

# Legal Issues Concerning the Cres-Lošinj Marine Habitat & Protected Area Legislation in Croatia

*Emily Becker, \* Amir Pavlovicm, \*\* Sandra Nemet, \*\*\* and Dr. Peter  
Mackelworth\*\*\*\**

*This paper analyzes legal issues concerning the Cres-Lošinj Marine Habitat and protected area legislation in Croatia generally. The Cres-Lošinj Marine Habitat is home to bottlenose dolphins, marine turtles, and migratory birds, species designated as endangered or at-risk by various international organizations. Scientific research encourages protection of the Cres-Lošinj area. The Croatian government has long insisted on its commitment to the protection of the Cres-Lošinj dolphin habitat, both to remain in compliance with its international obligations and in response to external and internal pressure. However, despite this commitment to protection and the scientific support for protection, the Croatian government has yet to implement permanent protection of the Cres-Lošinj area and many other sites. Ultimately, we conclude that failure to implement permanent protection constitutes an unfulfilled commitment under several legal regimes, including Croatian law, the Aarhus Convention, the Bern Convention, and the Barcelona Convention. Additionally, although Croatia has yet to accede to the EU, it stands to be in violation of the Habitats Directive upon accession if further protective action is not taken.*

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\* Corresponding author, J.D. Candidate, Harvard Law School, 1563 Massachusetts Avenue, Cambridge, MA 02138, USA, ebecker@jd14.law.harvard.edu.

\*\* J.D. Candidate, Harvard Law School, 1563 Massachusetts Avenue, Cambridge, MA 02138, USA.

\*\*\* Faculty of Law, University of Rijeka, Hahli 6, 51000 Rijeka, Croatia.

\*\*\*\* Conservation Director, Blue World Institute of Marine Research and Conservation.

Article reviewed by Prof. Tullio Scovazzi, Professor of International Law, University of Milano-Bicocca.

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## I. THE STATUS OF CRES-LOŠINJ UNDER CROATIAN LAW

### A. Sources of Law

Croatian law outlines the process for declaring preventive (temporary) and permanent protection of areas in the 2005 Nature Protection Act (NPA).<sup>1</sup> The Regulation of Procedure for Public Participation in Protected Area Designation (RPP) clarifies the procedure for public participation during the process of establishing protected areas.<sup>2</sup>

### B. Summary of Applicable Laws

#### 1. Preventive (Temporary) Protection Under the NPA

The NPA provides the framework for declaring the preventive protection of a site, a temporary designation that may last for a maximum of three years.<sup>3</sup>

<sup>1</sup> The Nature Protection Act (Official Gazette, No. 70/05).

<sup>2</sup> Regulation of Procedure for Public Participation in Protected Area Designation (Official Gazette, No. 44/05).

<sup>3</sup> The Nature Protection Act, art. 26(2).

Preventive protection may be granted for sites that are: (1) in the process of becoming a permanently protected area and/or (2) have been nominated for preventive protection status by the State Institute for Nature Protection<sup>4</sup> (Institute).<sup>5</sup> Sites must also face an imminent threat.<sup>6</sup> The Ministry of Environment and Nature Protection<sup>7</sup> grants preventive protection status by passing “a decision on preventive protection.”<sup>8</sup>

Because preventive protection constitutes a temporary designation intended to protect sites under threat, there exists no legal requirement of public participation for the declaration. The NPA does provide a measure of informing the public: the decision authorizing preventive protection must be forwarded to a “competent court for registration in land registers.”<sup>9</sup> But the RPP’s requirements relating to public participation do not extend to the establishment of areas under preventive protection because the RPP applies only to proposals for an act of permanent designation.

The grant of preventive protection means that the “provisions of [the NPA] apply during the period of preventive protection.”<sup>10</sup> During this period, the competent body should take measures to manage and protect the site.<sup>11</sup> However, because there is no time limit governing either the establishment of protective measures or the establishment of a public entity to administer these protective measures, it remains unclear if the failure to establish a management plan or board during the period of preventive protection may result in legal action.<sup>12</sup>

## 2. The Proposed Law on Permanent Protected Areas

In the case of designating permanent protected areas, the NPA proscribes the official procedure for proposing protected areas and informing the public of such

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<sup>4</sup> Other translations refer to the institute as the State Institute for Nature Protection, abbreviated SINP. In Croatian, the institute is referred to as Državni zavod za zaštitu prirode, or DZZP.

<sup>5</sup> See The Nature Protection Act, art. 26.

<sup>6</sup> P. Mackelworth et al., *Unbalanced Governance: The Cres-Lošinj Special Marine Reserve, a Missed Conservation Opportunity*, 41 MARINE POL’Y 126, 130 (2013).

<sup>7</sup> Since November 2011, the competent authority for Nature Protection has been the Ministry of Environment and Nature Protection; prior to this the Ministry of Culture was the competent authority. *History of nature protection in the Republic of Croatia*, STATE INST. FOR NATURE PROTECTION, available at <http://www.zastita-prirode.hr/%20eng/Protected-Nature/Nature-protection-in-the-Republic-of-Croatia/History-of-nature-protection-in-the-Republic-of-Croatia> (last visited Nov. 21, 2013).

<sup>8</sup> The Nature Protection Act, art. 26(1).

<sup>9</sup> *Id.* art. 26(4).

<sup>10</sup> *Id.* art. 26(3).

<sup>11</sup> See *id.* art. 73.

<sup>12</sup> See *id.* art. 72.

proposals.<sup>13</sup> Article 22(1) specifies that “[a] proposal of an act of designation shall be founded on [an] expert base proposal drawn up by the [Institute].”<sup>14</sup> Then the competent body or bodies may propose protective designation.<sup>15</sup> There is no legal requirement that the appropriate body respond affirmatively or negatively to an expert base proposal by the Institute. Neither is there a requirement that the public be able to access or comment on the expert base proposal.

The requirement of public access to information and public participation in the decision-making process triggers only if the competent body issues an act of permanent designation. In such a case, the relevant body must inform the public of both the expert base proposal and the proposed act on designation.<sup>16</sup> Access to these documents must be available for a period of at least thirty days, and notice on the provision of public access must be provided “in at least one mass media organ.”<sup>17</sup> The NPA also requires that the government respond to observations submitted during public access.<sup>18</sup>

The RPP confirms some of the requirements of the NPA, including the requirements that public participation should be announced in the media, that the public participation procedure should last at least 30 days, that all relevant documentation about establishment of protected areas be displayed to all private persons, NGOs, official different sectors and all others, and that all comments, suggestions, and remarks should be taken into account.<sup>19</sup> The RPP adds the additional requirement that at least one public presentation be held in the area of the proposed protected area.<sup>20</sup>

From its inception in 2005 until 2008, the Institute has granted preventive

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<sup>13</sup> *Id.* art. 22.

<sup>14</sup> *Id.* The “expert statement” in support of preventive protection is distinct from the “expert base proposal” in which the Institute recommends that an area be granted permanent protected area status.

<sup>15</sup> The body charged with issuing a proposal of protected area designation depends on the type of protected area recommended by the Institute. *See id.* art. 21. A special nature reserve is “designated by the Government of the Republic of Croatia by a regulation at the proposal of the Ministry,” *id.* art. 21(2). A regional park “is designated by the county assembly or by the town assembly of the City of Zagreb subject to prior approval of the Ministry and central state administration body competent for agriculture and forestry,” *id.* art. 21(3). If the Ministry proposes protection of a regional park “and the relevant representative body fails to pass the act on protection within three months from receipt of the proposal, such a natural asset shall be designated as protected by the Government,” *id.* art. 21(6).

<sup>16</sup> *Id.* art. 22(3).

<sup>17</sup> *Id.* arts. 22(5), 22(7).

<sup>18</sup> *Id.* art. 22(6) (“The body issuing the proposal on the act of designation of a protected area must issue an opinion on the observations submitted during public access, and the observations submitted and the opinions shall become an integral part of the documentation presenting the grounds for the proposal on designation.”).

<sup>19</sup> Regulation of Procedure for Public Participation in Protected Area Designation, arts. 3, 6, 1 (Official Gazette, No. 44/05).

<sup>20</sup> *Id.*

protection status to eight<sup>21</sup> sites.<sup>22</sup> Of these eight, seven,<sup>23</sup> including Cres-Lošinj, were the subject of an expert elaboration proposing permanent protection status.<sup>24</sup> Of these seven proposed for permanent protection, only two (Moslovačka gora and Mura Drava) actually gained permanent protection status.<sup>25</sup> The fact that so few sites proposed for preventive protection go on to receive permanent protection status suggests that the preventive protection process may constitute a short-term reactionary process at times of international scrutiny and/or internal pressure.

### C. Croatian Law as Applied to Cres-Lošinj

#### 1. The Preventive Protection Proposal Complied with Croatian Law

The Institute issued an expert statement in support of preventive protection of the Cres-Lošinj Archipelago on October 7, 2005.<sup>26</sup> The competent authority at the time, the Ministry of Culture, granted preventive protection as a special marine reserve on July 26, 2006.<sup>27</sup> These steps complied with Articles 12, 70, and 72 of the NPA, which outline the implications of the special reserve designation and include the requirement that the competent body establish protective measures in the area and establish a public entity to administer these protected areas.

#### 2. The Administration of the Preventive Protection Area May Have Violated Croatian Law

The NPA requires that “the provisions of this Act shall apply during the period of preventive protection.”<sup>28</sup> This includes provisions requiring both the creation of protection measures and the establishment of an authority to administer these

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<sup>21</sup> These eight sites are: Turjak- Mališćak-Pliš- Lapjak, Karišnica and Bijela, Cres-Lošinj, Savica, Moslovačka gora, Mura Drava, and Crnika.

<sup>22</sup> *Indicator Fact Sheet – Theme BIODIVERSITY*, CROATIAN ENV’T AGENCY., [www.azo.hr/lgs.axd?t=16&id=3077](http://www.azo.hr/lgs.axd?t=16&id=3077) (last visited Nov. 16, 2013).

<sup>23</sup> The seven sites are: Turjak- Mališćak-Pliš- Lapjak, Karišnica and Bijela, Cres-Lošinj, Moslovačka gora, Mura Drava, and Crnika.

<sup>24</sup> *Compare Baseline Study for Permanent Protection*, STATE INST. FOR NATURE PROTECTION, <http://www.dzrp.hr/eng/protected-areas/procedure-of-protecting-new-areas/baseline-study-for-permanent-protection-253.html> (last visited Oct. 7, 2013) with *Indicator Fact Sheet – Theme BIODIVERSITY*, *supra* note 22.

<sup>25</sup> *Id.*

<sup>26</sup> STATE INST. FOR NATURE PROT., FIRST EXPERT ELABORATION OF CRES-LOŠINJ 2 (2005).

<sup>27</sup> AGREEMENT ON THE CONSERVATION OF CETACEANS ON THE BLACK SEA, MEDITERRANEAN SEA AND CONTIGUOUS ATL. AREA (ACCOBAMS), REPORT OF THE THIRD MEETING OF THE CONTRACTING PARTIES TO ACCOBAMS 340 (2007) [hereinafter ACCOBAMS THIRD MEETING REPORT].

<sup>28</sup> The Nature Protection Act, art. 26(3) (Official Gazette, No. 70/05).

measures.<sup>29</sup> The county Public Institution for Nature (Javna ustanova Priroda) held responsibility for fulfilling these requirements but neither passed protection measures nor established an administrative authority.<sup>30</sup> However, because there is neither a time limit for the creation of protective measures nor a time limit for the establishment of an entity to administer those measures, it may be difficult to establish that a violation occurred during the three-year tenure of the protected area.<sup>31</sup>

### 3. The Initial Expert Base Proposal Complied with Croatian Law

During the period of preventive protection, the Institute produced an expert base proposal in support of permanently protecting Cres-Lošinj as a special marine reserve.<sup>32</sup> The text of that document indicates that it “was formed on the basis of [NPA] Article 22.”<sup>33</sup> Consistent with the requirements of the NPA, the document also expresses the intent that the document be “delivered to the Ministry of Culture with a goal to start the regulation process with an aim to proclaim the marine part of Lošinj-Cres area as a special marine reserve.”<sup>34</sup> Because the Ministry never issued a proposal in support of permanent designation of Cres-Lošinj, there was no requirement of public participation at this stage or that the public be granted access to the expert elaboration.

### 4. No Croatian Laws Applied to Assessments of Public Opinion

Although not obliged to provide public access to information or public participation at this stage, the expert elaboration promises that the “Ministry will conduct an assessment of the public opinion on this documentation and the proposal shall then be sent to the Government of Croatia.”<sup>35</sup> According to a February 2010 report of the Croatian government regarding the Cres-Lošinj reserve, the Institute rather than the Ministry conducted the assessment of public opinion research in 2009.<sup>36</sup> The Institute found public concern that the strict category of special marine reserve would disrupt commercial fishing in the region and conducted “additional stakeholder consultations and additional

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<sup>29</sup> *Id.* arts. 70, 72.

<sup>30</sup> Interview with State Inst. for Nature Prot. (June 19, 2012).

<sup>31</sup> *See* The Nature Protection Act, arts. 70, 72.

<sup>32</sup> STATE INST. FOR NATURE PROT., *supra* note 26, at 2.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> The Gov't of Croat., Complaint in Stand-by: Lošinj Dolphin Reserve (*Tursiops truncatus*) (2010), at 2, [http://www.coe.int/t/dg4/cultureheritage/nature/default\\_en.asp](http://www.coe.int/t/dg4/cultureheritage/nature/default_en.asp) (follow “Advanced Search” hyperlink; then search “T-PVS/Files(2010)03E”; then follow “T-PVS/Files(2010)03E / 17 February 2010” hyperlink).

analysis.”<sup>37</sup> Based upon these additional steps, the Institute concluded “protection under strict category of special marine reserve could cause more harm than good due to the resistance from the local community.”<sup>38</sup> In order “to find compromise . . . the Ministry of Culture and [the Institute] . . . developed [a] new proposal for the protection under the category of the regional park and se[nt] it to local stakeholders for further consultation.”<sup>39</sup> Again, Croatian law does not provide for assessments of public opinion, stakeholder consultations, and analysis; as such, no laws exist to regulate the assessment procedure and degree to which the public has access to information.

#### 5. The Second Expert Base Proposal Complied with Existing Laws

The Institute, in cooperation with the Ministry of Culture, produced a second expert base proposal for the Cres-Lošinj archipelago; this version recommended declaring the area a regional park.<sup>40</sup> No formal measure governing the re-issuance of expert base proposal exists.

Pursuant to Croatian law on nature protection, the proposed protected area could be pursued either by (1) the County in which the area is located (in this case Primorsko-Goranska County) or (2) by the Croatian government if the County fails to declare the area.<sup>41</sup> Both of these steps rely on the Institute issuing a proposal of designation as a permanent protected area. Such a proposal triggers the requirements of public comment and participation. Because the initiative for the protection of Cres-Lošinj stopped with the Institute’s second expert base proposal to the Ministry of Culture, no legal requirements regulating public access to information or public participation apply in this case.

#### 6. The Current Status of Cres-Lošinj is Consistent with Croatian Law

The preventive protection of the Cres-Lošinj region expired on July 26, 2009. Because the initiative for protection of Cres-Lošinj stopped with the Institute’s second expert base proposal, the area is not in any protected area category according to Croatian law.<sup>42</sup> The NPA does not require the competent body or bodies to act after the Institute has proposed the establishment of a protected area in an expert base proposal; therefore, the lack of protection does not constitute a violation of Croatian law.<sup>43</sup>

The area has been included in the National Ecological Network (NEN) since

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Mackelworth et al., *supra* note 6, at 130.

<sup>41</sup> The Nature Protection Act, art. 21 (Official Gazette, No. 70/05).

<sup>42</sup> Interview with State Inst. for Nature Prot., *supra* note 30.

<sup>43</sup> *Id.*



November of 2007.<sup>44</sup> The NPA requires an assessment of the impact of any planned intervention that may affect conservation goals of the NEN.<sup>45</sup> Thus, such future interventions in the Cres-Lošinj region must be assessed and the impact on the region must be considered.

## II. THE STATUS OF CRES-LOŠINJ & CROATIAN LAW UNDER THE AARHUS CONVENTION

### A. *Nature of Aarhus Convention Obligations*

On March 28, 2007, Croatia ratified the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.<sup>46</sup> The Convention entered into force for Croatia on June 25, 2007, the ninetieth day after ratification.<sup>47</sup>

Public participation in environmental decision-making is also an important value in the European Union (EU). Croatia has officially fulfilled all of the benchmarks set in negotiation chapters, including Chapter 27 on the Environment.<sup>48</sup> Ratification of the Aarhus Convention constitutes part of Croatia's transposition of EU law, particularly Directive 2003/35/EC on public participation.<sup>49</sup> However, as recently as April 2012, the European Commission issued a monitoring report on Croatia's accession preparations that "[p]articular attention needs to be paid to the effective public participation and access to justice in environmental matters."<sup>50</sup>

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<sup>44</sup> The Gov't of Croat., *supra* note 36, at 3.

<sup>45</sup> *See id.*

<sup>46</sup> *Croatia Ratifies Aarhus Convention*, UNITED NATIONS ECON. COMMISSION FOR EUR. (Mar. 28, 2007), <http://www.aarhusclearinghouse.org/news/1000208/?year=2007>.

<sup>47</sup> *Id.*

<sup>48</sup> *Screening Report, Croatia, Chapter 27 – Environment*, at 20 (Feb. 1, 2007), available at [http://ec.europa.eu/enlargement/pdf/croatia/screening\\_reports/screening\\_report\\_27\\_hr\\_internet\\_en.pdf](http://ec.europa.eu/enlargement/pdf/croatia/screening_reports/screening_report_27_hr_internet_en.pdf).

<sup>49</sup> Council Directive 2003/35, Providing for Public Participation in Respect of the Drawing up of Certain Plans and Programmes Relating to the Environment and Amending with Regard to Public Participation and Access to Justice Council Directives 85/337/EEC and 96/61/EC, 2003 O.J. (L 156) 17, 18 (EC).

<sup>50</sup> European Commission, *Communication from the Commission to the European Parliament and the Council: Monitoring report on Croatia's accession preparations*, at 12 (Apr. 24, 2012), available at [http://ec.europa.eu/commission\\_2010-2014/fule/docs/news/20120424\\_report\\_final.pdf](http://ec.europa.eu/commission_2010-2014/fule/docs/news/20120424_report_final.pdf).

*B. Compliance with the Aarhus Convention*

1. The Aarhus Convention Obliges the Institute to Incorporate Public Participation into its Development of an Expert Base Proposal
  - a. The Institute Likely is a “Public Authority” Under the Aarhus Convention

The Institute likely qualifies as a “public authority” under multiple definitions provided by the Aarhus Convention.<sup>51</sup> The Institute was established pursuant to the National Strategy and Action Plan for the Protection of Biological and Landscape Diversity of the Republic of Croatia.<sup>52</sup> It performs numerous “expert tasks of nature protection for the Republic of Croatia,” such as monitoring and assessing the state of nature and developing proposals for the protection and conservation of areas within Croatia.<sup>53</sup>

The Institute may also constitute a “public authority” under 2(2)(b), as it receives funding from the other Croatian Ministries, including the Ministry of Culture in 2010.<sup>54</sup> Likewise, it creates the expert base proposal for the competent body that will propose a permanent protected area in that region.<sup>55</sup>

- b. Designation of a Protected Area is a Plan, Program, and Policy Related to the Environment Under Article 7 of the Aarhus Convention

Article 7 of the Aarhus Convention provides for public participation concerning plans and programs relating to the environment, specifically requiring that “[e]ach Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programs relating to the environment, within a transparent and fair framework, having provided the necessary information to the public.”<sup>56</sup>

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<sup>51</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 2, June 25, 1998, 38 I.L.M. 517, 518 (entered into force Oct. 30, 2001) [hereinafter Aarhus Convention]. The Aarhus Convention defines “public authority” as: “(a) Government at national, regional and other level; (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above.”

<sup>52</sup> *About Us*, STATE INST. FOR NATURE PROTECTION, <http://www.dzpz.hr/eng/o-nama/> (last visited Oct. 10, 2013).

<sup>53</sup> *Id.*

<sup>54</sup> MINISTRY OF CULTURE, PROGRAMI ZAŠTITE PRIRODE I INVESTICIJSKI PROGRAMI U 2010 [NATURE PROTECTION PROGRAMS AND INVESTMENT PROGRAMS IN 2010], available at [http://www.min-kulture.hr/userdocsimages/odobreni%20programi%20za%202010/np%20pp%20financije\\_web%20\\_3\\_.pdf](http://www.min-kulture.hr/userdocsimages/odobreni%20programi%20za%202010/np%20pp%20financije_web%20_3_.pdf).

<sup>55</sup> The Nature Protection Act, art. 22 (Official Gazette, No. 70/05).

<sup>56</sup> Aarhus Convention, *supra* note 51, at 523.

The Aarhus Convention provides no definition of a “plan, program and policy relating to the environment,” instead relying on its common meaning. The process of designating a protected area very likely constitutes such an activity. The Institute itself supplies the IUCN definition of a protected area as “a clearly defined geographical space, recognized, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.”<sup>57</sup> As the definition refers to management through legal or other effective means, as well as long-term goals for conservation of the area, protected area designation likely falls within the activities described in Article 7.

Prior Aarhus Compliance Committee decisions lend support to such an argument. Indeed, the designation of a protected area constrains the way that the land may be used, like the process of adopting decrees related to modification of land use designation and zoning.<sup>58</sup> Thus, the process of designating a protected area falls within the scope of Article 7.

- c. As All Options are Not Open After the Expert Base Proposal is Completed, Issuance of the Expert Base Proposal Without Public Participation Violates Article 7 by Reference to Article 6(4)

The Aarhus Convention also requires that “[e]ach Party shall provide for early public participation when all options are open and effective public participation can take place.”<sup>59</sup> However, once the Institute issues an expert base proposal, it has initiated the process of protection and effectively closes options (i.e., preempts other potential designations).<sup>60</sup> By law, the decision to pursue the proposal turns to a narrowed set of “competent bodies,” meaning that the portions of the government responsible for designating other types of protected areas cannot act on the expert base proposal to propose a different type of designation.<sup>61</sup> In practice, in a case like Cres-Lošinj, where the government decides to consider alternate designations, the Institute must re-issue an expert base proposal according to a procedure not specified by law and for which there are no legal frameworks to challenge the procedure as applied.

Even though Croatian law eventually provides for public participation after

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<sup>57</sup> *What is a Protected Area?*, STATE INST. FOR NATURE PROTECTION, <http://www.dzpp.hr/eng/protected-areas/what-is-a-protected-area/what-is-a-protected-area-246.html> (last visited Oct. 13, 2013).

<sup>58</sup> See U.N. Econ. and Soc. Council, Econ. Comm’n for Eur., Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Report of the Compliance Committee on its Sixteenth Meeting, Addendum: Findings and Recommendations with Regard to Compliance by Albania, ¶¶ 2, 74, U.N. Doc. ECE/MP.PP/C.1/2007/4/Add.1 (July 31, 2007).

<sup>59</sup> Aarhus Convention, *supra* note 51, at 522.

<sup>60</sup> See The Nature Protection Act, art. 22.

<sup>61</sup> See *id.*

the competent body proposes protected area designation, the issuance of an expert base proposal effectively narrows the scope of the public participation process.<sup>62</sup> The Aarhus Convention Compliance Committee has recognized the tiered nature of certain types of environmental decision-making.<sup>63</sup> The Committee ultimately concludes that when tiered decision-making occurs, “[w]ithin each and every such procedure, where public participation is required, it should be provided early in the procedure when all options are open and effective public participation can take place.”<sup>64</sup> Thus, public participation ought to be incorporated formally into the expert base proposal process.

2. The Aarhus Convention Likely Obliges the Competent Body to Formally Include Public Participation and Access to Information During its Consideration of Expert Base Proposals
  - a. All Competent Bodies are Public Authorities Under the Aarhus Convention

Depending on the type of protected area designation proposed by the Institute, the competent bodies charged with considering whether or not to pursue permanent protected area designation may include some combination of the Croatian Parliament, the Ministry of the Environment and Nature Protection, the Government of the Republic of Croatia, county assembly, and/or town assembly of the City of Zagreb. Each of these entities constitutes a public authority under the Aarhus Convention, as “[g]overnment at national, regional and other level.”<sup>65</sup>

- b. The Decision Whether or Not to Propose Permanent Protection Constitutes an Environmental Decision

The decision of whether or not to propose permanent protection is even more likely to be an environmental decision within the meaning of the Aarhus Convention Article 7 than the decisions made in the expert base proposal process. Like the Institute’s proposal, the competent body’s decision to propose

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<sup>62</sup> See U.N. Econ. and Soc. Council, Econ. Comm’n for Eur., Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Report of the Compliance Committee on its Sixteenth Meeting, Addendum: Findings and Recommendations with Regard to Compliance by Albania, ¶ 74, U.N. Doc. ECE/MP.PP/C.1/2007/4/Add.1 (July 31, 2007).

<sup>63</sup> See U.N. Econ. and Soc. Council, Econ. Comm’n for Eur., Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report by the Compliance Committee, Addendum: Compliance by the European Community with its Obligations Under the Convention, ¶ 51, U.N. Doc. ECE/MP.PP/2008/5/Add.10 (May 2, 2008) [hereinafter Compliance by the European Community].

<sup>64</sup> *Id.*

<sup>65</sup> Aarhus Convention, *supra* note 51, at 518.

designations affect if long-term management or conservation measures may be taken in the area. Unlike the Institute's proposal, the competent body's decision could terminate the process of declaring protection. A decision to propose designation would continue the process of granting environmental protections in the area while the decision not to pursue protection would mean the tiered decisions regarding protection would end.

c. Limited Options Remain After the Competent Body Elects Not to Propose Permanent Protection

The decision not to pursue protection closes all available options. The area does not receive protection and the public participation requirement does not trigger. Hence, there is currently no framework for incorporating public opinion into the decision not to pursue protection, nor is there legal recourse for parties to contest the manner of the decision-making.<sup>66</sup> The decision not to pursue protection constitutes another tier in a multi-tiered decision process, and public participation should be incorporated at this stage so that all options remain open.<sup>67</sup>

3. The NPA Does Not Offer Sufficient Protection for Cres-Lošinj Under the Aarhus Convention

a. Informal Inclusion of Public Participation Constitutes a Failure to Maintain a Clear, Transparent, and Consistent Framework to Implement Public Participation

The Aarhus Convention requires that Parties establish and maintain "a clear, transparent and consistent framework to implement the provisions of the Convention."<sup>68</sup> The Compliance Committee explains that this obligation may be fulfilled "by providing clear instructions on the status and obligations of bodies performing functions of public authorities."<sup>69</sup> There were no clear instructions governing the "assessment of public opinion" conducted by the Institute and the Ministry in the case of Cres-Lošinj.<sup>70</sup> Thus, the lack of a framework for public

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<sup>66</sup> The Nature Protection Act, art. 21 (Official Gazette, No. 70/05).

<sup>67</sup> Compliance by the European Community, *supra* note 63, ¶ 51.

<sup>68</sup> Aarhus Convention, *supra* note 51, at 519.

<sup>69</sup> U.N. Econ. and Soc. Council, Econ. Comm'n for Eur., Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Report on the Seventh Meeting, Addendum 1: Findings and Recommendations with regard to compliance by Kazakhstan with the obligations under the Aarhus Convention in the case of information requested from Kazatomprom, ¶ 23, U.N. Doc. ECE/MP.PP/C.1/2005/2/Add.1 (March 11, 2005).

<sup>70</sup> See The Gov't of Croat., *supra* note 36, at 2 (stating only that "additional field consultations with local people (stakeholders) were conducted by the State Institute of Nature Protection").

participation as applied in the case of Cres-Lošinj constitutes a violation of the Aarhus Convention.

b. Informal Inclusion of Public Participation Precludes Access to Legal Remedies

Further, the informal methods of assessing public opinion provided no legal framework to contest the manner of the assessment, nor was there an option to contest “that adequate information had been given about the inquiries and that they were held in an open and transparent manner.”<sup>71</sup> Thus, resorting to informal methods of public participation indirectly denies citizens access to judicial remedies to contest the decision and/or the manner in which public opinion was incorporated into the decision.<sup>72</sup>

4. Other Cases

From 2003 to the present, the Institute has proposed protection, re-categorization, and/or changes in boundaries for forty-two areas.<sup>73</sup> However, only three changes in boundaries and seven areas of permanent protection were actually issued.<sup>74</sup> This shows that the vast majority of decisions regarding protected area designation take place before public participation is required under the NPA.

### III. VIOLATIONS OF EUROPEAN UNION LAW

#### A. Background

Croatia acceded to the European Union on July 1, 2013. In anticipation of accession, Croatia signed a Stabilization and Association Agreement with the EU, which entered into force on February 1, 2005.<sup>75</sup> On February 12, 2008, the Council of the EU adopted the Accession Partnership with Croatia, which outlines further requirements to be met by the Croatian government prior to accession, including “implementation of the EU acquis” relating to the environment, “with particular emphasis on . . . nature protection.”<sup>76</sup> The

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<sup>71</sup> See U.N. Econ. and Soc. Council, Econ. Comm’n for Eur., Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report of the Compliance Committee on its Twenty-fourth Meeting, Addendum: Findings with regard to communication concerning compliance by France, ¶ 43, U.N. Doc. ECE/MP.PP/C.1/2009/4/Add.1 (Feb. 8, 2011).

<sup>72</sup> See Aarhus Convention, *supra* note 51, at 519.

<sup>73</sup> *Baseline Study for Permanent Protection*, *supra* note 24.

<sup>74</sup> *Id.*

<sup>75</sup> *Croatia – EU-Croatia Relations*, EUR. COMMISSION, [http://ec.europa.eu/enlargement/candidate-countries/croatia/eu\\_croatia\\_relations\\_en.htm](http://ec.europa.eu/enlargement/candidate-countries/croatia/eu_croatia_relations_en.htm) (last visited Oct. 12, 2013).

<sup>76</sup> Council Decision 42/51, on the Principles, Priorities and Conditions Contained in the

European Commission monitors implementation of the SAA and the Accession Partnership.<sup>77</sup>

By the date of accession, Croatia must implement the policies of the Habitats Directive,<sup>78</sup> including a proposed list of sites for the Natura 2000 network.<sup>79</sup> The Cres-Lošinj marine area is listed by the Institute as a proposed Natura 2000 site,<sup>80</sup> and the Croatian government has indicated that it will be protected in the Natura 2000 network.<sup>81</sup> Cres-Lošinj is also listed by the Institute as a NEN site, which is a list of sites that are to “become part of the EU ecological network Natura 2000.”<sup>82</sup> The Institute notes on its website that implementation of the NEN project “is one of the obligations Croatia has to meet in the accession process to the European Union.”<sup>83</sup>

To help cover the costs of implementation, the European Union set up the Natura 2000 Management and Monitoring program (NATURA MANMON), with a budget of €1,250,000.<sup>84</sup> Additional funds to implement Natura 2000 were provided by the World Bank in the form of a €20.8 million loan.<sup>85</sup> However, despite being listed as a potential Natura 2000 site by the Institute, the Cres-Lošinj area was not nominated by the government for funding from either source. It remains to be seen what measures, if any, the Croatian government will take to comply with the requirements of Natura 2000 with regards to this specific site.

Failure to properly implement the Habitats Directive reflects negatively on

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Accession Partnership with Croatia and Repealing Decision 2006/145/EC, 2008 O.J. (L 42) 51 (EC).

<sup>77</sup> *Id.* at 62 (“The implementation of the Accession Partnership shall be examined in the framework of the Stabilization and Association Process, including through the annual Reports presented by the Commission, in the context of the political and economic dialogues, as well as on the basis of information provided to the accession conference.”).

<sup>78</sup> *The Habitats Directive*, EUR. COMMISSION, [http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index\\_en.htm](http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm) (last updated May 7, 2013).

<sup>79</sup> The World Bank, Environment and Natural Resources Management: Europe and Central Asia, Croatia – European Union Natura 2000 Integration Project, 29, Report No. 59120 (December 29, 2010), available at <http://documents.worldbank.org/curated/en/2010/12/13616745/croatia-european-union-natura-2000-integration-project> [hereinafter Project Appraisal Document] (“The European Union does not grant transition periods for countries to establish their Natura 2000 network, even though extensive preparation time is required; this network will legally go into effect on the date of accession.”).

<sup>80</sup> Interview with Ramona Topić, State Inst. for Nature Prot. (June 14, 2012).

<sup>81</sup> See NATURE PROT. DIRECTORATE, CMS REPORT 2010: CROATIA 20 (2010), available at [http://www.cms.int/bodies/COP/cop10/national\\_report/037\\_croatia\\_e.pdf](http://www.cms.int/bodies/COP/cop10/national_report/037_croatia_e.pdf) (referring to Cres-Lošinj as a “potential Natura 2000 site”).

<sup>82</sup> Mackelworth et al., *supra* note 6, at 129.

<sup>83</sup> DANUBE REGIONAL ANALYSIS 2009-2012: THE SPATIAL DEVELOPMENT OF INTERREGIONAL CO-OPERATION IN THE DANUBE SPACE 35 (n.d.), available at [http://www.donauregionen.net/workpackage4/WP4\\_NC.pdf](http://www.donauregionen.net/workpackage4/WP4_NC.pdf).

<sup>84</sup> *NATURA 2000 Management and Monitoring – NATURA MANMON*, EUR. COMMISSION, <http://delhrv.ec.europa.eu/?lang=en&content=3912> (last updated Jan. 10, 2012).

<sup>85</sup> Project Appraisal Document, *supra* note 79, at 1.

Croatia's ability to comply with EU environmental law. The European Commission has already expressed concern in its Progress Report on Croatian accession that "gaps remain in the administrative capacity for implementing and enforcing the *acquis*, especially in the Institute and at local level."<sup>86</sup> It is still relatively soon after Croatia's accession to the European Union.<sup>87</sup> The list of Croatian Natura 2000 sites is still under consideration<sup>88</sup>, with Cres-Lošinj remaining on the list of potential sites.<sup>89</sup> Even if Cres-Lošinj is listed as a Natura 2000 site in the future, significant concerns remain about implementing and enforcing Natura 2000 requirements in the marine area.

### B. Potential Violations

#### 1. Requirement for Inclusion in Natura 2000

The Cres-Lošinj marine area is home to the bottlenose dolphin (*Tursiops truncatus*), which is listed in Annex II of the Habitats Directive as a "species of community interest whose conservation requires the designation of special areas of conservation."<sup>90</sup> It is also listed in Annex IV as a "species of community interest in need of strict protection."<sup>91</sup> Pursuant to Article 3(1), habitats of species listed in Annex II are to be included in the Natura 2000 network of sites.<sup>92</sup>

Due to the presence of a "species of community interest" in the Cres-Lošinj site, the Croatian government is required to protect the area. In the *Santoña Marshes* case, the European Court of Justice (ECJ) ruled in 2006 that "a Member State could not escape from its duty to protect a site which, according to relevant scientific criteria, deserved protection, by not classifying it as a special protection area."<sup>93</sup> The Cres-Lošinj site has been duly recognized by the

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<sup>86</sup> *Croatia 2010 Progress Report*, at 59, SEC (2010) 1326 final (Nov. 9, 2010), available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2010/package/hr\\_rapport\\_2010\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/hr_rapport_2010_en.pdf).

<sup>87</sup> *NATURA 2000 in Croatia*, STATE INST. FOR NATURE PROTECTION, <http://www.natura2000.hr/PageTemplates/PageContent.aspx?pageId=38&langID=2> (last visited Oct. 13, 2013).

<sup>88</sup> See *Implementing the Birds and Habitats Directives in Croatia*, NATURA 2000: NATURE & BIODIVERSITY NEWSL., July 2013, at 2, 4, available at [http://ec.europa.eu/environment/nature/info/pubs/docs/nat2000newsl/nat34\\_en.pdf](http://ec.europa.eu/environment/nature/info/pubs/docs/nat2000newsl/nat34_en.pdf) ("The final list of Natura 2000 sites is currently being adopted by the government following a further period of public consultation . . . . It is expected that the final list will contain . . .").

<sup>89</sup> *Marine Protected Areas: Areas of special importance for cetaceans in the ACCOBAMS area*, ACCOBAMS, [http://www.accobams.org/index.php?option=com\\_content&view=article&id=1094&Itemid=147](http://www.accobams.org/index.php?option=com_content&view=article&id=1094&Itemid=147) (last updated July 3, 2012).

<sup>90</sup> Council Directive 92/43, on the Conservation of Natural Habitats and of Wild Fauna and Flora, art. 6(4), 1992 O.J. (L 206) 7 (EC) [hereinafter Habitats Directive].

<sup>91</sup> *Id.* annex IV.

<sup>92</sup> *Id.* art. 3(1).

<sup>93</sup> EUROPEAN COMM'N, MANAGING NATURA 2000 SITES: THE PROVISIONS OF ARTICLE 6 OF



Scientific Committee of the Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea and Contiguous Atlantic (ACCOBAMS),<sup>94</sup> which recommended protection in 2002, 2007 and 2010.<sup>95</sup> Thus, it is left not to the discretion of the Croatian authorities to include the site in the Natura 2000 network: failure to classify the site violates EU law under the Habitats Directive.

## 2. Lack of Necessary Conservation Measures

For special areas of conservation, Article 6(1) requires Member States to have at least one of the following: a management plan, statutory measure, administrative measure, or contractual measure.<sup>96</sup> The language of the Article indicates that a management plan is not strictly necessary, but instead left to the discretion of the Member State.<sup>97</sup> However, statutory, administrative or contractual measures must be implemented.<sup>98</sup> The Environment Directorate-General of the European Commission clarifies that “the choice between statutory, administrative or contractual measures, or even of the management plans, is left to the Member States. . . . However, Member States must choose at least one of the three categories, i.e. statutory, administrative or contractual.”<sup>99</sup> The Directorate-General further notes that “measures are not necessarily new measures, since existing measures can be considered sufficient if they are appropriate.”<sup>100</sup>

At this time, no specific measures exist to protect the Cres-Lošinj area. Because of the particular characteristics of the site, a management plan would seem appropriate. The Croatian government indicated in its 2009 Report to the Bern Convention that a management plan was forthcoming, writing that “every NEN or NATURA 2000 site should be managed in accordance with management plans which have to be developed by managing public institution.”<sup>101</sup> Three years later, no management plan exists. No statutory, administrative or contractual measures dealing specifically with the site exist

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THE ‘HABITATS’ DIRECTIVE 92/43/EEC 12 (2000).

<sup>94</sup> See Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea and contiguous Atlantic, Nov. 24, 1996, 36 I.L.M. 777 [hereinafter ACCOBAMS]; ACCOBAMS THIRD MEETING REPORT, *supra* note 27, at 253.

<sup>95</sup> ACCOBAMS, REPORT OF THE FOURTH MEETING OF THE CONTRACTING PARTIES TO ACCOBAMS 116 (2010) [hereinafter ACCOBAMS FOURTH MEETING REPORT]; ACCOBAMS SCIENTIFIC COMM., RECOMMENDATION 4.9: SPECIALLY PROTECTED AREAS FOR CETACEANS 1–2 (n.d); ACCOBAMS THIRD MEETING REPORT, *supra* note 27, at 252–53.

<sup>96</sup> See EUROPEAN COMM’N, *supra* note 93, at 20.

<sup>97</sup> *Id.* at 8.

<sup>98</sup> See *id.* at 21. (“The phrase ‘if need be’ refers only to the management plans and not to the statutory, administrative or contractual measures. Thus, even if a Member State considers that a management plan is unnecessary, it will nonetheless have to take such measures.”)

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> The Gov’t of Croat., *supra* note 36, at 3.

either. Simply listing Cres-Lošinj as a Natura 2000 site will not suffice to comply with the Habitats Directive. Without specific conservation measures in place, Croatia violates its obligations under the Habitats Directive to protect the bottlenose dolphins in the Cres-Lošinj area.

### 3. Violation of Article 6(4)

The Cres-Lošinj dolphin habitat is listed by the Institute as an Emerald Network site with an area of 52,575.62 hectares and borders extending to the coastline.<sup>102</sup> The boundaries of the site were determined based on scientific recommendations provided by the Blue World Institute of Marine Research and Conservation<sup>103</sup> and adopted by the original expert base elaboration undertaken by the Institute. Furthermore, the Institute has indicated it will retain these boundaries in its proposed listing of Cres-Lošinj as a Natura 2000 site.<sup>104</sup> Yet in the Government's most recent proposal for protection, the site was reduced to 46,296.53 hectares.<sup>105</sup> This downsizing removed protected status for much of the coastal waters, including the site of a planned marina. As preventive protection catalyzed fierce resistance at the local level due its impact on the proposed marina and as the new municipal administration campaigned in support of the marina, the downgrading and downsizing of the Cres-Lošinj protected area appears to have been influenced by economic and political considerations.<sup>106</sup>

Consideration of the marina in the designation of the boundaries would violate Article 6(4) of the Habitats Directive, which permits only certain considerations when a site hosts a priority habitat or priority species.<sup>107</sup> The Habitat Directive allows only those considerations "relating to human health or public safety, to beneficial consequences of primary importance for the environment, or . . . to other imperative reasons of overriding public interest."<sup>108</sup> In addition to the bottlenose dolphin, the Cres-Lošinj site also hosts the loggerhead sea turtle (*Caretta caretta*), which is listed in Annex II as a priority species,<sup>109</sup> making the site liable to the protections noted in Article 6(4).

Case law of the ECJ supports a strict interpretation of Article 6(4). In *Commission v. Germany*, the ECJ ruled that "only criteria of a scientific nature

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<sup>102</sup> Directorate of Culture & Mark Roekaerts, *Draft List of Proposed Emerald Candidate Sites* (2011), at 20, [http://www.coe.int/t/dg4/cultureheritage/nature/Bern/Institutions/Documents/122011/Draft\\_TPVS\\_PA\\_2011\\_6E.pdf](http://www.coe.int/t/dg4/cultureheritage/nature/Bern/Institutions/Documents/122011/Draft_TPVS_PA_2011_6E.pdf).

<sup>103</sup> See The Gov't of Croat., *supra* note 36, at 3.

<sup>104</sup> *Natura 2000 Croatia*, NATURA 2000 U HRVATSKOJ [NATURA 2000 IN CROATIA], <http://natura2000.dzpp.hr/natura/> (last visited Aug. 12, 2012).

<sup>105</sup> The Gov't of Croat., *supra* note 36, at 2.

<sup>106</sup> Mackelworth et al., *supra* note 6, at 130.

<sup>107</sup> Habitats Directive, *supra* note 90, art. 6(4).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* annex II.

may guide the choice of the sites to be proposed.”<sup>110</sup> The Court further held in the *Lappel Bank* case that “a Member State may not, when designating an SPA [special protection area] and defining its boundaries, take account of economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive.”<sup>111</sup> It added that Member States may “reduce the extent of a SPA only on exceptional grounds . . . superior to the general interest represented by the ecological objective of the Directive. Economic requirements cannot be invoked in that context.”<sup>112</sup>

There is no scientific basis for reducing the size of the Cres-Lošinj site. In defending the downgrading and downsizing of the site, the Croatian Government argued that “proposed conservation measures were based on the recommendations and data received from relevant scientific bodies and organizations.”<sup>113</sup> None of the recommendations and data referenced by the government support downsizing. There are also no other “exceptional grounds” that would warrant the change.

Even if the Cres-Lošinj area is listed in the Natura 2000 network with the original boundaries in place, the Croatian government has already indicated its unwillingness to protect the site with these boundaries. The proposed change of the site area for non-scientific reasons and lack of sufficient conservation measures to protect the site constitute violations of the Habitats Directive.

### C. Remedies

Failure to properly prepare its part of the Natura 2000 network can have significant legal ramifications for Croatia as a New Member State. According to a report by the EU Natura 2000 Integration Project, “[o]ver the past decade, several EU infringement cases have been brought against New Member States that failed to adequately establish their part of the Natura 2000 network, underscoring the importance of early preparation work and continued commitment to effective implementation after accession.”<sup>114</sup>

Croatia has only recently acceded to the European Union on July 1, 2013. At this time, Croatia submitted a proposed list of Natura 2000 sites to the EU Commission, which had been prepared and published by the State Directorate for the Protection of Nature in December 2012. The submission of the proposal started a six-year clock, with the implementation of Natura 2000 in Croatia

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<sup>110</sup> Case C-244/05, *Comm’n v. Germany*, 2006 E.C.R. I-885, 889.

<sup>111</sup> Case C-44/95, *Regina v. Sec’y of State for the Env’t ex parte Royal Soc’y for the Protect. of Birds*, 1996 E.C.R. I-3843, 3853.

<sup>112</sup> *Id.*

<sup>113</sup> The Gov’t of Croat., *supra* note 36, at 3.

<sup>114</sup> Project Appraisal Document, *supra* note 79, at 11.

having to occur within that period. Once that time period elapses, any European citizen or association can file a complaint to the European Commission for instances where “European legislation has not been lawfully applied in the Member State concerned.”<sup>115</sup> If necessary, the European Commission can take further action by initiating formal legal proceedings.<sup>116</sup>

#### IV. OTHER INTERNATIONAL OBLIGATIONS

##### A. *Bern Convention (1979)*

Croatia ratified the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention, 1979) on July 3, 2000. The Convention requires signatory countries to take “appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of the wild flora and fauna species” listed for protection in Appendix II.<sup>117</sup> To identify areas in need of protection under the treaty, the Standing Committee of the Bern Convention maintains the Emerald Network (which expands the Natura 2000 network to include non-EU member state sites). Under Recommendation No. 157, Contracting Parties to the Emerald Network are recommended to create “administrative, management or development plans corresponding to the ecological requirements for the long term survival of species and habitats present in the proposed Emerald sites.”<sup>118</sup>

The common bottlenose dolphin found in the Cres-Lošinj marine area is listed as a strictly protected fauna species in Appendix II.<sup>119</sup> The Cres-Lošinj area is also included as a candidate Emerald Network site, and is subject to the provisions of Recommendation No. 157.<sup>120</sup> However, neither the original treaty nor the recommendations for implementing the Emerald Network require the Croatian government to take specific action. The words “appropriate and necessary” allow the government discretion as to how to protect the habitat, and

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<sup>115</sup> TANJA DRÄGER DE TERAN ET AL., APPLYING EU ENVIRONMENTAL LEGISLATION: LEARNING FROM EUROPEAN COURT CASES AND THE EXAMPLE OF THE NATIONAL MARINE PARK OF ZAKYNTHOS 14 (2003).

<sup>116</sup> *Id.* at 15.

<sup>117</sup> Bern Convention on the Conservation of European Wildlife and Natural Habitats art. 4(1), Sept 19, 1979, C.E.T.S. No. 104 (entered into force June 1, 1982) [hereinafter Bern Convention].

<sup>118</sup> Directorate of Democratic Governance, Culture and Diversity, *Recommendation on the Status of Candidate Emerald Sites and Guidelines on the Criteria for Their Nomination*, Rec. No. 157 (2011), at 3, [http://www.coe.int/t/dg4/cultureheritage/nature/bern/default\\_en.asp](http://www.coe.int/t/dg4/cultureheritage/nature/bern/default_en.asp) (follow “Advanced Search” hyperlink; then search “Rec(2011)157E”; then follow “Rec(2011)157E / 09 December 2011” hyperlink) [hereinafter Directorate of Democratic Governance].

<sup>119</sup> Bern Convention, *supra* note 117, app. II.

<sup>120</sup> See State Inst. for Nature Prot., Preparation of Emerald/NATURA 2000 Network Proposal in Croatia (Jan. 26-27, 2011), at 3–5, [http://www.coe.int/t/dg4/cultureheritage/nature/EcoNetworks/JP/Documents/2011/ppt/Croatia\\_Emerald.pdf](http://www.coe.int/t/dg4/cultureheritage/nature/EcoNetworks/JP/Documents/2011/ppt/Croatia_Emerald.pdf); Directorate of Democratic Governance, *supra* note 118, at 3.

plans to aid in conservation of an Emerald Network site are recommended only “if and when appropriate.”

In 2008, the Ecological Coordination Association, a sub-group of the Environmental NGO Eko Kvarner, filed a complaint to the Standing Committee alleging a violation of Croatia’s obligations to the Bern Convention for downgrading the status of the Cres-Lošinj site from a special reserve to a regional park.<sup>121</sup> The Croatian government responded by promising to implement a management plan and formally designating the park as a regional park.<sup>122</sup> Based on these commitments made by Croatia, the Committee ultimately decided to remove the case from the list of complaints in stand-by.<sup>123</sup> Since this decision, the protected status of the Cres-Lošinj reserve has lapsed, and no additional measures have been taken to protect the area.

The Croatian government is not required by the Bern Convention to create a protected area. As long as the government ensures conservation of the habitat, they are not in violation. By promising specific actions in their response to the Standing Committee, however, the government has indicated that these measures are necessary to comply with the treaty. Because the language of the treaty is vague, it is the responsibility of the Standing Committee to ensure compliance. Inaccurate information submitted to the Committee reflects poorly on the government and indicates a lack of commitment toward its conservation obligations. A further complaint can be filed to the Standing Committee outlining Croatia’s failure to follow up on its promises, even if no explicit violations exist.

#### B. *Barcelona Convention (1976)*

Croatia ratified the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention) on October 8, 1991.<sup>124</sup> The treaty requires Contracting Parties to “take all appropriate measures” to protect habitats of threatened species.<sup>125</sup> In 2002, Croatia ratified the Special Protected Area and Biodiversity Protocol to the Barcelona Convention, which outlines criteria for establishing Specially

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<sup>121</sup> Standing Committee to the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention), Meeting Report (March 29, 2010), at 8, [http://www.coe.int/t/dg4/cultureheritage/nature/default\\_en.asp](http://www.coe.int/t/dg4/cultureheritage/nature/default_en.asp) (follow “Advanced Search” hyperlink; then search “T-PVS/Files(2010)03E”; then follow “T-PVS/Files(2010)03E / 13 April 2010” hyperlink).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 9.

<sup>124</sup> Regional Activity Center for Specially Protected Areas, Signatures and Ratifications of the Barcelona Convention and the SPA/BD protocol as at April 2010, [http://www.rac-spa.org/sites/default/files/signatures\\_ratification\\_bc\\_spabd.pdf](http://www.rac-spa.org/sites/default/files/signatures_ratification_bc_spabd.pdf) (last visited Oct. 17, 2013).

<sup>125</sup> Convention for Protection of the Mediterranean Sea Against Pollution art. 4, Feb. 16, 1976, 1102 U.N.T.S. 27 (entered into force Feb. 12, 1978) [hereinafter Barcelona Convention].

Protected Areas of Mediterranean Importance (SPAMI).<sup>126</sup> Contracting parties determine which sites to include on the SPAMI list.<sup>127</sup> Although the Protocol provides guidelines for inclusion, there exist no requirements to designate a site for SPAMI protection. The Protocol also generally requires signatory parties to “protect, preserve and manage threatened or endangered species of flora and fauna.”<sup>128</sup> These protected species, listed in Annex II of the Protocol, include *Tursiops truncatus*.<sup>129</sup>

The Cres-Lošinj marine area is not listed as a SPAMI site. It is eligible under the guidelines of the Protocol, but the Croatian government has discretionary authority whether to list it for SPAMI inclusion. However, the general requirements of the Protocol suggest that the Croatian government is under an obligation to the Barcelona Convention to ensure the protection of *Tursiops truncatus* and to preserve its habitat. Accordingly, the Croatian government risks violating the agreement if it is insufficiently protecting the habitats of threatened species.

### C. Bonn Convention (1979)

The Convention on the Conservation of Migratory Species of Wild Animals (CMS) entered into force in Croatia on January 10, 2000. CMS is a framework convention in that it identifies endangered species and species that should be subject to further agreements to promote conservation.<sup>130</sup> Article II of the Convention obliges Croatia “to provide immediate protection for migratory species included in Appendix I.”<sup>131</sup> This list includes *Caretta caretta*, found within the Cres-Lošinj archipelago.<sup>132</sup> Appendix II species are to be protected by agreements concluded by the Contracting parties.<sup>133</sup> *Tursiops truncatus* and *Sterna albifrons* are Appendix II species found in the Cres-Lošinj area.<sup>134</sup>

In a 2010 report to CMS, the Croatian Ministry of Culture mistakenly included *Tursiops truncatus* as an Appendix I species. To demonstrate compliance with the requirement for Appendix I species “to the extent feasible and appropriate, to prevent, reduce or control factors that are endangering or are likely to further endanger the species,”<sup>135</sup> the Ministry cites the Cres-Lošinj

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<sup>126</sup> Regional Activity Center for Specially Protected Areas, *supra* note 124.

<sup>127</sup> Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean art. 9.4, Dec. 14, 1999, 1999 O.J. (L 322).

<sup>128</sup> *Id.* art. 3.1(b).

<sup>129</sup> *Id.* Annex II.

<sup>130</sup> Convention on the Conservation of Migratory Species of Wild Animals arts. III, IV, June 23, 1979, 19 I.L.M. 15 (entered into force Nov. 1, 1983) [hereinafter CMS].

<sup>131</sup> *Id.* art. II.

<sup>132</sup> *Id.* app. I.

<sup>133</sup> *Id.* art. II.

<sup>134</sup> *Id.* app. II.

<sup>135</sup> *Id.* art. III.

archipelago as a “specially protected area” to protect *Tursiops truncatus* habitats.<sup>136</sup> This erroneous mention notwithstanding, there is no requirement under CMS to designate Cres-Lošinj as a protected area. Other species in the site fall under Appendix I protection, but the Croatian government has discretion in how to protect them, and is not in violation of any specific provisions of CMS.

*D. The Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea and Contiguous Atlantic*

The ACCOBAMS was created under the auspices of CMS.<sup>137</sup> Croatia acceded to ACCOBAMS on June 1, 2001. The treaty applies to *Tursiops truncatus*, a species listed in Annex I.<sup>138</sup> Based on the presence of protected species in the area, the ACCOBAMS Scientific Committee recommended Cres-Lošinj for protection in 2002 and re-recommended protection for the site at the third and fourth Meetings of the Parties in 2007 and 2010 respectively.<sup>139</sup> It further reaffirmed the scientific need for protection in a letter to the Institute in 2008.<sup>140</sup> Resolution 4.15, adopted in 2010, lists the “waters along [the] east coast of the Cres-Lošinj archipelago” as an area of special importance for the bottlenose dolphin, and encourages contracting parties to provide for adequate protection of the areas, including through the creation of SPAMI.<sup>141</sup>

These actions indicate that the Cres-Lošinj site is under need of protection, but there is no compulsion for Croatia to follow the recommendations of the Scientific Committee. Recommendations by ACCOBAMS may support the finding of violations under other treaties, but they do not legally bind Croatia to act.

## V. CONCLUSION

The Croatian government has long insisted on its commitment to the protection of the Cres-Lošinj dolphin habitat, both to remain in compliance with its international obligations and in response to external and internal pressure. However, the record of protection has been inconsistent, and claims of future protective action made to international bodies remain unfulfilled or unsubstantiated.

<sup>136</sup> NATURE PROT. DIRECTORATE, *supra* note 81, at 20.

<sup>137</sup> *Introduction*, ACCOBAMS, [http://www.accobams.org/index.php?option=com\\_content&view=category&layout=blog&id=68&Itemid=1](http://www.accobams.org/index.php?option=com_content&view=category&layout=blog&id=68&Itemid=1) (last visited Oct. 17, 2013).

<sup>138</sup> ACCOBAMS, *supra* note 94, annex I.

<sup>139</sup> ACCOBAMS FOURTH MEETING REPORT, *supra* note 95, at 116; ACCOBAMS SCIENTIFIC COMM., *supra* note 95, at 1-2; ACCOBAMS THIRD MEETING REPORT, *supra* note 27, at 252-53.

<sup>140</sup> Letter from Giuseppe Notarbartolo di Sciara to State Inst. for Nature Prot. (Feb. 8, 2008).

<sup>141</sup> See ACCOBAMS FOURTH MEETING REPORT, *supra* note 95, at 109, 216; ACCOBAMS SCIENTIFIC COMM., RESOLUTION 4.15: MARINE PROTECTED AREAS OF IMPORTANCE FOR CETACEANS CONSERVATION 2 (n.d).

Scientific research encourages protection of the Cres-Lošinj area. The government's initial designation of the Cres-Lošinj area as a site for preventive protection and its subsequent listing of the site with various international conventions as an area in need of protection suggest a scientific consensus to protect the area. Additionally, the recommendations of the Scientific Committee of ACCOBAMS provide external, objective support for protection.

Despite scientific support for protection, the Croatian government has yet to implement permanent protection of the Cres-Lošinj area and many other sites. The fact that most sites granted preventive protection by the Croatian government have yet to achieve permanent protection status invites speculation that the process is reactionary to short-term political and public pressures, and is not meant to achieve long-term biological diversity objectives.

The failure to implement permanent protection constitutes an unfulfilled commitment under several legal regimes. First, though the Preventive Protection Proposal for the Cres-Lošinj area complied with Croatian law, its subsequent administration potentially violated such law. Second, the Croatian government violated the spirit of the Aarhus Convention in its application of the NPA to the Cres-Lošinj site and through insufficient public participation in the process. Third, the government may also be accountable under other treaties, most notably the Bern Convention, which has already received a prior complaint over the status of the Cres-Lošinj area. Fourth, Croatia has an obligation under the Barcelona Convention to ensure the protection of *Tursiops truncatus* and to preserve its habitat, which includes the Cres-Lošinj area. Ultimately, Croatia stands to be in violation of the Habitats Directive if further protective action is not taken.