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Secretariat to the Aarhus Convention
United Nations Economic Commission for Europe
Environment and Human Settlement Division
Room 332, Palais des Nations
CH-1211 Geneva 10
Switzerland

Communication to the Aarhus Convention's Compliance Committee

RE: Lack of compliance with the Aarhus Convention

I. Communicant:

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II. Country Interested

Italy

III. Facts to communicate

1. Italy has ratified the Aarhus Convention with law 108 of 2001.
2. The Aarhus Convention's preamble, after recognizing that every person has the right to live in an environment adequate to his or her health and well-being and the duty, both individually and in

Lo scopo finale del WWF è fermare e far regredire il degrado dell'ambiente naturale del nostro pianeta e contribuire a costruire un futuro in cui l'umanità possa vivere in armonia con la natura.

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association with others, to protect and improve the environment for the benefit of present and future generations, states that in order to assert this right and observe this duty they may need assistance in order to have access to justice in environmental matters. Judicial remedies should therefore, be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.

3. Article 1 of the Aarhus Convention, which announces its scopes, provides that each Party shall guarantee the rights of access to justice in environmental matters and article 3, paragraph 8, further declares that each Party shall ensure that “persons exercising their rights in conformity with the provisions of this Convention shall not be penalized or harassed in any way for their involvement”. Moreover, it underscores the fact the Convention’s provisions do not affect the powers of national courts to award *reasonable* costs in judicial proceedings.

4. Article 9, paragraph 4 of the Convention states that judicial and administrative procedures “shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive”.

5. Finally, article 9, paragraph 5 of the Convention provides that each Party has to establish “appropriate mechanisms to remove or reduce financial and other barriers to access to justice.”

6. WWF Italia alleges the violation of the organization’s rights recognized by the above-mentioned norms, in particular article 3, paragraph 8, article 9, paragraph 4 and 5 of the Convention and therefore demands the Compliance Committee to declare Italy’s state of non-compliance in order to promote the necessary reforms concerning the judicial fees regime that have been repeatedly asked without any success.

7. Article 9, paragraph 4, of the Aarhus Convention states that “each Party shall, within the framework of its national legislation, ensure that the members of the public concerned:

- a) having a sufficient interest
- b) or alternatively, maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent or impartial body (...).”

8. The law no. 349 of 1986 that has instituted the Ministry of the Environment states at article 18, paragraph 5, that organizations recognized according to article 13 of the above-mentioned law, “may intervene in the proceedings for environmental damage and bring claims in front of an administrative judge for the annulment of illegitimate acts.”



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9. WWF Italia is an organization recognized by the Ministry of the Environment in conformity with article 13 of the law 349 of 1986.
10. The major obstacle that WWF Italia has to face when exercising its right of access to justice (which mainly concerns administrative proceedings) is represented by an economic factor. “The Aarhus Convention, an Implementation Guide”, although it may not offer a binding interpretation of the Convention, clearly states that costs of bringing a challenge under the Convention must not be so expensive as to prevent the public from seeking review when they consider it necessary”. Therefore, according to this document, the costs of access to judicial or administrative procedures must not undermine either the proposition, nor the conduct of such remedies.
11. In Italy the tax that has to be paid in order to file a claim in front of administrative judges, pursuant art. 13, paragraph 6 bis, letter d) of the Presidential Decree concerning judicial fees no. 115 of 2002, ranges from € 650,00 to € 2,000.00 depending on the matter at stake. The same amount has to be paid in order to introduce further arguments to the original claim. This happens frequently in case of appeal against numerous acts issued progressively in time.
12. In case of appeal, the initial tax ranges from € 925.00 to € 9,000.00.
13. According to article 119 of the Presidential Decree concerning Judicial Fees no. 115 of 2002, nonprofit organizations are entitled to equally benefit from the regime of legal aid from the State as individuals do. Thus individuals and organizations need to both satisfy the same financial prerequisite of not exceeding an annual income of € 11.369,00.
13. Despite this provision, WWF Italia does not benefit of any exemption and its access to the legal aid regime is barred, on the basis of a very questionable interpretation given by the national administrative judges. The law and therefore national judges do not take into consideration the nonprofit character of the organization, leading to a solution which must be considered unfair and incorrect.
14. Nonprofit organizations such as WWF Italia, may exceed the income ceiling of € 11,369,00. WWF’s revenues however, do not arise from commercial activities but derive mainly from individual or corporate donations or annual subscriptions, while all property owned do not generate annuities or rental income and are stated at book values for real estate tax purposes.
15. WWF Italia in fact, carries out only institutional activities and those strictly linked to them, pursuant article 10, paragraph 8, of the Legislative Decree no. 460 of 1997, which in respect of article 12, are not commercial activities.



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16. In particular, in conformity with its Statute, WWF Italia commits itself to the protection of Nature and of the environment for the scope of social solidarity and without any profit. In order to pursue its mission it manages funds for the conservation of nature, finances projects and researches, organizes meetings furthering the environment's protection and promotes the public awareness on matters concerning the importance of living in a sustainable and wealthy environment.

17. Therefore, there aren't any revenues deriving from commercial activities or profits distributed amongst members, but any income must be reinvested in institutional activities, in respect with the above-mentioned Legislative Decree no. 460.

18. The national legislator does not make any difference between economic entities and nonprofit organizations. Moreover, judges have given no relevance to the fact that WWF's financial report demonstrates that the organization has recently incurred losses due to the fact that expenditures exceed revenues.

19. This situation has been brought to the attention of the Italian Minister of the Environment, Land Protection and Sea in 2006, in a letter written by WWF Italy's former President, Fulco Pratesi, in which he called for a change in the rules on judicial costs beared by NGOs and asked to tackle the issue of their denial to the legal aid regime.

20. The same issue has been brought up to the Parliament during the discussion of the Financiarly Law of 2007, unfortunately without any success.

21. Another attempt to refer the matter to the Parliament has been tried in occasion of the approval of the Stability Law of 2015, by submitting a proposal of exeeming nonprofit organizations from the payment of the tax. In this latter proposal, it was therefore asked to modify article 119 of the Presidential Decree no. 115/2002, which stated that the legal aid regime is granted to nonprofit organizations or associations that do not carry out economic activites, in order to include the following words "organizations and associations which produce stated incomes not arising from profits of commercial activities".

22. These demands has not yet been accepted.

23. The reform of the administrative justice, which has taken place with the Legislative Decree no. 104 of 2010, has made it more burdensome for such organizations to have access to justice, inspired by previous proposals which had as an objective to hinder organizations' appeals to the courts, in particular those appeals opposing to realisations of public works,. This reform has also modified the rules concerning the unsuccessful party in court by extending to the administrative procedure the civil procedures' norms concerning judicial fees. Pursuant article 91 of the Code of Civil Procedure, "when pronouncing the decision of terminating the trial, the judge orders the unsuccessful party to



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bear the opposing party's judicial costs of procedure in the amount by him determined". In addition, according to the reformed article 26 of the above-mentioned Decree, "in any case, the judge may also order, *ex officio*, the unsuccessful claimant to pay, in favour of the opposing party, a sum equitably determined, which, however, may not exceed a total sum equal to the double amount of judicial costs that have actually been paid, in presence of manifestly unfounded arguments". It is clear that this judgment, may be characterized by extreme discretion and may have a crucial deterrent effect on subjects seeking to introduce environmental claims. Therefore, it is necessary to assess whether this provision results compatible with article 3, paragraph 8 of the Convention, which clearly underscores the fact that "persons exercising their rights in conformity with the provisions of this Convention shall not be penalized or harassed in any way for their involvement" or the provision that allows national courts to award only reasonable costs in judicial proceedings.

24. In many cases, WWF Italia has been sentenced to pay high litigation costs that, very unlikely, may be considered "reasonable" in the light of the Convention's provisions and its final scope of granting wide access to justice for environmental matters.

25. For example, in 2010, WWF Italia has brought up a case in front of the Administrative Court of the Regione Liguria against the approval of the city of Ventimiglia's project concerning the construction of a tourist port area. The administrative court rejected the appeal and ordered WWF Italia to pay the legal costs to the extent of € 4,000.00 for each of the counterparties, for a total of € 16,000.00 euro. WWF Italia therefore challenged this decision in front of the Court of Second Instance which again rejected the appeal and ordered WWF Italia to pay additional fees for a total of € 6,000.00.

26. In 2011, WWF Italia has challenged the decision of Tuscany's regional Government authorizing a wind farm project. In 2013 the regional administrative court rejected the claim and ordered WWF Italia to pay € 3,000.00 in favour of each of the parties concerned, for a total of € 18,000.00.

27. In 2006, WWF Italy proposed an action against four resolutions of the City Council of Grosseto regarding a recovery plan for the creation of an area of a house settlement. In 2009, the Regional Administrative Court sentenced the WWF to pay a total of € 4,000,00 of judicial fees.

28. These examples give a clear picture of how a very important environmental organization, such as WWF Italia, struggles to pursue its institutional scopes of protection of the environment through judicial remedies because of the burdensome costs of justice. This issue concerns both the moment of access to the judicial remedies and the decisional phase when such organizations very often are sentenced to pay high judicial fees which represent a great deterrent for the proposition of further actions or appeals. This deterrent has been reinforced by the recent reforms of the Italian



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administrative procedure that give the judge the discretionary power to order the unsuccessful party to pay additional fees when the arguments of the claim are manifestly unfounded.

29. The report drafted in 2014 by the Italian Ministry of the Environment, Land Protection and Sea on Italy's status of compliance with the Aarhus Convention, with reference to the factors hindering a correct implementation of the third pillar, mentions only the excessive lawyers' fees. As for the initial tax of access to judicial remedies, as well as the discretionary power of the judge to order the unsuccessful party to pay additional sums in the event of manifestly unfounded claims, as provided by the new law, the report only states that allegations on this point have been made by numerous organisations. Moreover, nothing is said about the issue concerning the legal aid regime which is denied to some nonprofit organizations, mainly in the administrative procedure and the fact that this problem has been brought repeatedly to the attention of the Italian Government without any positive result.

30. WWF Italy therefore invites the Compliance Committee:

- to acknowledge the excessive costs of access to justice that are borne by environmental organizations in Italy and that violate article 3, paragraph 8, article 9, paragraphs 4 and 5 of the Convention;
- to recommend that a tax exemption or a lower fee should be applied in order to allow nonprofit organizations to bring a claim in front of a judge when it concerns environmental matters;
- to recommend that a legal aid regime should be granted to nonprofit organizations. In order to achieve this goal it would be useful to make a difference in treatment between commercial entities and nonprofit organizations, since the latter's incomes are functional to further their institutional activity and may not be distributed to the organisation's members as profit.

IV. NATURE OF ALLEGED NON-COMPLIANCE

Violation of the right to access to justice in accordance with article 3, paragraph 8, article 9, paragraphs 4 and 5, of the Aarhus Convention.

V. PROVISIONS OF CONVENTION RELEVANT TO THE COMMUNICATION

Article 3 (8)

Article 9 (4)

Article 9 (5)



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VI. USE OF DOMESTIC OR OTHER INTERNATIONAL PROCEDURES UTILISED

The issues concerning the prohibitively expensive costs of access to justice in environmental matters have been repeatedly brought to the attention of the Italian Government without any success. In addition, this matter has been referred to the European Commission in 2014. Italy's high costs of environmental justice result in breach of European provisions as well, in particular of art. 10 bis of Directive 85/337/CEE.

VII. SUPPORTING DOCUMENTATION

- 1) Order of the Administrative Court of the Regione of Liguria requiring the payment of € 4,000,00 for each of the parties concerned, for a total of € 16,000.00.
- 2) Decision of the Court of Second Instance (on the appeal against the above-mentioned order) requiring the payment of additional € 2,000.00 for each of the parties concerned, for a total of € 6,000.00.
- 3) Order of the Administrative Court of the Regione of Tuscany requiring the payment of € 3,000,00 for each of the parties, for a total of € 18,000.00.
- 4) Order of the Administrative Court of the Regione of Tuscany requiring the payment of € 2,000,00 for a total of € 4,000.00.
- 5) Letter of the 21st of December, 2006, of the former President of WWF Italia, Fulco Pratesi, asking the Italian competent Ministeries to intervene in order to modify the rules concerning the costs of judicial fees for nonprofit organizations.
- 6) Text of the proposal of amendment of the Law of Stability presented by WWF Italia in 2015 to the Government concerning costs of judicial fees for nonprofit organizations.

VIII. SUMMARY OF COMMUNICATION

1. WWF Italia alleges in first place the violation of the organization's right to access to judicial remedies and asks the Compliance Committee to recommend to Italy the necessary reforms in order to result in compliance with the Aarhus Convention.
2. The violated norms are in first place, art. 3, paragraph 8, of the Aarhus Convention, which states that each party shall ensure that "persons exercising their rights in conformity with the provisions of this Convention shall not be penalized or harassed in any way for their involvement."
3. Moreover, whilst recognizing the power of national courts to award costs in judicial proceedings, the Convention underscores that such costs must necessarily be *reasonable*. This requisite can not be



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considered satisfied by the present Italian judicial fees regime, since WWF Italia has been sentenced to pay very high litigation costs. Some examples have been reported.

4. The Administrative Court of the Regione of Liguria ordered WWF Italia to pay € 4,000,00 for each of the parties concerned, for a total of € 16,000.00. The appeal against the decision of the court of first instance has been dismissed and WWF was required to pay additional € 2,000,00 for each of the counterparties, for a total of € 6,000.00.

5. Moreover, in 2011, WWF Italia was ordered by the Administrative Court of the Region of Tuscany to pay € 3,000.00 in favour of each of the opposing parties, for a total of € 18,000.00.

6. In addition, in 2009, WWF Italia was sentenced to pay a total of € 4,000,00 of judicial fees. This situation has worsened since new reforms concerning the administrative procedure give the judge the discretionary power of sentencing the unsuccessful claimant to pay an additional amount of fees when the action's grounds are considered to be manifestly unfounded.

7. These judicial costs clearly represent a heavy financial burden and a serious deterrent for nonprofit organizations when proposing actions in front of a national judge, therefore resulting in contrast with the scopes of the Aarhus Convention which guarantee a wide access to justice in environmental matters.

8. In addition, WWF Italia alleges the violation of article 9, paragraph 4 of the Aarhus Convention, which requires each Party's judicial and administrative remedies to be adequate, effective, appropriate, fair, equitable, timely and not prohibitively expensive.

9. In order to file a claim in front of an Italian court, the claimant must pay a very high tax, according to the Presidential Decree no. 115 of 2002, ranges from € 650,00 to € 2,000.00 and which varies according to the matter at stake. An additional tax, from € 925.00 to € 9,000.00, must be paid in case of appeal. These initial costs to access to justice clearly represent a considerable financial obstacle for the nonprofit organization pursuing its institutional activities, which include the protection of the environment also through judicial remedies. These provisions are not compatible with the right of wide access to justice and not prohibitively expensive judicial costs established by the Convention.

10. Lastly, the above-mentioned Decree does not respect article 9, paragraph 5 of the Convention, which requires each Party to establish "appropriate mechanisms to remove or reduce financial and other barriers to access to justice." The Italian law explicitly provides a system of legal aid for individuals and organizations which have an annual income lower than € 11,369.00 and wish to defend their rights in front of a court. Nevertheless, the legal aid is rarely recognized to WWF Italia, especially in administrative proceedings, because the nonprofit organization's incomes exceed the



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amount required by the law in order to enjoy the state's financial assistance. WWF Italia's incomes, however, are not the result of a commercial activity which brings profits subsequently distributed amongst its members. In the respect of the Legislative Decree no. 460 of 1997, in fact, WWF Italia needs to reinvest its revenues in institutional activities provided by its statute and therefore the income statement reflects only the revenue deriving from donations and not from other investments while deductions are from ordinary operating expenses.

11. Numerous attempts to change this situation have been tried at a national level in order to change this situation which represents a heavy financial burden for WWF Italia.

In 2006, Fulco Pratesi, WWF Italy's former president, has reported this issue to the Italian Government, suggesting how the present laws should be reformed in order to assure a fairer judicial fees regime.

In 2007, during the discussion of the Financial Law's adoption, WWF Italia has, once again, referred the matter to the Government, without obtaining successful results.

In 2015, another attempt has been made in the occasion of the approval of the Stability Law of 2015, by submitting a proposal of exempting nonprofit organizations from the payment of the tax.

12. The national report of the Ministry for the Environment, Land Protection and Sea on the implementation of the Aarhus Convention does not sufficiently underscore the above-mentioned issues. It states that the lawyers' fees represent the major obstacle undermining the nonprofit organization's right of access to justice and does not exhaustively mention the unreasonable amount of taxes applied to those seeking access to judicial remedies.

Lastly, no consideration is made about the actual system of legal aid which, even though provided by the law, is *de facto* denied to nonprofit organizations, such as WWF Italia, especially in administrative proceedings.

IX. SIGNATURE


Donatella Bianchi
President

Roma 20/4/2015

