

INSTRUMENTO INTERNACIONAL PARA EL DESARROLLO SOSTENIBLE DE UNA ZONA DE MONTAÑA TRANSFRONTERIZA: EL CONVENIO DE LOS ALPES Y LOS RETOS DE SU APLICACIÓN

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I. INTRODUCCIÓN

El Convenio de los Alpes quedó abierto para su firma en 1991 y entró en vigor en 1995. Se aplica a los ocho estados alpinos: Austria, Francia, Alemania, Italia, Liechtenstein, Mónaco, Eslovenia y Suiza. Fue ratificado por la Unión Europea en 1996. El Convenio es el resultado de largas negociaciones que llevaron al reconocimiento de que la protección de los Alpes, el desarrollo sostenible de los mismos y los intereses de sus habitantes precisaban de una cooperación que superase las fronteras de cada Estado.

II. EL CONVENIO MARCO

El Convenio de 1991 establece los principales objetivos, determina los órganos principales y los procedimientos aplicables. El artículo 2 requiere a las Partes adoptar medidas bajo la forma de protocolo en doce áreas: población, cultura, ordenación del territorio, prevención de la contaminación atmosférica, conservación del suelo, gestión de los recursos hídricos, conservación de la naturaleza y del paisaje, agricultura de montaña, bosques, turismo, transporte, energía y gestión de residuos. Como se puede apreciar, el ámbito de aplicación del Convenio, cubre prácticamente todas las materias relativas al desarrollo sostenible.

¹Las opiniones expresadas son a título personal y no reflejan las de la institución.

Entre 1994-2000 se han aprobado ocho protocolos temáticos. Al exigir a las Partes la adopción de dichos protocolos, el Convenio insiste de manera patente en la cooperación en materias de investigación, control y recopilación de datos, bajo la premisa de que una sólida base científica es un requisito necesario para la adopción de normas comunes.

El poder de decisión reside en la Conferencia de las Partes (COP) que se reúne cada dos años en el Estado que ostente la presidencia rotatoria. Las Naciones Unidas (y sus organismos especializados como el Programa para el Medio Ambiente (UNEP)), el Consejo Europeo y otros Estados europeos, así como organizaciones transfronterizas que involucren a autoridades alpinas, pueden participar en la COP como observadores. La COP puede también admitir a ONGs internacionales. En principio, la COP decide por consenso. Sin embargo, se ha decidido que las resoluciones se tomen por mayoría de tres cuartos si no se pueden alcanzar por unanimidad. Como se ha indicado, la Unión Europea es Parte del Convenio y de sus Protocolos. Esto implica que en las áreas de su competencia puede votar en lugar de los Estados miembros que sean igualmente Partes. Sin embargo, hay que hacer notar que la Unión no hizo declaración alguna al respecto cuando firmó el Convenio y que ésta no ha hecho uso de ese derecho, a pesar de que algunas cuestiones caen claramente en el ámbito de sus competencias, caso de la agricultura y el transporte.

Un comité permanente con funcionarios de los Estados Partes prepara las decisiones que serán adoptadas por la COP. En 2002 se adoptó la decisión de crear un secretariado en Innsbruck y una oficina operativa en Bolzano (Italia). El ámbito geográfico del Convenio se define en un anexo que enumera las entidades territoriales de cada Parte. Austria e Italia aglutinan el 60 % de la superficie y de la población. El resto se distribuye entre Francia, Suiza y en menor medida Alemania y Eslovenia, más Liechtenstein y el Principado de Mónaco.

III. LOS PROTOCOLOS TEMÁTICOS

Los tres primeros protocolos se adoptaron en 1994: Ordenación del territorio, protección de la naturaleza y el paisaje, y agricultura de montaña. Los dos primeros están fundados en las normas de evaluación de impacto ambiental y de protección de los hábitats de la Unión Europea, aunque su lenguaje resulta menos obligatorio. Estos dos protocolos persiguen un propósito conservacionista. Hay que tener en cuenta que menos del 20 % del territorio alpino es adecuado para establecer núcleos de población. Esto da lugar a importantes conflictos sobre el uso del suelo, ya sea la necesidad de zonas industriales, residenciales y recreativas. El Protocolo de ordenación del territorio exige la adopción de planes por parte de las autoridades estatales. El contenido de estos planes se detalla en el art. 9 que, por ejemplo para el caso de las aglomeraciones urbanas, pretende limitar las segundas residencias. Por lo que respecta a la protección de la naturaleza, un 25 % del territorio alpino lo constituyen las zonas protegidas. A los Estados alpinos se les exige que promuevan la designación de nuevas áreas. En 1995 se creó una red de áreas alpinas protegidas (ALPARC).

Por lo que respecta a la agricultura de montaña, aunque sólo un 4 % de la población vive de este sector y en los 25 últimos años la población agrícola se ha reducido un 40 %, este tipo de actividad todavía tiene un importante papel para la conservación de los hábitats alpinos. Por otra parte, mantener la actividad agrícola significa preservar la población en áreas remotas y por tanto, conservar la cultura alpina. Por ello, este Protocolo, contiene medidas que persiguen compensar a la agricultura de montaña frente a aquélla que se lleva a cabo en los valles, por ejemplo, facilitando el acceso de los productos a los distintos mercados o diversificando las fuentes de financiación de los agricultores. Puesto que este Protocolo ha sido ratificado por la Unión Europea y ésta goza de una competencia exclusiva en la materia, sus disposiciones tienen mucha importancia en relación con la política agrícola común, caso de las cuotas de producción lechera. Hay que destacar el art. 9, que exige la aplicación de criterios comunes para favorecer el uso y la difusión de los métodos de cultivos típicos de cada área, así como de los productos agrícolas. La cuestión que surge en este punto es si esta norma resulta compatible con el uso de organismos modificados genéticamente (OMG) al no ser estos característicos de las montañas. Además, los OMG tienden a uniformizar culturas. Aunque el Protocolo no utiliza el término “tradicional”, lo que en el lenguaje de la Unión Europea equivaldría a agricultura que no emplea OMG, la referencia a una agricultura característica del área de que se trate, basada en métodos de producción extensiva respetuosos con el medio ambiente, parece indicar con claridad que tiene por objeto la típica actividad de la agricultura de montaña con una producción limitada pero de calidad, y no a aquélla de carácter más “tecnológico” basada en OMG. Esto llevó a la Unión Europea a añadir una declaración al Protocolo reconociendo el principio de coexistencia y la capacidad de los agricultores para elegir entre productos convencionales, orgánicos y modificados genéticamente. Esta declaración pretende impedir a los Estados del Convenio que puedan prohibir la utilización de OMG. No obstante, Austria pretendió en vano defender su proyecto de prohibición de los OMG en el Alta Austria. Tanto la Comisión Europea como el Tribunal de Justicia llegaron a la conclusión de que Austria no había probado que ese territorio contenía ecosistemas particulares o excepcionales que precisasen de una evaluación de riesgos distinta de aquélla efectuada para Austria en su conjunto o para otras regiones similares de Europa². Hay que indicar, sin embargo, que ni la Comisión ni el Tribunal han exigido la prueba de la existencia de ecosistemas “únicos” sino sólo “inusuales”.

En 1996 se adoptó el Protocolo relativo a los bosques de montaña. Más del 40% de los Alpes está cubierto de bosques. Una quinta parte de esos bosques protege núcleos de población e infraestructuras de transporte. La explotación de la madera ha adquirido relevancia en los últimos años al haberse redescubierto como material de construcción en un tipo de arquitectura respetuosa con el medio ambiente. Además, los bosques cumplen un papel crucial en la lucha contra el cambio climático como sumideros de CO₂. El Protocolo se refiere a los métodos de reforestación natural, así como a la plantación de especies autóctonas. Igualmente añade una polémica norma por la que la contaminación atmosférica ha de ser reducida gradualmente de manera que no produzca perjuicios a los ecosistemas forestales [art. 2.a)].

² Dec. 2003/653/CE. Asuntos T-366/03 y T-235/04; Asuntos C-439/05 y C-454/05.

Entre los otros protocolos adoptados cabría destacar el relativo al turismo, teniendo en cuenta que catorce millones de personas viven en los Alpes, pero aproximadamente cien millones los visitan cada año. Hay 135 ciudades en las que hay más camas hoteleras que habitantes. El Convenio de los Alpes ya determina el objetivo de que en el sector del turismo se restrinjan las actividades perjudiciales para el medio ambiente. El Protocolo tiene en cuenta este objetivo. Por otra parte, persigue fortalecer la competitividad de un turismo ambientalmente sostenible y añade el objetivo de que se determinen áreas en las que no puedan establecerse instalaciones turísticas.

El Protocolo de conservación del suelo asume que éste no es un recurso renovable. Al no haber normas sobre su conservación en los Estados alpinos, este Protocolo ha establecido distintas referencias en este terreno. En concreto, el art. 14.1 se refiere a la negativa a conceder nuevos permisos para instalaciones de esquí en zonas poco estables o que afecten a bosques protegidos. Esta norma ha sido central en algunas decisiones de los tribunales administrativos de Austria, que la han aceptado para justificar la negativa a conceder la correspondiente licencia de obras en estos casos.

Por lo que respecta a la energía, los Alpes constituyen una importante reserva de fuentes renovables. El protocolo pretende promover medidas que aseguren que las funciones ecológicas de los ríos y la integridad del paisaje se mantengan. Este Protocolo es uno de los pocos que menciona el cambio climático.

De gran importancia es el Protocolo relativo al transporte y, sin duda, el más controvertido. La escasez de espacio para las infraestructuras y el atractivo turístico de los Alpes, hacen que el transporte esté en la agenda de buena parte de las decisiones que se toman. Por lo que respecta al transporte de mercancías, el 35 % del todo el tráfico a través de los Alpes se concentra a lo largo del paso de Brenner que, paradójicamente, se encuentra en el punto en el que los Alpes alcanzan su máxima anchura, 300 kms., Ahora bien, el tránsito no es el único problema si se piensa que el 72 % de todo el tráfico tiene su origen en los propios Alpes. El Convenio establece la necesidad de adoptar medidas para reducir el tráfico a un nivel que no sea perjudicial para la población, la fauna, la flora y el medio ambiente. Por otra parte, también establece la necesidad de evitar la construcción de nuevas carreteras para el transporte transalpino.

IV. ALGUNAS CARACTERÍSTICAS GENERALES DE LOS PROTOCOLOS

Todos los protocolos tienen una estructura similar. Exigen a los Estados que definan en su estructura institucional el mejor nivel de coordinación al aplicar las distintas políticas y medidas que les afecten. Por otra parte, las autoridades regionales y locales deben participar en los diferentes trámites de preparación y ejecución de dichas medidas, en el ámbito de sus competencias. Esto, como es lógico, depende de cada Estado y de su estructura interna. En Estados federales como Austria las competencias respecto del convenio de los Alpes se encuentran en los *länder*. Un comité compuesto de representantes de los ministerios y de las regiones se reúne periódicamente y prepara la posición de Austria, mientras que el ministerio general tiene un papel de coordinación. En el caso italiano, el papel de las regiones resulta más limitado, sobre todo por el hecho de que este país no ha ratificado los protocolos³. Sin embargo, ha de tenerse

en cuenta que los cuatro protocolos ratificados por la Unión Europea se aplican en este país, al menos en las materias que son competencia de aquella. No obstante, en el caso del Protocolo sobre transporte si bien la Comisión planteó su ratificación en diciembre de 2008, Italia ha bloqueado hasta la fecha la adopción de una decisión del Consejo. La ausencia de ratificación también sucede en Suiza, cuyo parlamento, de manera sorprendente, se mostró contrario a la misma en diciembre de 2009, planteando la duda de si serán alguna vez ratificados. En el caso francés las competencias de las regiones son limitadas debido a la estructura centralista de este país, a pesar de las leyes de 1983 y 2004, y de la Ley de la Montaña de 1985.

Otro de los principios que se encuentra en todos los protocolos es el de integración, que exige que los objetivos de los mismos se tengan en cuenta en el resto de políticas. Este principio, también recogido en el TFUE (art. 11), es de importancia crucial debido a la naturaleza transversal de los objetivos del Convenio de los Alpes.

De manera final, pero no sorprendente, todos los protocolos exigen la correspondiente cooperación internacional, que abarca aquellas políticas que formen parte de aquellos. Una de las funciones de la secretaría del Convenio es precisamente emitir informes periódicos sobre el estado de los Alpes con información sobre las novedades que se estén produciendo en el contexto de los protocolos, sirviendo así de base para la adopción de ulteriores medidas.

Con todo, existen todavía algunas áreas para las que no se han adoptado protocolos. Éste es el caso de la población, cultura, contaminación atmosférica, gestión de residuos y de los recursos hídricos. Población y cultura constituyen dos de los temas de mayor trascendencia, pero también de importante controversia política. En el caso de la gestión de los recursos hídricos los debates se han sucedido a lo largo del tiempo. En 2006, los ministros decidieron posponer cualquier decisión hasta la publicación de un informe científico sobre la materia. Éste se adoptó en 2009 y la COP tomó la posición de que en vez de aprobar nuevas normas para la región alpina en su conjunto, resultaba de mayor importancia asegurar la ejecución de las normas actualmente en vigor. Con todo, la COP tomó la decisión de crear un grupo de trabajo sobre este tema, con el mandato de examinar la aplicación de la Directiva 2000/60 (marco de aguas). Sin embargo, diversas ONGs han exigido la adopción de un Protocolo.

Por el contrario, todavía no se han iniciado actividades en el contexto de la contaminación atmosférica y la gestión de residuos, aunque estos temas sean objeto de tratamiento parcial por parte de los distintos protocolos.

V. ÓRGANOS EJECUTIVOS

Después de 2002, una vez aprobados los principales protocolos, los Estados Partes, decidieron concentrarse en la ejecución de estos. Para ello, establecieron un comité de cumplimiento y también un procedimiento específico. A lo anterior

³ En 2009 el senado italiano votó a favor de la ratificación y en febrero de 2010 la cuestión se estaba debatiendo en la Cámara de Diputados.

se añadió la creación de un secretariado permanente, como antes se ha indicado. Aunque formalmente el secretariado no tiene competencia directa respecto de la ejecución del convenio, muchas de sus iniciativas persiguen facilitar la realización de proyectos y medidas en el contexto del Convenio y de los protocolos.

El Comité de cumplimiento puede proponer, sobre la base de informes periódicos, que la COP apruebe recomendaciones para uno o más Estados Partes. Estas recomendaciones pueden, entre otras cosas, incluir la invitación para que se adopte una estrategia de ejecución de las medidas correspondientes, acompañada de un calendario. Las recomendaciones se adoptan por consenso. Si éste no se puede lograr, una mayoría de tres cuartos de las Partes es suficiente. Por tanto, las recomendaciones se pueden adoptar incluso con la oposición del Estado concernido. Sin embargo, no hay sanciones previstas en caso de incumplimiento de una recomendación. De hecho, el primer informe sobre la ejecución del Convenio, de marzo de 2009, contiene recomendaciones muy generales dirigidas a los Estados.

El Protocolo sobre la resolución de conflictos del año 2000 establece un procedimiento en caso de disputa entre los Estados Partes acerca de la interpretación o aplicación del Convenio o de los protocolos. Si en una fase de consultas no se encuentra una solución, existe un procedimiento para constituir un tribunal arbitral cuyas decisiones son vinculantes. Sin embargo, la decisión no se podría ejecutar si el Estado concernido se opone a ello. Por ello, es muy poco probable que este procedimiento se utilice, porque prima el principio de no interferir en los asuntos de los otros Estados. Esto lleva a la conclusión de que la correcta ejecución del convenio y de los protocolos depende en buena medida de la actitud de aquellos.

VI. EL CASO DEL PLAN DE ACCIÓN SOBRE EL CAMBIO CLIMÁTICO DEL CONVENIO DE LOS ALPES

Uno de los terrenos en el que son necesarias medidas efectivas y sin demora es el caso del cambio climático. Debido a que los protocolos se discutieron en los años 90, cuando las cuestiones sobre el cambio climático no habían alcanzado un grado de desarrollo importante, esta materia no aparece reflejada en aquellos. Las únicas referencias se encuentran en el Protocolo de energía y de bosques. Sin embargo, la décima COP adoptó un plan de acción a instancia de la presidencia francesa. El hecho de que se trate de un plan de acción, constituye por una parte, un perjuicio, ya que no necesita ratificación por los parlamentos nacionales, y por tanto, tiene una posición más débil que un protocolo, y, por otra parte, es una ventaja al poder negociarse con flexibilidad. Sea como fuere, desde un punto de vista legal, el Plan de Acción no es más que una declaración no vinculante. El plan ha sido objeto de críticas al considerarlo muy poco concreto en cuanto a su contenido y medidas. Con todo, hay que señalar que se está ante un marco estratégico para el establecimiento de objetivos más estrictos en el ámbito nacional, regional y local. En este sentido, la difusión del plan puede tener importancia para las autoridades locales. Contiene 24 objetivos divididos en 9 áreas estratégicas. Algunos de ellos son muy generales, caso de control de las catástrofes naturales, mientras que otros son más específicos, caso de la promoción de ofertas de vacaciones que sean neutras desde la perspectiva de las emisiones de CO₂. La pregunta que se podría plantear es si hubiese sido posible adoptar un instrumento vinculante. Sin embargo, se habría necesitado aprobar un protocolo y haber enfocado este tema desde una perspectiva más concreta.

INTERNATIONAL INSTRUMENT FOR SUSTAINABLE DEVELOPMENT OF A TRANSNATIONAL MOUNTAINOUS AREA: THE ALPINE CONVENTION AND ITS IMPLEMENTATION CHALLENGES

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I. INTRODUCCION

Open to signature in 1991 and entered in force in 1995, today in force in the eight Alpine States (Austria, France, Germany, Italy, Liechtenstein, Monaco, Slovenia and Switzerland), ratified in 1996 by the EC, the Alpine Convention is the result of a long process which led to the recognition that the preservation and sustainable development of the Alps and of the interests of their inhabitants requires action beyond the national frontiers. Due to their geomorphology (difficulty to access and cross, dividing line for waters) the Alpine territory has found itself to be, much more than other territories in Europe, a concentration of national frontiers. Nowadays, fortunately, these frontiers have lost much of their significance and cooperation among alpine people (which dates back several centuries) can flourish and serve not only the cause of economic development but also of the search for

⁴The opinions contained in this Article are expressed on a personal basis and engage only the author.

concerted actions to common environmental and social problems. This is the background to the Alpine Convention, which scope covers not only environmental concerns but also social, economic and cultural aspects. Indeed, the preservation and development of the interest of the Alpine population is one of the main goals of the Convention.

In this article, the main contents of the Alpine Convention and its Protocols are presented. Some common features of the Protocols to this “territorial” Treaty are highlighted. Subsequently, the focus will be on some of the main current implementation challenges, with specific reference to the relevance of the Alpine Convention - a regional cooperation instrument - in relation to the global challenge of climate change.

II. BRIEF SUMMARY OF THE CONTENTS OF THE CONVENTION AND ITS THEMATIC PROTOCOLS

II.1 The framework Convention

The 1991 Framework Convention lays down the supreme objectives of the Treaty, sets up the decision making organs and procedures and other institutional arrangements. Article 2 calls upon the Contracting Parties to adopt measures, in the form of Protocols, in twelve thematic areas: population and culture, spatial planning, prevention of air pollution, soil conservation, water management, conservation of nature and the countryside, mountain farming, mountain forests, tourism and recreation, transport, energy and waste management. As one can see, the Alpine Convention covers in its scope of application practically all subjects related to sustainable development. Since the founding session of the Convention, the Ministers of the Alpine States have met every two years and, between 1994 and 2000, approved eight thematic Protocols.

Besides requiring the Contracting States to agree on binding legal instruments (Protocols) on the mentioned twelve specific themes, the Alpine Convention also puts much emphasis on cooperation in relation to research, observation, monitoring and data acquisition relating to alpine developments, being understood that a sound scientific basis on such developments is a prerequisite for the adoption of common rules and policies. The Decision making power lies with the Conference of the Parties (Alpine Conference), which gathers every two years in the State which holds the rotating chair. The UN and its specialized agencies (such as UNEP), the European Council, any other European State as well as cross-border associations of Alpine territorial authorities are entitled to participate in the works of the Alpine Conference as observers. The Alpine Conference may also admit international non governmental organizations. The Alpine Conference decides on the basis of consensus, although it is established that decisions may be taken at a majority of $\frac{3}{4}$ if unanimity cannot be reached, in a number of areas (decision on the format of the information to be provided as regards measures taken to implement the Convention and its Protocols; acknowledgement of the submitted information and adoption of the Rules of Procedure of the Alpine Conference). The EU is a Contracting Party and, within its areas of competence, shall vote instead of the EU Member States which are Parties to the Convention. However a declaration of competence was not made at the time of sig-

nature and conclusion of the Convention by the EU, and the EU has never made use of this right, despite certain areas are clearly falling under its competence (e.g. agriculture, transport).

A permanent (or “standing”) Committee, made of by officials of the Contracting Parties, prepares the decisions to be taken by the Alpine Conference. Art. 9 of the Convention foresees the possibility to set up a permanent Secretariat. A decision in this sense was taken by the 2002 Alpine Conference, and an international secretariat was created with main office in Innsbruck (Austria) and operational external office in Bolzano/Bozen (Italy).

The geographical scope of application of the Alpine Convention is defined by means of an Annex, which lists the territorial entities (provinces, municipalities) in each Contracting Party, which are subject to the Convention. Austria and Italy alone count about 60% of the surface and population covered by the Convention. The rest is shared between France, Switzerland and, to a minor extent, Germany and Slovenia plus the two micro States Liechtenstein and the Principality of Monaco.

II.2. The thematic Protocols

The first three thematic Protocols were adopted by the 1994 Alpine Conference, and deal respectively with spatial planning, nature conservation/landscape protection and mountain agriculture. The EU Commission actively cooperated in drafting these Protocols and as a matter of fact the spatial planning and the nature conservation Protocols are strongly inspired, respectively, by the EU Directives on Environmental Impact Assessment (the EIA Directive⁵) and on the protection of fauna and flora and their habitats (the habitat Directive⁶), although the language of the Alpine Convention Protocols is less prescriptive – as it is typically in international law as compared with EU law.

These two Protocols have a “conservationist” goal: less than 20 percent of the entire Alpine territory is suitable for settlements, therefore great conflicts on the use of land arise, caused by different interests. In central areas there is a growing need for transport surfaces, industrial and handicraft areas. Demand for living spaces also increases, but recreational areas must be preserved, as well as sufficient areas for agriculture. In peripheral areas the clashing interests between the preservation of nature, tourism, energy, are also very evident. **The Spatial Planning and Sustainable Development Protocol** aims at finding answers to these complex issues, in particular by requiring the adoption of spatial planning plans and programmes at appropriate level of territorial authorities. The issues that these plans and programmes must regulate are laid down in details in article 9. For example, in urban agglomerations, there is a requirement to limit “second residences” (o the so-called “cold beds”).

⁵ Dir. 85/337/EEC (OJ L 175/85, p. 40) as amended by Dir. 97/11/EC (OJ L73/97 p.5) and 2003/35/EC (OJ L156/2003, p. 17).

⁶ Dir 79/409/EEC (OJ 103/79, p. 1); Dir. 92/43/EEC (OJ L 206/92, p. 7).

As regards **nature conservation and landscape protection**, also in the Alps nature is on the retreat due to the growth on human settlements and infrastructures, although up to 25% percent of the Alpine area consists of protected areas, with differences regarding the various protection categories, which vary nationally and internationally. Unlike other mountain regions of the world, the Alps are strongly characterized by cultural landscapes which are present also at high altitudes. The transition to “wild nature” is often blurred. According to the nature protection Protocol, unavoidable impairment should be offset by compensation measures. If such compensation is not possible, projects should only be approved once the decision is reached that the needs for nature conservation are not dominant. The Alpine states are encouraged to promote the institution of newly protected areas. The Protocol plays an important role in relation to international cooperation between protected areas. A network of Alpine Protected Areas – ALPARC has been created in 1995 as implementation project of the Alpine Convention.

Besides conservationist measures, in order to pursue the supreme goals of the Alpine Convention, it was necessary to take measures on the main economic activities which take place in the alps. The first sector to be subjected to a specific Protocol was, in 1994, **mountain farming**. Although only slightly more than four percent of the population in the Alpine area still live on agriculture and, in the last 25 years, the agricultural population has decreased by over 40 percent, mountain agriculture still plays a very important role for the preservation of some typical Alpine habitats. The constant abandonment of high altitudes farms leads in some cases to loss of biodiversity. Moreover, keeping mountain farming alive means keeping the population in the remote areas, thus preserving the alpine culture (such as typical mountain farming products) and contributing to the prevention of natural hazards (landslides). The mountain farming Protocol contains measures aimed at offsetting the competitive disadvantage of mountain agriculture compared to intensive agriculture on plains (for instance by means of measures facilitating the access of products to the market or the diversification of the sources of revenue of farmers, by creating synergies with tourism or forestry) as well as at preserving the genetic diversity of livestock and crops. Important is the reference to the need to take decisions aimed at improving the economic situation of mountain farmers, based on the awareness that pure economic considerations are not per se sufficient. In other words this implies an intervention of the State into the market, whenever necessary. This also applies to measures on limitation of agricultural production: the specific situation of mountain farmers must be duly taken into account. Given that this Protocol has been ratified by the EU and that agriculture is an exclusive competence of the EU, these provisions are of high relevance in relation to the common agricultural policy (for example, in relation to the quotas for the production of milk). Worth mentioning is also article 9 of the mountain farming Protocol, as it requires the application of common criteria for favouring the use and diffusion of extensive cultivation methods, inter alia « *characteristic of the area* », as well as the protection and promotion of « *typical farming products, with distinctive, unique, nature-friendly production methods limited to the locality* ». The question arises as to whether, and to which extent this provision is compatible with the use of GMOs. GMOS are in fact far from being « characteristic » of mountains nor they easily adapt to extensive agriculture, locally limited and “unique”. On the contrary, GMOs tend to standardise cultures. Although article 9 of the mountain farming Protocol does not explicitly use the term « traditional », which in EU language is used to indicate

“non-GMO” farming, the reference to an agriculture « characteristic of the area, based on « nature-friendly extensive farming methods » seems to indicate clearly the typical mountain farming, with a limited and high quality « output », rather than a « technological » agriculture based on GMOs.

The issue did not pass unobserved when the EU concluded the mountain farming Protocol of the Alpine Convention. At this occasion the following declaration was made: *“The European Community recognises the principle of coexistence as the ability of farmers to choose between conventional, organic and genetically modified crop production, in compliance with the legal obligations for GMO labelling and/or purity standards. The relevant articles of the Protocol on Mountain Farming should be interpreted in this light”*⁷.

This declaration aims to hamper the States members to the Convention to prohibit the utilisation of GMO in certain areas or regions. However, this interpretation of the declaration has not been accepted by Austria. This State unsuccessfully tried to defend, even before the European Court of Justice, its project to ban GMO in the Province of Upper Austria, notified to the European Commission on 13 March 2003, according to Article 95(5) of the EC Treaty. In its Decision of 2 September 2003, the Commission held that Austria had failed to provide new scientific evidence or demonstrate that a specific problem in that Province had arisen following the adoption of Directive 2001/18, which made it necessary to introduce the notified measure. Since the conditions set out in Article 95(5) EC were not satisfied, the Commission rejected Austria’s request for derogation⁸. Both the Commission and the Court considered that Austria had not put forward evidence to prove that the territory contained “unusual ecosystems” requiring separate risk assessments from those conducted for Austria as a whole or in other similar areas of Europe. It should be noted that the Commission and the Court did not require proof of the existence of “unique” ecosystems but only “unusual” ones⁹. The notification of a prohibition on the use of GMO in unique agricultural mountain areas, such as those recognized by the Convention, must be assessed by the Commission (and eventually by the Court) bearing in mind the provisions of the Convention. Be that as it may, even though Austria and the Province of Upper Austria fall within the territorial application of the Convention, they did not mention the Convention or the Protocols in the notification under Article 95(5) or before the Court of First Instance or the European Court. Therefore, this question remains theoretical.

In 1996 the Protocol on **mountain forest** was adopted. More than 40 percent of the Alpine area is covered by forests. One fifth of these forests protect settlements and transport infrastructures, thus the Protocol requires the on-site conservation of such forests.

Timber as a raw material has also increased its significance in recent years. It has been re-discovered as building material for a modern, environmentally conscious

⁷OJ L 271/2006, page 70.

⁸Dec. 2003/653/CE, OJ L230/2003 page 34. See also the judgement of the Court of First Instance of 5 October 2005 in cases T-366/03 et T-235/04 and the judgement of the Court of Justice of 13 September 2007 on cases C-439/05 et C-454/05.

⁹« unusual » in English, « ungewöhnliches » in German.

architecture and, as biomass, it is one of the main elements in a sustainable energy strategy. Moreover, forests play a crucial role as carbon sinks. The purpose of the Protocol is to preserve mountain forests as a near-natural habitat. Methods of natural reforestation are envisaged, tree types must be suited to their location, as well as use and collection must comply with the needs of nature. Politically topical is the provision by which air pollution “is to be gradually reduced to a level that is not harmful to the forest’s ecosystems” (article 2a).

Three more Protocols were adopted by the 1998 Alpine Conference, dealing with tourism, energy and soil protection.

The tourism Protocol is one of the most “strategic” set of legal provisions for sustainable development in the Alps, given that 14 million people live in the Alps, but those who visit the Alps from other regions of the world exceed 100 million per year. There are 135 towns where there are more tourist beds than inhabitants. The Alpine Convention had already determined the objective for tourism development in 1991 in “restricting activities harmful to the environment” in order “to harmonize tourism and recreational activities with ecological and social requirements”. The Tourism Protocol has been built upon this objective and offers a series of points of connection for a sustainable development of tourism. Among them, the requirement, in areas attracting high numbers of tourists, for “a balance to be struck between intensive and extensive forms of tourism”. This provision has already played a fundamental role in some nature protection legal procedures as an argument in weighing the various interests. The objective of the Protocol is to strengthen the competitiveness of environmentally-friendly tourism and specifically to take measures that promote innovation and diversity in tourism. Furthermore, as regards planned tourist developments, environmental issues should be taken more into account, specifically with respect to the construction of new ski lifts: both new authorisations to operate ski lifts and concessions must be subject to disused ski lifts being dismantled and removed, and areas no longer in use being returned to nature, priority to plant species native to the area (art 12.2). The Protocol expressly contains a commitment to the establishment of quiet areas, where no tourist facilities will be developed (art 10). Further issues are to stagger holidays, measures to extend holiday seasons, and the promotion of public transport to resorts and in tourist areas. Limitations to sporting activities using motorised vehicles and helicopter tourism complete the Protocol¹⁰.

The **soil conservation Protocol** is based on the awareness that soil is not a renewable asset. Since there are no laws on soil protection in most Alpine countries¹¹, the soil conservation Protocol has set new references. Its Article 14(1, third indent), which speaks against the granting of new permits for skiing infrastructures in unstable areas or in protective forests, was at the basis of some controversial decisions of administrative Courts in Austria, where the refusal to grant a development consent was upheld, based on this provision¹². One of the central objectives is the sustainable preservation of soil since it is a vital resource, a living environment for humans and animals, and a gene-

¹⁰J. Heuck, *L'utilisation des hélicoptères à des fins de loisirs en montagne: analyse juridique en France et dans le monde*, CIPRA France, 2009.

¹¹A 2006 Commission proposal for a framework Directive on soil protection is still pending before the Council (COM (2006) 232 of 22.9.2006).

tic reservoir. The Protocol points out that soil is a characteristic element of nature and landscape and an integral part of the ecological balance, especially with regards to the water and nutrient cycles. The functions of the soil must be guaranteed and preserved or restored also for its economic utilisations, as a space for human settlement or for transport. Alongside the economical use of land resources, the Protocol also aims at limiting erosion and minimising the input of substances harmful to the soil. The prevention principle must ensure the functionality of soil to future generations. In this sense, in case of risk of serious and sustained damage, it is also necessary for protection to be given priority over utilisation. The Protocol recommends an economical use of the soil with the indication of substitute materials and the recycling of raw materials. High moors and lowland moors should be preserved as the medium-term goal is to completely discontinue the use of peat.

As regards **energy**, the Alps come to relevance as a reservoir of renewable energy (hydropower, biomass) as well as a vulnerable environment, where energy production has severe impacts. Large water power stations have a serious impact on the landscape and also cause problems to river systems downstream. the Protocol promotes measures that “ensure that the ecological functions of watercourses and the integrity of the landscape are maintained”(art. 7(1)) Minimum flows are mentioned, as well as the reduction of artificial fluctuations in water level and animal migration. With respect to water power stations, water resources must be protected in areas reserved for drinking water, in protected areas, in quiet zones, as well as “in areas of unspoilt nature and countryside” (Art. 7(3)). The Energy Protocol of the Alpine Convention is one of the only two Protocols that mention climate change. In operational terms, this Protocol requires an increase in energy efficiency (e.g. building isolation) and the optimisation of existing energy production plants, as a measure on which to focus when constructing new power stations.

Of key importance is also the Protocol on **transport**, so far the last Protocol that has been adopted (in the year 2000) and certainly the most controversial. The scarcity of available space for settlements and infrastructures, the geographical location of the Alps as well as their appeal for tourists make transport a hot point in the agenda of all relevant decision making bodies. Even if inhabitants of central and peripheral Alpine regions benefit from better accessibility, the effects of increasing transport are far greater than in the plains. The narrow valleys amplify the effects of pollutants and noise. Moreover, transport infrastructure is more expensive to build and maintain, it has a serious impact on the landscape, and it is linked to the consumption of scarce soil reserves. As regards transit of goods, 35% of all traffic through the Alps is concentrated along the Brenner pass, which ironically is also located where the Alpine range reaches its maximum width (more than 300 km). But transit is not the only problem, if one thinks that 72% of all traffic in the Alps has either its origin or destination within the Alps (intra-alpine traffic)¹³.

¹²E. Galle, M. Mendel, “Impacts on Infrastructure Projects in the Alpine Space Illustrated with Examples from Austria”, in *Environmental Policy and Law*, 38/1-2 (2008), pages. 85-96.

¹³Permanent Secretariat of the Alpine Convention, Report on the States of the Alps. Transport and Mobility in the Alps, 2007, available at www.alpconv.org.

On all alpine and transalpine roads, transport increases much faster than rail. Already the Framework Convention stipulated in 1991 measures to reduce the inter-Alpine and transalpine traffic to a level which “is not harmful to people, flora and fauna and their environments and habitats” (Art. 2j). Already in this treaty, “transferring an increasing amount of transport, especially freight transport, to the railways” is defined as a fundamental step to reach environmental objectives. The political significance of the theme of transport is underlined by the fact that the drafting of this Protocol has been the most protracted and most debated of all.

A regulation of the Transport Protocol is to “refrain from constructing any new, large-capacity roads for transalpine transport”, where not only motorways are defined as “large-capacity” but also all “motorways and roads with two or more lanes, without intersections, or any road the traffic impact of which is similar to that of a motorway” (Art 11(1)). The use of the principle of real costs is mentioned (Art. 14). Gradually, the polluter should pay all the costs, in order to encourage the use of the most environmentally-friendly modes and means of transport.

III. SOME OUTSTANDING COMMON FEATURES IN THE THEMATIC PROTOCOLS

All thematic Protocols follow a very similar structure. Hereafter, some of the common features are presented. In the first place, as the Alpine Convention is one of the rare cases of international Treaties tailor made for a specific territory (one may well say that it is “a Treaty for the territory”) all Protocols contain a similar provision (“participation of regional and local authorities”) requiring each Contracting Party to define, within its institutional framework, “the best level of coordination and cooperation between the institution and regional and local authorities directly concerned, so as to encourage solidarity of responsibility, in particular to exploit and develop potential synergies when applying the different policies and implementing measures under them”. Moreover, it is established that the regional and local authorities directly concerned shall be parties to the “various stages of preparing and implement these policies and measures”, within their competence and within the existing institutional framework. Finally, the territorial authorities have to be associated in the periodic assessment by the Contracting parties of the effectiveness of the provisions of the various Protocols.

It is not surprising that this provision is applied to different extents and in different ways among the Contracting Parties, as the way regional and local authorities interact with national governments and parliaments depends on the constitutional structure of the States. It also depends on how many regions and involved. In Federal States, such as Austria, the competence for the Alpine Convention lies almost entirely with the regions (Länder), whose representatives are therefore directly involved in the decision making and implementation processes related to the Convention. A Committee composed of the representatives of the Ministries and of the Regions meets regularly and prepares the position of Austria in the Decision making bodies. The Federal Ministry plays a coordination role, gives inputs to the regions and collects their views before the meetings of the Decision making bodies of the Convention. Half of the eight Italian Alpine Regions (Valle d’Aosta, Friuli Venezia Giulia and the Provinces of Trento and Bolzano) enjoy a very strong autonomy – practically in all fields covered by the Convention – com-

pared to the other Regions (Piemonte, Lombardia, Liguria and Veneto), the so called “ordinary Regions”. However, regardless of the legal competencies and constitutional structure of the Italian regions, the involvements of regional and local authorities in Italy in implementing the Alpine Convention is still somehow limited by the fact that Italy has not yet ratified the thematic Protocols to the Convention. This is also the case of Switzerland, whose national Parliament, surprisingly, expressed itself against the ratification of the Protocols of the Alpine Convention in December 2009. The legal competence of French Regions is limited by the rather centralistic structure of the French Republic, although French Regions do enjoy quite large competences on the basis of two “decentralization laws” adopted in 1983 and 2004 and more specifically a “loi montagne” of 1985, aimed at structuring the economic, social and recreational activities in French mountainous areas.

Another provision found in all Protocols concerns the “integration principle”, requiring that the objectives expressed in the specific Protocols have to be taken into account in all other relevant policies. This principle, codified also by the EU Treaty (former Art. 6 Treaty on the European Union, now art. 11 of the Treaty on the functioning of the EU) is of crucial importance given the transversal nature of the objectives of the Alpine Convention.

Finally – also not surprisingly - all Protocols contain a requirement to international cooperation. This relates to the different policies which form the object of the specific Protocols. A common feature however stands out: the requirement to cooperate in the fields of research, observation, information and education. A similar provision laying down such a requirement is to be found in all Protocols, showing the importance, for the successful implementation of the Convention, of a close “contact with and knowledge of the Alpine territory”. Indeed, one of the main tasks of the Permanent Secretariat of the Alpine Convention is the production of periodic “reports on the State of the Alps” containing data and information on important environmental, social and economic developments, seen as the basis for the adoption of further common policy measures among the Contracting parties.

IV. TOPICS NOT (YET) COVERED BY PROTOCOLS

For four of the areas listed in Article 2 of the Convention, no Protocol has been adopted as yet. These are the areas of population and culture, air pollution, waste management and water management. Population and culture is certainly one of the most (if not the most) important and strategic areas of cooperation – but also by far the most politically sensitive. A working group on population and culture has been in operation for some years, but instead of a Protocol, which was opposed by some Contracting Parties, it was only able to draft a political declaration, which was endorsed by the Ministers in 2006 on the occasion of the IXth Alpine Conference. Despite its non binding character, it has been decided that the follow up given by the Alpine States to this Resolution would be assessed through the Compliance Procedure. This implies that a high political value was attributed to this Declaration.

As regards water management, the question of the need for a specific Protocol has been controversially debated since many years. In 2006 the Ministers decided to pots-

pone any decision until the adoption of a scientific dedicated report (the Report on the State of the Alps on water and water management). This report was adopted in March 2009, and the Alpine Conference took the view that “rather than producing a new specific piece of legislation for the Alpine region...it is of major importance to ensure that implementation efforts of the existing rules are continued and intensified”¹⁴. Therefore, although the decision has been taken not to produce a new Protocol at this stage, the Alpine Conference set up a new Working Group dedicated to water issues, with the mandate, among other things, to assess the implementation of existing rules, such as the EU water framework Directive¹⁵. Alpine NGOs continue to ask for the production of a specific Protocol¹⁶. No specific activity was started as yet by the Alpine Convention for a possible Protocol on air pollution and waste management, although these issues are partly touched by the existing Protocols, such as those on transport, energy, land planning and soil protection.

In addition, a Protocol on the solution of litigations has been adopted in the year 2000, although no Contracting Party has so far made use of it.

V. IMPLEMENTATION CHALLENGES

V. 1 The state of ratification

Whereas the framework Convention has been ratified by all Contracting parties and is in force since 2005, the process of ratification of the thematic Protocols has not been concluded yet. Although the Protocols are in force since 2002 in the first States which ratified them (Austria, Liechtenstein, Germany, subsequently Slovenia, France and Monaco, the latter only ratified those which are relevant to it), two States must still ratify all the thematic Protocols: Switzerland and Italy. On 11th December 2009 the Swiss Parliament voted against the ratification of three Protocols (transport, land planning and soil protection), putting a question mark as to whether the Protocols will ever enter into effect in this Country. In Italy the Senate voted in favour of the ratification of all Protocols in 2009, and the procedure is currently (February 2010) ongoing at the Chamber of Deputies. From the first discussion and votes in the responsible parliamentary committee (external affairs) it appears that there is a strong opposition to the ratification of the transport Protocol, whereas all other Protocols should soon be in effect in Italy. In reality, being Italy an EU State, the four Protocols which have been concluded by the EU (soil protection, tourism, energy and mountain farming) already apply in this country, at least as regards the provisions which fall under EU competence. The EU has signed the transport Protocol in 2006 and the Commission has proposed its rati-

¹⁴ Alpine Convention, 2nd Report on the State of the Alps – Water and Water Management issues, 2009, Summary, page 51 (available at www.alpconv.org).

¹⁵ Dir. 2000/60/EC, OJ L 327 of 22.12.200, page 1. See also M. Onida, *Plaidoyer pour une politique communautaire des montagnes: l'exemple à prendre de la Convention alpine*, *Revue du Droit de l'Union européenne*, 4-2008.

¹⁶ P. Hasslacher *CIPRA Österreich beharrt auf Wasserprotokoll*, *Die Alpenkonvention, Nachhaltige Entwicklung für die Alpen*, n. 53, www.CIPRA.at.

fication in December 2008. Up to know, however Italy has blocked the Decision to be taken by the Council unanimously.

V. 2 Implementation organs

The intensive “legislative phase” which characterized the activity of the Alpine Conference between 1994 and 2000, with the production of eight thematic Protocols, ended (or at least slowed down) somehow at the beginning of the new century. In 2002 the Contracting Parties decided to concentrate on the implementation of the signed Protocols. To this end, they set up a “compliance Committee” and a compliance procedure¹⁷. Moreover, in order to ensure a greater continuity and therefore effectiveness to the works of the Convention organs and to improve the public relations on behalf of the Convention, the decision was taken to set up a Permanent Secretariat of the Convention, with main seat in Innsbruck (Austria) and branch office in Bolzano/Bozen (Italy)¹⁸. The Secretariat acquired the public law status of international organization and two site agreements ensuring its independency on the territory of the hosting States where signed in 2003 with the Governments of Austria and Italy respectively. Although formally the Permanent Secretariat has no direct competence in relation to the implementation of the Convention, many of its initiatives are aimed at facilitating the undertaking of projects and measures which implement the Convention and its Protocols.

The compliance Committee can propose, on the basis of the results of a periodical compliance report, that the Alpine Conference addresses recommendations to one or more Contracting Parties. Recommendations may, inter alia, include the invitation to draw up an implementation strategy accompanied by a specific calendar. The Recommendations are in principle to be adopted by consensus but it is foreseen that, in case no consensus can be reached, a majority of 3/4 of the Parties is sufficient. This implies that, in theory, recommendations can be adopted by the Alpine Conference also when the concerned Party disagrees. However, there is no sanction foreseen in case of failure to comply with the recommendations. Moreover, the Compliance Committee is composed of up to two representatives of each Contracting Party. In other words, it is not a fully independent organ and it is very unlikely that it will decide against the will of one Contracting Party. As a matter of fact, the first compliance report¹⁹, adopted in March 2009 by the Xth Alpine Conference, contains only very general recommendations addressed to all Contracting Parties. There is also a remarkable difference with Compliance Committees of other legal instruments, such as the one of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus

¹⁷ Decision VII/4.

¹⁸ Decision VII/2.

¹⁹ http://www.alpconv.org/theconvention/conv06_CC_en.htm

²⁰ <http://www.unece.org/env/pp/>. For the Compliance Committee, see <http://www.unece.org/env/pp/compliance.htm#Committeemembers>

Convention)²⁰, which is composed of a limited number of Members acting in independence from the Contracting Parties they originate from.

The Protocol on the solution of litigations, adopted in 2000, and which is independent on the Compliance Procedure, provides for a procedure in case of disagreement between Contracting Parties on the interpretation or the application of the Convention or one of the Protocols. It can therefore, theoretically, also affect the implementation of a provision. If a consultative phase brings no result for the solution of the litigation, a specific procedure provides for the set up of an arbitration panel, whose decisions are then binding. Also in this case, however, there is no possibility to enforce the decision of the panel if the concerned Contracting Party refuses to do so. In any case, it is very unlikely that such a procedure will be used, as among Contracting Parties the principle of the non interference with each other's national business seems to prevail. As a matter of fact, no use of this Protocol has even been invoked so far.

All this leads to the conclusion that the correct implementation of the Alpine Convention Protocols depends very much on the attitude and procedures set up at national level. Both the compliance procedure and the Protocol on the solutions of litigations are built on the principle of cooperation, they cannot be considered jurisdictional remedies in the classic sense.

V. 3 Nature of the provision to be implemented

When discussing implementation of the Alpine Convention Protocols, it is useful to make some distinctions relating to the type of provision to be implemented.

As a matter of fact, the implementation of a legal provision depends first of all on its contents. The way a legal provision is written is decisive to its enforceability. Legal provisions can contain, for example, general objectives, concrete obligations or prohibitions, obligations to do one's best in a certain field or obligations of results, procedural obligations, obligations to draw plans or programmes and so on. Depending on the purpose of the assessment, more sub-types of legal provisions can be identified.

Beyond the content of a provision, the implementation depends also on the specific language used. International environmental law – and the Alpine Convention makes no exception – contains many so called “soft-law” provisions, whereby Contracting Parties are “encouraged”, rather than obliged, to take measures or to achieve a certain result. This, needless to say, greatly affects the enforceability of the concerned provision.

Even if a few “hard-law” provisions can be identified in the various thematic Protocols to the Alpine Convention, it emerges quite clearly that the very large majority of provisions contained in the eight thematic Protocols are general commitments or are expressed in a way to make their enforceability very much depending on the good will of the competent authorities.

The absence of a binding enforcing systems (such as an enforcing organ and a Court of Justice which can act independently on the will of the concerned State) marks an important difference with EU law, where the European Commission has been attributed a role of “guardian of the treaties” and can bring Member States before the European Court of Justice asking, eventually, for the payment of very heavy financial sanctions, as it has already been the case in more than one occasions (against Greece, Spain, France).

A conclusion can be drawn is that, with few exceptions, the provisions of the Alpine Convention Protocols are hard to enforce without the active contribution and good will of all the competent authorities at national, regional and local level. Most probably, this is the reason why each and every Protocol contains, as mentioned above, a reference to the need to involve the interested territorial authorities in (1) the preparation (2) the implementation and of the national measures aimed at giving effect to the provisions contained in the Protocols as well as (3) in the assessment phase of the effectiveness of the Protocols, with a view of possible amendments to the Protocols. Indeed, the participation of territorial authorities to the assessment phase of the Protocols is one of the few “hard-law” provisions which can be found in every Protocol.

A further conclusion is that the successful implementation of the Protocols of the Alpine Convention cannot depend solely on their legal implementation. Another form of implementation is necessary and relevant: the implementation through projects and exchange of good practices. This is a field in which several networks of territorial authorities are currently very active.

VI. THE ALPS FACING GLOBAL CHALLENGES. THE CASE OF THE ACTION PLAN ON CLIMATE CHANGE OF THE ALPINE CONVENTION

A field in great need of measures to implement without delays is climate protection. As most of the existing Protocols of the Alpine Convention were drafted in the Nineties, when international discussions on climate change had not yet reached the political maturity which today makes it to feature as the top of the agenda of most organizations, climate change is not directly addressed in the Alpine Convention Protocols. The only references to climate change are to be found in the energy Protocol and the mountain forest Protocol. As it gradually became clear that the effects of climate change in the Alps are felt more strongly than in other areas - with serious environmental as well as economic consequences -, the Parties to the Alpine Convention eventually decided to address this topic. Under the impulse of the Austrian Presidency, the Alpine Conference adopted in November 2006 a Declaration on climate change in the Alps.

Building on this Declaration, the Xth Alpine Conference adopted an “Action Plan” on climate change in the Alps²¹, based on proposal of the French Presidency,

²¹ Commission Internationale pour la Protection des Alpes,
http://www.alpconv.org/NR/rdonlyres/193D7A9E-0F5E-475D-A48D-E3276F11D292/0/AC_X_B6_en_new.pdf

as a result of the long and difficult negotiation process between the Contracting Parties.

As regards the choice of the legal instrument (“action plan”), the fact that it does not require ratification by national Parliaments is both a drawback (weaker legal status than a Protocol) and an advantage (greater flexibility in the negotiation process). In any case, from the legal point of view, an Action Plan is nothing more than a non binding declaration, that means, it expresses a common will to pursue given objectives and undertake given initiatives, but it has no binding character as a Protocol would have.

The Action Plan has been criticized by NGOs such as CIPRA²², which consider it, in short, too weak in its contents and commitments expressed. Regardless of the political judgement of this Action Plan, judgments which obviously are not independent on the tasks and objectives of the judging organization, it is interesting to assess the contents of the Plan from a purely legal point of view.

Already the title “Making the Alps an exemplary territory for prevention and adaptation to climate change” makes clear several things: the broad scope of the plan and its strategic, long term approach rather than concentration on a few specific measures to prevent or adapt to climate change. It is explicitly stated in the preamble that the Action Plan is “*part of the ongoing discussions to reach an ambitious post-2012 agreement and takes into account the commitments made in this regard by the European Union. Its aim is to go beyond the general framework to offer concrete measures that are specific to the Alps by promoting, both in terms of mitigation and adaptation, themes and measures that could be the subject of regional co-operation in the frame of the Alpine Convention, and by taking into account actions that are already in place at the national, regional and local level.*”.

“The measures recommended for illustrative purposes are aimed at multiple partners, either public – on a local or national level – or private, with a will to change the attitudes to tackle climate change”...

“the Action plan should also bring about common projects, promote the development of concrete regional cooperation and exchange of experiences and support specific scientific research projects” “The Alpine Conference will guarantee the dissemination of such measures as well as the promotion of corresponding “best practices”...

This introduction is very enlightening about the nature of this Action Plan, as it appears that it is not meant to be a “regulatory plan”, but rather a strategic framework for the setting of more precise objectives at national, regional and local level and for the implementation and diffusion of good practices. Indeed, it appears that the Action Plan is a strategic instrument addressed to the competent territorial authorities in the Alps so that they find inspiration for developing their policies and measures, on the basis of the specificities of the various alpine areas. In this sense, the diffusion of the Action Plan at the level of municipalities, Provinces and

²² CIPRA, Annual Report 2008, Editorial.

Regions is of considerable importance. As it is the exchange and diffusion of good practices. In this context, one cannot but see a consistency with the Protocols to the Alpine Convention.

The Action Plan contains overall 24 objectives divided over 9 strategic areas. Some of the objectives are of very general nature, such as “better control natural hazards” or “reinforce the implementation of the water framework Directive”, while others are specifically (though not exclusively) targeted for the Alpine reality, such as the “promotion of CO₂ neutral holiday offers”, the “preservation of alpine forests” or the “use of local wood as energy source”.

The question could be put as to whether the Alpine Convention Action Plan could have been “more binding” than what was eventually adopted in March 2009. It is clear that a more binding instrument would have required both another form (a Protocol) and another approach (few precise provisions instead of a large number of strategic considerations and commitments).

CIPRA had proposed, in advance of the Alpine Conference, an own version of an Action Plan, characterized by a number of more restrictive measures. The measures themselves have been collected in a separate document called “climate pact”, which CIPRA sent to international and national organizations asking them to support it, so to increase the mediatic coverage of the issue. Among these proposals are some very precise measures, such as minimum construction standards (maximum energy needed for heating not higher than given thresholds), a speed-limit in the Alpine territory of 100 Km/h on highways and 80 Km/h on other fast roads, the prohibition to build infrastructures on glaciers. Other proposals are of more programming and strategic nature, such as the request to the Alpine States to develop an “alpine vision of energy” and the set up of a system for the exchange of transit rights and of certification of forests. Some request would also imply heavy public intervention in private economic sectors, such as the public support of low carbon tourist offers.

The Alpine Conference took over in the Action Plan of the Convention only some of the CIPRA proposals and only those of very general and strategic nature. It is not the purpose of this article to make judgment on this fact, nor to suggest what could have done worse or better. It is undisputed that NGOs have to make ambitious proposals as it is often by the synthesis between these proposals and the other political interests that legislation is generated. The critical role of NGOs is therefore *per se* always a positive fact. This analysis has another purpose: to identify and discuss some factors of legal policy which may have been decisive in leading the Alpine Conference to decide the way it did. At least three considerations have to be made in this respect.

Firstly, one should recall that the scope of application of the Alpine Convention covers only part of the territory of the Contracting Parties (with the obvious exception of the two small-micro States, Liechtenstein and Monaco). Thus, committing to a speed limit of 100 Km/h in the territory of the Alpine Convention would have implied to introduce a differentiation of the speed limit in the Contracting Parties. In many cases, the differentiation would affect Regions or Provinces which are only partly covered by the Alpine Convention. The same applies for the introduction of

minimum construction standards. Legally, such a differentiation is not impossible. However, it would require a strong political commitment as its implementation would introduce a regulatory differentiation between the national/regional territories within and outside the Alpine Convention. In addition, such differentiation, in order not to be seen as a top-down imposition, would require the consent/active participation of the affected territorial authorities.

A second argument relates to the nature of the climate change challenge: by definition, this is a global issue ("The" global issue). Tackling polluting products or processes can be done at regional level. In the case of CO₂ emission, this is hardly possible (except if one limits himself to pure adaptation strategies). 188 States have subscribed to the UNFCCC and the subsequent Kyoto Protocol. This is certainly one of the reasons why the Contracting Parties of the Alpine Convention did not wish, pending more "global" international negotiations, to commit to measures affecting not only a limited number of States, but even a limited part of their respective territory, despite the fact that the Alpine territory is particularly vulnerable to climate change.

Thirdly, the Ministers attending the Alpine Conference are all responsible for environment in their country. One should not underestimate the difficulties that environmental administrations at national level have when it comes to the definition of national positions in international negotiations. As the environment as such as no voice, it is not unusual that the environment Ministers have eventually to accept defending a line which is less ambitious than the one he/she would have suggested to defend.

In light of the above, a question is whether, when it comes to the international negotiations of legal instruments relating to global issues, a regional international Convention would not be more successful by pushing for the adoption of measures at global level which better reflect the regional reality, rather than producing its own measures. In other words, one could wonder whether, in order to make the interest of the Alpine region, a specific legal tool of the Alpine Convention (such as the 2009 Action Plan or a climate Protocol) or, instead, a legal tool adopted at a broader level (e.g. EU level or UNFCCC) would be more effective. Probably, both instruments would serve the scope. One should however be aware of the political difficulties and resistance linked to the adoption of regional solutions to global problems.

In the case of the Alpine Convention, given that five of its Contracting Parties are EU Member States, out of which three count among the "giant" Member States, one could imagine that it would not be difficult to orient both EU policy and the EU position in the UNFCCC negotiations in such a way that the alpine specificities (which are indeed remarkable and need to be adequately addressed by politicians) are duly taken into account. This would be fully consistent with the introduction to the climate Action Plan. The Alpine Convention could, in parallel, continue to play an active role in implementing the results of global negotiations in the Alpine territory. This implies promoting and diffusing good practices and knowledge, raising awareness and advising local decision makers on how to best adapt to the results of international commitments. It is however a fact that the largest Alpine Convention

States rarely – if at all – refer to the Alps or to the Alpine Convention when they gather in the EC Council of Ministers.

In conclusion, it seems that the chances of the Alps being the subject of protective measures in relation to global challenges would be higher if the “voice” of the Alpine Convention was systematically made heard in larger international fora, in addition to developing legislative and policy instruments applicable only at regional scale. This seems however to be, for the moment, not to be a high priority, not even of NGOs which plea for a strong policy of protection of the Alps.