



**CONVENTION ON
MIGRATORY
SPECIES**

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Agenda Item 27.4

**RESERVATIONS WITH RESPECT TO AMENDMENTS TO
APPENDICES I AND II OF THE CONVENTION**

(Prepared by the EU and its Member States)

Summary:

This document concerns two issues in relation to reservations: the first part concerns late reservations to amendments to Appendices I and II of the Convention made after the 90-day deadline and the second part concerns the effective date of a withdrawal of a reservation.

RESERVATIONS WITH RESPECT TO AMENDMENTS TO APPENDICES I AND II

Background

1. This document has been prepared by the European Union and its Member States.
2. In accordance with the provisions of Article XI, the Conference of the Parties at its 12th meeting (CoP12, Manila, 2017), considered and adopted a number of amendments to Appendices I and II proposed by the Parties. The amendments adopted at the meeting entered into force 90 days after that meeting in accordance with Article XI, paragraph 5, except for those Parties which have entered a reservation pursuant to Article XI, paragraph 6 of the Convention on the Conservation of Migratory Species of Wild Animals (CMS Convention). These provisions read as follows:

[...]

5. An amendment to the Appendices shall enter into force for all Parties ninety days after the meeting of the Conference of the Parties at which it was adopted, except for those Parties which make a reservation in accordance with paragraph 6 of this Article.

6. During the period of ninety days provided for in paragraph 5 of this Article, any Party may by notification in writing to the Depositary make a reservation with respect to the amendment. A reservation to an amendment may be withdrawn by written notification to the Depositary and thereupon the amendment shall enter into force for that Party ninety days after the reservation is withdrawn.

3. On 12 March 2018, the CMS Depositary Government (Government of the Federal Republic of Germany) circulated a note verbale to all CMS Parties in relation to Article XI, paragraph 6 of the Convention on a late reservation received with respect to amendments to Appendix II adopted at CoP12.
4. The note verbale contained the following information:

“Pursuant to Articles 19 and 20 of the Vienna Convention on the Law of Treaties, although the reservation was made after the deadline, it may still be considered legal and deemed to have been accepted by the signatory States as of the date on which it was made, if they have raised no objection to the reservation by the end of a period of twelve months after they were notified of the reservation.”
5. In April 2019, the CMS Depositary Government informed Parties that an objection had been raised to the late reservation prior to the expiration of the twelve-month deadline. Therefore, the late reservation was ineffective, and the amendment entered into force for the Party that had made the late reservation as of 26 January 2018 (90 days after the adoption of the amendment by COP12).

Discussion

Part one: Late reservations

6. The CMS Depositary Government stated that the practice of accepting late reservations in the absence of an objection is described in Article 19 and 20 of the Vienna Convention on the Law of Treaties. The relevant parts of these provisions read as follows:

Article 19. FORMULATION OF RESERVATIONS

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

[...]

Article 20. ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

[...]

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

On this basis, the CMS Depositary Government concluded that a reservation to an amendment of an Appendix to the Convention, decided by a CoP, may only be made within the 90-day deadline or, alternatively, with the unanimous consent of all Parties to the Convention. Since a single objection is sufficient to finally refuse the reservation, the above-mentioned approach is nothing but a precise check by the CMS Depositary Government whether the condition of unanimous consent is tacitly fulfilled.

7. The CMS Depositary Government indicated that it would be helpful if decisions taken by the CMS CoP in the future could explicitly state whether such late reservations should continue to be treated according to this practice or, on the contrary, should not be admitted.
8. The practice applied by the CMS Depositary Government described above concerns late reservations that should have been made at the time of “signing, ratifying, accepting, approving or acceding to a treaty”, but for some reason were only formally made later in time. However, the matter at hand concerns reservations with respect to an amendment to the Appendices of the Convention entered by a Party to the Convention in accordance with paragraph 6 of Article XI of the Convention.
9. Article XIV of the Convention contains provisions on reservations. The relevant parts read as follows:
- 1. The provisions of this Convention shall not be subject to general reservations. Specific reservations may be entered in accordance with the provisions of this Article and Article XI.*
 - 2. Any State or any regional economic integration organization may, on depositing its instrument of ratification, acceptance, approval or accession, enter a specific reservation with regard to the presence on either Appendix I or Appendix II or both, of any migratory species and shall then not be regarded as a Party in regard to the subject of that reservation until ninety days after the Depositary has transmitted to the Parties notification that such reservation has been withdrawn.*

Article XIV of the Convention thus distinguishes between the two types of reservations: Paragraph 1 concerns specific reservations to an amendment to the Appendices of the Convention. This type of reservation can be made by a Party in accordance with Article XI of the Convention. Paragraph 2 on the other hand concerns specific reservations made by a State at the time of depositing its instrument of ratification, acceptance, approval or accession. In the context of the Convention, the practice which allows Parties to enter reservations after depositing their instrument of ratification, acceptance, approval or accession on a non-objection basis, should not apply to the reservations regulated by paragraph 1 of Article XIV.

10. Based on the clear deadline and specific procedure in Article XI, paragraph 6, for making a reservation with regard to an amendment of the Appendices, accepting late reservations may undermine the integrity of the Convention and its functioning by generating legal uncertainty among Parties.
11. Finally, the practice of accepting late reservations should only apply in the broader context of Article 20 of the Vienna Convention “unless the treaty otherwise provides.” As mentioned above, in the case of CMS, the treaty explicitly provides otherwise in Article XI, paragraph 6. There is no basis in the Convention to depart from the provisions of Article XI and allow CMS Parties to accept reservations after the deadline established in these provisions.
12. It is therefore suggested that hat reservations with respect to amendments to Appendices I or II must be made in accordance with the provisions of the Convention and within the 90-day deadline stipulated in Article XI, paragraph 6 of the Convention. This will provide clearer guidance in this regard not only to the Parties but also to the CMS Depositary Government.

Part two: Effective date of withdrawal of reservations

13. Articles XI and XIV of the Convention refer to the fact that a reservation that has been made in accordance with these provisions may be withdrawn. The Convention contains no guidance on the date of effect of a withdrawal of a reservation with respect to amendments to Appendices I and II in relation to other Parties. Article XI, paragraph 6 does not explicitly indicate that the CMS Depositary Government has to inform Parties of reservations received to an amendment to the Appendices or withdrawals of any reservation. However, in the case of reservations made at the time of ratification, acceptance, approval or accession, according to Article XIV, paragraph 2 of the Convention, the CMS Depositary Government has to inform Parties of any withdrawal of a reservation through a diplomatic notification to the Parties.
14. The Vienna Convention on the Law of Treaties addresses the question related to withdrawal of reservation in Article 22, which states:

Article 22. WITHDRAWAL OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) The withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

[...]

15. The practice under the Convention is that the CMS Depositary Government informs Parties of any withdrawal of a reservation through a diplomatic notification to the Parties. The notification indicates the date of receipt by the CMS Depositary Government of the withdrawal of the reservation and the date of the communication by the Party withdrawing the reservation. However, it is not always clear which of these dates is the effective date of the withdrawal, which may lead to legal uncertainty on the date from which the provisions of the Convention apply.
16. As noted above, the Vienna Convention stipulates that the withdrawal becomes operational in relation to another State only when notice of it has been received by the State unless otherwise agreed. The Conference of the Parties therefore may wish to agree that the CMS Depositary Government shall inform Parties of a withdrawal of a reservation to the amendment of the Appendices through a diplomatic notification. Additionally, it is suggested that the Conference of the Parties agree that the effective date of the withdrawal of a reservation is the date of the CMS Depositary Government's notification to the Parties. This would seem to be the most in line with Article 22 of the Vienna Convention. In cases where the Party withdrawing the reservation indicates a future date when the withdrawal becomes effective, this date shall be the governing date.

Recommended actions

17. The Conference of the Parties is recommended to adopt the draft Resolution contained in Annex 1 to the present document.

DRAFT RESOLUTION on *Reservations*

Recognizing that, in accordance with Article XIV of the Convention on the Conservation of Migratory Species of Wild Animals (the CMS Convention), a State may, when it becomes a Party to the Convention, enter a reservation with respect to any species included in Appendix I or II or both, and that, in this case, it shall be not be regarded as a Party in regard to the subject of that reservation until it withdraws such reservation;

Recognizing that, when Appendix I or II is amended in accordance with Article XI of the Convention, any Party may, within 90 days, make a reservation with respect to the amendment and that the withdrawal of such a reservation shall become effective 90 days after the date on which the reservation is withdrawn, unless a later date has been set by the Party withdrawing the reservation;

Considering that, if a species is removed or delisted from the Appendices, any reservation entered in relation to that species ceases to be valid;

Considering also that all Parties should interpret the Convention in a uniform manner;

*The Conference of the Parties to the
Convention on the Conservation of Migratory Species of Wild Animals*

- 1 *Urges* any Party to notify the Depositary Government in writing of a reservation with respect to an amendment to Appendix I or II within 90 days after the meeting in accordance with Article XI, paragraph 6 of the Convention;
- 2 *Requests* the Depositary Government, in accordance with Article XI, paragraph 6 of the Convention, not to accept any reservations entered after the 90-day deadline;
- 3 *Agrees* that the date mentioned in article XI, paragraph 6, for withdrawal of a reservation to an amendment, is the date upon which the Depositary Government receives the written notification of withdrawal;
- 4 *Agrees* that the withdrawal of a reservation to an amendment shall become effective 90 days after the Depositary Government received the written notification of withdrawal, unless a later date has been set by the Party withdrawing the reservation;
- 5 *Recommends* that, in the case of a species' removal or delisting from one Appendix of the Convention and simultaneously included in another, the removal or delisting shall render invalid any reservation that was in effect in relation to the species. Consequently, any Party that wishes to maintain a reservation in relation to the species must enter a new reservation in accordance with Article XI, paragraph 6, and
- 6 *Instructs* the Secretariat and the Depositary Government to remind affected Parties explicitly of the reservations that will be rendered invalid, in time for the Parties to renew their reservations if they so desire.