
**THE BLACK DIAMOND OF HARMONIZATION: THE
ALPINE CONVENTION AS A MODEL FOR
BALANCING COMPETING OBJECTIVES IN
THE EUROPEAN UNION**

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In recognition of the dual threat posed by increasing transport-related pollution and unsustainable levels of tourism to the ecology of the Alpine region of Europe, the countries surrounding the Alps convened in 1991¹ to create the Convention on the Preservation of the Alps (Alpine Convention or Convention).² The Alpine Convention is a regional treaty

¹ The countries attending the Convention were France, Germany, Italy, Liechtenstein, Switzerland, Austria, and Slovenia.

² See 31 I.L.M. 767 (1992); see also the official French text of the Convention in La Convention Alpine, 1995 J.O. (95) 1270 [hereinafter Alpine Convention]. The Convention is alternatively referred to as the "Alps Convention." In the years since

describing obligations that bind each signatory state, in pursuit of ensuring the protection of the region's delicate natural resources. While the Treaty Establishing the European Community (EC Treaty) itself repeatedly refers to the importance of preserving environmental resources,³ the Alpine Convention adds obligations more precisely tailored to the Alpine region than those enumerated by the EC Treaty, imposing general responsibilities and encouraging particular policies to address specific issues uniquely confronting the Alpine region.⁴

This Note will examine the Alpine Convention and its legacy to date, ultimately demonstrating how the Convention represents a unique and exemplary model for future cooperative efforts with regard to natural resources shared (or otherwise impacted) by discrete groups of nations. This Note will address such issues both in the abstract and by means of a case study, examining a recent preliminary ruling from the European Court of Justice (ECJ) to illustrate the difficulties of successfully reconciling the EU's liberalized transport policy with its efforts toward establishing an effective environmental protection scheme.⁵

Underlying these forces must be the acknowledgement of the uniquely powerful nature of the Alpine Convention. It bound Austria to the rulings of the ECJ before Austria had entered the European Union.⁶ The unusual nature of this commitment deserves investigation; Austria's potential acquiescence to the jurisdiction of the ECJ prior to its joining the Union represented an unusual break from traditional views of outsider nations toward regional government entities.⁷

the original ratification of the Convention, Monaco and the European Union (through ratification by the Council of Ministers) have joined as parties.

³ TREATY ESTABLISHING THE EUROPEAN COMMUNITY, NOV. 10, 1997, O.J. (C 340) 173 [hereinafter EC TREATY]. The Single European Act, 1987 O.J. (L 169) 1, added Articles 174-76 to the EC Treaty, which directly address environmental issues. As a matter of reference, this Note refers in all instances to the currently applicable treaty article numbers; the numbering system almost completely changed under the Treaty of Amsterdam. Articles 174-76 were originally numbered 130r-130t. *See also* EC TREATY, *supra* art. 2 (enumerating tasks of the EU including, *inter alia*, to ensure "a high level of protection and improvement of the quality of the environment") and *id.* art. 6 (stating that "[e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.").

⁴ Examples of these responsibilities are discussed *infra* Part II.

⁵ Case C-112/00, Eugen Schmidberger Internationale Transporte Planzuge v. Austria, 2002 E.C.R. II-___ (2002), available at <http://europa.eu.int> [hereinafter Schmidberger].

⁶ *See, e.g.*, Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J. 1092 (1995) (briefly sketching a timeline of Austria's accession to the EU).

⁷ *See* Christoph Henkel, *Constitutionalism of the European Union: Judicial Legislation and Political Decision-Making by the European Court of Justice*, 19 Wis.

Following an introduction in Part I to the fundamental issues leading to the creation of the Alpine Convention, Part II will discuss the Convention in detail, both in terms of its goals and its successes. Part III will contextualize the Convention, discussing the influence of industrial society on the environment (addressing both positive and negative effects) and will explore the concept of “sustainable development,” an influential concept in modern discourse regarding ecological preservation. Part IV will explain how, in light of the philosophies expressed in the Alpine Convention, the ECJ’s 2002 *Schmidberger v. Austria* opinion demonstrates the difficulty of developing nuanced policies that simultaneously address deepening ecological concerns and the necessity of developing a practical means of transport across the challenging geography of the Alpine region. The Note will conclude with an exploration of the lessons learned from the Alpine Convention’s successes, and will evaluate the consequences to future governments that fail to heed these lessons.

I. FUNDAMENTAL ISSUES

A. *Ecology, Tourism, and Related Social Issues*

Throughout the latter half of the twentieth century, tourism represented one of the fastest-growing sectors of the world economy. Despite the economic slump beginning late in 2001 and continuing into early 2002, tourism continues to constitute a major percentage of the world’s economic activity.⁸ The industry directly affects the economies of countries active in the market through the tangible economic effects of increased visitation to tourist areas. It simultaneously affects these areas indirectly by means of social and cultural changes wrought by development of the tourism industry.⁹

The Alpine region traverses many European states, and hosts numerous classes of terrain, wildlife, and plant life. The Alps are famous both for their natural beauty and for the creature comforts available to visitors to the region. Numerous high-profile resorts situated in and around the Alps attract the rich and famous from Europe and the rest of the world year after year.¹⁰ The region is more than a mere tourist magnet, however, many small communities are located in and around the Alps, dot-

INT’L L.J. 153, 155, 179 (2001) (describing the influence of international jurisdiction on the sovereignty – and thus the behavior – of states bound by international treaties).

⁸ Jose-Roberto Perez-Salom, *Sustainable Tourism: Emerging Global and Regional Regulation*, 13 GEO. INT’L ENVTL. L. REV. 801, 802-03 (2001).

⁹ *Id.* at 804-06.

¹⁰ See, e.g., Scheherazade Daneshkhu, *Alpine Development Takes Toll on Beauty*, NAT’L POST 45 (Toronto), Mar. 8, 1995, at 45, available at 1995 WL 4333309 (detailing the toll human behavior, such as traffic and littering, takes on the Alpine environment).

ting the mountains with cities that have survived for generations on the strength of economies largely dependent on the continued vitality of their natural surroundings as well as mankind's industrial creations.¹¹

As nature-based tourism experienced a particular growth surge in the 1980s and 1990s, "ecotourism" became particularly popular. This type of tourism depends particularly on a thriving natural environment. The environment constitutes the *raison d'être* for businesses that advertise and exploit their surrounding environs specifically in hopes that visitors will flock to enjoy the scenery and experiences attached directly to interacting with nature, as opposed to the man-made attractions available at other popular destinations.¹² A foundational philosophy underlying the promotion of ecotourism transcends mere encouragement of the preservation of the natural resources supporting the industry, taking the further step of mandating that tourists leave those resources in *better* condition than they would be absent the influence of tourist visitation.¹³ Examples of popular ecotourism destinations include the Alps and other natural creations in Europe, as well as tours of Antarctica and various U.S. national parks.¹⁴

B. *Transport Policy*

Inseparable from the ecology-driven aspects of Alpine development and preservation is the unique problem of formulating a transport policy aimed at encouraging commerce between the Member States of the European Union. The EC Treaty compels states to cooperate in the

¹¹ See, e.g., Mathis Wackernagel, *Can Trade Promote an Ecologically Secure World? The Global Economy from an Ecological Footprint Perspective*, 5 BUFF. ENVTL. L.J. 180, 193 (1998) (highlighting Switzerland's high level of "resource dependence" in supporting its globally competitive economy).

¹² Ryan K. Danby & D. Scott Slocombe, *Protected Areas and Intergovernmental Cooperation in the St. Elias Region*, 42 NAT. RESOURCES J. 247, 248 (2002) (explaining that "[g]iven the size of regions; the complexity of land use, ownership, and jurisdiction often associated with such areas; and the fact that ecosystems invariably transcend political and administrative boundaries; cooperative efforts are key to facilitating effective ecosystem-based management of parks and protected areas.").

¹³ For a more detailed explanation of what ecotourism is designed to accomplish, see, for example, Alexander C. O'Neill, Note, *What Globalization Means for Ecotourism: Managing Globalization's Impacts on Ecotourism in Developing Countries*, 9 IND. J. GLOBAL LEGAL STUD. 501, 503 (2002).

¹⁴ See Perez-Salom, *supra* note 8, at 822-26 (discussing the Antarctica Treaty System, a series of international agreements aimed at protecting Antarctica's natural resources from the deleterious effects of tourist activity); see also Sean T. McAllister, Note and Comment, *Community-Based Conservation: Restructuring Institutions to Involve Local Communities in a Meaningful Way*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 195 (1999) (discussing the American national parks system as a model for ecotourism development).

“establishment and development” of trans-European transit networks.¹⁵ This language represents a commitment easier to undertake in certain areas of the continent than others; the Alps, in particular, are difficult to traverse. Useful throughways crossing the region are limited, and those few that are available experience consistent, heavy usage, resulting in significant impacts on the surrounding environment.¹⁶

With this in mind, the EU must balance the competing mandates of creating an effective transport policy and preserving environmental resources, particularly those most likely to be impacted negatively by transport-caused pollution – such as the Alps, where few traversable passes exist.¹⁷ The concept of sustainable development¹⁸ represents an important influence on such debates; the European Union has adopted a policy of studying the environmental impact of all its endeavors, yet it must simultaneously remain mindful of its commitment to support an effective network of international ground transport corridors.¹⁹

C. *The Environment vs. Commerce Conflict Illustrated: Schmidberger v. Austria*

In 2000, an Austrian Court referred several questions to the European Court of Justice about specific actions taken by the Austrian government regarding its regulation of transport through its Brenner Pass.²⁰ The

¹⁵ EC TREATY, *supra* note 3, art. 154, ¶ 1. *See also id.* art. 155, ¶ 2 (stating that “Member States shall, in liaison with the Commission, coordinate with themselves the policies pursued at national level which may have a significant impact on the achievement of the objectives referred to in Article 154.”).

¹⁶ Don C. Smith, *The European Union’s Commitment to Sustainable Development: Is the Commitment Symbolic or Substantive in the Context of Transport Policy?*, 13 *COLO. J. INT’L ENVTL. L. & POL’Y* 241, 243 (2001).

¹⁷ *Id.*

¹⁸ *See discussion infra* Part III.B.

¹⁹ Further complicating the balance between transport and ecological concerns is the “precautionary principle,” which urges governments not to allow the lack of complete scientific evidence to deter them from preventing possible environmental damage if resources appear to be threatened. *See* Laurent A. Ruessman, *Putting the Precautionary Principle in its Place: Parameters for the Proper Application of a Precautionary Approach and the Implications for Developing Countries in Light of the Doha WTO Ministerial*, 17 *AM. U. INT’L L. REV.* 905, 909 (2002), *citing* United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, 31 *I.L.M.* 874, 879 (1992) (according to principle 15, “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”).

²⁰ For a summary of Austria’s questions for the court, see Reference for a Preliminary Ruling by the *Beschlusses des Oberlandesgerichts Innsbruck* by Order of 1 February 2000 in the Case of Eugen Schmidberger v. Republic of Austria, 2000 O.J. (C 163) 12. Given the small number of routes crossing the Alps, there exists a long

issues in *Schmidberger* arose from the Austrian government's acquiescence to, and arguably active support of, a protest held by a group of environmental activists that temporarily disrupted traffic through Austria's Brenner Pass, on announced dates and times.²¹ The government and protestors cooperated with one another throughout the planning and organization of the protest; alternative routes on the protest dates were announced and publicized in advance, and Austria provided for police presence at the site of the protest.²²

Schmidberger, an Austrian transport company, alleged that the Austrian government's conduct violated the EC Treaty, arguing that the government interfered with transport between EU states by coordinating its actions with the protestors.²³ According to *Schmidberger*'s theory, Austria's actions were unlawful under established European Court of Justice case law, which required governments to be proactive when aware of the potential for outside interference with transport.²⁴ The preliminary opinion issued by the ECJ regarding the *Schmidberger* matter respectfully addressed and analyzed the shipper's concerns, but ultimately concluded that Austria properly exercised its discretion in allowing the protest to go forward.²⁵ The Advocate General determined that, given all the facts and circumstances of the case, and given the lack of complaints from other shippers regarding the protest, Austria handled the situation in a lawful manner.²⁶

II. THE ALPINE CONVENTION: WHAT IT IS, WHAT IT DOES

This section will discuss the circumstances necessitating the creation of the Alpine Convention and the subsequent, elaborate framework that has developed to further its purposes. The Convention is particularly notable as a strong influence on the gradual development of a series of entities in

and storied history of conflict with regard to the Brenner Pass, particularly regarding whether Austria or Italy could rightfully exercise control over the pass and the surrounding area. Today the Brenner Pass marks the border between Austria and Italy; the Pass itself is considered Austrian territory. See Elizabeth F. Defeis, *Minority Protections and Bilateral Agreements: An Effective Mechanism*, 22 HASTINGS INT'L & COMP. L. REV. 291, 296-97 (1999).

²¹ *Schmidberger*, 2002 E.C.R. II-__, II-__ (¶¶ 7-10) (2002), available at <http://europa.eu.int>.

²² *Id.*

²³ *Id.* at __ (¶ 11).

²⁴ See generally Case C-265/95, *Commission v. France*, 1997 E.C.R. I-6959 (1997), available at <http://europa.eu.int> (finding French nonintervention against violent and destructive protestors interfered with the free movement of goods throughout the European Union, and therefore represented a violation of France's treaty obligations). See also EU Treaty, arts. 70-80 (establishing a common transport policy for the European Union).

²⁵ *Schmidberger*, 2002 E.C.R. at II-__ (¶ 105).

²⁶ *Id.* at II-__ (¶¶ 107-12).

Europe devoted particularly to “mountain ecology,” both as pertaining to the Alps specifically and mountainous resources in Europe generally. The ease with which Alpine area nations have accepted these regulations has been accelerated by the commonality of interests of these nations; the fact that they are all already reasonably well developed; and of the lack of elements in the Convention that address concerns with the specificity that many observers feel is necessary to truly make the Convention suitably strict to assure the preservation of the Alpine ecology.

A. *An Overview of the Alpine Convention*

The Convention begins with a general statement of purpose, recognizing the unique and threatened position of the Alpine ecology.²⁷ With this in mind, the text imposes a series of general obligations on the parties—specifically, to “maintain a comprehensive policy of protection and preservation of the Alps, taking into account in an equitable way the interests of all Alpine States and their Alpine regions, as well as those of the European Economic Community (EEC) in using resources wisely and exploiting them in a sustainable way.”²⁸ This objective is to be pursued with particular regard to policy areas such as population and culture, regional management, air quality, soil preservation, water regulation, protection of nature and preservation of scenery, mountain agriculture, mountain forestry, leisure and tourism, transportation, energy, and waste.²⁹

The Alpine Convention mandates the regular meeting of an “Alpine Conference,” which is charged with examining questions of common interest and potential means of cooperation between the member countries.³⁰ The Convention recognizes that other international organizations, notably the United Nations and the European Union, may have interests in the members’ activities and decisions, and accordingly grants them the right to send observers to Alpine Conferences as representatives.³¹ Further, the Convention confers to these conferences the power to adopt amendments and protocols as circumstances may require.³²

The Convention sets forth detailed guidelines for the adoption of protocols which are generally adopted by consensus, but may also be adopted by three-quarters vote should the Chair of a Convention deem it necessary.³³ The treaty explicitly enumerates guidelines under which a

²⁷ Alpine Convention, *supra* note 2, at pmb1.

²⁸ *Id.* art. 2, ¶ 1.

²⁹ *Id.* art. 2, ¶ 2.

³⁰ *Id.* art. 5, ¶ 1.

³¹ *Id.* art. 5, ¶ 5.

³² *Id.* art. 6, ¶ 1.

³³ *Id.* art. 11, ¶¶ 1, 2. Compare EC TREATY, *supra* note 3, art. 94 (stating that “[t]he Council shall, acting unanimously on a proposal . . . issue directives for the approximation of such laws, regulations or administrative provisions of the Member

party may formally denounce its obligations,³⁴ and details the requirements for notification of Convention parties to any changes in the Convention itself, protocols, or denunciations.³⁵

B. *Protocols to the Convention*

Since its inception in 1992, numerous protocols have been appended to the Alpine Convention, all intended to provide specific instruction to the governments of party states regarding implementation of the Convention's directives. These protocols refer to specific articles of the organic Convention, directing behavior and suggesting specific amendments to existing policies and procedures. While these protocols potentially possess the power to effectuate significant changes in and regulation of government behavior across the Alpine region, the Alpine Convention has only recently formally adopted these protocols.³⁶

This failure to ratify the protocols likely impacted the result in *Schmidberger*. Given a more stringent set of standards explicitly recognizing the relationship between transport and the Convention, as the Transport Protocol sets forth, the preliminary ruling would have taken the factors weighing in favor of transport into account.³⁷ The future applicability of *Schmidberger* may thus relate directly to potential changes to the Protocol prior to its formal adoption by the Committee.

C. *Success Under Case Law of the Alpine Convention*

Perhaps the greatest indication of the success of the Alpine Convention has been the lack of controversy surrounding the requirements it imposes on its signatory states. The cooperative spirit under which the Convention developed has continued unabated in the decade following the Convention's formulation.

Environmental issues which would give rise to controversy under any circumstances occasionally invoke the commitments undertaken through the Alpine Convention, as illustrated in *Schmidberger*. This is not the

States as directly affect the establishment or functioning of the common market.") and *id.* art. 95 (enumerating circumstances where the qualified majority voting procedure of Article 251 replaces the unanimity requirement).

³⁴ Alpine Convention, *supra* note 2, art. 13.

³⁵ *Id.* art. 14.

³⁶ For an up-to-date listing of ratification and implementation dates for the Alpine Convention and its protocols, see http://www.convenzionedellealpi.org/page3_en.htm (last visited May 4, 2003). The recent entry into force of nine of the protocols ended a period during which some member-state governments grew frustrated with waiting for the ratifications to become effective. See, e.g., *Secretariat Moves to Innsbruck*, AUSTRIA TODAY, Nov. 20, 2002, available at 2002 WL 26342856.

³⁷ The French-language version of this protocol is available at http://www.convenzionedellealpi.org/archive/protocols/protokoll_f_verkehr.pdf (last visited Mar. 3, 2003).

first time Austria has had legal difficulties with regard to its transport policies in the context of environmental protection. The ECJ struck down an earlier case regarding Austria's setting of tariff rates in accordance with its environmental policies, finding Austria's actions unjustifiable given the overarching European Union objective of tariff reduction concerns.³⁸

Arguments claiming that the Convention fails to effectuate meaningful reforms in the parties' environmental practices enjoy scholarly support in the United States.³⁹ Furthermore, there is a general criticism, frequently repeated in Europe and referenced in *Schmidberger*, that environmental concerns are used as a shield by nations to defend themselves against challenges to practices that clearly violate other areas of EU and national law.⁴⁰

Also noteworthy is the unfortunate fact that the Convention has yet to implement the protocols.⁴¹ Critics of the convention publicly lament that it only pays lip service to the pressing issues of environmental management that gave rise to the Convention in the first place. Observers recognized the problem this situation would create as early as 1994, when France, Italy, and Switzerland balked at signing protocols aimed at transport and tourism, claiming that these protocols would go too far in frustrating industrial development.⁴² Similar concerns eventually gave rise to *Schmidberger*.

III. HUMAN BEINGS, MOUNTAIN ECOLOGY, AND SUSTAINABLE DEVELOPMENT

Human civilization and industrial development have undeniably altered the environment, and, unavoidably, will continue to do so. While many human activities harm the environment, desirable results also arise from human influence over nature. Consciousness of, and appreciation for, the preservation of environmental resources has always affected the conduct of humanity to some extent. However, as sustainable development issues arise in both broader and local paradigms, as noted in

³⁸ See generally Case C-205/98, *Commission v. Austria*, 2000 E.C.R. I-7367 (2000), available at <http://europa.eu.int>. An Austrian tariff requirement which subjected drivers from other Member States to higher tariffs than Austria's own drivers was struck down as violative of Directive 93/89, and furthermore as unjustifiable despite Austria's environmental concerns argument, and an alternative Austrian argument invoking its national transportation policy. See Council Directive 93/89/EEC, art. 7(b), 1993 O.J. (L 279) 32.

³⁹ See generally Perez-Salom, *supra* note 8.

⁴⁰ *Schmidberger*, 2002 E.C.R. II-__, II-__ (¶ 54) (2002), available at <http://europa.eu.int>.

⁴¹ See *Secretariat Moves to Innsbruck*, *supra* note 36.

⁴² *Alps Convention Set to Come Into Force, But No Agreement On Protocols*, ENV'T WATCH W. EUR., Dec. 2, 1994, available at 1994 WL 2511785.

Schmidberger, the immediacy of particular issues has driven the development of a broad, influential area of public law, seeking to reshape human interaction with its habitat both remedially and prospectively.⁴³ Ecological issues are particularly vital given the international consensus that modern managing generations act as “stewards” of environmental resources for the benefit of future generations, and failure to handle this awesome responsibility appropriately must result in punishment and remedial action, lest irreplaceable resources perish forever.⁴⁴

A. *Human Effects on the Environment*

Scientists and other interested observers have debated the existence of a global warming phenomenon over recent decades, as the effect of atmospheric pollution on the world climate has undergone substantial scientific research and scrutiny.⁴⁵ Although the existence of some pollution-related effects on global climate appears to be a foregone conclusion, detractors of the theory, particularly those with industrial interests, continue to press arguments against, and produce research refuting, the notion that such pollution causes changes in global climate.⁴⁶ While governments worldwide have taken steps to regulate industry based on the compelling evidence favoring the theory, effective industrial lobbying has slowed the implementation of many such initiatives and retarded the efficacy of others.⁴⁷

The tourism industry is particularly susceptible to the influence of environmental discourse, treaty, and local legislation. Consultation with the proprietor of any ski resort, particularly in the Alps, will likely yield an

⁴³ See Perez-Salom, *supra* note 8.

⁴⁴ See Jonathan Baert Wiener, *Beyond the Balance of Nature*, 7 DUKE ENVTL. L. & POL'Y F. 1, 6-7 (1996) (explaining the time honored notion that present generations are caretakers of the environment for future generations). *But see* Edwin R. McCullough, *Through the Eye of a Needle: The Earth's Hard Passage Back to Health*, 10 J. ENVTL. L. & LITIG. 389, 415 (1995) (questioning the rationale behind the stewardship ethic, and arguing that a better course of action would involve protection of the earth for the earth's sake, as opposed to the benefit of future generations).

⁴⁵ Michael Weisslitz, Note and Comment, *Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context*, 13 COLO. J. ENVTL. L. & POL'Y 473, 474 (2002).

⁴⁶ AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* 6 (1992) (citing, and rebuking, a commonly-held assumption that “the earth is so vast and nature so powerful that nothing we do can have any major or lasting effect on the normal functioning of its natural systems”).

⁴⁷ See Donald O. Mayer, *Corporate Governance in the Cause of Peace: An Environmental Perspective*, 35 VAND. J. TRANSNAT'L L. 585, 633 (2002) (discussing the Global Climate Change coalition, an industry-backed public relations effort that “routinely dismissed global warming as a serious problem”).

unequivocal argument that global warming is a very real problem.⁴⁸ Outdoor winter sports such as skiing, snowboarding, and ice skating depend upon snow and cold weather to exist. In recent years, many such businesses have experienced hard times based on changes in the weather.⁴⁹ Thus, for the Alpine tourism industry, an effective environmental protection regime for the region is of paramount importance.

B. *Sustainable Development*

In a commonly accepted view, the earth has a limited “carrying capacity.” Essentially, this means that there is a finite number of human beings which planet earth can support before its resources become so depleted that it will no longer be able to provide the necessities of human existence.⁵⁰ A logical corollary to this globally applicable theory is that specific geographical areas can only be developed so far before they are no longer able to sustain human activity.⁵¹

Reaching a consensus on the proper definition of “sustainable development” has proven difficult. One definition recently advanced in Europe posited that sustainable development equates to development that “meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁵² Alternatively, critics assert that this definition oversimplifies the issues involved, and is designed to obscure the inherent contradiction between environmental protection and industrial expansion.⁵³ Indeed, the idea of environmentally harmful development seems inapposite to the principle of stewardship but, as a practical matter, the two concepts seemingly must coexist. Neither body of interests will retreat in influence in the foreseeable future.

⁴⁸ See, e.g., John Newton, *Weatherwatch*, THE GUARDIAN, Jan. 9, 2003, at P14 (discussing the history of glacial activity in the French Alps and noting that effects of global warming can be seen in the melting of snow at ski resorts and the frequent landslides which now occur at Mont Blanc).

⁴⁹ See, e.g., Paul Tolme, *Periscope: Trying to Keep Cool*, NEWSWEEK, Dec. 2, 2002, at 12 (citing a United Nations report that “the Alps are warming faster than the rest of the globe,” and addressing the concern that by the end of this century many existing ski runs may turn into green pastures).

⁵⁰ Bruce Ledewitz, *The Constitutions of Sustainable Capitalism and Beyond*, 29 B.C. ENVTL. AFF. L. REV. 229, 245 (2002).

⁵¹ See, e.g., Paul C. Kiamos, *National Security and Wildlife Protection: Maintaining an Effective Balance*, 8 ENVTL. LAW 457, 463 (2002) (noting the wisdom of identifying maximum carrying capacities of discrete aquatic habitats for marine life).

⁵² WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE: REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT 8 (1987).

⁵³ *Id.*

IV. A MODEL FOR THE PROMOTION OF SUSTAINABLE DEVELOPMENT

The Alpine Convention represents a significant step in the development of international environmental law, as it voluntarily obligates a special group of countries regarding specific activities of the Alps. The framework of international environmental law itself is unusual, and therefore deserves a brief discussion before delving into the history, content, and consequences of the Alpine Convention, particularly as seen from the perspective of the *Schmidberger* opinion.

A. *The Evolution of International Environmental Law*

The development of International Environmental Law (IEL) has taken a different course from other areas of international public law. As in other areas of international law, IEL is shaped by treaty, generally recognized international law concepts, and commonly accepted principles of relations between nations.⁵⁴ It is a branch of public international law—created by nation states for the benefit and control of nation states.⁵⁵ Governments set policies in the area, with the assistance of intermediary international organizations.

The protection of the environment is a unique issue in international discourse. A general consensus exists that protection of the environment is an important concern and that steps must be taken to protect the planet for future generations.⁵⁶ Development of the law in this area derives not solely from political factors, but also from the recognition of scientific evidence and the realization of the need to adopt prospective, rather than remedial, measures in order to effectuate policies likely to achieve immediate results.⁵⁷

In 1972, the Stockholm Conference on the Human Environment created a center and a focus for IEL through the Stockholm Declaration.⁵⁸ The Stockholm Conference, and its successors, addressed indications of a philosophical disconnect between developed and less developed countries (LDCs) regarding the true importance of the supposed environmental issues and how best to deal with them. Countries approaching industrialization complained bitterly about the pollution controls because such controls would necessarily raise the cost of industrialization greatly, a

⁵⁴ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 284 (5th ed. 1998).

⁵⁵ *Id.* at 283.

⁵⁶ See, e.g., Smith, *supra* note 16, at 244-45 (explaining the high degree of concern Europeans exhibit regarding environmental issues). Between 1999 and 2001, a strong majority of Europeans polled opined that the environment should occupy a high level of concern in the setting of policy, and that “fighting pollution and implementing environmental protection were immediate and urgent needs.” *Id.*

⁵⁷ John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT’L L. 291 (2002).

⁵⁸ Declaration of the United Nations Conference on the Human Environment, June 16, 1972, *reprinted in* 11 I.L.M. 1416 [hereinafter Stockholm Declaration].

situation perceived as unfair by the LDCs given that the developed nations had taken advantage of the opportunity to develop without such restrictions.⁵⁹

Rather than adopt the historically common tactic of imposing developed-world concerns on the LDCs,⁶⁰ the developed and developing states reached a compromise. The Stockholm Declaration noted that most of the LDCs' environmental problems resulted from economic underdevelopment, and that by all means, LDCs had the right to develop with the understanding that due regard should be given to environmental factors in this development.⁶¹ The standard set by this declaration for LDCs is thus impossible to pigeonhole, but the "due regard" concept generally suggests a high degree of flexibility to governments accorded the opportunity to decide for themselves how much "regard" is "due."⁶²

This "due regard" principle is clearly at work in *Schmidberger*, albeit in a differing context from the norm. The opinion respects the legitimacy of all competing interests in the case: the shipper to use available roadways, the protestors to exercise their freedom of speech and assembly rights, and, especially, the Austrian government to determine how best to balance the competing interests of each side.⁶³ The respect the Advocate General accords to the government indicates the complexity of the issues involved, and the necessity and wisdom of allowing individual governments to devise their own standards for dealing with such conflicts. The opinion notes Austria's attempt to balance the competing interests, and respects the government's response as the most prudent available under the circumstances.⁶⁴

As illustrated by the aforementioned conflict in *Schmidberger*, a common problem with the enforcement of competing rules of law involves the predictability of adherence to international agreements. There is a

⁵⁹ See Dena Marshall, *An Organization for the World Environment: Three Models and Analysis*, 15 GEO. INT'L ENVTL. L. REV. 79, 86 & n.41 (2002).

⁶⁰ See, e.g., Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. 115, 115-16 (2002) (quoting THUCYDIDES, THE PELOPONNESIAN WAR 5.84 (T.E. Wick ed. 1982)). From the time when the Athenians informed the Melians that "the strong do what they will and the weak suffer what they must," it has been commonly expected that the world's poorer countries will fall into line with developed world concerns in order to obtain the economic, as well as other humanitarian aid upon which many of them rely to provide for their basic survival necessities.

⁶¹ Stockholm Declaration, *supra* note 58.

⁶² The notion of due regard in the international context invokes principles of comity, in which obligations are neither absolute nor borne exclusively of mere good will. See, e.g., Lakshman D. Guruswamy, *Sustainable Agriculture: Do GMOs Imperil Biosafety?*, 9 IND. J. GLOBAL LEGAL STUD. 461, 497 n.156 (2002).

⁶³ *Schmidberger*, 2002 E.C.R. II-__, II-__ (¶¶ 116-7) (2002), available at <http://europa.eu.int>.

⁶⁴ *Id.* at II-__ (¶ 111).

general assumption that states adhere to international law most of the time.⁶⁵ However, there are numerous reasons to question this assumption. While this problem is most pronounced in other areas of law, notably human rights,⁶⁶ international environmental law invokes these problems as well. The common view is that international environmental agreements influence governments at all levels, including industries and corporations, nongovernmental organizations, and individuals.⁶⁷ Much as in the area of international human rights law, however, there is a large amount of political capital building involved in nations' acceptance of environmental agreements.⁶⁸ States will ordinarily act in their own best interests regardless of consequences under a treaty; it is not uncommon for a state to back out of a treaty knowing full well, and being prepared for, the consequences of non-compliance with a treaty.⁶⁹

In light of these factors, the Alpine Convention is notable for the comparative ease with which nations have accepted their obligations under the Convention. Perhaps still more notable is the lack of case law that has arisen under the Convention; the requirements set forth in the treaty fit in unusually well with the extant laws and regulations of the party nations.⁷⁰ Of course, a compelling counterargument, as evident in *Schmidberger*, is that courts will defer to national governments to determine how best to interpret their obligations under their own treaties.⁷¹

⁶⁵ Edith Brown Weiss, *Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths*, 32 U. RICH. L. REV. 1555, 1560 (1999).

⁶⁶ See generally Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (comprehensively examining various regional human rights treaties to establish that outside factors determine whether states will truly honor their commitments under international human rights treaties more than the force of international law and the potential for retribution from other states and international organs). Professor Hathaway's article deals with an area of law substantially differing in scope, purpose, and philosophy from the nascent body of international environmental law, but the notion that outside factors affect compliance is worthy of investigation as related to IEL issues.

⁶⁷ Weiss, *supra* note 65, at 1556.

⁶⁸ *Id.*; see also Hathaway, *supra* note 66, at 1938 (where competitive market forces do not press for compliance with an element of public international law, a given state is less likely to comply with that element).

⁶⁹ Weiss, *supra* note 65, at 1559.

⁷⁰ Compare *id.* at 1562 (stating "[s]tudies of national compliance with environmental laws in the United States and the United Kingdom indicate that compliance is often less than desired, indeed, compliance is even weak").

⁷¹ Schmidberger, 2002 E.C.R. II-___, II-___ (¶ 106) (2002), available at <http://europa.eu.int> (Member States enjoy a "margin of discretion" in determining the extent of their obligations under their own treaties).

B. *European Union Environmental Law*

Developments over time have allowed the EU to pursue its objectives of protecting the environment under an increasingly predictable and well-recognized corpus of case law and treaty acceptance.

In the early 1980s the European Court of Justice had to rely upon Article 94 of the Treaty to justify environmentally concerned case law decisions. The Court justified this stretch by claiming that “[p]rovisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and if there is no harmonization of national provisions on the matter, competition may be appreciably distorted.”⁷² Other cases referred to specific provisions of Community directives aimed at environmental protection in order to justify rulings favoring environmental protection.⁷³

The development of the Single European Act represented a radical change in the European Union’s ability to enforce its environmental legislation. Article 95 introduced qualified majority voting as an option in adopting environmental legislation,⁷⁴ allowing for easier implementation of such legislation than was possible under Article 94, which required unanimity of the Member States before legislation could be passed thereunder.⁷⁵

In the mid-1990s the Council of Ministers handed down a directive that requires Member States to complete an environmental impact assessment before undertaking certain projects.⁷⁶ The ECJ subsequently ruled that no project likely to effect significantly the environment should escape assessment, “unless the specific project excluded could, on the basis of a comprehensive assessment, be regarded as not likely to have such effects.”⁷⁷ Particularly for Austria, given its location in central Europe, transport policy in an environmental context constituted an important element of policy formulation even in the time preceding its formal accession to the Union. By the time of its accession, Austria’s ability to adhere to the transport policy presented a substantial worry to the rest of the

⁷² Case 92/79, *Commission v. Italy*, 1980 E.C.R. 1115, 1122, [1981] 1 C.M.L.R. 334, 334 (1980).

⁷³ E.g., Case 240/83, *Procureur de la République v. Association de défense des brûleurs d’huiles usagées*, [1985] E.C.R. 531, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,164 (1985).

⁷⁴ EC TREATY, *supra* note 3, art. 95.

⁷⁵ *Id.* art. 94.

⁷⁶ Council Directive 85/337/EEC, 1985 O.J. (L 175) 40.

⁷⁷ Case C-435/97, *World Wildlife Fund v. Autonome Provinz Bozen*, 1999 E.C.R. I-5613, [2000] 1 C.M.L.R. 149 (1999).

Union given Austria's particularly stringent regulation of trans-Alpine transport.⁷⁸

The European Commission continues to keep a careful watch on developments regarding the environmental situation in Europe. A 2001 report from the Commission notes that the Treaty of Amsterdam⁷⁹ "enshrines the principle of sustainable development as one of the EC's aims."⁸⁰ This report notes that "Community institutions are now obliged to take account of environmental considerations in all their other policies."⁸¹ Clearly, the EU's commitment to environmental protection at its highest levels of governance is only getting stronger and more forceful over time. This must be considered in light of the subsidiary principle underlying all EU endeavors; the Single European Act added language to this effect to the EC Treaty,⁸² and *Schmidberger* would appear to indicate that this principle is respected by the courts.⁸³

C. European Union Transport Law and Alpine Transport Issues

The EU relies upon a dependable network of transport routes in order to effectuate its goals of promoting free trade between Member States. Problems in the area are not limited to the *Schmidberger* Brenner Pass conflict. In particular, the Swiss have faced criticism for their own reticence at allowing unfettered access to their mountain passes.⁸⁴ Generally, transport through the Alps must go through a limited number of passes in Switzerland, Austria, and France, and the air and noise pollution that results from the heavy use of these passes causes considerable harm to both humans and the environment in the surrounding areas.⁸⁵ As *Schmidberger* makes clear, although their freedom is far from unfettered, the Member States continue to enjoy some degree of deference in determining their own courses of action regarding these resources.

⁷⁸ Goebel, *supra* note 6, at 1160 (describing Austria's unusually severe regulation of transport) and 1168 (observing Austria forfeit "sensitive" elements of its transport policy in favor of the European Union's objectives).

⁷⁹ TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (c 340) 1 1997 [hereinafter TREATY OF AMSTERDAM].

⁸⁰ European Commission, ENVIRONMENT: CURRENT SITUATION & OUTLOOK, available at <http://europa.eu.int/scadplus/leg/en/lvb/l28066.htm> (last updated Nov. 12, 2001).

⁸¹ *Id.*

⁸² See EC TREATY, *supra* note 3, art. 174 (4).

⁸³ See generally *Schmidberger*, 2002 E.C.R. II-__ (2002), available at <http://europa.eu.int>.

⁸⁴ Franz Xaver Perrez, *The Efficiency of Cooperation: A Functional Analysis of Sovereignty*, 15 ARIZ. J. INT'L & COMP. L. 515, 569 (1998).

⁸⁵ *Id.*

D. *Auxiliary Schemes of International Ecological Management*

As noted above, the Alpine Convention presents a model of international cooperation in environmental management unprecedented at the time of its creation and not (yet) subsequently duplicated. While other treaties and other international agreements have addressed specific environmental concerns, no other has so ambitiously pursued the preservation of what is essentially a single, albeit vast, environmental asset. The question remains, however, as to whether such a Convention represents the best way to ameliorate the division between transport requirements and ecological necessity.

The European Union has taken numerous steps over the past twenty years in recognition of the evolving understanding of the necessity for environmental protection initiatives as a guiding principle underlying other initiatives. The original European Economic Community treaty, signed in 1957, contained little foundation for the formulation of environmental protection initiatives.⁸⁶ In the 1970s, the community undertook an active role in setting environmental policy, particularly in 1972 with the adoption of a series of basic environmental principles at a summit of community leaders in Paris. A series of five-year environmental protection programs followed, covering the years 1972-1976, 1977-1981, 1982-1986, and 1987-1992.⁸⁷

The Single European Act, adopted in 1987, added environmental provisions to the EC Treaty, and mandated that proposals under Article 95 concerning completion of the internal market, "take as a base a high level of protection."⁸⁸ The Act added Article 174, mandating that Community environmental policy contribute to the preservation, protection, and improvement of the quality of the environment; the protection of public health; the prudent and rational use of natural resources; and the promotion of international measures dealing with regional and worldwide environmental problems.⁸⁹

The EU has since progressed even further in its advocacy of a strong pro-environmental policy with particular respect to its dedication to the promotion of tourism.⁹⁰ The difficulty in this, as discussed at length above, is that this objective competes with the development of transport

⁸⁶ See GEORGE A. BERMAN ET. AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 1364 (2002).

⁸⁷ *Id.* Through 1986, European Economic Community justified environmental initiatives under Articles 94 and 308 of the EC Treaty. *Id.*

⁸⁸ EC TREATY, *supra* note 3, art. 95, ¶ 3.

⁸⁹ *Id.* art. 174 (1).

⁹⁰ See Call for Proposals – Tourism and the Environment, 1992 O.J. (C 51) 16 (the European Commission issued a call for proposals regarding support for projects in the field of tourism and the environment); see also Final Adoption of the General Budget of the European Communities for the Financial Year 1992, 1992 O.J. (L 26) 1, 659 (the European Parliament decided that for 1992 there would be an expenditure of at

policy. Synchronizing the achievement of these disparate goals will require the participation of both interests; compromises will undoubtedly continue to be necessary.

E. *The Benefits of the Alpine Convention's Environmental Protection Regime*

There are many elements of the Alpine Convention regime which would be difficult to duplicate in other agreements due to the commonalities of culture, economy, history, and interests the parties to the Convention are able to rely upon. The overall structure of the initiative, and the resulting encouragement of cooperation between its parties, however, serves as an admirable model under which similarly-aimed legislation should be developed for a number of reasons.

First, regional groupings of states with specific interests in specific natural resources will enjoy greater rates of success in regulating their own resources than will multifunctional bodies such as the United Nations or the European Union. Local governments are better able to balance various competing factors in setting and enforcing policies than are faraway governmental structures. Noting the competing interests of freedom of transport and environmental protection, *Schmidberger* relies on the principle that "where a Member State invokes the necessity to protect a given fundamental right the normal proportionality test should be applied."⁹¹ The Austrian government, acutely aware of the competing interests involved in the *Schmidberger* conflict, demonstrated its ability to effectively balance two compelling objectives in the overall best interests of both its own citizenry and the effectuation of EU principles.

Second, the Member States' shared interests in the resources protected will permit interested citizens to lobby regulatory bodies more effectively and directly than they would under more general environmental measures. Localization of the apparatus of environmental protection allows for individuals to meaningfully participate in the policy-making process regardless of their ability to travel or form groups. Taking the relevant analogy from *Schmidberger*, the Austrian protestors' freedom of speech rights would have been meaningless but for the protestors' ability to consult directly with the Austrian government regarding the national laws concerning the Brenner Pass.⁹²

Additionally, a more detailed and specific measure is easier for international bodies, as well as local legislatures and courts, to regulate than a fuzzier, generic pro-environmental measure. Expectations by the drafters of legislation are guided more effectively where the specificity of related legislation can be predicted and the aims of regional governments more

least 530,000 ECU to support an information network on European ecological tourism projects).

⁹¹ *Schmidberger*, 2002 E.C.R. at II-__ (¶ 105).

⁹² *Id.* at II-__ (¶ 101).

clearly developed over time. The differences in priorities of multiple states lead to failures to successfully implement accords. The difficulty involved with moving the Alpine Convention protocols into effect illustrates the problems confronted even in getting a small, economically similar group of states to agree on various aspects of treaty instruments. Such problems are even more apparent at the level of the European Union and United Nations, where great differences in states' wealth and philosophies create grand obstacles in treaty formation and ratification.

V. CONCLUSIONS: LESSONS LEARNED SO FAR FROM THE ALPINE CONVENTION

This Note endeavors to illustrate how an increase in the proliferation of treaties such as the Alpine Convention would undoubtedly prove useful as a substantive development in the area of international law. It would be disingenuous to argue that treaty-making for its own sake would result in any improvement in the efficacy of international environmental law. Regional agreements to protect specific resources can facilitate the recognition of areas of regulation where cooperation can be expected to produce positive results without having to expect states to renege on commitments and require complicated, resource-wasting punitive hearings against alleged violators.

The utilization of treaties to promote international cooperation is far from an original concept. Treaties can do more; they serve an indicative function that goes unrecognized, and is in fact rather unimportant, in other areas of law. The Alpine Convention illustrates the forcefulness of the commitments undertaken by the signatory parties to protect the Alps for future generations. This stewardship duty, a bedrock principle underlying the very purpose for international environmental law, deserves to be memorialized and constantly considered over the entirety of nations' international policies in all areas of interaction. The Alpine Convention reinforces the commitments of numerous Member States of the European Union, with particular regard for the preservation of the natural resources of one of the world's most renowned, and most endangered, mountain ranges. Such specific commitments to specific resources can only provide a positive influence upon the global community to undertake substantive efforts to uphold their obligations of caring for vital environmental resources, for both present and future generations.

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