REGIONAL AFFAIRS

Latin America

2nd Congress on National Parks and other Protected Areas

by Soledad Aguilar*

The second Latin American Congress on National Parks and other Protected Areas (the second Latin American PA Congress), a decennial event held in between World Parks Congresses, attracted 2200 participants in Bariloche, Argentina, from 30 September to 6 October 2007. The event, organised by IUCN, FAO, UNEP and other organisations, was characterised by an active participation by indigenous communities and other stakeholders and a focus on the socio-economic aspects of protected areas in Latin America. During the second Latin American PA Congress, government representatives, non-governmental and intergovernmental organisations, researchers and the private sector were able to showcase their best experiences and listen to hundreds of presentations, sharing information on advances in, and new threats to, protected area management, as well as identifying opportunities for further enhancement of protected areas and their environmental and social benefits.

The initiative for a Latin American congress on protected areas was born at the Fourth World Parks Congress held in Caracas, Venezuela in 1992. At that time a recommendation was made to the Latin American National Parks Network (REDPARQUES) to hold a regional congress in between World Park Congresses to allow a follow-up of progress in the Latin American region. As a consequence, the first Latin American Congress on National Parks and Other Protected Areas was held in Santa Marta, Colombia in 1997, and the second in Argentina in 2007.

The second Latin American PA Congress was organised around four key thematic lines. The first addressed protected areas and the conservation of biological diversity, featuring symposia on protected area systems and the ecosystem approach, as well as several workshops focusing on issues such as the connectivity between protected areas, strategies for conservation in private lands, urban and marine protected areas, and the relation between protected areas and climate change, as well as with water and watersheds.

The second thematic line analysed knowledge and information in relation with protected areas. This theme included symposia on protected areas and science, protected areas and traditional knowledge and management effectiveness. Workshops were also held on related issues such as indicators for management effectiveness, the role of park rangers, management plans, and land planning.

The third thematic line evaluated mechanisms to strengthen capacity and support for protected area management, with symposia held on good practices for protected area management and protected areas' financial sustainability. Workshops were held on methodologies to identify needs and strengthen capacity, environmental education, the impact of tourism on protected areas, and financial mechanisms for protected area support.

The last thematic line addressed governance, equity and quality of life, with symposia held on opportunities and threats for protected areas arising from globalisation and regional processes, international agreements on protected areas and multinational transborder protected areas. Workshops were held on: the impact of deforestation, illegal trade, large infrastructure projects including dams, and regional energy policies on protected areas; as well as on models for good governance and conflict management, the role of the private sector, and the relation between protected areas and other social objectives like poverty eradication.

A condensation of many of the ideas presented during the week is reflected in the Bariloche Declaration,[1] where participants in the second Latin American PA Congress present the main issues affecting protected areas, recognise main developments during the past ten years, highlight key requirements to improve the status of protected areas in the region, and assume commitments to improve national park and protected area management. The following section will briefly review the Bariloche Declaration in light of the 1997 Santa Marta Declaration resulting from the first Latin American PA Congress,[2] noting issues that emerged, evolved, or maintained their relevance during the past decade in national parks and protected area management.

The Latin American Congresses on Protected Areas: Evolution and new Perspectives, from Santa Marta to Bariloche

Financial constraints appear to lead the way among issues that maintained their relevance during the past decade. While the 1997 Santa Marta Declaration noted na-

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tional budgets should include financing for national parks systems,[3] the Bariloche Declaration goes further to incorporate the concept of financial sustainability, urging governments and other actors to agree on budget goals for the period 2008–2018, in order to close the financing gaps identified in national parks system plans under the Work Programme on Protected Areas adopted by the CBD.[4]

The issue that seems to have evolved most notably in the last decade is the consideration of the rights of indigenous peoples and their participation in protected area management. The original Santa Marta Declaration included a pledge to guarantee indigenous rights through agreements that allow the consolidation of indigenous territories and protected areas as "peace scenarios" and sought dialogue and participation mechanisms with the aim of democratising protected area systems.[5] The Bariloche Declaration presents a stronger stance on indigenous issues. A large participation by indigenous community representatives, and an indigenous forum held in parallel to the Congress, for example, injected renewed vigour in the presentation and discussion of the concept of co-management of protected areas by the State and indigenous communities living in these areas. In this respect, the Bariloche Declaration highlights the adoption of the 2007 UN Declaration on the Rights of Indigenous Peoples[6] and declares that protected areas established totally or partially over indigenous people's territories should be managed respecting the rights of these people, and ensuring their full and effective participation in decision making related to the management and protection of these sites.[7] It also makes reference to article 28.1 of the UN Declaration on the Rights of Indigenous Peoples that recognises the right to redress or compensation for protected areas taken from traditional indigenous people's lands without their consent.[8] The Bariloche Declaration also specifies that indigenous communities that are neighbours to protected areas should be placed on equal standing to other local actors. It notes, nevertheless, much room for improvement in terms of participation by local and indigenous communities in protected area management and decision-making, as well as on the equitable distribution of costs and benefits associated with the establishment and management of protected areas.[9]

Following this integrated approach to management, the Bariloche Declaration also assigns a prominent space to local communities, the private sector and other stakeholders in participatory planning for protected area management, noting the importance of applying good governance principles, as well as effectiveness evaluation of management strategies.[10]

Regarding novel threats and concerns, the Bariloche Declaration identifies climate change as a key threat, emphasising the importance of studying the role of protected areas in adaptation to climate change. It also highlights other "new" threats like the expansion of the agricultural frontier for biofuel production and emphasises the relevance of supporting the Antarctic Treaty to conserve biodiversity in this pristine region. Moreover, the Bariloche Declaration does not shy away from making a strong statement with regards to mining and oil drilling within protected areas, as well as on the reduction of using protected areas for extractive purposes, noting these activities are "contrary to the objectives of biodiversity conservation."[11]

The issue of marine protected areas and coastal and inland waters is another theme that was assigned a higher priority than in the past. While the Santa Marta Declaration promoted work on these topics, the Bariloche Declaration takes stock of developments during the last decade and recognises threats caused by the growing pressures over coastal and marine areas caused by tourism, fishing and urban development. It therefore urges governments to prioritise the creation of national and regional networks of marine protected areas and integrated ocean management to achieve the global goals of biodiversity conservation.[12]

Conclusion: An Integrated Approach to Protected Area Management

The Second Latin American Congress on National Parks and other Protected Areas succeeded in attracting a large participation by all countries in the region, bringing national parks and protected area issues to the attention of political authorities. It also evidenced a shift in perspective towards protected area management in Latin America, from a focus on the economic value of protected areas ten years ago, towards an integrated approach to management that takes into account the social value of protected areas and their relation with their neighbouring communities and their livelihoods. This shift may be aligned to a wider political shift towards socialist or centre-left governments throughout the region during the past decade. The fact that the Bariloche Declaration portrays Latin America "as an environmental creditor of developed countries"[13] is also coherent with this political movement.

The attention given during the second Latin American PA Congress to the impact of protected areas on local communities and other stakeholders provides a clear example of the shift towards an integrated approach, which also surfaces in efforts to maximise positive effects on neighbouring communities through improving governance and participation by all stakeholders in the management process. The challenge of achieving a balanced distribution of costs and benefits of protected areas on surrounding communities is reflected, for example, in the special relevance given to tourism as a generator of income for communities around protected areas and the introduction

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of shared management and co-management schemes. Moreover, the ambitious goal of turning protected areas into instruments for sustainable development and poverty eradication seems to underlie the Bariloche Declaration. The message by Latin America stemming from the results of this Congress, is it does not wish to see protected areas end up as isolated – and possibly degraded- islands of conservation but, on the contrary, as sources of welfare for, and compromise by, surrounding communities, who are those in the best position to further conservation objectives and ensure the protection of biodiversity in these areas and their surroundings.

Notes

1 "Bariloche Declaration," Second Latin American Congress on National Parks and other Protected Areas, 2007. Found at <http://www.congresolatinoparques2007.org/>.
2 "Santa Marta Declaration and Guide for Action," First Latin American Congress on National Parks and other Protected Areas, 1997. Found at <http://www.congresolatinoparques2007.org/mas_info04.htm>.
3 "Santa Marta Guide for Action," *supra* n. 2, point 2.
4 "Bariloche Declaration," *supra* n. 1, pp. 9–10.
5 "Santa Marta Guide for Action," *supra* n. 2, points 18–19.
6 "United Nations Declaration on the Rights of Indigenous Peoples," UN General Assembly, 13 September 2007 (A/RES/61/295). Found at <http://www.un.org/esa/socdev/unpfii/en/declaration.html>.
7 "Bariloche Declaration," *supra* n. 1, p. 8.
8 According to art. 28.1: "Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent", *supra* n. 4.
9 "Bariloche Declaration," *supra* n. 1, p. 8.
10 "Bariloche Declaration," *supra* n. 1, pp. 10–11.
11 "Bariloche Declaration," *supra* n. 1, p. 7.
12 "Bariloche Declaration," *supra* n. 1, p. 10.
13 "Bariloche Declaration," *supra* n. 1, p. 1.

CEDE

Report of Activities in 2007

by Cesare Pitea*

2007 was a period of transition for the CEDE. It suffered the loss of Prof. Alexandre Kiss, who, beside being a founder of the CEDE and its President since 1974, was an invaluable friend to all of its members. At the same time, Brigitte Brunner, Secretary General of CEDE decided to resign. Moreover, its financial prospects were uncertain after the expiry of its agreement with the Regional Government of Madeira, Portugal. However, the financial problems were overcome in September when the Regional Government of Madeira and its President, Dr Alberto João Jardim, undertook to renew the cooperation agreement providing funding for three years starting in 2007.

CEDE's members nonetheless were determined to carry on working and to further the life and the scientific activity of the organisation. Two meetings were held in Madeira on the 4–5 May and the 14–15 September 2007. Besides the scientific activity, discussed below, an intense institutional renovation was undertaken. A first step towards this goal was achieved in the election by *consensus* of Prof. Tullio Treves as the new President in accordance with the statutes. A new Secretary General, Dr Cesare Pitea, was also appointed and the General Assembly undertook a review and update of the membership. Due to organisational difficulties in previous years, the terms of most members have been fixed at three years. Therefore, the General Assembly, at its September meeting, decided to re-elect all members who were present at the meeting and whose terms had expired. Those who were absent are to be re-elected at the next meeting, though some turnover is expected.

In the course of the two meetings, the CEDE finalised its work on three topics. It adopted a letter (below) stating the position of CEDE on the right to water, which was sent to the UN High Commissioner for Human Rights in the framework of work undertaken in this area by the UN Human Rights Council. Resolution 29 on Alien and Invasive Species in the Marine Environment was adopted and sent to the EC Commission. It also adopted a key document – Resolution 30 on Integrated Coastal Zone Management in the Mediterranean Sea. This Resolution elaborated on the proposed Draft Protocol of this topic and was sent to the Secretariat of the Barcelona Convention, national focal points and participants in the preparatory meetings.[1] Other topics were also discussed without any formal outcome, namely the developments in the practice of compliance mechanisms under multilateral environmental agreements, the dispute between Uruguay and Argentina on the River Uruguay within the International Court of Justice and the ongoing process to set standards for public participation in international fora under the Aarhus Convention. Discussions on a final subject, environment and health, were not fully completed.

CEDE organised and helped contribute to two public scientific events in 2007. It organised a conference on

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"Sustainable Development and Intangible Heritage", held in Funchal on 14 September. The outcome will be published in 2008. It also contributed to the preparation of the conference on "Compliance Mechanisms and the Effectiveness of International Environmental Law", [2] held at the University of Milan (Italy), 9–10 November.

A number of areas for future work were identified during the September meeting. After some discussion, it was decided to keep several issues, including the issue of competences of the EC and its Member States in the field of the environment and its work on the regulation of noise (using Portuguese law in this connection) on the agenda, along with the outstanding topic of "Environment and health".

The Friendship between CEDE and Madeira

In his speech to the September meeting of CEDE, Dr Alberto João Jardim, President of the Regional Government of Madeira remarked: "It is impossible to think of the future without connecting it directly to environmental issues. The environment is even more important in the globalization era in which we live and in which it is important for citizens to be aware of their rights". He further specified that "Citizens more conscious of their rights are the best weapon to defend ourselves from *massification* attempts. Furthermore, it is important to have greater intervention from the citizens, as this is the best way to mediate the problems of globalization".

He went on to emphasise Prof. Alexandre Kiss's vision in the creation of CEDE, a centre dedicated to environmental issues. He also used the opportunity to assert the Regional Government's intention to continue supporting CEDE. He praised the contribution that studies undertaken by CEDE members have made to the resolution of Europe's environmental problems, as well as the legal definition of the rights of European citizens on this matter.

One of the challenges of the future, he added, is to try in an intelligent way to reconcile economic development with environmental issues. Concluding, he added that the best tribute which could be paid to Prof. Alexandre Kiss was to continue working to defend the environment.

In closing, Prof. Tullio Treves, in the name of CEDE, expressed his gratitude to the Autonomous Region of Madeira and to its President, Dr Alberto João Jardim for all the support over the years and the warmth with which they had been received. He also expressed CEDE's willingness to provide legal advice concerning environmental matters of particular interest to Madeira.

Letter to High Commissioner for Human Rights:

"As a stakeholder according to Decision 2/104 on Human Rights and Access to Water adopted by the Human Rights Council on November 27, 2006, I have the honour of submitting the views of the European Council on Environmental Law (CEDE) on the scope and content of relevant human rights obligations relating to equitable access to drinking water and to sanitation.

The CEDE has been working on legal aspects of the right to water during the past decade. In its Madeira Declaration of April 1999, it stated that "No person may be deprived of the amount of water needed to meet his basic needs". Via the International Council on Environmental Law, it submitted its reflections to the Sub-Commission on the Promotion and Protection of Human Rights in 2000 and 2006 (Annexes 1 and 2). The Sub-Commission subsequently referred to CEDE's conclusions in numerous resolutions adopted in the framework of its work on the right to water. The work of the CEDE is synthesised in the attached Annex 3.

The CEDE considers that the right to water means the right of access to drinking water and sanitation and that, as such, it is protected under international law, in particular by the Covenant on Economic, Social and Cultural Rights (Articles 11 and 12). Life is impossible without drinking water and human dignity cannot be assured without basic sanitation. Measures taken to guarantee the right to water should be compatible with environmental law.

The right to water was included in General Assembly Resolution A/RES/54/175 on the Right to Development. It was subsequently recognised by the European Parliament and the Parliamentary Assembly of the Council of Europe. In 2006, Ministers participating in the Summit of the Non-Aligned Movement in Havana, Cuba, unanimously recognised the right to water. Accordingly, a majority of States have expressed their approval of the right to water. Moreover, all States without exception have adopted internal legal provisions to facilitate access to water and sanitation by their population.

A global recognition of the right to water is thus desirable in the context of sustainable development, not only as part of environmental law, but also as a human right. This action should have a positive effect on the implementation of the Millennium Development Goals and should, in particular, permit a progressive reduction of the decimation currently caused by the lack of drinking water in certain countries.

We hope that these clarifications on the scope of the right to water will have a positive effect on its recognition at the global level."

Páramo colombiano Courtesy: Congreso Latino Parques

Notes

1 That protocol has since been adopted. See http://195.97.36.231/acrobatfiles/08IG18_Final_Act.pdf. A detailed report on the new protocol will be forthcoming in EPL 38/3.

2 See page 70.

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EU

The Eco-Management and Audit Scheme: Towards Obscurity?

by Michael S. Wenk*

In 1995, the European Union (EU) implemented the European Union's Eco-Management and Audit Scheme, or EMAS. Manifestly designed and implemented to become a vanguard in the environmental management and protection arena, EMAS prematurely reflected Dunlap's (1997) conclusion that "public concern regarding environmental issues has generally escalated in the last few decades…increasingly it has become global in nature as the international community acknowledges the environmental risks".[1] At the time of its implementation, the developed world, particularly the United States and the European Union, were undergoing a resurgence of sorts with respect to their commitments on environmental issues. Recent (to the time) highly visible environmental incidents, such as the November 1992 contamination of French nuclear power workers, the 1988 Piper Alpha oil platform explosion off Scotland, and the 1 November 1986 chemical spill into the Rhine near Basel, Switzerland – among others – added fuel to the growing public outrage against environmental contamination, resulting in calls for increased environmental management, protection and, perhaps most strikingly, accountability. EMAS ("the Scheme"), together with such other aspects as the European Eco-Label, was developed to complement traditional "command and control" legislation, in the hope that it would encourage industry to *voluntarily* reduce their environmental footprints.[2]

From this "eco-revival" came several initiatives, such as the United States' High Production Volume (HPV) programme, which some consider the precursor of the EU's current Registration, Evaluation and Authorisation of Chemicals (REACH). The HPV programme essentially required corporations manufacturing or importing chemical products in certain volumes in/into the United States to be cognisant of the downstream effects of their chemical products.[3] It was at this juncture that the concept of "eco-auditing" began to more formally emerge. Hitherto, companies around the world had generally viewed environmental compliance as an aspect imposed upon them by regulatory agencies, and a drain on their corporate bottom line, as opposed to a financial, public relations and management tool which could be used to bolster the business of the firm.

Introduction

EMAS was seen as a means to make "companies operating a site or sites where an industrial activity is performed" (to which the Scheme was originally restricted) "much more publicly accountable with respect to their environmental impacts. …"[4] In sum, "[t]he overall objective of the scheme [was] to promote continual environmental improvement".[5] Further, the trumpeted benefits included "quality environmental management due to the use of a highly developed scheme", "resource savings and lower costs", "added credibility and confidence with public authorities, other businesses and customers/citizens" and, perhaps most enticingly, "marketplace advantage and improved company image".[6]

The Scheme drew, at least implicitly, on early studies on environmentally responsible behaviour, which focused on the assumption that knowledge was linked to attitudes, and attitudes to behaviour, in a linear model. This thinking suggested that if people became more knowledgeable about the environment and its associated issues, they would in turn become more aware of the environment and its problems, and thus be more motivated to act towards the environment in more responsible ways. This knowledge could come from being aware of the impact humans had on the environment, for example, not just from a consumerism standpoint, but from a corporate or industrial operations one as well. "Beginning with the mid-1990s, ISO 14001 and EMAS…became very much in vogue as the tool for demonstrating environmental responsibility in the global marketplace. Consultants jumped on ISO and EMAS as the next opportunity in a mature market no longer driven by regulatory dynamics…The hopes for ISO 14001 and EMAS centred on them leading firms to achieving sustainability".[7]

EMAS was unique in concept in that it was *voluntary* in its uptake, which was contrary to how many of the more environmentally-"advanced" States were managing environmental compliance at the time. "By the mid-1990s, highly complex regulatory frameworks existed in many countries. In Germany, for example there were approximately 800 environmental laws, 2,800 ordinances and 4,700 technical instructions. If state (*länder*) laws are taken into account, the total number of domestic environmental regulations may be as high as 35,000".[8] As Faure (2004) has noted, environmental management systems which are voluntary are, *de facto*, "toothless" from an enforcement perspective, as all that can really be accomplished is to draw public (*e.g.*, non-enforcement) attention to the site. Faure argues that "[t]oday, in many Member States administrative sanctions are used and have often proven to be at least as effective in the "war on environmental crime" as criminal sanctions".[9] In other words, many States have seen the need to step beyond strictly voluntary approaches

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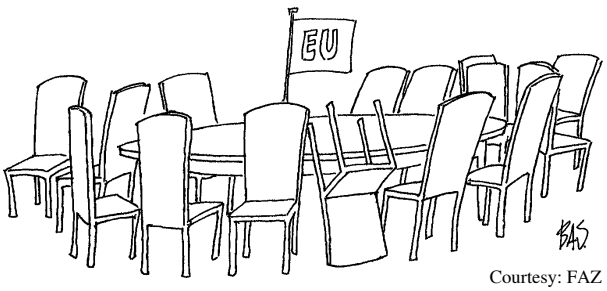
to compliance, at least in some arenas, and return, at least in part, to the "command and control" regime. Conversely, however, in these and other areas…this approach can give rise to an inherent conflict; "[c]ommand and control strategies can be difficult to implement. They rely on enforcement agencies which may be reluctant to use the powers they possess. They also depend on the existence of reasonably comprehensible bodies of environmental law".[10] While "mandated" by entry into the EU for new Member States, this aspect is certainly wide-ranging in its implementation scope.

Cause for Concern

Virtually since its implementation in 1995, EMAS has been questioned by various parties as to its overall effectiveness.[11] As implementation of the Scheme began, various parties began to notice what they determined were significant gaps between the grandiose promises of the Scheme and the practical, "hands on" application. "Indeed, despite a large number of academic articles espousing the



Courtesy: FAZ

importance of…EMAS there appears to be a growing crisis of confidence in the whole system".[12] Further to these perceptions, a 2004 study conducted by Environmental Data Services (ENDS) revealed that half of the respondents to the survey "said they would not take on trust the environmental performance of their suppliers even if they were…EMAS registered".[13]

Key shortcomings perceived within EMAS include(d) a lack of performance requirements and the absence of required performance indicators which would allow for direct "apples to apples" comparison between and among adopters.[14] "An evaluation of empirical investigations and studies showed that the external benefits of EMAS did not materialise…the environmental performance of companies with EMAS did not differ from companies with other EMSs, and regulation was not only more demanding than expected but also more complicated and difficult to implement".[15]

The "Evaluation of EMAS and Eco-label for their Revision" (EVER) Study, conducted on behalf of DG Environment of the European Commission, concluded that: "most quantitative studies have not been able to confirm a better environmental performance of EMAS-registered organisations as compared to other organisations, or that EMAS is not generally seen as a benchmark…".[16] From the outset, it was believed that very little objective evidence existed to attest to the value of implementing the Scheme, or even ISO 14001, for that matter:[17] "Despite evidence of an increase in levels of environmental concern and behaviour...it is difficult to establish the relative importance of public effort and government legislation in bringing about these changes" [as a result of EMAS' efforts].[18] Most tellingly, the REMAS project, a three-year EU study of the benefits of EMS, relative to regulations, noted "[t]here is no evidence that better environmental management leads to improved compliance or conduct", and "[t]here is no evidence that commitment to training and awareness or documentation control have any effect on environmental performance".[19]

In addition, "[t]he EU's executive arm [the European Commission] highlight[ed] a series of hurdles [relative to EMAS implementation]: lower number of registrations during the last two years (2002–2004), the corporate sector's harsh criticism of the lack of external incentives and the cost/benefit mismatch, particularly amongst small and medium-sized enterprises (SMEs), uneven distribution among Member States of the companies registered (inconsistent image of the system for the EU as a whole), [and] opening the system up to companies from new Member States…"[20]

One of the main "selling points" of EMAS from its inception was the, albeit implicit, concept of reduced regulatory requirements and/or scrutiny which would result from implementing the Scheme. This would, in concept, apply to both large and small operations, thereby providing the smaller ones (*e.g.*, SMEs) with the same regulatory relief experience as their larger brethren, thereby making the playing field (more) equitable. However, even now – 12 years later – this aspect appears to be a concept honoured more in the breach than the observance. *Ceteris parabis*, this aspect is perhaps the one which has left the poorest taste in the mouth of adopters of EMAS. While certain countries do offer minimal relief for EMAS adoption (and some only offer – nominal – relief for SMEs, such as reduced or eliminated EMAS application fees), their efforts are generally insubstantial.[21]

A further question which was raised with respect to the "efficacy" of EMAS, beginning in 1996 with the introduction of ISO 14001, was the overall *value* which EMAS offered in an increasingly global environment. Two of the main criticisms of EMAS in this vein were that the Scheme was limited to (at the time) only 10 countries and that, perhaps consequently, it was almost unknown outside of the EU. Sites external to the EU might enjoy an advantage over the internal EU sites, assuming the Scheme was undertaken by the EU members, because implementation was not mandatory. Even though ISO 14001 was in its relative infancy in 1996, it was not restricted in its scope to only one region of the world as EMAS was (the current EU Member States), nor to only industrial sites (as EMAS also was). As a result, a German site employing EMAS would necessarily incur a variety of costs associated with implementing and maintaining the programme, such as the cost of verifiers, of developing programmes and protocols, of (potentially) compensating an individual/individuals who administer the programme, etc. A Swiss (non-EU) or Dutch (EU) firm, again as an example, who did not undertake the programme would most likely experience a financial advantage in the marketplace, due to

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a lack of having to incur these variable costs related to the Scheme.

Further to the ISO 14001 comparison, a 2004 study by Faisal and Filho revealed that almost 60% of the respondents "…applying for EMAS registration already had ISO 14001 certification".[22] The same study also noted that only one respondent (5%) "had the opinion that EMAS is in very high demand".[23] According to Faisal and Filho's results:

> …the main reasons for client applicants to apply for EMAS registration are existing ISO14001/BS7750 certification…[t]he reasons for the high rate of ISO 14001 certified organisations applying for EMAS are due to the already established EMS systems in these organisations, and the easy way to bridge documentation from ISO 14001 certification to EMAS certification...[24]

In other words, according to Faisal's and Filho's findings, the majority of sites which undertook EMAS registration felt that they did so (or that it was being done) because there was an easy link, most likely from a documentation standpoint, from ISO 14001 to EMAS. In other words, the viewpoint was seemingly "with a little more work we can have both, so why not?", as opposed to pursuing EMAS registration for the independent value which it offered.

EMAS III: A "Quick Fix", or More of the Same?

In accordance with its mandate regarding periodic review, discussions as to potential revisions of EMAS have recently begun. "Article 15 of the EMAS Regulation (EC No 761/2001) states that the Commission shall review the EMAS scheme in light of the experience gained during its operation and shall propose the appropriate amendments to the European Parliament and Council".[25] The process, dubbed EMAS III, has been the subject of much discussion and debate, due in no small part to perceptions and realities previously examined. The first draft revision of EMAS III was scheduled for issuance in early 2007. The European Parliament and Council agreement is expected to take place between late 2007 and late 2009, with the new EMAS III currently expected to be issued not later than January 2010.[26]

In recent years, the overall number of EMAS registrations have been increasing, reversing a period of stagnant or declining growth. Germany and Austria, hitherto vanguards in EMAS implementation, have stabilised, while countries such as Italy and Spain have experienced a significant upturn in the number of registrations.[27] The number of registrations peaked around December 2001, with approximately 3,912 registrations. Since then, the overall numbers began to decline, stabilising in mid-2004, but they have yet to meet or exceed the December 2001 level. In addition, 60% of the overall growth of registrations has been in the SME sector. Finally, growth has taken place in the food processing and chemicals sectors, as well as tourism and local authorities. What does this decline in some previously strong-uptake countries mean, coupled with increases in previously static countries' and industries' registrations, and what implications does it have on the potential revisions to the Scheme? Is there an overarching reason, or perhaps several reasons, which are contributing to the trend?

Given the foregoing trends and perceived shortcomings, where then can EMAS III most effectively direct its attention and efforts? The entities involved in refining EMAS have determined that several elements of the current Scheme should be retained, since they provide objective credibility. Among these are third party certification, compliance with legal requirements, a requirement for continuous performance improvement, and employee involvement.[28]

Key drivers in the revision have been identified as both "external benefits" (better image and relationships with stakeholders) and "internal benefits" (savings in terms of both resources and other costs). Fundamental within these drivers are the current lack of external benefits, such as the reduced regulatory scrutiny discussed earlier, a (at least perceived) marketplace indifference towards firms which are registered, and the cost of registering to the Scheme overall.[29] Hamon and Gilles (2007) have noted that "[a] strengthening of the requirements of the EMAS regulation *e.g.*, in terms of legal compliance, or environmental performance improvement and reporting is therefore our aim for the revision, so that we can claim that EMAS is indeed the most robust system that exists, over and above other systems, incl. [sic] ISO 14001".[30] The point related to registration costs is perhaps most directly applicable to SMEs, who generally do not have the resources (financial or personnel) to implement the Scheme. Internal benefits, such as a better sense of the company's operations, increased public relations, *etc.*, are most often realised via implementation, but the external ones remain much more elusive, both to quantify and to realise.[31]

Another aspect which needs to be addressed as part of the EMAS III review is the interrelationship, so to speak, between EMAS and many other environmental schemes, whether more localised or more global. Chief among these are programmes such as Corporate Social Responsibility ((CSR) – for example, via the Commission's Communication number 113180, the "Green Paper on Promoting a European Framework for Corporate Social Responsibility 2001", or the UN Commission on Human Rights' work during their sixty-first session in April of 2005), the Dow Jones Sustainability Index, the IPPC and so forth. At present, there are no precise means for EMAS to dovetail with these programmes, all of which have gained substantial notoriety and scope in recent years. In order to remain relevant and vital in the coming years, EMAS needs to at least implicitly recognise the "value" of these programmes. Otherwise, these programmes may well take on their own independent standards, which could challenge and/or supersede EMAS's goals and aspects.

Four other specific changes to the Scheme are being considered, to continue to make it (more) viable and relevant in 2007 and beyond. One key item under consideration is how to "incentivise" the Scheme. Understandably, as EMAS was developed to be (via EMAS II) applicable

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across a wide variety of agencies, industries and aspects, it was necessarily non-proscriptive in how certain aspects were to be addressed and/or implemented. One thought being considered in this vein is to make the Scheme global, thereby "standardising" it more. However, in its present form, and even with substantial change, EMAS would be hard-pressed to function in a global environment already much more thoroughly permeated by ISO 14001. As Watson (2004) has commented, proceduralising any business activity tends to minimise strategic thinking. In many respects, ISO 14001 and EMAS illustrate one of the worst trends in environmental management. They may create the illusion to executive management that all is well because the process is in place; management's attention may shift from improving performance goals to completing a procedure and getting a box checked. Essentially, environmental concerns are reduced to a binary question: "Are we certified or not?"[32]

A second change being considered by the authorities involved is to open the programme to the emergent aspects described earlier, such as CSR. This approach appears to be intended to keep EMAS "alive" in the coming years. However, EMAS, *prima facie*, has been designed and continues to function as an environmental management system, not a social responsibility or management one. Granted, a reduction in the volume of non-reusable waste material which a site generates, which could reasonably fall under the purview of EMAS, could also "double" as a CSR aspect, since the site accomplishing such is more likely to be a "responsible" citizen than a site which does not undertake this task. With respect to CSR as a whole, the question has been raised as to whether a full-fledged CSR management system is practical, effective, or even necessary. Granted, more and more firms are choosing to develop and implement CSR programmes, but there does not appear to be a particular hue and cry for a separate standard. While this aspect has been "tested" via ISO 9001, ISO 14001 and OSHAS 18001 (and, it should be noted, ISO is currently examining a CSR standard of its own), the thinking is that CSR is better intertwined with EMAS III – or even EMAS IV – than as a standalone programme.

A third aspect being considered involves adding what has been termed a "product dimension" to EMAS.[33] Currently, various third party product certifications exist throughout the EU, such as the Nordic Swan Ecolabel. Companies have argued that since EMAS expressly prohibits using EMAS or the EMAS logo on products to convey even the appearance of an endorsement, one of the most valuable marketing tools they are able to offer is effectively removed. In this regard, a Commission Recommendation was released in 2006.

Finally, a proposal for revision involves revisiting the role of both the Competent and Accreditation Bodies.[34] Specifically, questions such as: with what frequency should the EMS be verified? Should there be a minimum of annual visits to confirm that the EMS is still functioning properly? How frequently should data and information be validated? And what is the minimum that needs to be checked (under Article 3), in order to achieve and to maintain EMAS registration?[35]

Conclusion

As we have examined, EMAS has not been without controversy almost since its inception in 1993 and its implementation in 1995. Significant groups, such as SMEs, have expressed concern for the burdens which undertaking the Scheme appear to foist upon them, and the perceived disadvantages which result. In addition, EMAS seems to be almost a moot point in 2007, as it has competed for over ten years with the much more well-known, and popular, ISO 14001 standard, and currently does not have the flexibility to include emerging and recently-established programmes such as CSR. Interestingly, the concept of developing the Scheme in some way to expand its viability and application outside of the EU has not been substantially discussed to date. Unless these aspects are fully discussed, and ultimately undertaken, EMAS as a whole will continue to move inexorably towards its own demise.

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Eastern Europe, Caucasus, and Central Asia

Better Environmental Regulation
– Adopting International Practices –

by Angela Bularga and Eugene Mazur*

Since the mid-1990s, the Organisation for Economic Co-operation and Development (OECD) has actively promoted the efficiency and efficacy of regulatory policies in its member and non-member countries (Box 1) and supported major initiatives to change regulatory cultures, such as, for instance, the "Better Regulation" initiative of 2005, which is a centrepiece of the European Commission's "Partnership for Growth and Jobs". The key objective of new policies is to ensure that the regulatory environment is simple and of high quality, given that the regulatory framework in which businesses operate is a key factor in their competitiveness, growth, and employment performance. The process of policy dialogue among OECD countries has also led to the adoption of the "Guiding Principles for Regulatory Quality and Performance".

OECD Work on Regulatory Reform

OECD Ministers requested in 1995 that the OECD examine the significance, direction and means of reform in regulatory regimes in member countries. The 1995 Recommendations for Improving the Quality of Government Regulation were the first-ever international statement of regulatory principles common to member countries. Building on this fundamental text the OECD's 1997 Recommendations for Regulatory Reform provided the basis for review of reform efforts in member countries carried out in both sectoral and policy areas. To date, 20 reviews of member countries have been completed; the review of Russia, the first one of a non-member country, was completed in 2005.

The 1997 Principles have often been the basis for the design of national policies, but as countries make progress, their goals are set higher, and their working methods adjusted to changes in the policy environment. Based on the lessons learned from this body of reviews and following an intensive process conducted in policy committees and in the Special Group on Regulatory Policy, the OECD updated the 1997 Recommendations and published the Guiding Principles for Regulatory Quality and Performance which were adopted by the OECD Council in April 2005.

In the field of the environment, modern regulation aims at a high level of environmental protection at least cost to society. Lately, many OECD countries have recognised the need for a regulatory system that chooses regulatory and non-regulatory measures according to the specific context of the environmental issue and the regulated community. The key objective of improved regulation is to increase the polluters' responsibility for the environment and, at the same time, to increase their flexibility in reaching compliance. It also seeks to minimise the bureaucratic burden on firms and to focus on environmental outcomes. Compliance and enforcement are given particular emphasis in this context.

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With respect to ensuring compliance with environmental laws and regulations, the better regulation process requires environmental authorities to improve the design of regulatory instruments and to better target their use at specific segments of the regulated community. The following main trends in compliance assurance have been observed over the last decade in most OECD countries:

- Streamlined environmental permitting with differentiation of regulatory regimes for major and minor pollution sources;
- Steadily growing importance of compliance assistance, using a variety of web-based tools, especially for small and medium-sized enterprises (SMEs);
- Promotion of environmental management systems in exchange for lesser regulatory intervention;
- Cross-media integration and risk-based targeting of environmental inspections, combined with the reduction of their overall number;
- Putting more emphasis on self-monitoring by the regulated community while reducing unnecessary reporting requirements for businesses;
- Improvement of enforcement regimes by making sanctions more proportionate to violations; and
- Shifting from output-based to outcome-oriented performance indicators of enforcement authorities.

Reform of Environmental Regulation and Compliance Assurance in EECCA

The reform of environmental regulation and compliance assurance in the EECCA countries was catalysed by the *Guiding Principles for Reform of Environmental Enforcement Authorities in Transition Economies* (OECD, 2003).[1] This document was endorsed at the Fifth Ministerial Conference "Environment for Europe" held in Kiev in May 2003, where EECCA Environment Ministers agreed on a reference model to guide the modernisation of their systems for environmental regulation and compliance assurance. In 2007, the OECD/EAP Task Force Secretariat[2] reviewed the implementation of the "Guiding Principles" and provided recommendations for future reform.[3]

The main conclusion is that countries took action to comply with the "Guiding Principles", mostly through elevating the status of environmental enforcement authorities, clarifying responsibilities, and providing training and a better infrastructure. While such improvements are an important basis for further reform, continued lack of progress in modernising strategies and instruments of work will inhibit institutional and environmental performance. Although the report shows that the situation is uneven

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across the region, it was possible to identify the following patterns:

Improvement of Environmental Regulatory Requirements

The quality of regulatory requirements, which can have an important influence on the level of compliance, has started to improve. The development of environmental codes (finalised in Kazakhstan, and on-going in Belarus, Kyrgyzstan and Russia) emerged as a tool for making regulatory frameworks more coherent. An important change in EECCA is the introduction of gradual phase-in of legal requirements. However, discrepancies between new laws and unreformed by-laws still result in requirements that are unrealistic and difficult to implement and enforce. While some EECCA countries are preparing to introduce Strategic Environmental Assessment in line with the 2003 Kiev Protocol, Regulatory Impact Analysis (RIA) has only been applied in a limited way.

Environmental Permitting

Over the last four years, EECCA environment ministries have come to realise the deficiencies of this Soviet-legacy permitting system. Most EECCA countries have started a permitting reform process, with industry's and donor support, trying to shift the regulatory emphasis to more realistic norms. The changes are largely inspired by the approach of the European Union's Integrated Pollution Prevention and Control (IPPC) Directive (96/61/EC) but take different forms in different countries (Box 2). The permitting reform process in EECCA countries, given an impetus by the endorsement by the Ministers in Belgrade of the "Guiding Principles of Effective Environmental Permitting Systems" (OECD, 2007), is likely to intensify in the near future.

Different Models of Environmental Permitting Reform in EECCA

In **Ukraine**, the political commitment to convergence with the EU legislation aligns the reform more closely with the European norms. Ukraine's Ministry of Environmental Protection expects to draft a law on environmental permitting in 2007, which would stipulate a phased transition to integrated permitting based on best available techniques for large industry and simplified permit requirements for small and medium-sized enterprises (SMEs).

In **Kazakhstan**, separate medium-based environmental permits have been integrated into a single document, and the new Environmental Code calls for the introduction of integrated permitting for large industry already in 2008. However, there are serious capacity constraints for such radical short-term changes in the country.

In **Russia and several other EECCA countries** (*e.g.,* Belarus and Kyrgyzstan), regulations are being drafted that are likely to replace environmental quality-based permit requirements with uniform technology-based emission limit values (ELVs), thereby limiting the discretion of permitting authorities. This reform is seen as a way to facilitate investments and alleviate the regulatory burden on industry. Results achieved so far are controversial, as industry requires a wider use of performance-based standards.

Source: OECD/EAP Task Force Secretariat, 2007.

Compliance Promotion

In order to address poor knowledge of environmental requirements by the regulated community, EECCA environmental authorities made efforts to improve the access to laws and selected by-laws through their web sites and other means. Half of the countries report that they organise special events to inform the regulated community about legal developments or explain new regulatory requirements. Kazakhstan, the Russian Federation and Ukraine have adopted rating schemes to assess and disclose industry's environmental performance. And proactive mass media communication has been used (for example in Georgia and the Russian Federation) to promote public disapproval of environmental non-compliance. However, unlike in OECD countries, there are no comprehensive compliance promotion programmes, and the implementation of compliance promotion activities by inspectorates is often seen, especially by NGOs, as exceeding the enforcers' mandate.

Compliance Monitoring

The use of integrated approaches in inspection has widened and procedures of inspection were updated and better documented in several countries, *e.g.*, in Georgia, Ukraine and Kazakhstan. All inspectorates tend to prioritise their activities in order to use scarce resources more effectively, but the use of risk-based inspection approaches is limited by poor identification and profiling of the regulated community, as well as the absence of priority-setting methodologies and tools. Despite institutional improvements, the probability of discovering non-compliance remains low. This is often due to continued legal restrictions imposed to prevent corruption, whereby planned inspections of industrial facilities should not occur more often than once every year or two, and all site visits should be announced well in advance.

Armenia, Georgia, Kazakhstan, and Russia improved the legal basis for enterprise self-monitoring and reporting. At the same time, self-monitoring and reporting requirements remain unrealistically extensive and administratively cumbersome: commonly, companies are required to send three to four different reports to several authorities in different formats and with different deadlines.

Enforcement

Several EECCA countries claim to have improved deterrence because of a more adequate level of fines (in Armenia, Georgia and Russia) and better fine collection rates (particularly in Georgia and Azerbaijan). However, analytical tools to estimate illegal financial gains from non-compliance and the affordability of fines are missing. The array of other administrative sanctions is wide (see Figure 1) but few of them are used in practice, and their application lacks proportionality. Criminal enforcement is still hindered by insufficient communication between environmental inspectorates, prosecuting authorities and courts. The low capacity to collect and record non-compliance evidence and the opacity of decision making on enforcement cases further undermine both administrative and criminal enforcement. Environmental enforcement authorities do not use non-compliance response policies in determining sanctions. ➳

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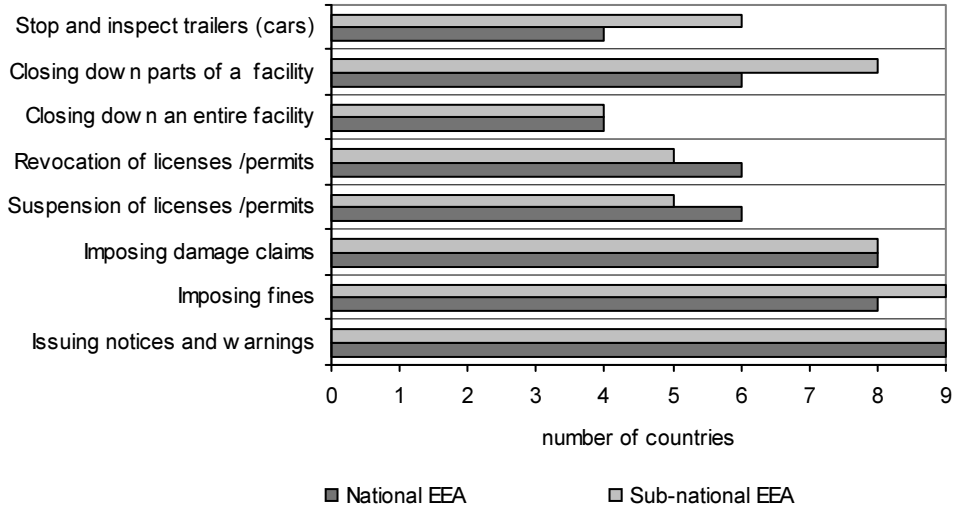
Figure 1. Administrative Enforcement Powers of the Environmental Enforcement Authorities at the National and Sub-national level in EECCA (2006)



Source: EECCA Environmental Enforcement Authorities. Data missing for Russia, Turkmenistan and Uzbekistan.

Performance Management

In each EECCA country, over thirty environmental compliance and enforcement indicators are routinely collected within relatively structured frameworks. The scope of collected data is quite comprehensive: commonly, the indicators cover the entire body of environmental legislation and are broken down by medium-specific programme areas, geographic areas, and sometimes by industry sectors. Regular reporting to internal and external audiences ensures a certain level of transparency and accountability. At the same time, the indicators are hardly used to make strategic and operational decisions. The effectiveness and efficiency of compliance assurance instruments and strategies are not analysed while good performance is associated only with high numbers of inspections, investigated violations, or monetary sanctions.

Addressing the Challenges in EECCA

Overall, the EECCA countries' responses to environmental non-compliance have been more systematic over the last few years. While such improvements are an important basis for further reform, continued lack of progress in modernising strategies and instruments of work will inhibit institutional and environmental performance.

Compliance assurance is still poorly planned and often gravitates toward punitive instruments. Despite gradual re-focusing on environmental results, enforcement of pollution charges and fines remains a key element of work and creates perverse incentives for inspectors. Among non-compliance responses, fines are predominant while softer means, such as warning letters, are neglected or even banned in some countries (*e.g.,* in Kazakhstan) in order to prevent dealings between companies and inspectors. The lack of sound and transparent enforcement policies, protectionism by high-level officials, pressure from sectoral ministries and opaque decision making often distort the consistency and proportionality of regulation and enforcement, thus undermining the rule of law, public confidence and staff integrity.

Further progress will require profound changes in regulatory frameworks and compliance assurance strategies. Possible priority actions include:

- **Increase the effectiveness of regulation.** EECCA countries may consider (a) systematically applying Regulatory Impact Assessment and conducting stakeholder consultations to ensure, among others, feasibility of the requirements; (b) making the legal frameworks more coherent and reducing the number of legal acts through their integration; and (c) ensuring that legal requirements and non-compliance responses are proportionate to the risks and compliance behaviour that they address.
- **Improve compliance assurance strategies and performance management.** Environmental authorities will need to identify and profile the regulated community and use risk-based strategies, taking full account of incentives for the regulated community to comply and their actual compliance behaviour. Compliance assurance strategies should emphasise prevention of non-compliance. In addition, the probability of discovering non-compliance should be increased through better targeted inspections and greater interaction with non-governmental actors that are likely to report violations. When offences occur, sanctions need to be designed in accordance with clear enforcement policies and applied in a proportionate, consistent and transparent manner. To enable strategic enforcement, an improved system of environmental compliance and

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enforcement indicators (including quantification of compliance rates) is required, along with better planning and priority-setting tools, and adequate data collection and information management systems.

- **Better use preventative instruments to promote compliance.** Government authorities should seek to increase the adherence of firms to sound environmental management systems and corporate environmental responsibility. This can be done by raising firms' awareness of their environmental impacts, explaining the economic and social gains from environmental compliance, encouraging sector-specific benchmarking of environmental performance, *etc*. Technical assistance programmes are needed for SMEs that do not have sufficient internal resources and expertise to identify appropriate pollution prevention and control solutions.

Continued institutional strengthening is also necessary to develop better procedures and technical guidance, train staff, and improve infrastructure, as well as to ensure adequate staffing and budgets.

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2 The EAP Task Force is an inter-governmental body that helps EECCA countries to integrate environmental considerations into the process of economic and political reform; upgrade institutional and human capacities for environmental management; broaden political support for environmental improvement, and mobilise and make cost-effective use of financial resources. The secretariat of the EAP Task Force is provided by OECD's Environment Directorate.

3 This review is a contribution to the Belgrade Ministerial Meeting, held in October 2007 within the "Environment for Europe" process. The Conference brought together delegates from 56 UNECE member states and the European Commission, representatives of the United Nations organisations, other intergovernmental organisations, NGOs, financial institutions and the private sector.

Alpine Convention

Impacts on Infrastructure Projects in the Alpine Space Illustrated with Examples from Austria

by Ewald Galle and Michael Mendel*

In Austria in 2004, the general public became aware for the first time how the legal framework for the authorisation of large projects with significant effects on the environment had changed from that of previous decades. The new provisions didn't just require greater administrative effort, but also significantly more rigid authorisation criteria. People were astonished at two decisions by the independent Environmental Senate ("Umweltsenat")[1] in which projects were refused which previously would most likely have been approved. The two projects were the expansion of a ski area[2] and the overall renovation of a motor race track.[3]

Although the media devoted much more attention to the case of the race track, the case of the ski resort was actually more interesting, as the Environmental Senate's starting point, in this case, was a complete ban on projects of this nature in the relevant site (whereas with the race track, the issue was about the actual project design and full authorisation has since been given for a revised project).

The Environmental Senate based its refusal to authorise the ski area on an international provision that, in its opinion, was directly applicable – Art 14 par. 1 of the Protocol for the Implementation of the Alpine Convention of 1991 regarding soil conservation.[4] This provision calls for a ban on the construction of new ski tracks in sensitive environments. The opinion of the Environmental Senate, that this rule was directly applicable, was later confirmed by the Austrian Administration Court.[5] In other words, in cases like this, international law can play a significant role in the authorisation of large projects which impact on the environment.

With this background, the Alpine Convention[6] and its protocols are considered, to determine whether and to what extent they can be legally assumed to include further provisions that are relevant to national law. We look first at the history and structure of the Convention and its protocols, in order to understand their content.

Thereafter, we will examine the direct effects on the national authorisation law, based on some key points with respect to infrastructural projects in the Alpine space. There are two key reasons to consider in this connection: on one hand infrastructure projects (including not only roads, but also power supply lines and pipelines for oil and gas and,

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from a larger viewpoint, also facilities for energy production and tourist infrastructures) often represent a spatial expansion that almost inevitably also touches sensitive areas.[7] On the other hand it is possible to admit that projects like this are more or less part of the public interest, therefore absolute prohibitions on action naturally need a specific relevant legal justification.

In this framework, it must be shown that the Alpine Convention and its protocols have conservation objectives, but do not aim to create obstacles or prohibit the development of the Alpine space in absolute terms.

History and Content of the Alpine Convention

History

After the Second World War, problems in the Alpine space were complex and manifold. The Alpine region was acquiring more and more significance for economic development, and energy and tourist expansion projects. At the same time, the countries in the Alpine space followed the most diverse economic and political models.

The idea of an agreement for safeguarding the Alps emerged for the first time in the founding document of a non-governmental organisation (NGO) created in 1952: the International Commission for the Protection of the Alps CIPRA (Commission Internationale pour la Protection des Alpes-CIPRA).[8]

The European Parliament played a fundamental role in the birth of the Convention: in a decision dated May 17th 1988 it explicitly called for a convention for safeguarding the Alps,[9] in order to find a solution especially for the issues of "transit traffic" and "mountain farming".

Concern about the upcoming European common market led CIPRA to further push forward its initiative, aimed at setting up such an Alpine convention before the Maastricht Treaty. After some initial indecision and under the pressure of CIPRA, the governments of the Alpine countries and the EC, represented by their Ministers for the Environment, followed up this effort and finally organised the *First International Alpine Conference of the Ministers for the Environment on October 9–11 1989 in Berchtesgaden*.

At the conference – which gathered the ministers responsible for the environment and for safeguarding nature, and government representatives from Germany, France, Italy, Yugoslavia, Liechtenstein, Austria, Switzerland and the European Commission – a resolution was adopted containing 89 points. Austria was entrusted with the task of translating the resolution into a draft framework convention.

At the same time, the first protocols on transport, mountain farming, the protection of nature and landscape, as well as spatial planning and tourism, were discussed.

The actual agreement for the protection of the Alps (Alpine Convention) was finally signed during the *Second International Alpine Conference on 7 November 1991 in Salzburg* by the Ministers for the Environment or their authorised representatives from the Alpine countries Germany, France, Italy, Liechtenstein, Switzerland and Austria, as well as by the European Commissioner for environmental issues,[10] and after the adoption of three ratification instruments, it finally came into force on 6 March 1995.

Contents of the Alpine Convention

Article 1 paragraph 1 defines the area covered by the scope of the Convention, as described in the Annex. The Annex includes a list of administrative units of the Alpine countries and a map, based mainly on geological criteria, altitude (at least 700m) and the corresponding vegetation classes and areas.[11] The entire area covers about 190,000km^2 with 13 million people and has a total length of 1,200km, from the French Maritime Alps to the Karawanken between

36th Standing Committee: Towards France 2009

Meeting in Bolzano, Italy on the 22–24 October, the Standing Committee agreed on the proceedings from its thirty-fifth Session and accepted as additional observers, the organisation "Pro Mont Blanc" and a representative of the Alpine space programme, "INTERREG-IIB". The representative of the depository State reported on the further ratification of protocols (in the meantime, the European Community has signed the Transport Protocol). Additionally, the report of the Compliance Committee was taken note of.

Following the decision of the last Ministerial Conference (reported in Environmental Policy and Law, 36/6 (2006) on pages 280–281), the Chair presented a draft action plan in connection with climate change and asked the representatives of Contracting Parties and observers to present formulated proposals for measures to be taken.

Of special interest was the report of the Working Group on Natural Hazards, which the Standing Committee requested it continue. The Working Group on Transport was especially lauded for its finally established report "The Costs of Trans-alpine Corridors", which had never been successfully calculated till now. The Working Group will now deal with the question of costs associated with transfer and transport from road to rail.

The Committee then dealt with a list of proposals of Alpine areas in the region to be included in the World Heritage List. There will be a special meeting of experts convened to further consider the list. In this connection, they also requested all Parties and observers to take sufficient action for the implementation of the Declaration on People and Culture (available in German, French, Italian and Slovenian at www.alpenkonvention.org) from Alpbach.

The conclusion of the first part of the Report on the State of the Alps, "Transport and Mobility in the Alps" ((also available in German, French, Italian, Slovenian and English at http://www.alpenkonvention.org/page9_en.htm.) was announced, with great appreciation. The Contracting Parties asked for its distribution to all Governments and organisations associated with the Convention. The second part of the Report, "Water in the Alps" is progressing. The same is the case for a long-term strategy for the Alpine Review and Information System.

The Standing Committee also dealt with the financial report and the combination of the Task Force for Protected Areas with the Secretariat's work.

Lastly, a longer discussion ensued on cooperation with the European Community and the International Mountain partnership, under the auspices of the United Nations. The Contracting Parties were also asked again to provide financial support for another Youth Parliament of the Alpine Convention, which has been a great success in past years.

There will be two further Committee meetings before the next Ministerial Conference where France will continue its Chairmanship of the Alpine Convention. (WEB/ATL)

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Slovenia and Austria. In Austria, this covers 64.8% of the national surface and, with the exception of Vienna, includes all the "Bundesländer" (Provinces) – Kärnten, Tirol and Vorarlberg in their entirety. In the 1,135 municipalities of the Alpine Convention live about 3.14 million people, 40.23% of the total Austrian population.

The core of the agreement for safeguarding the Alps is article 2, which defines the general obligations of the signatories – to implement an environmentally friendly use of the area in all sectors and to preserve the Alpine range as a living and economic space for its population. Hence, the signatories must implement a comprehensive policy for the preservation and protection of the Alps, following the principles of prevention, polluter-pays and cooperation. These three principles acquire a fundamental role in the field of environmental policies in the Alpine space. The signatories are also prompted to take into account the interests of all Alpine countries, of their Alpine regions, as well as those of the EU. In the course of negotiations, this has meant that the participation of regional bodies in the implementation in all protocols has been recognised as a fundamental harmonising element, at least to ensure the necessary information flow. The signatories are further obliged to use resources in a careful and sustainable manner. Furthermore, the signatories of the Convention shall strengthen and expand their transboundary cooperation both in spatial and practical terms. This is an essential aspect of the above-mentioned cooperation principle.

Article 2 paragraph 2 of the Convention also states that, in order to preserve and safeguard the Alps, the signatories shall adopt suitable measures in specific fields and identifies twelve objectives in different subject areas. The signatories agree on the creation of further protocols, where the details for implementing the agreement are defined (art. 2 para. 3). While the agreement for the protection of the Alps is conceived as a framework treaty, the implementation protocols are binding legal agreements which further translate in to practical terms the obligations set forth and more generally outlined by the Alpine Convention (see below).

The Alpine Convention provides for the following bodies: the Alpine Conference, the decision-making body which meets regularly every two years and brings together the Ministers for the Environment, the Standing Committee – the executive organ at administrative level – and the Standing Secretariat, elected by decision of the ministers,[12] based in Innsbruck and with an external office in Bolzano.

In most circumstances, decisions are taken unanimously.[13] The choice of the unanimity principle can be explained by the fact that the small number of signatories saw little potential for conflict in the discussion of the general and non-binding formulation of the Alpine Convention at the time of its drafting.

A peculiarity of the Alpine Convention, compared to other environmental treaties, is the relatively broad area dedicated to common research and monitoring (arts 3 and 4), including cooperation in the legal, scientific, economic and technical sectors. This is clearly done in the spirit of the comprehensive cooperation principle of the Alpine Convention.

The remaining, largely formal legal sections correspond to similar treaties. It is still worth mentioning that the Alpine Convention – in contrast to the majority of other environmental treaties[14] – does not provide for any procedure for the settlement of disputes.[15] In the first drafts there was still a comprehensive procedure, inspired by other conventions for safeguarding nature.[16] The formulation and integration in the Convention of rules for the settlement of disputes were finally abandoned. The signatories shared the wish to bring about all the necessary solutions unanimously. Also, devoting too much space to the settlement of disputes in such a straightforward convention was not seen as appropriate.

During the lengthy discussion on the transport protocol, the enforcement of law and of the conciliation of disputes was seen as a way out of this deadlock in the short term. Later, when setting up the new working group on transport during the Vth Alpine Conference of 1998 in Bled (Slovenia), an *ad hoc* working group for the development

Glacier blanc in Ecrins National Park Courtesy: alpMedia

of a mechanism for consultation and the settlement of disputes in the framework of the Alpine Convention was created.[17] The main task of this group was to develop a procedure to be used in the event of inconsistencies in the application of the provisions of the Alpine Convention and its protocols.[18] This finally led to the drafting of the above-mentioned protocol on the settlement of disputes. This should not be seen as a classic implementation protocol, but rather as integration to the agreement.

The concluding sentence of the Alpine Convention defines German, French, Italian and Slovenian as equally binding languages and therefore as authentic languages of the Alpine Convention. In the course of negotiations on the implementation protocols, this multiplicity of languages, without the inclusion of English as the dominant common language, has proven very problematic.

The Alpine Convention regulates not only individual sectors, but also – if compared to other environmental agreements – can be seen to focus on safeguarding and developing a geographically integrated area in a comprehensive and cross-sector manner. As such, it has acquired a very peculiar role. This integrated approach and its comprehensive policy, which ranges from environmental protection to regional development, culture and the social

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dimension, not only requires environmentally sustainable behaviour and economic activities by all stakeholders, but turns the Alpine Convention into a political and long-term instrument for the preservation of the Alpine space.[19]

The Protocols of the Alpine Convention

As noted above, article 2, paragraph 2 of the framework Alpine Convention lists 12 objectives that shall be further detailed by additional protocols. These implementation protocols are themselves legally binding agreements, which expand and develop the goals and obligations identified and only roughly outlined by the Alpine Convention.

Even though, at first sight, the protocols of the Alpine Convention seem to be mere implementation provisions related to individual issues, they actually have the same legal status as the framework Convention and have been approved as individual agreements following the same national procedure. This means that each protocol has been equally and individually submitted to the National Council and Federal Council for approval.

The protocols are environmental agreements on the specific fields of tourism,[20] mountain farming,[21] spatial planning and sustainable development,[22] mountain forests,[23] transport,[24] soil conservation,[25] protection of nature and landscape[26] and energy,[27] as well as the settlement of disputes.[28]

Each of the nine protocols has legal amending and legal integrating character and has therefore been adopted by the National Council according to article 50 paragraph 1 of the Austrian Federal Constitution (B-VG). Since all the protocols, with the exception of the one regarding the settlement of disputes (only in this case is the agreement of the Federal Council not required, as provided by article 50, paragraph 1, last sentence B-VG), also regulate issues which fall under the sphere of action of individual federal states, according to article 50, paragraph 1, last sentence of B-VG, the approval of the Federal Council is required. Both in the National Council and in the Federal Council, the related decisions are taken unanimously. The protocols of the Alpine Convention became public documents in Austria in 2002 and, after the filing of further ratification instruments by Liechtenstein and Germany, came into force on December 18th 2002.

During the parliamentary procedure the decision was taken – in contrast to the framework Convention – that all protocols have direct application in the national legislation from the moment of their coming into force, so that the adoption of new laws, according to article 50 paragraph 2 B-VG, is not necessary. As a consequence, they need to be taken into account by the legislator and in their execution, as long as they are suitable for direct implementation ("self executing"). Any provision whose content does not address those who are subject to legislation or the executive bodies, but rather legislation itself, or oblige the signatories to sign further agreements, is not directly applicable under this general rule. This applies also to provisions which are so general that they can only be interpreted as programmatic statements, as well as to provisions which do not allow for a clear interpretation ("non self executing").

The direct applicability of a provision also depends on its level of precision, as provided by article 18 B-VG. This can only be evaluated by looking at its details. Should it be evident that a provision is not "self executing", the assumption is made that such provision is also not directly applicable. If the suitability of a provision to be directly applied is ("merely") doubtful, the fact that there is no legal reservation by a country can be interpreted as a basis for assuming direct applicability. The body responsible for the application of the provision shall decide on its direct applicability.[29]

A final clarification of this issue will be ultimately given by the future judgement of the "Verwaltungsgerichtshof" (VwGH), the Austrian Administration Court. In the meantime, the following rough classification of the protocol provisions is recognised in Austria:

- *Provisions which are* **immediately applicable** *(self executing) are those that can be applied by executive bodies and authorities without any further transformation or change.*

  National level implementation of the numerous reporting and investigation obligations of individual protocols is still necessary, in particular the protocol on the protection of nature and landscape. In the case of other provisions of the protocols which are to be directly applied, in order to avoid any possible conflict of jurisdiction it also necessary to immediately investigate whether their content is already covered by the federal state or national legal *acquis*. (Examples: art. 12 (2) of the tourism protocol; art. 11 (1) of the protocol on the conservation of nature).
- *Clauses whose aim is to bring about* **legal adjustments** *to laws and regulations or to become new provisions.*

  In a few individual sectors, such as various planning guidelines, there is a possible need for implementation of such provisions. Individual provisions can also lead to a new structuring and positioning in the administration. This is always the case in the field of subsidies. (Examples: art. 2 of the mountain forests protocol (consumption of oxygen and air pollutants which damage the forest); art. 8 and art. 10 of the protocol on spatial planning).
- *Provisions with a* **declarative character** *but which should still be taken into account by authorities as explanatory and motivating instruments.*

  The majority of provisions have a declarative character, but are still the primary tool of interpretation, and also important in setting political goals and as a benchmark when weighing any possible interest. (Examples: art. 6 (3) of the tourism protocol; art. 3 of the transport protocol.)

As for the goals of the Alpine Convention, four are still being worked on: population and culture, protection of air quality, water management and waste management. Only the population and culture sector, as requested by the Ministers, has been further examined through a declaration, which was adopted in autumn 2006,[30] during the IXth Alpine Conference at the end of the two-year Austrian presidency in Alpbach.[31] The other subject areas have not been tackled yet.

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The protocols essentially have the same structure: each contains in Chapter II – specific measures, the implementation of which is mandatory for the signatories.[32]

The perspectives on which the contents of Alpine Convention protocols are based are harmonised to the greatest possible extent. Nevertheless, both their level of detail and their binding effect are very different, depending on the different subject areas, the different times when each protocol was drafted, but also on the sphere of influence of each country and the role of the country holding the Presidency at the time of the protocol creation.[33]

Review Mechanism

International environmental law has the same shortcomings as international law in general,[34] for instance, the intrinsic problem of law enforcement. Thanks to the increasingly cooperative law enforcement mechanisms, the practice of using coercion is gradually disappearing. Ensuring compliance with obligations via positive incentives to abide by the law is becoming more and more commonplace.[35] The Alpine instruments contain no threat of sanctions, but rather a complex system to direct behaviour with the goal of improving the effectiveness of international environmental laws.[36]

With the above-mentioned protocol on the settlement of disputes, an arbitrational process has been agreed upon and thus the previous gap has been filled. In the environmental sector, however, another mechanism is being used more and more often in order to ensure implementation and compliance with the agreed provisions: the so-called *compliance mechanism*.[37] This type of instrument first appeared in the framework of the Montreal Protocol on Substances That Deplete the Ozone Layer,[38] with the objective of facilitating and supporting compliance with the stipulated obligations. This is a non-judicial procedure which guarantees the interests of all parties in implementing and respecting the law and provides support to those parties who have difficulties in fulfilling their obligations.

At the VIIth Alpine Conference in Meran, in November 2002, the Parties reached agreement on such a mechanism for the Alpine Convention and its implementation protocols.[39] It is a consultation instrument with no confrontational, judicial or discriminatory nature, managed by a specific review committee set up at the level of the Standing Committee in order to alleviate its work burden. On the basis of the reporting procedure defined in article 5 paragraph 4 of the Alpine Convention, every four years the signatories must present a report on their compliance with the Alpine Convention and its implementation protocols, including an evaluation of the efficacy of the measures applied.

The "sanction" provided, if necessary, is a recommendation by the Alpine Convention which invites the signing party to abide by the agreement or to develop a compliance strategy. This request is made publicly and, given the negative reaction from the media that could be expected, it does have an impact – which should not be underestimated – on the behaviour of the relevant signatory. Nevertheless, such a decision has no prejudicial effect on a possible procedure for the settlement of a dispute.

Compared to other environmental treaties, it is particularly interesting that not only signatories, but also observers in the framework of the Alpine Convention have the right to initiate such a process. In cases of presumed non-compliance with the Convention and its protocols, the review committee is required to "treat the request appropriately," however, these provisions have not been tested, since no such claim has yet been filed.

International Effects

It is estimated that 25% of the earth's surface consists of mountain regions; around 26% of the world's population lives in mountain areas or in neighbouring regions and almost half of the earth's drinking water comes from these areas. All this shows the importance of mountains for the world, and yet it is often felt that mountains are not adequately represented in the international debate.

For some years now however, the model of the Alpine Convention has been an example to other regions of successful collaboration. In the Carpathians, it led to the signing of the Carpathian Convention in Kiev in 2003, as part of the "Environment for Europe" Conference, and came into force in 2006. Similar ideas and initiatives are ongoing in the Caucasus, in the Balkans, in the Andes and in the central-Asian mountain ranges.

Over the years, the Alpine Convention has trodden unusual paths and in some areas it is ahead of other Conventions. One example is the special role that scientific collaboration has played from the very beginning, leading to the establishment of specific inventories of the situation in the Alps based on large amounts of data. Another unusual feature is the special legal position of observers in the control process, who have extensive party rights. The Alpine Convention is not only a political programme for regional collaboration in mountain regions. It is also a model *par excellence* for countries and country representatives to promote joint learning and mutual understanding.

If other regions were able to identify their needs, bring them into line with each other and share instruments with all countries concerned, then they would receive the attention and understanding they deserve.

National Situation

General Aspects

With the coming into force of the implementation protocols of the Alpine Convention in December 2002, implementation has entered a new stage in Austria. This is not least because of Austria's early awareness of the potential of the Alpine Convention. Various decisions taken by the authorities and courts have made reference to the Alpine Convention and its protocols.

However, sceptics still dismiss the protocols as purely restrictive administrative measures, without however recognising or making full use of their potential. In addition, the purely legal application is supplemented by implementation activities connected to specific projects, such as the mountain villages or the network of communities.

Two examples of legal application are worth mentioning. One of these is the "Salzburger Landesentwicklungsprogramm" 2003,[40] (Salzburg Land Development

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Programme), the first binding, national legal source that has made full and actual reference to the provisions of the implementation protocols of the Alpine Convention and which has therefore launched provisions with relevance for spatial planning. The other is the "Tiroler Seilbahn- und Skigebietsprogramm" 2005[41] (Tyrol cable railway and ski resort programme). In this spatial planning programme, the particular meaning of the Alpine Convention is highlighted in the introduction, as well as the obligations which are relevant for the implementation. The significance of the Soil Preservation Protocol is recognised, especially with reference to the management of the issues of fragile areas.[42]

At an institutional level, the Austrian situation is an enviable one. For 17 years the Österreichisches Nationales Komitee (ÖNK) – Austrian National Committee – has served as a specific institution for the creation of policies and the definition of agreements. 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.

Glacier "Untersulzbachkees" Courtesy: Nationalpark Hohe Tauern

The *manual* for the application of the Alpine Convention, finalised in spring 2007, represents the culmination of efforts to accompany the national implementation and, in particular, provides a single, final Austrian legal definition. This work of reference published by the Federal Ministry of Agriculture, Forestry, Environment and Water Management includes framework conditions, guidelines and practical proposals for the application into law of the Convention and its protocols. It aims to establish a unitary national executive practice, in order to rule out from the beginning unfair competition or misrepresentation. This application manual also describes the corresponding federal and regional laws and presents legal opinions about a wide variety of issues and cases, where the final judgement – as already shown – is made by the highest national courts.

The Direct Effect of International Treaties

In the above-mentioned "*Mutterer Alm*" case, the VwGH stated that the authorisation of the adoption of an international treaty by the National Council without legal reserve of execution, as per article 50 paragraph. 2 B-VG, would justify the assumption of the direct applicability of such a treaty (in this case, the protocol on soil protection). The inapplicability of a treaty could (only) arise, in terms of the administrative procedure of national authorities, when this is explicitly foreseen by the treaty, or when the subjective will of the signatories aims at creating an agreement which is not intended to be directly executed.

The VwGH also noted that there is no direct applicability "when, taking into account the rest of the legal system, the appointment of the body responsible for the execution of the treaty is not possible or when the treaty completely lacks the definition of execution actions".

This corresponds to the current jurisprudence of the "Verfassungsgerichtshof" (VfGH), (the Austrian Constitutional Court): it also considers that the lack of a compliance obligation on the occasion of the approval of an international treaty by the national council shows that this is to be directly applied.[43] In spite of this, in consideration of the individual treaty provisions, it must be ascertained whether these are objectively suitable to be the principle of executive deeds.[44]

The VwGH also takes as a basis that the provisions in a treaty must be sufficiently defined, in order to be directly executive in a domestic body of law.[45] The VfGH provides a rather more general formulation: for an international treaty to be immediately applicable, it first has to be evaluated to determine whether the signatories intended for it to be applied directly through national courts and administration institutions without domestic legislation and whether its provisions show an objective suitability for domestic application. In other words, each country must determine whether it is possible to define the relevant bodies in charge of its execution, the groups concerned and the procedure to follow for the implementation of these rights.[46]

Within the context of the following analysis of the provisions with relevance for authorisation legislation, it is therefore necessary to ask which agreement provisions can immediately be used by the institutions as a material basis for authorisation (or possibly: prohibition).

Agreement provisions Relevant to Authorisation Legislation

As all protocols of the Alpine Convention have been agreed and adopted with no legal reservation at the time of execution, it is basically necessary to investigate the direct applicability (as described above) of every single

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provision. In the present context, it is particularly relevant to investigate those provisions which, in comparison to the rest of the international environmental law (to which the protocols already belong) determine further authorisation conditions or obstacles. From this perspective, the following should be noted on individual protocols.

"Tourism" Protocol

In article 5 paragraph 1, this protocol contains a typical example of a programmatic provision which cannot be directly applied by national authorities. Here, the signatories commit themselves to "seeing that sustainable tourist development takes place through environmentally friendly tourism". Similarly general objectives are contained in article 6–8.

Article 9 is more concrete in the obligation to submit for prior evaluation all projects with possible significant consequences on the environment and to take into account the results of such evaluation in their decision. Although the imprecise nature of the expression "possible significant consequences" may hinder the direct applicability of the provision, it is important to note that Austrian law UVP-G 2000[47] (Environmental Assessment Act) already contains several elements regarding tourist facilities.[48] In addressing these, the national legislator has applied the implementation discretion that the Directive on the assessment of the effects of certain public and private projects on the environment grants it. The requirements of such a directive, which arise from article 9 of the protocol on tourism are not recognisable.

In contrast, an explicit request for authorisation procedures in the case of ski lifts and cable cars arises from article 12 of the protocol. Thus, in the framework of the national authorisation procedure, it is necessary to pursue a policy that also takes into account the relevant ecological and territorial requirements. New business authorisations and concessions will be required to dismantle facilities that are no longer in use and to replant areas which are no longer used, giving priority to endemic plant species.

In principle, it is presumed that such facilities, when they are not required to undertake environmental sustainability assessment, usually require the granting of an authorisation according to the laws for safeguarding nature in federal states. In this case it is unlikely that additional prerequisites for authorisation arise, although without recourse to the tourism protocol it would be theoretically possible that a new intervention in nature which does not take into account the future destiny of existing facilities may be authorised. In individual cases, should no authorisation by the authorities responsible for safeguarding nature be required, it is still necessary to carry out an ecological sustainability assessment, for example as a part of the procedure according to the Seilbahngesetz (law on cable railways).

Concrete prerequisites for authorisation arise from article 14 of the protocol, according to which the building, maintenance and operation of ski slopes shall be as respectful as possible to the landscape and take into account the natural cycles and the sensitivity of biotopes. Any changes to the terrain should be kept to a minimum; the modified surfaces, if possible, shall be planted with endemic plant species. Artificial snow-making facilities can be allowed within the limits of national regulations, provided that they take into account the local hydrological, climatic and ecological conditions. These provisions are certainly to be given due consideration in official procedures for the safeguarding of nature and (in relation to snow-making facilities) in procedures related to water legislation, but usually do not give rise to any prerequisite for authorisation which is not already provided by the national legal system.

Article 15 requires an environmentally compatible "management of outdoor sport activities". Paragraph 2 explicitly states that the practice of motorised sports shall be kept to a minimum and, if necessary, forbidden altogether, except when the responsible authorities have demarcated specific zones for such activities. This provision shall be taken into account in the official authorisation procedures or in environmental sustainability assessments, as long as the zoning plan does not already foresee the establishment of a special area, which explicitly allows the execution of the project.

Ice tunnel runs under the Pasterze Courtesy: Nationalpark Hohe Tauern

Protocol on "Mountain Agriculture"

In addition to programmatic provisions on the environmentally compatible use of land for agricultural purposes, the recovery of traditional cultural elements and the implementation and dissemination of natural extensive cultivation methods typical of the territory (arts 8 and 9), article 10 contains a very practical request to implement stock-farming methods appropriate to the local territory. This is relevant in particular for the approval

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procedure for intensive livestock farming, iSd, Annex 1, point 43 UVP-G. The protocol does not directly tackle infrastructural plans, which is outside the subject matter of the regulation.

Protocol on "Spatial Planning and Sustainable Development

This protocol should be taken into account primarily at the level of planning procedures (and not individual planning applications). Nevertheless, article 10 requires an assessment of the direct and indirect effects of public and private projects when these may have a significant, long-term impact on nature, landscape, construction materials and space. The cycle of projects for which it is necessary to carry out an assessment of its environmental effects requires more concrete definition. Therefore it does not seem to be a provision with direct applicability.[49]

Protocol on "Mountain Forests"

This instrument contains several very practical obligations. Article 6 paragraph 1 states that in the case of mountain forests, which protect their own habitat, human settlements, the transport infrastructure and agricultural farmlands, this protective effect should be considered as a priority. It also states that these mountain forests shall be preserved *in situ.*

Article 7 paragraph 2 requires that forest maintenance activities shall be carried out only with tree species suited to the given habitat and that reforestation shall be carried out with care and respect to the soil and local habitat. Article 9 requires that improvement measures needed to protect the forest and to ensure near-natural farming and maintenance, shall be carefully planned and implemented, taking into account the needs of nature and landscape.

The provisions contained in arts 6 and 9 are undoubtedly relevant to authorisation procedures for land clearance, according to §§ 17 and following the Austrian ForstG (law on forests – see further details below). Article 7 can be relevant in case of exceptional authorisations for the felling of trees which are not ready for cutting (according to § 81 ForstG) and for the felling which requires an authorisation (§ 85 ForstG).

Protocol on "Transport"

This protocol not only defines a common transport strategy (art. 7) and the obligation to carry out environmental assessments and risk analyses in the case of large new constructions or expansion of existing infrastructure,[50] but also contains very practical provisions which should be taken into account in the national authorisation procedure. According to article 11 paragraph 1, the signatories will refrain from building new high-priority roads for traffic crossing the Alps. High-priority road projects for the internal Alpine traffic, according to article 11 paragraph 2, may only be authorised if they meet strict requirements (preventive and compensatory measures on the basis of the results of an environmental sustainability assessment, comprehensive assessment of alternatives and suitability to attain a purpose, conformity with spatial planning plans and programmes).

Article 12 requires that the environmental impact of air traffic, including aircraft noise, shall be reduced as much as possible. Therefore, the construction of new airports and the significant expansion of existing airports in the Alpine space shall be kept to a minimum. This means that, in the authorisation procedure according to the Austrian LuftfahrtG (law on air transport) or the UVP-G, a strict assessment of the need for such projects shall be carried out.

Protocol on "Soil Protection"

This instrument contains, in article 7 paragraph 3, the general request to take into account the protection of soil and the limited availability of surfaces in the Alpine area in the spatial and environmental sustainability assessment of large projects in the industrial, building and infrastructure sectors, energy and tourism. This provision particularly emphasises the importance of soil as an asset to protect. From a practical perspective it should be remembered that, in any case, a project liable to an environmental sustainability assessment and which, from the point of view of soil protection, is not sustainable, cannot be approved (see §§ 1 paragraph 1, point 1, letter b, 17 paragraph 4 and 5 UVP-G).

Furthermore, the protocol on soil protection requires economical use of mineral resources and a minimisation of the burdens on other soil functions in cases of quarrying, processing and use of mineral resources. In those areas which are particularly significant for safeguarding soil functions and in areas devoted to the abstraction of drinking water, the quarrying of mineral resources should be renounced (art. 8 paragraph 2).

In the context of the protection of wetlands and swamps, draining may only be authorised in exceptional cases. In principle, marshlands should not be used; they may only be farmed for agricultural purposes in such a manner that preserves their specificities (art. 9 paragraphs 2 and 3).[51] For mountain forests with a high protective function (see art. 6 paragraph 1 of the protocol on mountain forests), the protocol on soil protection requires in article 13 paragraph 1 that this protective effect shall be considered a priority.

In the above-mentioned provision of article 14 paragraph 1, the signatories are generally obliged to prevent the negative effects of tourist activities on the Alpine soils. In particular, authorisation for the building and planning of ski slopes should only be granted in exceptional cases and implementing compensatory measures. They should not be granted in areas at risk. Finally, article 15 requires that the signatories make all possible efforts to minimise, in a preventive manner, the entry of pollutants in the soil through air, water, waste and environmentally burdensome substances.

The requirements of the protocol on soil protection – beside a possible environmental sustainability assessment – are to be taken into account in several administrative legal procedures. This happens, for instance, with the authorisation processes foreseen by the Austrian laws ForstG, MinroG (law on mineral resources),[52] WRG (law on waters),[53] Tyrolean SeilbahnG[54] and by the laws for safeguarding nature in federal states.

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The Protocol on the "Protection of Nature and Landscape"

This protocol obliges the signatories to implement the necessary measures to ensure the preservation of natural and near-natural biotope types in sufficient amounts and to guarantee their effective spatial distribution (art. 13). Among other things, they have to regulate fishing and hunting bans for specific animal species (art. 15), ensure the recovery of endemic species (art. 16) and prevent the settlement of animal and plant species which do not belong to the natural habitat (art. 17). These requirements are, in part, very practical but cannot be applied to the procedure for the authorisation of facilities.

Energy Protocol

Article 2 paragraph 2 of the "energy" protocol generally requires that new building or significant expansion of existing large energy infrastructures should undergo an environmental sustainability assessment and an evaluation of the spatial and socio-economic effects. The elements of fact of Annex 1, point 4 to 6 and 30 UVP-G correspond to this obligation.

Article 7 defines specific requirements for the authorisation of water power plants. According to this article, the ecological efficiency of running waters and the integrity of landscapes shall be ensured through appropriate measures, such as the definition of minimum flow amounts, the implementation of provisions aiming at reducing artificial water-level variations and the safeguard of transit passages for the fauna. This obligation applies "as much as possible" also to existing hydro-power plants. Furthermore, the signatories undertake to preserve the hydrological balance in specific sensitive areas (protected drinking water and natural areas, including buffer zones, reserve areas and rest areas as well as intact near-natural areas and landscapes). With respect to the European Directive establishing a framework for Community action in the field of water policy and the implementation provisions, §§ 30 *et seq*., 104a WRG give rise to no additional requirements.

In the case of new thermal facilities for the generation of electricity and/or heat from fossil fuels, the best available techniques shall be used. Emissions shall be limited as much as possible (art. 8 paragraph 1). This substantially corresponds to the requirements set out in article 3 of the IPPC directive, whose Annex 1 point 1.1. covers all furnaces with a thermal capacity of over 50MW. The IPPC directive has been implemented in the national legal system through the Austrian GewO (industrial code) (§ 77a i.c.w Annex 3) as well as various federal state regulations.

For the transport and distribution of energy, article 10 requires the rationalisation and optimisation of existing infrastructures. As for the construction of power supply lines and network stations, gas and oil pipelines and further facilities with significant effects on the environment, all precautions shall be taken to minimise the burden on the population and the environment. To the greatest possible extent, existing structures and lines should be used. The authorisation requirements set forth by § 20 RohrleitungsG (law on pipelines) correspond to these requirements – even for projects which do not need an environmental sustainability assessment – as well as to the wide range of public interests which, according to § 7 paragraph 1 StarkstromwegeG (law on high current lines), shall be taken into account when authorising the construction and operation of such structures.[55]

World's highest solar power plant at the Jungfraujoch, commissioned 11 January 2008 Courtesy: BKW FMB Energy

Furthermore, the environmental sustainability assessments provided by national law should include conditions which regulate the replanting of the area and the recovery of waters after the conclusion of works (art 11). For energy producing facilities, it is necessary to carry out an environmental sustainability assessment and the best available techniques to avoid or reduce the environmental effects shall be used (art. 12).

As for the above-mentioned elements of the environmental sustainability assessment for power stations, it is presumed that they correspond to the requirements of article 12 for larger facilities. A similar presumption seems appropriate for points 13 and 16 of the Annex of the UVP-G, which provide for a mandatory environmental sustainability assessment for specific pipelines and high current aerial lines. In reference to § 17 paragraph 4 and 5 UVP, the authorisation procedure also prescribes the necessary measures stated

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by article 11 of the energy protocol. It is nevertheless debatable whether the legal administrative procedures required for projects below the threshold values defined by Annex 1 of UVP-G fulfil the requirement of an environmental sustainability assessment according to article 10. Those administrative laws which define a wide range of public interests to be taken into account in environmental sustainability assessments (see, for instance, §§ 104, 104a WRG, § 7 StarkstromwegeG) would seem with appropriate interpretation, to comply with the protocol, although it must be noted that the protocol's provision does not discuss an "approval concentration", as provided by UVP-G.

Wider Lessons

In summary, it can be noted that the illustrated agreement provisions modify, in a selective manner, the authorisation prerequisites for specific types of projects. In the majority of cases though, this merely leads to a further emphasis of individual aspects which are already taken into account by the relevant administrative laws and by UVP-G 2000. Absolute obstacles to authorisation, such as those detected by the Environmental Senate and the VwGH in article 14 paragraph 1 last sentence of the protocol on soil protection can also be found in other provisions, but only in a very selective manner (prohibition on building of high-priority roads crossing the Alps, prohibition on quarrying mineral resources in particularly sensitive areas, prohibition on use of marshlands). It is debatable whether extensive prohibition of intervention can arise from article 6 second sentence of the protocol on mountain forests. The scope of this question cannot be overestimated when we think that, according to experience, there is hardly any transport project which does not have an impact on forested land.

Special Concerns Regarding Article 6 of the Mountain Forests Protocol

The Environmental Senate has defined Article 6 of the mountain forest protocol as a "land-clearing ban", – as in the specific circumstances it did not recognise any highly protective function of the interested forest – without dealing in more detail with the actual scope of such prohibition.[56] The immediate question therefore arises whether this provision – similarly to article 14 paragraph 1 of the soil protection protocol – is actually directly applicable to the individual authorisation procedure. This could be doubted, as the agreement does not contain any explicit arrangements, neither on the granting or non-granting of authorisations nor on the terms which should be respected in case of a positive decision on the authorisation. The formulation supports much more the interpretation according to which the signatories intended to set the goal of preserving mountain forests with highly protective value, which would then be implemented through national policies.

The assumption that this is merely defining a goal is further supported by paragraph 2 of article 6, which foresees that "necessary measures" in the framework of protective forests preservation or improvement should be implemented and that the goals of safeguarding nature and landscape shall be taken into account. This indicates that the preservation of mountain forests should not be ensured through a prohibition of intervention applied in the course of an authorisation procedure, but rather through projects of the signatories. To counter this interpretation, it could be argued that it wrongfully qualifies the clear formulation of the second sentence of article 6 paragraph 1 ("shall be preserved"). In other words, the question arises to what extent an absolute land-clearing ban – if the signatories aimed at creating one – could be further concretised.

The question on the exact content of article 6 paragraph 1, second sentence, of the mountain forests protocol actually questions its direct applicability. If "*in situ* preservation" actually means that in the relevant areas, figuratively speaking, no single square metre of forested land may be used for other purposes, nothing can be assumed from the fact that the agreement does not explicitly prescribe that it is not allowed to grant authorisations which contradict such prohibition. If, on the other hand, the provision is interpreted as a general definition of a protection goal, it is to be taken into account in authorisation procedures, but there is no directly applicable prohibition to grant land clearing authorisation.

Actually, several arguments contradict the interpretation according to which the signatories intended to create an absolute prohibition of intervention with this provision. The opinion was given in Austrian literature that the mountain forests protocol regulates a preservation order for protected forests and strengthens the prohibition on uprooting – in the meaning of a non-forestry use of a forest area – that is already present in the Forest Act. There are no exceptions. The expression "*in situ"* rules out uprooting even where "reforestation" is possible.[57]

This view appears to be realisable only in part: already according to the wording it is unquestionable that the objective of the provision is to preserve mountain forests with a higher protection function. The question is however, which obligations lie with the member state and individuals in achieving this objective. There is no justification for an individual uprooting to threaten this protection objective. The interpretation explained by the authors, that the granting of an uprooting authorisation is in any case unacceptable (and not: is linked to particularly rigid premises), is not explained in more detail and cannot be deduced as such from the wording.

Further and more detailed analysis is therefore absolutely required. First of all, it is relevant to note the goal definition in article 1. According to its formulation, the article's goal is to preserve mountain forests as near-natural habitats, to develop or multiply them if needed and to improve their stability. As a prerequisite for the fulfilment of the functions described in the preamble, careful, near-natural and sustainable mountain farming is necessary. When the second sentence emphasises the importance of mountain farming, this shows that the "near-naturalness" mentioned in the first sentence is not to be interpreted as complete natural wildness. The signatories rather see the Alpine space as a cultural landscape shaped by man in harmony with nature. Thus, the mountain forests protocol

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is not primarily an instrument for safeguarding nature, but it aims at preserving the manifold functions of mountain forests, shaped and used by man.

This is also made clear by the preamble, which mentions the importance of the mountain forest ecosystem as a habitat rich in fauna and flora – as well as emphasising its protective function, the climatic balance, its function for leisure activities, the extraction of raw materials, *etc*. – as only one among many aspects.

Also, the formulation of article 6 does not aim at preserving specific forests as ecosystems, but rather at guaranteeing their protective function. The safeguarding of nature and landscape is to be taken into account, as stated in paragraph 2. In contrast to environmental legislation, which in specific cases recognises absolute prohibitions on intervention as reasonable and effective instruments to protect ecosystems, from the perspective of the goal stated in article 6 of the mountain forests protocol it is not clear what sense it would make to impose an absolute prohibition of intervention detached from the actual protective function of the relevant mountain forest.

This consideration supports the argument that the second sentence of article 6, paragraph 1 means that substantial interventions which jeopardise the protective function of a mountain forest should be banned. Nevertheless there is no reason to forbid specific interventions which do not imply any significant deterioration of the protective function of the forest. Examples of this are transport routes and lines which, due to the path they follow at the edge of a forested slope, do not have any negative impact on the stabilising effect of the forest. Further examples are those in which the project subject to evaluation implies that the previous protective function of the forest is no longer necessary (for instance, the transfer of a transport route previously protected by the forest). Even in such a case there is no objective reason for an absolute prohibition of intervention.

This is the same interpretation that the National Council must have followed when approving the adoption of the mountain forests protocol. The government proposal[58] lists several implementation requirements. Among these are also specific implementation requirements in the field of forest legislation. In reference to the land clearing of protected forests though, there is no explicit expression of the legislator's intention to change the legislation. In the *Saalfelden* case, the Environmental Senate expressed doubts on the direct effectiveness of article 6 paragraph 1 of the mountain forests protocol, without taking a final stance on the matter. In our opinion, the main issue is not, as explained, whether the provision determines an immediately applicable prohibition. Much more relevant is the exact scope of a possible limitation in the granting of land clearance authorisations.

The interpretation that substantial interventions on mountain forests with a highly protective function which would obliterate such protective effect shall be prevented is not too far from the content of the ForstG. According to § 17 ForstG, a land clearance authorisation could theoretically be granted even in such cases, on the basis of an evaluation of interests. From a practical point of view though, it is extremely unlikely that different use of the land whose clearance has been requested will be more in the public interest than preserving the forest, when such clearance implies that the protective function of the forest is destroyed. It can therefore be understood that, on the occasion of the authorisation by the National Council, the provision of article 6 paragraph 1 of the mountain forests protocol was not seen as a material change to the previous legislation, although there can be cases when it determines the weighing of interests to be carried out by authorities, complementing § 17 paragraph 3 ForstG.

Another argument that supports the interpretation of the provision as a (mere) prohibition of interventions with a substantial negative impact is the fact that it provides for the preservation of mountain forests (it does not state that land clearances in mountain forests are not allowed). Furthermore, article 10 of the protocol obliges the signatories to demarcate natural forest reserves and to safeguard them. In such forests, every exploitation should be prevented. Such provision would be completely redundant if an absolute prohibition of intervention already arose from article 6 paragraph 1.

A comparison with article 14 paragraph 14 of the soil protection protocol leads to the same conclusion. This provision contains not only a general ban on the setting up of new ski slopes in areas at risk, but it also prescribes that ski slopes in forests with protective functions may only be authorised in exceptional cases and under implementation of compensatory measures. As the soil protection protocol was adopted on October 16th 1998, at a time when the mountain forests protocol of February 27th 1996 already existed, it can be assumed that the signatories have taken the latter into account. Since article 14 was specifically conceived as a limitation on the creation of ski slopes,[59] it cannot be assumed that this provision is to be interpreted as a relaxation of article 6 of the mountain forests protocol. This leads to the conclusion that, through the mountain forests protocol, no land clearance in mountain forested areas is banned, since otherwise the said provision of the soil protection protocol would be unnecessary (the interventions regulated in further detail would anyhow be generally inadmissible).

The interpretation of the standard depicted here corresponds to that which emerges also in the aforementioned manual about the Alpine convention, in which the Austrian Ministry for the Environment once again expresses itself explicitly about the assumption of an absolute uprooting prohibition: in addition, article 6 of the mountain forests protocol should be considered within the framework of the balance of interests before an authorisation for uprooting is granted.[60]

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. Even 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

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case of the Alpine Convention and its protocols, are allowed into national decision-making processes. The end of this journey should be that all people who live and are active in the Alpine area expect to start from the same place in the protocols and therefore the rules of the game for the life and the economy in the Alpine area are the same for everyone.

The strength of the Alpine Convention and its protocols lies in its approach towards integration, which promotes a permanent balancing of interests and a long-lasting confrontation with the most diverse claims to use, including the appropriate involvement of manifold objectives and interests, which again corresponds to the concept of sustainability.

The consideration of multiple, and often also contrasting, interests means this is not a purely "conservative" standard for environmental protection – of the type of an exhaustive area protection – which prohibits specific changes of the existing uses of space. In considering the wide spatial range of application of the Alpine Convention, this definitely cannot be its task. For this reason, the protocols, as was shown, only include real prohibitive rules as an exception, which rule out specific uses from the very beginning.

However the importance and the value of the Alpine Convention and its protocols should not be forgotten. While they cannot solve all the problems in the Alpine space, their potential is significant They should not be neglected.

For a commentary by the same author see BzU A 148 + supplement, ESV Berlin 2002.

Notes

1 This is a special institution, set up as a court of appeal for procedures to examine environmental impact.
2 Decision of the Environmental Senate of 22.3.2004, US 6B/2003/8-57 (Case *Mutterer Alm*).
3 Decision of 3.12.2004, US 5B/2004/11-18 (Case *Spielberg*).
4 BGBl. (Federal Law Gazette) III 235/2002; hereinafter: Soil Protection Protocol.
5 VwGH 8.6.2005, 2004/03/0116 (after refusal of the authorities by means of VfGH with decision dated 21.6.2004, B581/04).
6 Agreement for the protection of the Alps (Alpine Convention), BGBl. 477/1995.
7 Even in the Alps, it is possible to avoid this impact, however, if one uses the right site selection standards and techniques.
8 Peter Haßlacher, 2000, *Die Alpenkonvention*. Fachbeiträge des Österreichischen Alpenvereins, series: Alpine Raumordnung Nr. 17, p. 8.
9 EP decision of April 13th 1988, B 2-17788 – ABl. 1988, Nr. C 167/35.
10 Slovenia followed in March 1993; the Principality of Monaco became a signatory in 1994.
11 For a critique on this, see Ewald Galle, 2002, Das Übereinkommen zum Schutz der Alpen (Alpenkonvention) und seine Protokolle, Beiträge zur Umweltgestaltung; Bd. 148, page 31 *et seq*.
12 For more detailed information see *Environmental Policy and Law* (EPL), 33/1, pp. 35–36 (2003).
13 Exceptions are: matters regarding procedural rules, the acknowledgement of scientific information; and decisions on, or recommendations of, specific scientific measures, when a *¾ majority* is sufficient, as long as all possible efforts to reach unanimity have already been made and this is explicitly stated by the president.
14 Such as, for instance, the Vienna Convention for the Protection of the Ozone Layer (BGBl. 1988/596) in art. 11; or the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal – Basel Convention (BGBl. 1993/229) in art. 20; or the Convention on Environmental Impact Assessment in a Transboundary Context – Espoo Convention (BGBl. III 1997/201) in art. 15 i.c.w. Annex VII.
15 Wilfried Anreiter, 1997, *The Effectiveness of International Environmental Agreements and the Implication for the Alps Convention*, p. 40.
16 In particular art. 18 of the Convention on the Conservation of European Wildlife and Natural Habitats – Bern Convention (BGBl. 1983/372).
17 Point 6.2. of the minutes of decisions of the Vth Alpine Conference, 16 October, Bled, Slovenia.
18 Text taken from the ministerial decision on the Vth Alpine Conference, 16 October, Bled, Slovenia.
19 Roland Norer, 2002, *Die Alpenkonvention – Völkerrechtliches Vertragswerk für den Alpenraum*, p. 9.
20 BGBl. III 230/2002.
21 BGBl. III 231/2002.
22 BGBl. III 232/2002.
23 BGBl. III 233/2002.
24 BGBl. III 234/2002.
25 BGBl. III 235/2002.
26 BGBl. III 236/2002.
27 BGBl. III 237/2002.
28 BGBl. III 238/2002.
29 A detailed illustration of this is provided by Stefan Cuypers, 2004, "Die Alpenkonvention und ihre Durchführungsprotokolle: Einen alpinen Werkzeugkoffer für die Naturschutzarbeit öffnen". In Fachbeiträge des Österreichischen Alpenvereins, series: Alpine Raumordnung Nr. 24 (2004), p. 14 *et seq*.
30 Pt. 6 of the minutes of the decisions of the IXth Alpine Conference of 9 November 2006, Alpbach, Austria.
31 More detailed information in *Environmental Policy and Law* (EPL), 36/6, p. 280 (2006).
32 Chapter I contains general provisions, in particular the objectives of the protocol; chapter III includes provisions on research, training and information; chapter IV contains provisions on control and evaluation; and chapter V lists final provisions.
33 Werner Schroeder, „Die Alpenkonvention – Ein Abkommen über den Schutz und die nachhaltige Bewirtschaftung eines der wichtigsten Ökosysteme Europas" in BayVBl. 6/2004, p. 165.
34 See Patricia Birnie and Alan Boyle, 1992, *International Law and the Environment*, p. 136 *et seq*.
35 Ulrich Beyerlin and Thilo Marauhn, „Rechtssetzung und Rechtsdurchsetzung im Umweltvölkerrecht nach der Rio-Konferenz 1992", *Berichte 3/97*, p. 73 *et seq*.
36 A.H. Chayes/A. Chayes/R.B. Mitchell, 1995, "Active Compliance Management in Environmental Treaties". In W. Lang (Hrsg.), *Sustainable Development and International Law*, p. 75 (83 *et seq*.).
37 Gerhard Loibl, 1999, „Vom Umweltschutz zur nachhaltigen Entwicklung". In Cede/Sucharipa-Behrmann (Hrsg.) *Die Vereinten Nationen/Recht und Praxis,* p. 191.
38 BGBl. 1989/283.
39 A detailed illustration of this is provided by Tim Enderlin, 2003, "A Different Compliance Mechanism", *Environmental Policy and Law* 33/3-4: 155–159.
40 Explained as mandatory by means of a decree of the Salzburg Regional Government dated 30. 09.2003.
41 Spatial Programme, LGBl. (State Law Gazette) 10/2005.
42 Comprehensively covered by Peter Christ, 2005, „Das Tiroler Seilbahn- und Schigebietsprogramm 2005 aus kompetenzrechtlicher Sicht", *Baurechtliche Blätter* 8: 114–117.
43 See for example VfSlg. (official collection) 13952/1994, 12558/1990.
44 VfSlg 13952/1994.
45 See VwGH 11.6.2003, 2002/10/0084.
46 VfSlg 12281/1990.
47 BGBl. I 149/2006.
48 Annex 1 points 12, 17, 20, 22, 23; later come the "catch-all elements" of point 18b regarding city planning projects and of point 21 on publicly accessible parking lots or parking garages.
49 The VwGH has left this open in its decision of 24.2.2006, 2005/04/0044.
50 This last requirement corresponds to the Austrian law UVP-G, which in § 23a and Annex 1 point 9 covers comprehensively all new construction projects of high speed roads from the perspective of community law, as well as all other large road-building projects.
51 Comprehensively covered by Sebastian Schmid „Alpenkonvention und Moorschutz" in RdU/2007, p. 158 *et seq*.
52 BGBl. I 84/2006.
53 BGBl. I 123/2006.
54 LGBl. 10/2005.
55 The federal state laws on heavy current lines contain corresponding provisions throughout.
56 Decision of January 1st 2005, US 9B/2004/8-53, *Saalfelden.*
57 Heike Randl/Herbert Scheiring, „Alpenkonvention: Bergbau, Bergwald und Biotopschutz", in RdU 2006, *Umwelt & Technik*, p. 9 *et seq*.
58 Parliamentary materials, 1094 BlgNR XXI.GP.
59 See the parliamentary materials on the approval of this protocol, 1096 BlgNR XXI. GP.
60 P. 83 of the manual.

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