Change in the Alps

It has been shown how the issue of climate change has been progressively framed in the Alpine Convention regime, mostly through the directive lines established at Alpbach. Yet the Action Plan is a much more substantial document than the Alpbach Declaration, including a Preamble, respective strategies for *adaptation and mitigation*, detailed through 24 main objectives and more than 80 measures, and illustrated with good practices, altogether forming a document long of 26 pages.

a) The Philosophy of the Action Plan in the Alps

The Preamble of the Action Plan further reveals the philosophy of the Action Plan; it is important to grasp such philosophy to discuss the implementation dimension. Not only does the Preamble precises the reasons to respond collectively to climate change. It also explains that the Action Plan "complements a full and complete implementation of the Protocols of the Alpine Convention", as climate change policy "goes hand in hand with a real policy on sustainable development". Climate change in the Alpine Convention regime is therefore not entirely 'subordinated' but certainly included in the pre-existing frame of sustainable development as developed in the Alpine Convention and its protocols. And it derives from that "that some of the measures of the Action Plan materialise provisions mentioned in the various Protocols". This characteristic is crucial to understand the current stage of implementing the Action Plan, as it has been carried mostly through existing structures and actions previously ongoing within the Alpine Convention.[27] Another important statement of the Preamble is the one indicating that the Action Plan:

> « rests on the joint commitments taken by the Alpine countries which fall under the UNFCCC and the Kyoto Protocol. This Action Plan is part of the ongoing discussions to

27. Indeed the Preamble states that the Alpine Conference will « *secure the help of its various Working Groups and will integrate in its Multiannual Work Programme the objectives of this Action Plan, and it will promote the Plan with institutional partners assisting in its implementation, including European partners.* » For a complete overview of the actions taken during 2009-2010 concerning the Action Plan, consult: Permanent Secretariat of the Alpine Convention (2011), Alpine Signals 6, *Towards Decarbonising the Alps: National Strategies and policies, regional initiatives and local actions.*

reach a comprehensive and ambitious post 2012 agreement and takes into account the commitments made in this regard by the European Union. »

It is therefore clear that, at least for the mitigation part of the Action Plan, the binding threshold for reduction will remain the one defined within the EU frame, including for those alpine countries not belonging to the EU.[28] No specific or quantified mitigation targets are advanced in the Action Plan.[29]

Finally, regarding the implementation of the Action Plan, the Preamble advances that «The Action Plan should also bring about common projects, promote the development of concrete regional cooperation and the exchange of experiences, and support specific scientific research projects.» This principle could be key to the future success of the Action Plan, since it could mean that eight alpine countries develop specific alpine projects concerning climate change.

b) Structure and content of the Action Plan

The Action Plan being such a long document, it is not possible here to explore in detail all of its content. It will be enough to say that it lists 24 main objectives (regarding adaptation and mitigation), to be achieved through 81 specific measures in the following 9 sectors:

- Spatial and Land Planning
- Energy
- Transport
- Tourism
- Forestry
- Biodiversity
- Farming
- Water
- Public research & public awareness

The choice of these strategic areas of work mirrors the fields of work of the Alpine Convention, revealing once more the inclusion of climate change in the pre-existing frame.

28. Liechtenstein, Monaco, and Switzerland have endorsed emissions reduction's objective similar to the EU position. See European Environment Agency, *Tracking progress towards Kyoto and 2020 targets in Europe*, EEA Report 7/2010, Copenhagen. The Principality of Monaco presented its climate policy objectives during the 15th UNFCCC Conference of the Parties in Copenhagen: 30% reduction in GHG direct emissions compared to 1990 by 2020, and 80% by 2050.
29. In the final decision by which the Contracting Parties adopt the Action Plan, they agree to explore the idea of climate-neutrality in 2050. See section III.

Although not specifically a separate field, a strong emphasis is put in the adaptation part of the Action Plan concerning Natural Hazards, for which a specific Platform existed already.[30]

Therefore, as stated in the Preamble, some specific objectives and measures are a materialisation of ongoing work, such as the drafting of common guidelines for the construction of small power stations.[31] But the Action Plan also contains objectives and measures specially crafted for the question of climate change in the Alps. The drafting style of the objectives and measures varies, but it often goes beyond the simple expression of policy concerns or policy recommendations. For instance, if Measure nº3 under Spatial Planning: "maintain natural areas - as carbon sinks"[32] sounds quite general and could be seen simple recommendation, but Measure nº1 under Energy is much more circumscribed as it requires to "elaborate in a participative way an energy policy specific to the Alps in order to create a consensus for a future sustainable management of energy in the Alpine Space".[33]

Under Tourism, again, the requirement of "putting into place a regular environmental audit of tourist destinations containing a 'carbon report' and refer to this audit when granting authorisations and/or public subsidies"[34] is a well defined objective to achieve, that clearly falls on the side of the public authorities.

The juxtaposition of ongoing objectives and measures at different stages of implementation with climate-focused objectives and measures that require programming and common action to be realised is, in the author's opinion, a valid reason of confusion when it comes to the implementation agenda.

III.The Implementation of the Action Plan

III.1. Some Achievements...

The implementation of the Action Plan, in this first phase of its life, has been up to now mostly guided by the second part of the final decision of the Action Plan, which requires Contracting parties and the Permanent Secretariat to realise a series of tasks.[35]

Starting with the easiest, the tasks and "*common projects to concertedly apply measures of the Action Plan*" to be realised "*with the help of the structures provided by the Alpine*

30. PLANALP <http://www.alpconv.org/theconvention/conv06_WG_c_en.htm >
31. Action Plan, Adaptation strategies, p. 18, and Final decision, point 1.
32. Action Plan, Mitigation Strategies, p. 4
33. Action Plan, Mitigation Strategies, p. 5
34. Action Plan, Mitigation Strategies, p. 8
35. Decision of the Xth Alpine Conference, Action Plan, pp.23-24.

Convention and its Working Groups", listed under point 1 of the Final decision, are probably in a reasonable state of advancement:

a) the Natural Hazards Platform regularly meets to exchange information on natural hazards and the possible relation of the events with climate change.[36]
b) The creation of an ecological network proceeds in the relevant platform.[37]
c) A first draft on small hydroelectric power stations has been delivered by the Water Platform.[38]
d) Concerning the ecological construction, Liechtenstein has created a specific award for eco-architecture, realizing part of the requirement, the other being to "adapt, if necessary the existing regulations in this area".

Under point 1, therefore remains to be achieved:
- the guidelines for following-up the forests,
- identification of tour operators offering "carbon-efficient" packages and rewarding the best achievement.

Under point 2, relating to Transport, no specific request has been transmitted to the Zurich Group to acknowledge the urgency linked to climate change and the need to implement concrete solutions, but the two organisations are in regular contact.
The Permanent Secretariat has fulfilled the request to create an internet page,[39] and is currently working on the first report to the ministers on the implementation and the creation of monitoring tools, as the next ministerial level meeting will take place in March 2011 (points 3 and 4 of the final decision).
The 5th point of the final decision, that requires "to launch a survey on whether the Alps could become a carbon-neutral zone by 2050" is the one that offers us to share some reflection on the future implementation challenges.

III.2. ...And Some Obstacles

a) Engaging the necessary resources

Point 5 of the final decision concerns the realisation of a survey/study on climate neutrality

36. <http://www.alpconv.org/theconvention/conv06_WG_en.htm >
37. <http://www.alpine-ecological-network.org/>
38. < http://www.alpconv.org/theconvention/conv06_WG_e_en.htm >
39. <http://www.alpconv.org/climate/index_en.htm >

by 2050.[40] Being included in the formal decision of the Alpine Conference, it has –like the other points in that part- an informal yet clear priority over the rest of proposed measures in the action plan. Germany took the initiative over this point, by proposing to organise a first workshop with national experts from all the Contracting Parties to explore the technical and financial feasibility of such survey. The workshop advanced as many options as it raised methodological and substantial questions, and resulted in a pre-study drafted by the Wuppertal Institute for Climate and Energy.[41]
The complexity and the costs of realising such a study are not to be taken lightly, and they have not been by some delegations, which proposed a different way to explore the path of climate-neutrality in the Alps. Yet, like other authors, even without retaining the most pessimistic scenarios regarding the negative impacts of climate change displayed in the Stern Review and in the IPCC reports, it is questionable why the international community, even at the regional scale of the Alps, still hesitates to adopt ambitious GHG emissions cuts, and more importantly to take the measures to fulfil commitments.[42] A transboundary study realised by the Contracting Parties of the Alpine Convention, with their sound institutional and scientific capacity, could be truly a remarkable input in the process towards low-carbon societies. The final word on the realisation of the survey (or not) will be given by the Ministers at the XIth Alpine Conference.
In the meantime, a proposal of a project based on the work of the Wupertal Institute under the territorial cooperation programme Alpine Space was made.[43] It is a different outcome of the initial requested in the Final decision and might result, if accepted, in a very interesting project, providing valid answers. However, it is not, strictly speaking, a direct implementation of Point 5 of the final decision of the Action Plan by the Contracting Parties.
The final decision stipulates that the Contracting Parties "commit themselves to proceed in its implementation with concrete measures by providing the necessary resources." Yet, the reluctance to engage extra time, financial or human resources in the implementation of a project that has truly a great potential shows might well be the real obstacle to realise "common projects". It might not always be possible to find external funding and it might not be always possible to include the realisation of common projects through the multiannual working program, particularly if there is no prioritisation of the actions to be achieved.

40. The option of climate-neutrality by 2050 is loosing its glow and becomes a more common goal as public authorities worldwide fund research to develop scenarios to achieve it. Hourcade, J.C., Crassous R., "Low-carbon societies: a challenging transition for an attractive future", in *Climate Policy*, vol. 8 (2008), pp. 607-612.
41. Lechtenböhmer S., Gröne M.Ch., Venjakob J, Luhmann H.J., Onischka M., Schallaböck O., Schneider Cl., Shüwer D., *Climate Neutral Alpine Region: Summary for policy-makers,* Pilot Study, Wuppertal, 13/09/2009.
42. Hourcade, J.C., Crassous R., "Low-carbon societies:...", supra.
43. Lechtenböhmer S., & Venjakob J., *Climate Neutral Alps 2050. Make Best Practice Minimum Standard,* Wuppertal, 9/02/2010, Interreg Proposal.

b) The need to prioritise the implementation of the Action Plan

As mentioned, the first and current phase of the implementation of the Action Plan has been focusing on a rather limited part of the text: its final decision. Some other projects, measures of the Action Plan, already launched at the moment of the adoption of the action plan, have been proceeding. But can the latest really be included in the definition of implementation? And would that enough to say that the Action Plan is being implemented successfully? The Contracting Parties do have a long text to implement: to achieve the main objectives, and implement the 81 measures will take time. Therefore it seems inevitable that some priority themes have to chosen by the Contracting Parties, and some time frame is given to the implementation of a chosen number of measures that were not into place before. The credibility of the whole Action Plan depends on it. Observers to the Alpine Convention have already pointed to this question, by asking when Contracting Parties will start implementing the Action Plan.[44]

IV. Replacing the Action Plan on Climate Change in the Alps in a Larger Context: The originality of the Instrument

However, if the common logic may stand on that line of reasoning, the question of the necessary agreement among Contracting Parties over the priority themes for an effective implementation remains. This question does not seem to be specific to the Alpine region, but a general trend corresponding to climate change policy, and is partly inherent to the characteristic of the problem: climate change is a global problem with local impacts.

Mitigation and even more *adaptation strategies* differ from one nation to the other, from one region to the other: what is an adaptation concern for one nation might be an adaptation *priority* for another, being already developed as a policy and implemented with measures. A recent study assessing the adaptation policies in the EU demonstrates the extreme heterogeneity among 15 EU Member States concerning not only their adaptive capacity, but also the level of policy, the chosen adaptation policies, aims and measures. When looking at the adaptation objective profiles, the report notes how "*few countries have measures that cover all the objectives.*" [45] While this report concerns the first fifteen EU member States, it seems reasonable to extrapolate these findings to the alpine region, given that the results of ClimChalp project were taken

44. CIPRA's interventions during the 42nd and 43rd Permanent Committee.
45. See Eric E. Massey's Report: Assessing adaptation in the EU: an update. To be found at: <http://www.lne.be/en/2010-eu-presidency/events/climate-adaptation-conference/agenda/conference-day-1/massey-adapation-in-the-eu-member-state>

into account in the study.[46]

Despite these obstacles inherent to climate policy, and despite the fact that not all of the Alpine countries had already moved towards a comprehensive policy frame in climate change (including mitigation and adaptation strategies) in 2006, the Contracting Parties to the Alpine Convention have been able to agree on *mitigation and adaptation* objectives and on many specific measures to achieve them. It is therefore worth noting that the Action Plan, in many cases has come first to any national and/or regional adaptation strategies. The next step in assessing the value of the Action Plan will be to discover if the national and regional coming strategies will establish a coherent link with the Action Plan, legitimising or even endorsing it, or parts of it. [47]

The Action Plan on climate change in the Alps is now providing an informal framework to address climate change, and the drafting of the Action Plan has offered the alpine nations an opportunity to start embedding climate change into existing programs, projects that are specific to the Alps. Yet, like in many existing regional strategies generally, little attention is paid to implementation issues. [48] The Action Plan indicates that implementation must be achieved through: common projects, territorial cooperation, existing structures of the Alpine Convention and concrete measures; but it does not provide time horizons, nor a specific methodology. It sometimes designates a specific actor in charge of the action/specific measures,[49] but more than often, the measures are stated without further indication. In the Alpine Convention regime, States have therefore the responsibility of the implementation. It is foreseeable that this will open the door to many discussions within the executive organ of the Alpine Convention: the Permanent Committee, and will add some difficulty to implement jointly the Action Plan.

The Final decision of the Action Plan also asks for fine-tuning the implementation of the Action Plan, making it an iterative process. At the end of the first two years of existence of the Action Plan, both the renewed commitment of alpine States and a larger engagement of all stakeholders seems to be necessary. Involvement of the individuals, grass-roots organisations and local powers seems crucial.[50] It could also contribute to the ongoing work of assessing the

46. <http://www.climchalp.org/images/stories/documents-final_texts/climchalp_common_strategic_paper_en.pdf >
47. National adaptation strategies and/or action plans are under their way: Austria (2012), France (2011), Germany (2011), Slovenia is preparing a Low Carbon Strategy 2050; for a review of the Alpine national strategies, see Alpine Signals 6 (2011), *Towards Decarbonising the Alps, supra.*
48. Ribeiro, M. , Losenno, C., Dworak, T., Massey, E., Swart, R., Benzie, M., Laaser, C. *Design of guidelines for the elaboration of Regional Climate Change Adaptations Strategies.* Study for European Commission – DG Environment (Tender DG ENV. G.1/ETU/2008/0093r) Ecologic Institute, Vienna, 2009.
49. By designing the specific working group or Platform, or institutional cooperation with other organisms and processes . For instance Action Plan, Adaptation Part. Preservation of Biodiversity, p. 14.
50. Holman.,P., Rounsevell, M. D. A & alt.,"The concepts and development of a participatory regional integrated assessment tool", in Climatic Change , 2008:90, pp.5-30.

vulnerability of the Alps to climate change.[51] Developing partnerships with local authorities and civil society might inject a much needed impetus and life into the implementation of the Alpine Convention: should it work, it might also shift the implementation away from the national authorities.

This might be the future value of the Action Plan on Climate Change in the Alps: creating a momentum for all levels of authorities to engage into climate policy through real commitment, endorsing specific objectives and measures. Yet, it should not discourage nor prevent the Contracting Parties to the Alpine Convention to have the courage to engage in the implementation of truly "alpine" and common projects to tackle some of the challenges of climate change.

51. Many of the running projects of the Alpine Space Programme focus, or at least partly focus on deepening the knowledge of the vulnerability of the alpine territory to different impacts of climate change, and how to adapt and make the territory more resilient to climate change. New dimensions of vulnerability are still being discovered: the Paramount project, building on previous projects results, aims to fill the gap on the hazard management strategies concerning infrastructure specifically triggered by climate change. <http://www.paramount-project.eu/index.php >

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Is environmental law sufficiently adapted to respond to the specific environmental challenges faced by mountain ecosystems? An international conference was held in April 2010 in Innsbruck (Austria) in order to discuss and reflect on this question. This publication contains the contributions of experts who participated in that Conference.

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