



Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and contiguous Atlantic area, concluded under the auspices of the Convention on the Conservation of Migratory Species of Wild Animals (CMS)

Accord sur la Conservation des Cétacés de la Mer Noire, de la Méditerranée et de la zone Atlantique adjacente, conclu sous l'égide de la Convention sur la Conservation des Espèces Migratrices appartenant à la Faune Sauvage (CMS)



Seventh Meeting of the Parties to ACCOBAMS

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NOTE ON THE GRANTING THE RIGHT TO VOTE

*Delegates are kindly invited to bring their own documents to the Meeting.
This document will be available only in electronic format during the Meeting.*

NOTE ON THE GRANTING THE RIGHT TO VOTE

1. The Question

During the sixth Meeting (2016) of the Parties to the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS), the representative of Italy requested that a legal analysis note on “granting the right to vote” be prepared by the Permanent Secretariat and submitted to the subsequent Meeting of the Parties¹. The request was made during the discussion for the adoption of Resolution 6.1, by which the Meeting of the Parties decided that:

“although Libya is more than three years behind in paying its ordinary contribution, the current economic situation of this Party can be considered as an exceptional circumstance and that this Party shall exceptionally exercise its right to vote at the sixth Meeting of the Parties”.

2. The Provision on the Suspension of the Right to Vote

The ACCOBAMS Agreement provides that the Meeting of the Parties is the decision-making body of the Agreement (Art. III, para. 1) and that each Party has one vote (Art. III, para. 5). A special voting rule applies to regional economic integration Organizations.

There is no provision in the ACCOBAMS Agreement on the suspension of the right to vote at the Meeting of the Parties. This question is regulated by Art. 14, para. 2, of the Rules of procedure that the Meeting of the Parties has adopted at its first session (2002):

“Representatives of Parties which are three or more years behind in paying their subscriptions on the date of the opening session of the Meeting of the Parties shall not be eligible to vote. However, the Meeting of the Parties may allow such Parties to continue to exercise their right to vote if it is satisfied that the delay in payment arises from exceptional circumstances”.

A Party “not eligible to vote” can be considered as suspended from the right to vote². This suspension is limited to the right to vote at the Meeting of the Parties and does not affect the participation of the defaulting Party to the ACCOBAMS Agreement as a whole or any other rights and obligations arising from this treaty. For instance, the defaulting Party keeps the right to attend the Meeting of the Parties and to participate in its work, even though it is not entitled to cast its vote.

The suspension of the right to vote has some consequences also for the determination of the required majorities. For example, in applying Art. III, para. 6, the Party suspended from voting cannot be taken into account for the calculation of the two thirds majority. A difficult question is whether the position of the defaulting Party should be taken into account for the determination of the existence of a *consensus*. On the one hand, *consensus* could be seen as a way to take decisions (according to this substantive approach, the position of the defaulting Party should not be taken into account, as the very purpose of the suspension is to prevent it from participating in the decision-making procedure); on the other hand, *consensus* could be seen a way to take decisions without voting (according to this formalistic approach, the position of the defaulting Party should be taken into account, as no voting takes place). Another difficult question is whether the suspension of the right to vote of a regional economic integration organization party to

¹ See *Report of the Sixth Meeting of the Parties to ACCOBAMS*, Monaco 22-25 November 2016, para. 17.

² A completely different situation occurs where a State or regional economic integration organization, which has already deposited its instrument to be bound by the ACCOBAMS Agreement (ratification, acceptance, approval or accession), is not yet a party to the ACCOBAMS Agreement, as the term of three months provided for in Art. XIV has not yet elapsed. The Meeting of the ACCOBAMS Parties may decide to exceptionally grant to such State or organization the status of full participating Party with the right to vote. This has happened in the cases of Tunisia (Resolution 1.1), Portugal (Resolution 2.1) and Algeria (Resolution 3.1).

ACCOBAMS³ entails also the suspension of the right to vote of its member States. The answer seems to be an affirmative one, if voting relates to a matter within the competence of the organization (see Art. III, para. 5, of the Agreement).

The suspension applies automatically, in the sense that it is a mandatory consequence of the mere fact of a Party being three years or more behind the payment of the due subscriptions, without a need for a decision in this regard by the Meeting of the Parties. The critical moment to evaluate if the breach occurs is the opening of the Meeting of the Parties. The defaulting Party resumes its right to vote when the due subscriptions are paid or when the amount of the unpaid subscriptions becomes less than what is due for three years.

3. The Purpose of the Suspension of the Right to Vote

The suspension of the right to vote is a sanction for a Party that does not comply with one of the obligations arising from the ACCOBAMS Agreement, that is to pay its subscription to the budget of the Agreement according to the scale determined by the Meeting of the Parties (see Art. IX, para. 1).

Under Art. 60, para. 3, of the 1969 Vienna Convention on the Law of Treaties, the repudiation of the treaty or the violation of a provision essential to the accomplishment of its object or purpose are material breaches that can determine the termination or the suspension of the treaty for the defaulting party. It is evident that the ACCOBAMS drafters have taken the position that being in arrear with the payment of the subscription is not such a serious violation. They have chosen a less severe sanction for the defaulting State, consisting in the suspension of its right to vote. This is allowed by the above-mentioned Vienna Convention, according to which the regime on the termination or suspension of a treaty as a consequence of its breach does not affect any provision in a treaty applicable in the event of a breach (Art. 60, para. 4). However, if the lack of payment of contributions were to persist for a considerable amount of years, nothing would prevent the ACCOBAMS Parties from invoking this situation as a ground for terminating or suspending the ACCOBAMS Convention in the relations between themselves and the defaulting Party.

The broad margin of discretion left to the parties to a treaty as regards sanctions explains why the ACCOBAMS Parties have decided to set forth an exception to the rule of the suspension of the right to vote, if the delay in payment arises from exceptional circumstances. This can be seen as a justification that prevents the application of the sanction arising from the breach of an international obligation. In the Rules of procedure of the Meeting of the Parties there are no examples of such circumstances. Conflicts, natural disasters or serious economic problems could be relevant instances in this regard.

To avoid a sanction that would automatically apply there is a need for a decision of the Meeting of the Parties. This is the reason why the Bureau, at its third extended Meeting (2016), recommended that each Party facing exceptional circumstances provide the Secretariat with a formal letter explaining the “exceptional circumstances” that led to the delay in payment. A similar attitude was taken by the Bureau at its fourth extended Meeting (2019) that asked the Secretariat to contact the Focal Points of two Parties requesting them to provide the Secretariat with a formal letter explaining such circumstances and asked the forthcoming Meeting of the Parties to examine this document at its opening⁴.

³ For the time being, there are no such organizations parties to the ACCOBAMS Agreement.

⁴ *Provisional Report of the Fourth Meeting of the ACCOBAMS Extended Bureau* (Monaco, 18-19 April 2019), para. 5.1.

As already mentioned⁵, by Resolution 6.1, the Meeting of the Parties decided not to apply the sanction of the suspension of the right to vote to Libya, because of the existence of exceptional circumstances. This was also done in consideration of the fact that:

“decisions-making at the Sixth Meeting of the Parties will benefit from the active participation of as many Parties as possible”.

4. Relevant Instances in Other International Organizations or Meetings

Several instances of suspension of the right to vote as a special sanction for delays in payment of contributions can be found in the rules of procedure of organs of international organizations or meetings (or conferences) of the parties to treaties. Only a few instances will be recalled hereunder.

As stated in the records of the first ACCOBAMS Meeting of the Parties (2002), where the Rules of procedure were adopted,

“(…) the Secretariat made it clear that, generally speaking, the draft was based on the Rules of Procedure of the Meetings of the Parties of the mother Convention (CMS), of its Agreements and of the Barcelona Convention. After fresh changes had been presented by a delegate and agreed on, the Rules of Procedure were adopted by the Meeting”⁶.

The Rules of procedure of the Meeting of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 1969) provide as follows:

“Representatives of Parties that are three or more years in arrears in the payment of its assessed contributions on the date of the opening session of the meeting of the Conference of the Parties shall not be eligible to vote. However, the Conference of the Parties may allow such Parties to exercise their right to vote if it is satisfied that the delay in payment arises from exceptional and unavoidable circumstances, and shall receive advice in this regard from the Standing Committee. The exceptional and unavoidable circumstances shall be communicated in advance by the Party concerned to the Standing Committee for consideration at its meeting prior to the meeting of the Conference of the Parties” (Rule 13, para. 2).

The Rules of procedure for meetings and conferences of the Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona, 1976) provide as follows:

“A Contracting Party that is more than twenty-four months in arrears with its contribution shall not be entitled to vote. However, the meeting may authorize this Contracting Party to participate in the vote if it finds out that arrears are due to circumstances beyond its control” (Rule 42).

Going beyond the declared sources of inspiration of the ACCOBAMS Rules of procedure, it may be useful to recall the Rules of procedure of the Whaling Commission, established by the International Convention for the Regulation of Whaling (Washington, 1946), which provide as follows:

“The right to vote of representatives of any Contracting Government shall be suspended automatically when the annual payment of a Contracting Government including any interest due has not been received by the Commission by the earliest of these dates:

- 3 months following the due date prescribed in Regulation E.2 of the Financial Regulations; or
- the day before the first day of the next Biennial or Special Meeting of the Commission if such a meeting is held within 3 months following the due date; or
- in the case of a vote by postal or other means, the date upon which votes must be received if this falls within 3 months following the due date.

This suspension of voting rights applies until payment is received by the Commission” (Rule E, para.2, a).

⁵ *Supra*, para. 1.

⁶ *Proceedings of the First Session of the Meeting of the Parties of ACCOBAMS* (Monaco, 28 February – 2 March 2002), para. 17.

As regards the organs of international organizations, a well-known instance of suspension of the right to vote is regulated by the Charter of the United Nations (San Francisco, 1945):

“A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member” (Art. 19).

Other instances can be found in the Constitution of the International Labour Organization (Art. 13, para. 4), the Convention establishing the International Maritime Organization (Art. 56), the Convention establishing the International Civil Aviation Organization (Art. 62), the Convention establishing the International Agency for Atomic Energy (Art. 19), the Constitution of the World Health Organization (Art. 7), the Convention establishing the World Meteorological Organization (Art. 31), the Statute of the Council of Europe (Art. 9).