QUESTIONNAIRE FOR THE AVOSETTA MEETING IN KRAKOV, JANUARY 13-14, 2006

Report on Italy

MASSIMILIANO MONTINI (UNIVERSITY OF SIENA)

I. General background of the MS relevant for nature protection

Please describe shortly:

- *the legislative and executive competencies in your country with regard to nature protection*
- *and the characteristics of your natural resources and major threats for nature*

- The fifth Title of the Italian Constitution, as amended by L. 3/2001, provides that the State has exclusive legislative power concerning environmental protection. This amendment didn't take into consideration the fact that environment is a value affecting a plurality of different subjects, some of them regulated by regional legislators. With two important decisions (n. 407/2002 and n. 536/2002) the Constitutional Court has interpreted art 117 Const. defining the environment as a constitutionally guaranteed value that can be protected by regional laws too. This trend has been recently confirmed by the Constitutional Court through decisions n. 248/2004 and n. 135/2005. The repartition of legislative and executive powers between State and Regions is then inspired to the principle of "leale collaborazione", (loyal cooperation) between the public institutions according to the public interest of each situation. In particular, when more stringent, the regional legislation is applicable instead of the national one. For what concern the nature protection descending from Dir. 92/43 and Dir. 79/409, the Italian Regions (including the autonomous Provinces of Trento and Bolzano) have the main legislative and executive competencies and functions.

- The Italian territory is characterized by particular environmental values and by numerous environmental beauties thanks to the great variety of Italian landscapes and environments, (i.e. marine, mountain, etc.). The protection of Italian nature is becoming harder due to the human activities and the economic interests interfering with the environmental interests. The major threats for nature are therefore human activities which contribute to destroy habitats and species. Moreover, for many years a not well defined repartition of legislative and executive competencies between the State and the Regions has compromised the natural resources protection effectiveness.

II. Natura 2000

1. Identification and notification of special areas of conservation (SACs) and special protection area (SPA's) in MS

a) Article 4(1) Dir 92/43 and 4(1) Dir 79/409

- *How were the areas identified which went into the national list of candidate areas for SACS (Article 4(1) of Directive 92/43)? Which criteria were used, if any?*

The regions were in charge of selecting the SACS and transmitting the lists to the Ministry of Environment which finally presented the pSCIs to the European Commission.

The criteria used were those listed in Annex C of the Decree n.357/97. For sites with habitat set out by Annex A: 1) representativeness of the habitat in the area, 2) surface covered by the habitat compared to the total Italian surface covered by the same kind of habitat, 3) conservation of the habitat, 4) assessment of the site value. For sites with species listed in Annex B: 1) size and density of the species on the site, 2) conservation of the species, 3) isolation of the species, 4) assessment of the site value for the conservation of the species.

- *Has your country identified sufficient candidate SACs and notified them to the Commission? Have core zones and puffer zones been suggested?*

No, in fact the ECJ upon request by the European Commission has condemned Italy (i.e. *C-378/01*) for not having classified various areas as SACs and SPA. Lombardia and Sardinia are the regions with the highest number of areas (25) which ought to be protected but were not duly classified.

- *Which criteria were used to designate SPA's (art. 4(1) Dir. 79/409)?*

Similar procedure and criteria used for the selection of SACs, according to Law n.157/92 as amended by Law n. 221/02

- *Was there any public consultation or discussion with regard to the selection of sites of Article 4(1) of Directive 92/43 and to designate SPA's (Dir. 79/409)?*

The selection of sites was conducted within the BioItaly Project, co-financed by the European Commission through the Life Program, which resulted in a cooperation among different parties, regions, provinces, scientific referees and scientific associations (i.e. Unione Zoologica Italiana, Società Botanica Italiana, etc.)

- *What were the main obstacles in process of identification these areas (e.g. local protests, lack of explicit criteria, lack of national data base on such areas)*

Mainly, there was a lack of national data base on such areas.

b) Article 4 para. 2 and Art. 5 Dir 92/43

- *Is the Commissions decision with regard to the lists of areas (Article 4(2) of Directive 92/43) final? How many areas of those that had been proposed have been retained (number and surface)? What then happens to the candidate areas which had been proposed by a Member State, but not retained?*

So far, Italy identified 2255 areas as pSICs and 559 areas as SPAs (of which 311 coincide with pSIC). No data are available on how many areas of those proposed have been retained.

c) Art. 4(4) Dir 92/43

- *Has your country already taken decisions with regard to Article 4(4) of Directive 92/43 (final decision to consider an area as special area of conservation of Community interest)? What is the state of decision-taking?*

For some regions, such as *Regione biogeografica alpina* (Decree of the Ministry of Environment n. 167/04), *Regione biogeografica mediterranea e continentale* (Decree of the Ministry of Environment of 25 march 2005), the answer is positive, for the rest the procedure is still ongoing. It should be added that the list of SCI recently approved by the Commission was considered not complete, therefore provisional. More proposals from Italy are to be expected in the next future.

d) Are Natura 2000 sites protected through a genuine category of area protection, or are the existing categories of protected areas used for Natura 2000 areas?

Generally speaking, Natura 2000 areas are protected through a new and genuine category of area protection, although some of Nature 2000 areas correspond to previously selected categories of protected areas under national law (i.e. national/regional parks).

e) A*re there decisions by national courts which deal with the identification and notification of areas under Article 4(1) of Directive 92/43?*

No specific decisions were reported on this issue.

f) If the notification of the first round is completed, is there an obligation to improve the list of Natura 2000 sites, eg under Art. 10 Dir 92/43?

Is it possible to reduce or abolish already designated sites (for others reasons then indicated in point II. 3.c).

According to the applicable provisions (art. 10 Dir 92/43 and art. 7 Decree n. 357/97) neither there is an obligation to improve the list of Natura 2000 sites, nor it is possible to reduce or abolish already designated sites.

Under art. 3 (4bis) of Decree n. 357/97, regions shall monitor the effectiveness of the SACs identified so far and may present proposals to the Ministry of Environment to update the list of Natura 2000 areas, with the aim of including new sites.

2. Management of Natura 2000 sites

a) Article 6 paras. 1 and 2 Dir 92/43

- *does national law require management plans for the sites - are they specifically designate for the site or integrated to others plans (which?)*

According to art. 4 of Decree 357/97, regions and provinces are in charge with the adoption of the necessary conservation measures involving, if needed, management plans. Such plans are not compulsory and can be either specific and integrated to other development plans.

- *which conservations measures - statutory, administrative or contractual measures – where chosen in your country? Which is the main form?*

In Italy the main form for the adoption of conservation measures are regional legislative or administrative measures. Moreover, regions can delegate provinces for the adoption of management plans.

- *what appropriate steps are taken to avoid deterioration/disturbances (art.6(2) Dir 92/43*

The Italian legislation doesn't foresee in general terms which appropriate steps are to be taken to avoid deterioration/disturbances in the SACs. According to art. 4 decree n. 357/97, it is within the competence of the region the adoption of specific measures to avoid deterioration/disturbances, when they appear to be necessary.

b) Who does administer/supervise Natura 2000 sites – *is it organized within existing nature public bodies? Do environmental associations supervise?*

The Ministry of Environment is responsible for the overall supervision over Natura 2000 sites, while regional and local administrations are in charge for the concrete management of such sites. No specific role is provided for environmental associations.

c) Special question on GMOs and nature protection (posed in the context of research for the German Nature Protection Agency): Is there specific regulation or a discussion in your country on whether in nature protection areas the sowing of genetically modified seeds can and even must be prohibited? Can the authorisation for releasing genetically modified seed be denied for the mere fact that the site of release is situated in a nature protection area? Would an authorisation of the bringing on the market of genetically modified seed exclude any measure restricting the sowing of the seed in nature protection areas (see Art. 22 Dir 2001/18)?

In Italy, this sector has been recently regulated by Law n. 5/05, which states at art. 2 that the sowing of genetically modified seeds is allowed when it doesn't compromise the other sowing. In any case, the matter is specifically regulated under regional legislation and the specific regional laws examined (i.e. regional law Basilicata n. 18/02, art. 2(3), regional law Abruzzo n. 6/01, art. 2(2)) do not allow sowing of GMOs in nature protection areas.

3. Appropriate assessment' and authorisation of plans and projects

a) Article 6 para 3 and 4 Dir 92/43

- *How was Article 6(3) and (4) Dir 92/43 transposed in your country*

It was transposed by art. 5 (3) and (9) of the Decree n. 357/97. The Italian transposition is the exact translation of the Directive text.

- *does national law/case law make Article 6 para 3 and 4 applicable also to a) Proposed Sites of Community Importance (pSCIs) b) non proposed but eligible sites (npSCIs)? If yes is this regarded as required by EC law or as a stricter national measure?*

  Under Decree n. 357/97 pSCI are already subject to the provision of art. 6 Dir. 92/43.

- *what is the factual information on plans and projects affecting Natura 2000 candidates or determined sites*

  The factual information on plans and projects affecting Natura 2000 candidates or determined sites which are relevant for the assessment under art. 6 are determined by Annex G to Decree n.357/97 as foreseen by art. 5(4) of Decree n. 357/97.

b) Relation of the appropriate assessment under Article 6 to the EIA under EIA Directive and SEA under SEA Directive

PROJECTS

- *Does the assessment for the purposes of Article 6(3) take the form of an assessment under EIA Directive /or SEA Directive (if not – please shortly indicate the form, content and procedure of 'appropriate assessment ', including questions of public participation*
- *is the appropriate assessment confined only to EIA Directive Annex I and II projects or also to other projects (if yes - how they are being defined and what triggers the procedure)*
- *is the appropriate assessment confined only to 'development consent" under EIA Directive or also to other permits (for example: IPPC permit)*
- *is the scope of EIA procedure and EIA documentation (EIS) limited in case of 'appropriate assessment' as compared with those under EIA Directive?*

has there been any discussions concerning the possible effects on the national legal scheme of the Dragaggi (case C-117/03) and *Raad van State "Waddenzee"* (case C-127/02).

The Italian legislator decided to avoid the performance of a "double assessment procedure" in case both EIA/SEA and Habitat impact assessment procedures are applicable. Therefore, art. 5 (4) of Decree n. 357/97 (as modified by Decree n. 120/03) states that when the aforementioned case occurs, the habitat impact assessment is absorbed by the more general and comprehensive EIA/SEA procedure. In such a case, however the latter shall include the assessment of the effects that the Project could have on the protected site, in particular the negative assessment of the implications for the site in view of the site's conservation objectives. In addition, the assessment study shall be drawn according to the specific criteria listed in Annex G to Decree n. 357/97, (i.e., types of actions, use of natural resources, waste, etc.)

PLANS

- *is the 'plan'' under the Habitat Directive (and legal implications under Article 6.4) interpreted to cover all plans and programs covered by SEA Directive? How in practice it is determined that they are "likely to have significant effects on the site'? what triggers the procedure?*

In case projects and plans are assessed under EIA/SEA procedures, the habitat assessment is absorbed by them, while in case EIA/SEA procedures are not required it is compulsory to undertake the habitat impact assessment. When projecting and planning, the proponents have to examine the environmental values of the site. Art. 5(2) of Decree n. 357/97 states that all territorial, urban and sector plans shall be subject to the habitat impact assessment; according to art. 5(3), also projects and other activities not directly connected with the management of the site conservation shall be subject to the habitat impact assessment when they are likely to have a significant effect thereon. Proponents of projects and plans shall present a study which underlines the major effects on the site according to criteria of Annex G to Decree 357/97.

- *is there any special decision making procedure to decide in case a plan will "adversely affect the integrity of the site". Who decides whether to agree to the plan and what compensatory measure be taken (the authority competent to prepare/adopt the plan or any other authority)?, in what legal form?*

No specific provision on the proponents of plans is contained in the Italian legislation. This is in fact an open category. Plans having a national relevance are subject to the Ministry of Environment approval, while plans having a regional and local relevance are subject to the regional and local administrative bodies approval, which decide whether the plans could have adverse effects on the site and which compensatory measures are to be taken, if any.

c) Interpretation of certain terms according to administrative adjudication, court decisions, and academic debate (<u>you can illustrating the following problems on significant case/cases or just answer the questions</u>)

- *design of impact studies*

  See Annex G to Decree 357/97.

- *meaning of „significant effect" and „adversely affect", e.g.: is the cutting of a special area of conservation (SAC) per se an adverse effect? Any mandatory or indicative thresholds (for example - projects within certain radius from a site deemed to be likely to have significant effect on it)*

  Significant effect is to be defined, according to the Ministry of Environment, with reference to the following criteria: loss of habitat areas (%), fragmentation, changes of the site major features.

  According to the Ministry of Environment, "adverse effect" includes any adverse effect on the integrity of the site, or in other words, any adverse effect on the environmental elements which contribute to reach the site's conservation goals. An adverse effect is an effect which may damage the structure and functions of the habitat or which may interfere with the distribution of the species population. When assessing the adverse effects, the precautionary principle shall apply.

- *what is and what not regarded as „imperative reason of overriding public interest"? On what level of concretion are the objectives of the plan or project formulated (mark that the more concrete the less alternatives come into play)? Are they sometimes expressed in monetary terms?*

According to the Ministry of Environment, the *imperative reason of overriding public interest* refers to situations where plans or projects are essential for reaching the protection of Constitutional guaranteed values, such as human health, safety and environment, or essential for State and society, or connected to specific obligations relating to discharge of public service. In addition, the *public interest* is *overriding* when it meets a long-term interest.

- *what is the scope of alternatives to be considered? must any alternative considered be realizable by the original applicant? Are alternatives involving more costs than the prime variant excluded from further consideration? Are compensatory measures (Art. 6 para 4 subpara 1) be counted as reducing the adverse effect?*

  When adverse effects are found, one should consider whether alternative measures are applicable, having in mind the project/plan objectives. This phase is aimed at evaluating whether the projects/plans can also be realized under different conditions, not/less adverse for the site. Possible alternatives are for instance: alternative locations or paths, alternative size or development of the plan, alternative building methods, different means to reach the same targets, different timetable of realization, etc.

  Compensatory measures are viewed as the last measure to limit the adverse effect of the project/plan on the site, when there are *imperative reason of overriding public interest* to undertake the project/plan. Compensatory measures can result in: reintegration of the habitat, establishment of a new habitat, improvement of the habitat, selection of a new area for the habitat.

- *Do „prioritary" species under under Art. 4 para 4 subpara 2 Dir 92/43 also include endangered birds, such as those listed in Annex 2 of Dir 79/409 recognised?*

  No specific reference to this issue is contained in the relevant Italian legislation.

- *what counts and what not as an „opinion from the Commission"? Is an informal statement sufficient? Are there instances of lobbying the Commission to render obtain a favorable opinion? What is the legal role of a positive or negative opinion?*

  On the basis of the general principles of Italian law, it is to be understood that the Opinion of the Commission in this context should refer to a formal act, rather than to an informal statement or similar.

- *who has standing to challenge decisions under Art. 6 para 4 Dir 92/43? is it a difference between plans and programs in this respect? Does Article 10a of the EIA Directive apply?*

  No specific provisions on standing in such a case are contained into Italian law. Moreover, there is no difference between plans and programs. Art. 10a of the EIA Dir. is not applicable in this case.

- *Is Art. 4 para 4 Dir 79/409 either as such or in combination with Art. 7 /Art. 4 para 4 Dir 92/43 directly applied if the site was not notified?*

Such provisions should be directly applicable under EC law, although no specific reference in this sense can be found under Italian law.

- *Is Art. 4 para 4 Dir 92/43 directly applied aa) if the site was notified and listed by the Commission (Draggagi case) bb) if the site was notified but not yet listed cc) if the site was not notified but qualifies as potential Natura 2000 site*

aa) Yes, according to Decree n. 357/97 bb) Yes, according to Decree n. 357/97 cc) No protection is foreseen for this case under Italian law, unless the site is protected under EC law.

III. Species Protecion (only for discussion)

- *For reasons of time we will discuss this topic as in terms of EC requirements rather than as in terms of national law. It is recommended that you make yourself familiar with Articles 12 to 16 Dir. 92/43 as they are viewed from the EC and national perspectives. No written report is requested.*
-

IV. Financing nature protection (please write a short opinion, if possible)

- *Should there be a financial instrument (fund) at EC level for financing conservation measures? Don't we run the risk that then Member States will do something on the condition that there is money coming from Bruxelles?*
- *What about Article 175(5) EC Treaty and Article 8 of Directive 92/43: should these provisions be made operational?*
- *Is it appropriate to delete LIFE (Regulation 1655/2000) and let the Structural Funds intervene instead?*

Shortly speaking, in my opinion there should be a financial instrument, such as a fund, at EC level, to assist Member States in the expenses incurred for the designation of SACs, while their management should be undertaken at their own expenses, unless it is proven that they experience severe financial difficulties in fulfilling their tasks. Moreover, it seems that it would be better to retain an instrument such as LIFE, being it a more specific and effective environmental tool, rather than a general structural fund.

V. The actual state and the future development of EU nature protection law (topic for final discussion; the written answer is optional)

It is suggested that we come up with an avosetta resolution on certain basic points including e.g.

- *The results of 26 years of Directive 79/409 and 13 years of Directive 92/43. What has been the evolution of animals and plants in this time? Is it true that despite these measures, nature slowly withdraws from the environment in Member States?*

- *Major deficiencies in the 2 directives: e.g.: does EC law allow for too many possibilities for the balancing of interests and thus the preponderance of exploitation interests?*

- *The main 'troubles' with regard to transposition and applying of the directives?*

- *Is the system of Directives 79/409 and 92/43 enough to protect nature in Europe? Should there be further European legislation (e.g. on landscapes)?*
- *What can be done to improve the situation of nature within the EU and globally?*

Over the past decade the two Directives 79/409 and 92/43 have served as a foundation for a more comprehensive natural resources protection, but many obstacles have been experienced in the way for their effective implementation.

Transposition into national legislation of Directive 79/409 and Directive 92/43 gave rise to infringements procedures because selected areas for Natura 2000 were often too few and protection instruments chosen at the national level were in many cases not fully effective. In particular, too often the provisions of the Directives 79/409 and 92/43 left room for economic interests to prevail, being environmental protection interests often succumbent in the balancing of the different interests at stake.

The main challenge today is to render fully effective the development of a coherent network of designated areas throughout the European Union territory. So far, many of the SPAs and SACs are small islands in areas where large-scale economic activities are dominant. Therefore, reconciling habitat protection and economic activities will be the major challenge for the future.

The recent Directive 35/04 can be viewed as a further step toward an effective nature protection providing liability for those who damage the environment, defined as to include also protected species and natural habitats.

Furthermore, the European Commission should also explore the possibility of proposing a specific piece of EC legislation on landscape protection, based on the model of the 2000 Council of Europe Landscape Convention.