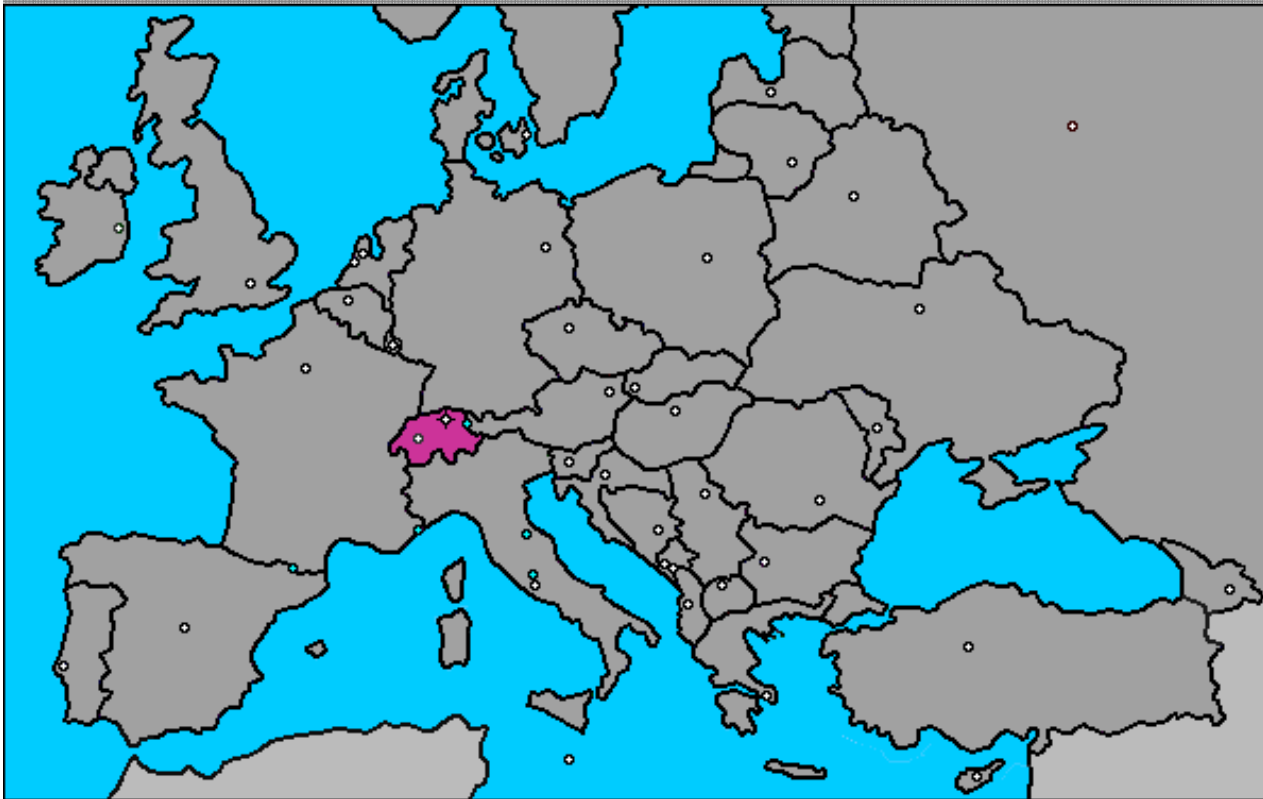


# Transboundary Access to Justice for Environmental NGOs

## The Case of Switzerland



Roman Hapka

International Workshop, Berlin, 15.10.2010

Swiss Foundation for Landscape Conservation (SL-FP)

[r.hapka@sl-fp.ch](mailto:r.hapka@sl-fp.ch)

## Introduction

**Switzerland was traditionally relatively progressive in environmental policy and legislation**

**The enforcement of the international environmental law in the Swiss case law remained extremely rare**

**While Switzerland shares borders with five countries, the cases of transboundary interventions involving either authorities or private citizens, or NGOs, are also rare; this even if the potential conflict situations are not scarce**

## **Right of appeal of the NGOs**

**A right of appeal is available to the municipalities, the authorities and the environmental protection organizations**

**Environmental NGOs have a special right of appeal allowing them to act in justice for public interest. This right of appeal is reserved to the Swiss organizations of national importance existing for at least 10 years. The quality to act has been recognized to a total of 29 swiss NGOs by the federal government**

**Foreign environmental NGOs have no quality to act in Switzerland**

## **International environmental problems in the case law**

**The international standards have an immediate validity in Swiss law and no special procedure is necessary to incorporate them when they come into effect for Switzerland**

**However, the Federal Court applies only the measures which are precise and clear enough to constitute the base of a concrete decision**

## **Ex: Junction road between Switzerland and Germany**

**The modalities of the building of the junction road had been set in a treaty between the two states in 1977**

**Several years after the Federal Office for the Environment decided that certain zones where the road had to be built constituted a forest zone deserving being protected**

**The Federal court judged that the treaty of 1977 could only be modified by the two states. He considered that the implementation of the treaty could not depend on later developments in national law**

## **Environmental problems and Human rights**

**Since the coming into force of the European Convention on Human Rights (ECHR) for Switzerland in 1974, the invocation of the fundamental rights contained in the Convention became more frequent within the framework of environmental problems**

## **Exemple: International Airport of Geneva**

**At the beginning of the 90s, the Federal Court had to answer to the claims for compensations for the expropriation of neighbourhood rights by Swiss and French local residents around the international airport of Geneva**

**The Federal Court rejected this argument by referring to the case law of the European Court of Human Rights and so declared that big international airports are necessary to the economic well-being of the country**

## **Transboundary cases and « international » NGOs**

**Two main environmental NGOs of international importance are active in Switzerland: the World Wide Fund for Nature (WWF) and Greenpeace**

**In case of an intervention in a bordering country, WWF Switzerland and Greenpeace Switzerland would normally appeal to their colleagues of the foreign countries so that they act on their own territory**

**In the statements of the representatives of these two associations, the examples of cross-bording legal actions are so to speak non-existent**

## **Ex: Rhine-Rhône river channel**

**Planification of a channel between the Rhine river and the Rhône river through Franche-Comté and Alsace (France) since 1961**

**In 1978, the Doubs, the river marking the border between Switzerland and France, is directly concerned by this project. Three dams from 20 to 170 m of height are planned on this still natural river**

**WWF-Switzerland contact his French counterpart**

**The works have been stopped in 1992 following an action in justice led by the Coordination Saône-Doubs, living Sundgau and WWF-France**

## **Ex: Chemical dump of Hirschacker (Germany)**

**Big quantities of dioxins were poured by the Swiss company Roche in the ancient toxic waste dump of Hirschacker (Germany) near the Swiss border**

**The current cleaning up of Hirschacker consists in excavating the dump partially, without knowing exactly the contents and the toxicity of the waste and to burn them or to store them in other dumps in Germany**

**Greenpeace Switzerland required in 2009 that the committed errors be corrected. The waste from Hirschacker stored in other dumps must be taken out**

**The cleaning up of the Hirschacker dump has to be pursued cleanly following an agreement settled between the Roche company and Greenpeace**

## **Why so few transboundary cases handled by the courts**

**The geographical situation of a country surrounded by three big industrial nations or the fact of being situated at the source of several transcontinental rivers, show that transboundary conflicts are possible and likely**

**The relative absence of case law must be thus imputed to other factors. We could suggest**

- the position of Switzerland at the avant-garde in the development of environmental laws**
- or the preference of the Swiss courts for precise rules and regulations instead of general principles**
- the Swiss tradition of the settlement of disputes by negotiation**

## **The Swiss justice prefers precise rules**

**The Swiss courts are historically little inclined to discuss general principles and tend to limit to apply precise rules and regulations**

**The Federal Court so prefers to consider specific rules and tends to avoid general statements**

**In view of this, it is not surprising that the non-binding instruments and the general principles of the international law are only very rarely considered by the Swiss courts**

## **Ex: World ski championship of Crans-Montana (1987)**

**The organizers wanted to undertake forest clearings to open new runways and to widen certain existing runways as a way to improve safety and meet the standards requirements of the International Ski Federation**

**In its decision - rejection of the appeal- the Federal Court compares the environmental interests with the possible economic gains**

**The Federal Court repeats that the tourism has to adapt itself to the natural conditions and to the landscape, but indicates that a competition such as the world championships constitutes an excellent publicity for Switzerland**

## **The settlement of dispute by negotiation**

**The main cause of the little number of transboundary cases is doubtless the preference for a negotiated solution to the disputes**

**The Swiss practice is known to prefer the negotiation rather than the judicial procedures**

**It even seems to spread to the situations of strong transboundary environmental impacts**

## **Ex: Pollution of the Rhine after a fire in a chemical warehouse in Basel**

**In 1986 an fire which happened in a warehouse of the chemical firm Sandoz caused the pouring of important quantities of toxic matter into the Rhine**

**The Swiss authorities do not seem to have taken all the necessary precaution measures to prevent the accident, for example by:**

- not exercising a sufficient supervision on the company**
- not alert the countries downstream at the appropriate time**

**No riverside State asked for compensations from the Swiss Confederation**

**The private disputes in all the concerned countries were amiably settled with the firm Sandoz**

**A financial solution was quickly found because it did not threaten the financial viability of the company**

**In France, the Alsatian authorities grouped together the private citizens, the professional associations and the environmental NGOs**

**Switzerland adopted in 1991 a legislation close to the European directive Seveso, the Ordinance on major accidents**

## **Ex: Hydroelectric power plant of the Valle Osernone**

**1997: The Swiss authorities heard of the existence of a hydroelectric power plant project in the Italian part of Valle Osernone (a river which takes his spring in Italy and flows to Switzerland)**

**Possibilities for Switzerland to assert its position against Italy by virtue of the public international law (in particular the Espoo Convention)**

**2005, the federal authorities announced to the Italian authorities - by the diplomatic way - the position of Switzerland**

**2007: On the fringe of the European Union's Ministers of Environment conference in Lisbon, the federal Minister Moritz Leuenberger spoke to his Italian counterpart**

## **Conclusion**

**The Swiss environmental NGOs are little concerned by the question of access to justice in other countries**

**We can bring up reasons of technical nature (preference of the Swiss justice for precise rules and regulations) or social nature (art to settle disputes by negotiation) to explain it**

**The reason seems nevertheless to be much simpler and could be explained by the relatively small number of transboundary environmental problems which happened during the last decades**