ACCC/C/2015/130 From the communicant to ACCC – Response to the answers of the party concerned

1. Regarding the answers to question 1: The answers of the party concerned confirm the facts described in the communication submitted by WWF Italy.
The tax (*contributo unificato*) pursuant to Presidential Decree no. 115/2002, article 13, n. 6-bis for administrative proceedings is the same for the court of first instance and for the court of appeal (paragraph12 of the Communication). We apologize for the mistake.

2. Regarding the answers to question 2: The "Code of the Third Sector", (Legislative Decree No. 117 / 3.7.2017) does not expressly modify the regime of access to environmental justice for NGOs including the right of NGOs to be exempted from the payment of the tax (*contributo unificato*). Nor does the party concerned clarify how the new rules could change the costs of access to justice.

3. Regarding the answers to questions 3 and 4: The party concerned confirms what has been stated in WWF's communication of 12/05/15. The regime, according to which the unsuccessful party is obliged to bear the judicial costs of the successful party pursuant to Article 91 and subsequent articles of the code of civil procedure, is the rule in the administrative procedures (Article 26 of the legislative decree 104 of 2.7.2010). The possibility of the judge to order the unsuccessful party to pay further sums in the case of manifestly unfounded reasons or vexatious litigation is an exception.
It is worth clarifying that the main concern on the prohibitive costs of access to justice found in the Communication (paragraph 23) is the rule according to which the party that loses the case in court has to bear the costs of the successful party. It is important to note that in administrative proceedings there is always a plurality of parties. The appellant must notify the appeal to the body that issued the act and to at least one of the other interested parties. Environmental acts often are issued by a number of bodies. The NGO therefore has more than one counterparty in the proceeding and in the event of losing a case it is ordered to pay the judicial costs for all the other parties. Consequently, WWF and other NGOs must bear very high costs in the case of unsuccessful administrative proceedings. This constitutes a violation of Article 9 of the Aarhus Convention. This conclusion is supported by two recent judgements. First, the decision of the Council of State sec. IV 22 February 2018, n. 1619 which ordered the VAS (environmental NGO) to pay € 12,000.00 plus CNPA and VAT (Annex 1). The organisation VAS as mentioned in the response of the Party concerned (9.1.), was exempted from the payment of the tax (*contributo unificato*). Second, the decision of the Council of State of June 15, 2017 n. 4001 which ordered WWF to reimburse the litigation costs in the amount of € 30,000.00 in addition to CNPA and VAT (Annex 2).
This shows that the ordinary rules applying to almost all the administrative proceedings have a deterrent effect on seeking remedies through judicial proceedings.

The issue regarding the implications of the rule that the losing party has to bear the costs of the successful party on the right of access to justice was recently addressed in a ruling of the Italian Constitutional Court (n.77 of 2018) of April 19, 2018 (Annex 3).
The Court held that Article 92 of the code of civil procedure is unconstitutional to the extent it limits the cases in which the judge may compensate the expenses between the parties to the cases of absolute novelty of the matter dealt with and change of jurisprudence. The Court considered Article 92 in contrast with the principle of reasonableness and equality (Article 3.1 of the Constitution) as well as the right to a fair trial (art.111.1. Const) and the right to judicial protection (Article 24.1 Const.). It further argued that the fear of the party in court to be ordered to pay litigation costs even in unexpected and unpredictable situations, can constitute a unjustified deterrent to claim its rights.
Following the Court's judgment, the judge can now compensate the expenses between the parties, partially or entirely, even if there are other similar serious and exceptional reasons.
This ruling of the Constitutional Court, however, does not resolve the issue dealt with in the Communication, given that the cases of compensation of expenses still remain extremely limited; even if the contradiction with the constitutional principles was addressed, the issue of the prohibitive judicial costs for access to justice, described in the Communication of WWF, has not been resolved.
The Constitutional Court - citing other decisions – found that it is for the legislator to address the effects of the regime of costs applying to the losing party. In the same decision 77 of 2018 (Annex 3), the court considered unfounded the question of constitutionality, with regard to granting a more favourable treatment to the worker, considered as a "weak" party in the proceeding. In this respect, it is important to recall the particular role of NGOs. These can not be classified as "weak" parties of the proceedings but rather are identified by international norms as entities that have the role of guaranteeing effective environmental protection and protecting public interests.
The exceptional case of manifestly unfounded reasons in which the judge may order the unsuccessful party to pay further sums represents an additional deterrent. This case, however, has not been applied to WWF, yet.

4. Regarding the answers to question 5: The Party concerned has made some assumptions in its response on the reasons why the legislator has set an annual income level for accessing the legal aid regime, which is the same for individuals and organizations. According to the Party concerned, NGOs - in the same way as individuals - should be distinguished into "poor" and "rich" organisations. The latter were considered as the ones that are constituted by a plurality of subjects and capable of "obtaining considerable income". What has been stated by the Government confirms the illogical nature of the law that has led judges to reject applications for legal aid. By applying this interpretation, the NGOs that are able to attract more members and financial resources than others to pursue their objectives would be penalized. It is therefore inappropriate to talk about income with the exception of the cases in which an NGO carries out economic activities. The “Code of the Third Sector” (Legislative Decree No. 117 / 3.7.2017), as the Italian Government states in answer n. 7, is trying to address this error for determining what contributes to the

formation of income. Another reason why it is inappropriate to take into consideration the budget of those NGOs that operate at an international level, is that there are internal rules concerning the financial allocation of part of the budget to contribute to projects in countries where there is a weaker presence of the NGO and where often the need of financial contributions is greater.

5. Concerning the answers to Question 6:

The following decisions are attached: TAR Marche concerning access to legal aid of 2 December 2016 n. 118 (Annex 4) and TAR Calabria 14 September 2016, n. 1967 (Annex 5).

6. Regarding the answer to question 7: The entry into force of the "Code of the Third Sector" (Legislative Decree 117 / 3.7.2017) depends on the issuance of a series of decrees that have not yet been approved. In any case, the new law does not explicitly change the regime for access to environmental justice for NGOs. Nor does the Party concerned clarify how the new rules could change this cost. By all means, it is important to keep in mind that even if the new criteria for determining the income of NGOs will come into force and allow an easier access to the legal aid regime for NGOs, the issue of the prohibitive costs to be borne by NGOs in case of a loss in court would remain unsolved. The person or NGO admitted to legal aid is not exempted from the payment of the judicial costs in case of loss. This, as it has been stressed in the previous paragraphs, is one of the main issues that make the Italian system of access to environmental justice prohibitively expensive. In this regard, the Court of Justice stated in C-260/11, David Edwards c. Environment Agency:
(...) it must be pointed out that the requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings (see, to that effect, Commission v Ireland, paragraph 92).The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned.

7. Regarding the answer to question 8: The answers of the Party concerned confirm the statements of the communication submitted by WWF Italy.

8. Regarding the answer to question 9: The case law as described by the Party concerned on the issue of the exemption from the payment of the tax (*contributo unificato*) by the ONLUS is correct. The Court of Cassation has denied the right of exemption from the tax to NGOs and the Tax Courts' decisions align to the Court of Cassation's judgement. Exceptional are some rulings where judges have excluded the payment of the tax (*contributo unificato*) on the basis that the refusal of the exemption from the payment of tax (contributo unificato) would lead to a clear contrast with the obligations deriving from the Aarhus Convention. The uncertainty with regard to the interpretation of the law to be applied constitutes further prejudice for the NGOs. These are seen forced, even after many

years, to bear expenses for proceedings initiated with the presumption of the exemption from the payment of the tax (*contributo unificato*).

9. Regarding the answer to question 10: The answers of the Party concerned are correct.